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FOREWORD

This inaugural issue of the Asia-Pacific Journal of International Humanitarian Law (APJIHL) is the result of a collaborative project of the University of the Philippines Law Center Institute of International Legal Studies (UP-IILS) and the International Committee of the Red Cross (ICRC). It follows a previous joint initiative, the Asia-Pacific Yearbook of International Humanitarian Law, which published five (5) volumes between 2005-2017.[1]

With this re-branded and re-formatted journal, we hope to provide a unique platform for reflection and comment on international humanitarian law (IHL) in and by the Asia-Pacific region. The journal will be an annual publication, collating peer-reviewed scholarly articles, book reviews and analyses of significant IHL developments and events in the region.

For the ICRC, a key aspect of our mandate is to spread understanding and foster the development of IHL. Supporting academic journals such as the APJIHL is an excellent means of fulfilling this mandate, by stimulating discussion and encouraging scholarship and debate. At the same time, such journals are useful resources for us within the ICRC. The range of contributions from authors of all different backgrounds and disciplines allows us to take the temperature in certain areas, and to stay abreast of contemporary IHL issues and the application of the law in various contexts.

Having previously worked as a government legal officer, I know that these kinds of publications are also extremely helpful in informing government thinking and policy development processes on cutting-edge IHL issues.

During my time as the ICRC's Regional Legal Adviser in the Pacific, I have had the privilege of meeting and engaging with so many talented IHL scholars and practitioners, and I am delighted that we can provide here a dedicated platform for them to showcase their work.

One such talented academic and practitioner who really needs no introduction, Dr. Suzannah Linton opens this edition with an excellent

[1] APYIHL Vol. 1 (2005), APYIHL Vol. 2 (2006), APYIHL Vol. 3 (2007), APYIHL Vol. 4 (2008-2011) and APYIHL Vol. 5 (2012-2017).

scene-setting article. The contribution gives an overview of what Dr. Linton rightly describes as the complex and diverse IHL landscape in the region. With a wealth of practical examples, stretching all the way from Nauru to Pakistan, it showcases the meaningful contribution made by Asia-Pacific States to the development and application of IHL.

Dr. Eve Massingham's article deals with what is currently a hot topic of IHL: autonomous military systems. However, she does so from a novel angle, looking at the need for autonomous military aircraft to interact safely with the civilian environment, and the resulting impact of laws that protect international civilian aviation. Dr. Massingham's article highlights the intersections between IHL and a wide range of other applicable legal frameworks, thereby reminding us of the need to avoid considering IHL issues in a vacuum.

This intersectionality is again a feature of the article by Ms. Trang T. Ngo, which canvasses possible international legal frameworks, including IHL, that may apply to uses of force in "grey zone conflicts". T Ngo's analysis is framed in the context of the situation in the South China Sea, which continues to be one of the most disputed seas not just in this region, but in the world.

Then there is the intersection between IHL and domestic law, demonstrated beautifully in the articles by Atty. Raphael Lorenzo A. Pangalangan, by Ms. Kelisiana Thynne and Ms. Sahar Haroon, and by Ms. Kelisiana Thynne and Ms. Fiona Barnaby. Atty. Pangalangan's article examines the international criminal law doctrine of command responsibility, and the way in which it applies not only to acts but also omissions. It then traces the history of the notion of command responsibility as it is found in the criminal and administrative law of the Philippines.

Ms. Thynne and Ms. Haroon consider the compatibility of national gunshot wound reporting regimes with fundamental IHL rules protecting healthcare and access to healthcare. Their article draws on three case studies from across the region, Pakistan, Papua New Guinea and the Philippines. It assesses the extent to which these countries' laws on medical ethics and gunshot wound reporting are adapted to ensure consistency with IHL.

In their article on Malaysia's implementation of international and domestic criminal justice, Ms. Thynne and Ms. Barnaby provide persuasive arguments in favour of Malaysia becoming Party to the Rome Statute of the International Criminal Court. In doing so, they

courageously tackle thorny issues such as the US' opposition to the ICC, and whether a sovereign would enjoy Head of State immunity before the Court. The question of Head of State immunity was also picked up during a panel discussion held in the margins of the IHL Moot Court Competition in Malaysia in October 2019. That discussion is the subject of Dr. Jan Römer's report that appears in this edition of the APJIHL.

And speaking of tricky issues, Mr. Jonathan Kwik's article explores the various, and sometimes contradictory, international criminal law narratives that have developed around ex-child soldiers who go on to perpetrate war crimes. Mr. Kwik's contribution is very timely as, at the time of writing, the ICC Trial Chamber IX is deliberating on the proceedings against former child soldier, Dominic Ongwen.

Ms. Natasha Chabbra's article also looks at a recent ICC development: the Pre-Trial Chamber's authorisation of an investigation into the alleged deportation of the Rohingya population, based on the transboundary nature of that crime. Ms. Chabbra raises the interesting possibility that this decision has established a precedent that could be applied to establish ICC jurisdiction over international crimes committed in Syria.

We hope you enjoy these articles in our first edition, and that they will contribute to a greater understanding of and appreciation for IHL and humanitarian action in the Asia-Pacific, and beyond. We also encourage submissions for our future editions from students, scholars and practitioners, and look forward to supporting an ongoing regional discussion on issues which go to the heart of our shared humanity.

Finally, on behalf of the ICRC, I would like to extend our heartfelt thanks to the team at UP Law Center, especially my co-Managing Editor Prof. Rommel J Casis, for the expert guidance, support and partnership in producing this Journal.

GEORGIA HINDS
ICRC Regional Legal Adviser in the Pacific

PREFACE

The Institute of International Legal Studies (IILS) of the Universities of the Philippines (UP) Law Center is mandated by law to undertake research, training and extension services in various fields of international law, including international humanitarian law (IHL). Over the years it has conducted research and training in the field of IHL and published papers and other publications relevant to the topic. It also hosted the National Moot Court on International Humanitarian Law in partnership with the ICRC. This partnership in recent years resulted in the publication of what was then called the Asia-Pacific Yearbook of International Humanitarian Law (APYIHL).

Between 2005 and 2017, five volumes of the APYIHL were published featuring peer-reviewed articles and book reviews on significant developments in IHL and related fields.

Sometime in 2018, it became apparent to ICRC and IILS that it may be better to reformat the APYIHL from a yearbook into a journal with a Board of Experts representing countries in the Asia-Pacific Region. Thus, energized by a fresh concept and a new memorandum of understanding signed between the UP and ICRC in May 2019, the Asia Pacific Journal of International Humanitarian Law (APJIHL) took off aiming to not only continue what the APYIHL had accomplished but to take it to even greater heights.

After many months of planning, meeting, and peer review, finally in 2020, and amid the exigencies of an ongoing global health emergency, the UP-IILS and ICRC are proud to launch the first edition of the APJIHL, which will be made available in print and online.

The APJIHL is an important addition to the UP Law Center's roster of research and publications that further its mandate of advancing legal scholarship and identifying projects for legal reform, including in civil rights protection, international relations, and law enforcement. The APJIHL's special focus on subject matters that relate to the Asia-Pacific region, as well as by researchers who hail from or are based in the region, is also significant, in view of the challenges towards full implementation of international humanitarian law in the region, as well as the rapid emergence of non-traditional security threats in its constituent States' territories. The Philippines, for one, recently enacted its new anti-

terrorism legislation at the height of its citizens' struggle against Covid-19. Just a little over a month later, over a dozen persons were killed in suicide bombings in Jolo, Sulu, which acts were ascribed to the Abu Sayyaf Group, which in the past has aligned itself with ISIS and other non-state armed groups.

Following the online launch of this inaugural edition in November 2020, successive editions of the APJIHL may explore thematic areas of IHL, and will continue to publish peer-reviewed articles under an interdisciplinary lens. The production of new media for online distribution will also be continuously explored, including through podcasts and blog posts on the topics covered by the contributed articles.

Finally, UP-IILS would like to thank the research and administrative staff of the UP Law Center who most kindly assisted with the editorial and organizational needs of the Journal. This volume would not be possible if not for the tireless efforts of Associate Editor Maria Emilynda Jeddahlyn Pia Benosa, Assistant Editor Joan Paula Deveraturda, Copy Editor Sheigne Alvir Miñano, and Mr. Mario Dela Cruz who prepared the lay-out. We would also like to thank the ICRC, particularly Dr. Jan Römer and Ms. Georgia Hinds whose tenacious spirit made this volume possible.

ROMMEL J CASIS
Managing Editor

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Deciphering the Landscape of International Humanitarian Law in the Asia-Pacific

Dr. Suzannah Linton[*]

ABSTRACT

The 70th anniversary of the adoption of the Geneva Conventions on 12 August 1949 provided an opportunity for reflection on international humanitarian law (IHL). This article continues that reflection and presents some fresh scholarship about and from the Asia-Pacific region. The region's plurality leads to a complex and diverse landscape where there is no single "Asia-Pacific perspective on IHL" but there are instead many approaches and trajectories. This fragmented reality is, however, not a mess of incoherence and contradiction. In the following pages, the author argues for and justifies the following assessments. The first is that the norm of humanity in armed conflict, which underpins IHL, has deep roots in the region. This, to some extent, explains why there is no conceptual resistance to IHL, in the way that exists with the human rights doctrine. The second is that there has been meaningful participation of certain States from the region in IHL law-making. Thirdly, some Asia-Pacific States are among those actively contributing to the development of new or emerging areas relevant to IHL, such as outer space, cyberspace and the protection of the environment in armed conflict. This leads to the unavoidable issue of contradiction. How is it that in a region where such findings can be made (i.e., where there is discernible positivity towards the norm of humanity in armed conflict), there are so many armed conflicts with very serious IHL violations emerging? Should we reflect in a more nuanced way on "norm internalization" and "root causes"? These issues will be considered in the second section of the article. This examination leads to a third and final section, a concluding reflection on what all of this reveals about IHL in the Asia-Pacific. The real challenge for progressive humanitarianism, the author contends, is to traverse disciplines and to build on work done in, on and from the region in order to develop more informed and nuanced approaches to understanding the countries and societies of the region, moving on to study the process of norm internalization, and then developing creative and meaningful strategies for strengthening the links between that internalization, actual conduct on the ground, and norm socialization in the wider community.

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Keywords: Asia-Pacific, international humanitarian law, perspectives, diversity, pluralism, norm of humanity in armed conflict, norm internalization, root causes, contradiction, contribution.

On the face of it, the four Geneva Conventions of 1949 have a 100% success rate, with all 196 States having committed themselves to abide by their terms.[1] A generalist reader may be tempted to believe that all States have a common approach to international humanitarian law (IHL). The more discerning reader, however, knows that being party to the Geneva Conventions does not, unfortunately, equate with adherence to their provisions. States demonstrate vastly differing degrees of implementation and enforcement and have different understandings of certain concepts and terms. Self-identifying as democratic and human-rights-respecting is no guarantee against inhumanity, as the US-led "war on terror", in several of its manifestations including renditions and Abu Ghraib, confirmed. The docket of the European Court of Human Rights evidences that some European States engaged in armed activities are not living up to what should be a collective vision of humanity at all times, whether in peace or in war.[2]

What of the Asia-Pacific region?[3] Like the rest of the world, the nations of the region are now all party to the Geneva Conventions, but

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[1] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1951); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1951).

[2] See European Court of Human Rights, "Armed Conflicts", Factsheet, September 2018, available at: www. echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf (all internet references were accessed in February 2020).

[3] Many a quarrel has been and continues to be had over what the geographical concept of "Asia" entails. The present work views the "Asia-Pacific" region as including the countries of South, Southeast and East Asia, which are indisputably part of "Asia", as well as the countries that are indisputably part of the Pacific Island nations. It does not include the countries of "Central Asia" (e.g. Turkmenistan) and those that are actually part of the "Middle East" (e.g. Iraq). This notion is obviously different from the United Nations' "Asia-Pacific" grouping, which includes countries that are geographically not part of Asia (e.g. Cyprus and Saudi Arabia) and locates two countries that are in the

while some States have long implemented these in domestic law,[4] others were late joiners,[5] and a number of them have maintained substantial reservations or entered declarations or understandings that colour their engagement.[6] Simon Chesterman has shown how Asia's ambivalence towards international law is manifested through under- participation and under-representation.[7] A plurality of perspectives from the region about wider international law is borne out in articles published in *the Indian Journal of International Law,*[8] the *Chinese Journal of International Law,*[9] the *Korean Journal of International and Comparative Law*[10] and the *Asian Journal of International Law*.[11] New works, such as The *Oxford Handbook of International Law in Asia and the Pacific* and Asia-*Pacific Perspectives on International Humanitarian Law*, present expert views on and from the Asia-Pacific region and reveal great diversity, with no all-encompassing single perspective.[12] These publications take a non-linear, non-mechanical approach based on discrete topics within broad clusters of issues, indicating that efforts to decipher the region's pluralism are not best facilitated by an intellectual straitjacket which diminishes the existence, meaning and value of diversity. They draw out two dominant features: firstly, conservatism and a tendency towards the centuries-old notion of the all-powerful State that rejects external scrutiny or controls, and

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Pacific region (Australia and New Zealand) in the "Western European and Others" grouping.

[4] Examples include Australia's Geneva Conventions Act of 1957, India's Geneva Conventions Act of 1960, Malaysia's Geneva Conventions Act of 1962 and Singapore's Geneva Conventions Act of 1973.

[5] For example, Brunei acceded in 1991 and Myanmar in 1992.

[6] For example, Australia, Pakistan, Vietnam, the Republic of Korea and China. Vietnam's reservations to the Geneva Conventions are extensive – see: https://tinyurl.com/r67wv3k.

[7] Simon Chesterman, "Asia's Ambivalence about International Law and Institutions: Past, Present and Futures", *European Journal of International Law*, Vol. 27, No. 4, 2016.

[8] Available at: www.springer.com/law/international/journal/40901.

[9] Available at: https://academic.oup.com/chinesejil.

[10] Available at: https://brill.com/view/journals/kjic/kjic-overview.xml.

[11] Available at: www.cambridge.org/core/journals/asian-journal-of-international-law.

[12] Simon Chesterman, Hisashi Owada and Ben Saul (eds), The *Oxford Handbook of International Law in Asia and the Pacific*, Oxford University Press, Oxford, 2019; Suzannah Linton, Timothy McCormack and Sandesh Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge and New York, 2019.

secondly, diversity and fragmentation in terms of normative approach and practice.

Acharya rightly asserts that Asia is not "one", and that there is no singular idea of Asia.[13] Why should there be a single perspective in a region that is not drawn together into a grouping such as the European Union, which has common approaches and even coordinates external action in certain areas? The groupings that do exist, such as the Association of Southeast Asian Nations (ASEAN), the South Asian Association for Regional Cooperation and the Pacific Islands Forum are sub-regional, decentralized and of a loose nature.[14] This reflects the reality that the countries of the region are diverse, in terms of ethnicity, religion, culture, history, legal systems, political structures, security situations, socio-economic development and roles in the international community. The accident of being neighbours or being located within a man-made geographical concept does not mean that they have, or should have, the same perspectives on or approaches to IHL. Take the degree of embedding of IHL in the armed forces. Australia and Indonesia may be direct neighbours, but their militaries' approaches to IHL are profoundly different.[15] The situation of nuclear weapons can also provide some insight. The nations of Oceania, Australasia and Southeast Asia have rejected nuclear weapons,[16] but four of the world's nuclear powers are from the Asia- Pacific: two from East Asia (China and North Korea) and two from South Asia (India and Pakistan). And Japan, the one and only country to have borne the brunt of nuclear weapons in armed conflict, has

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[13] Amitav Acharya, "Asia Is Not One", Journal of Asian Studies, Vol. 69, No. 4, 2010.

[14] See, generally, Nicholas Thomas (ed.), Governance and Regionalism in Asia, Routledge, London, 2009.

[15] Contrast Yvette Zegenhagen and Geoff Skillen, "Implementation of International Humanitarian Law Obligations in Australia: A Mixed Record", with Suzannah Linton, "International Humanitarian Law in Indonesia", both in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

[16] See Treaty on the Southeast Asia Nuclear Weapon-Free Zone, 15 December 1995 (entered into force 27 March 1997), International Legal Materials, Vol. 35, p. 635; South Pacific Nuclear Free Zone Treaty, 1445 UNTS 177, 6 August 1985 (entered into force 11 December 1986). For analysis, see Roger S. Clark, "Pacific Island States and International Humanitarian Law", and Satoshi Hirose, "Japan and Nuclear Weapons", both in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

a surprisingly nuanced approach to the prohibition of nuclear weapons.[17] IHL in the Asia-Pacific region is very much contextualized, depending on factors such as country, local and international politics, culture, religion, time frame, political doctrine, actors and situation of violence. These factors obviously mean that assertions about IHL in the Asia-Pacific are not absolutely or equally applicable to every single country in the entire region. Universality seems only to relate to regional participation in the Geneva Conventions and the Convention on the Rights of the Child.[18]

The uncovering and analysis of the complex and large-scale realities of IHL application in such a large swathe of the globe is not facilitated by applying rigid academic approaches such as tracking a single, narrow technical issue (e.g., the implementation of the duty to take precautions in attack) across every single country. The present author has, instead, drawn from close scrutiny of the literature, in particular the most recent and authoritative, and applied the experience of years of working in and on the region. In this way, it has been possible to extract convergence in perspectives and approaches. This method is not exceptional, but the endeavour is in itself an original contribution, and it facilitates an innovative entrée into deciphering the Asia-Pacific's complex IHL landscape. The result is that the author is able to argue the following. First, the norm of humanity in armed conflict, which underpins IHL, has deep roots in the region.[19] This, to some extent, explains why there is no conceptual resistance to IHL in the region, in the way that exists within the human rights doctrine. Second, there has been meaningful participation of States from the region in IHL law-making, both in terms of treaties and custom. Third, some Asia-Pacific States are

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[17] See further below for the Japanese submissions during the advisory proceedings on the *Legality of the Threat or Use of Nuclear Weapons* and the complex interplay between Japanese culture, martial practices and IHL.

[18] See above note 6. The participation of many Asia-Pacific States in the Convention on the Rights of the Child is heavily diluted by substantial reservations. See the United Nations Treaty Collection website, available at: https://tinyurl.com/rxksp5l.

[19] This paper adopts Axelrod's behavioural definition: "A norm exists in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way." He argues that "[n]orms often precede laws, but are then supported, maintained, and extended by laws." Robert Axelrod, "An Evolutionary Approach to Norms", *American Political Science Review,* Vol. 80, No. 4, 1986, pp. 1097, 1106.

actively contributing to the development of emerging or evolving areas relevant to IHL, such as weapons, outer space, cyberspace and the protection of the environment in armed conflict. Given the fragmented reality of the region, this leads inexorably to the issue of contradiction. How is it that in a region where there is discernible positivity towards the norm of humanity in armed conflict, there are so many armed conflicts with very serious IHL violations emerging? What happened to norm internalization? These issues will be considered in the second section of the article. This examination leads to a third and final section, a concluding reflection on what all of this reveals about IHL in the Asia-Pacific.

The nature of IHL in the Asia-Pacific is such that the present author does make some cautious generalizations; the grounds for making them are presented for the reader's consideration in the first section, and the contradictions are addressed in the second. This paper is about the Asia-Pacific experience, and the author is not suggesting that such features are unique to this part of the world. It should also be obvious that the present work attempts to make sense of a complex situation. The approaches of many regional States, large and small, powerful and less so, are referenced in this paper. However, some States have practice that is more accessible, and the author has obviously had to exercise some selectivity for a publication of this nature. Readers should examine the cited sources for the details and reasoning that cannot be presented in this article.

Assertion 1: The norm of humanity in armed conflict has deep roots in the Asia-Pacific region

The countries of the Asia-Pacific region do not display conceptual or ideological animosity towards the norm that requires humanity in armed conflict, in contrast to their well-documented ambivalence about human rights.[20] There is also nothing to suggest that IHL, as a collection of specific rules arising from that one fundamental norm, is seen as a foreign project imposed on the region. Review of the submissions during the

[20] See Hurst Hannum, "Human Rights", and Suzannah Linton, "International Humanitarian Law and International Criminal Law", both in S. Chesterman, H. Owada and B. Saul (eds), above note 12.

International Court of Justice (ICJ) advisory proceedings on the *Legality of the Threat or Use of Nuclear Weapons*[21] and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[22] reveals that Australia, Bangladesh, the Democratic People's Republic of Korea (DPRK), India, Indonesia, Japan, Malaysia, the Marshall Islands, Nauru, New Zealand, Pakistan, Palau, the Philippines, Samoa and the Solomon Islands presented themselves as great humanitarians and champions of the IHL regime. There were, however, some nuances. Japan, very interestingly, held that "the use of nuclear weapons is clearly contrary to the spirit of humanity that gives international law its philosophical foundation" and repeatedly emphasized the necessity of nuclear disarmament and a desire to promote nuclear disarmament, but studiously avoided discussing the legality of the use of nuclear weapons.[23] Hirose explains that Japan takes a "realistic approach" because under the Japan–US Security Pact, Japan benefits from the so-called "nuclear umbrella" of the United States, and this has become an indispensable component of Japan's security policy.[24] Taking these positions, along with others, into account, the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* determined that the "fundamental rules [of IHL] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[25]

However, the rhetorical public embrace of humanitarianism illustrated above goes far back in time for some Asia-Pacific States. We

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[21] Written submissions: Democratic People's Republic of Korea (DPRK), India, Japan, Malaysia, Marshall Islands, Nauru, New Zealand, Palau, Samoa and Solomon Islands (responses to submissions by Nauru and Solomon Islands), available at: www.icj-cij.org/en/case/95/written-proceedings. Oral submissions: Indonesia, Japan, Malaysia, Marshall Islands, New Zealand, Philippines, Samoa and Solomon Islands, available at: www.icj-cij.org/en/case/95/oral-proceedings.

[22] Written submissions: Australia, DPRK, Indonesia, Japan, Malaysia, Micronesia, Marshall Islands, Pakistan and Palau, available at: www.icj-cij.org/en/case/131/written-proceedings. Oral submissions: Bangladesh, Indonesia and Malaysia, available at: www.icj-cij.org/en/case/131/oral-proceedings.

[23] S. Hirose, above note 16, p. 446.

[24] *Ibid.*

[25] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 257, available at: www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

can see something more sophisticated than a simplistic belief in a moral duty "to be kind to the needy." Some of the earliest participants in IHL treaties and arrangements have been from the region. Three of the twenty-six participating nations in the Hague Peace Conference in 1899 were from the Asia-Pacific region: Siam, China and Japan.[26] Siam, one of Southeast Asia's great Buddhist warrior kingdoms, began to engage in IHL treaty participation as long ago as 1899, becoming party to Hague Convention II on the Laws and Customs of War on Land (1899), Hague Declaration IV (2) concerning Asphyxiating Gases (1899) and Hague Declaration IV (3) concerning Expanding Bullets (1899).[27] The Thai Red Cross Society was founded in April 1893 as the Red Unalom Society, before the nation became a party to the then Geneva Convention.[28] In fact, Yeophanthong explains that King Vajiravudh of Siam was open to merging both Western legal and political ideas with Buddhist values: he published a volume on international law in 1914, which included a substantial section devoted to explaining the laws of war.[29] That engagement has continued to the present Thailand, which is a signatory to the Arms Trade Treaty (2013)[30] and was one of the first States to sign and ratify the Treaty on the Prohibition of Nuclear Weapons (TPNW) on 20 September 2017, the first day it was open for signature.[31]

Humanitarian ideas do indeed have "deep roots in most Asian societies, being the products of complex social and religious systems."[32]

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[26] Betsy Baker, "Hague Peace Conferences (1899 and 1907)", Max Planck Encyclopaedia of Public International Law, available at: https://tinyurl.com/vrb9run.

[27] For Thailand's treaty participation, see the International Committee of the Red Cross (ICRC) database, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_country Selected=TH.

[28] Pichamon Yeophantong, "The Origins and Evolution of Humanitarian Action in Southeast Asia", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, p. 83.

[29] *Ibid.*

[30] Arms Trade Treaty, 2 April 2013 (entered into force 24 December 2014), available at: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002803628c4&clang=_en.

[31] Treaty on the Prohibition of Nuclear Weapons, opened for signature 20 September 2017 (not in force).

[32] Pichamon Yeophantong, "Understanding Humanitarian Action in East and Southeast Asia: A Historical Perspective", Humanitarian Practice Group Working Paper, Overseas Development Institute, February 2014, p. 1. See also the Dissenting Opinion of Judge Weeramantry in the ICJ's Advisory Opinion on the Legality of the Threat or Use of

Yeophantong argues that key influences on the evolution of humanitarian thought and practice, at least in the Southeast Asian region, are (1) communitarianism, meaning a shared existence with resulting common social obligations; (2) religion, faith and non-religious belief systems; (3) political theories on statecraft and just war; and (4) identity and security politics.[33] Humanity in warfare in many cultures of the region predates the positivist IHL framework that emerged in Europe in the nineteenth century, and even the Western European chivalric culture in which too many scholars situate the roots of humanitarianism in armed conflict.[34] India, China and Japan will be considered in the following paragraphs, but they do not stand alone. The many ethnic groups of the Indonesian archipelago[35]and the Pacific islands[36] had their own laws of war. Humanitarian concerns in war can be identified in Hinduism,[37] Buddhism[38] and Sikhism.[39] For years, experts have been writing about an Islamic international law, with areas such as Islamic humanitarian law,

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Nuclear Weapons, above note 25, pp. 443–444. For a closer analysis, see P. Yeophantong, above note 28.

[33] P. Yeophantong, above note 28, p. 76.

[34] For a study that focuses on the global roots of humane treatment of captured enemy fighters, see Suzannah Linton, "Towards a Global Understanding of the Humane Treatment of Captured Enemy Fighters", *Frontiers of Law in China*, Vol. 12, No. 2, 2016.

[35] Fadilah Agus et al., *Hukum Perang Tradisional di Indonesia*, Universitas Trisakti, Jakarta, 1999.

[36] ICRC Regional Delegation in the Pacific, Under the Protection of the Palm: Wars of Dignity in the Pacific, ICRC, Geneva, 2009.

[37] For more, see Manoj Sinha, "Ancient Military Practices of the Indian Subcontinent", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12; B. C. Nirmal, "International Humanitarian law in Ancient India", in Venkateshwara Subramaniam Mani (ed.), *Handbook of International Humanitarian Law in South Asia*, Oxford University Press India, New Delhi and New York, 2007.

[38] For more, see Christopher G. Weeramantry, "Buddhism and Humanitarian Law", in V. S. Mani (ed.), above note 37; Mahinda Deegalle, "Norms of War in Theravada Buddhism", in Vesselin Popovski et al. (eds), World Religions and Norms of War, United Nations University Press, Tokyo and New York, 2009.

[39] For more, see Gurpreet Singh, "Sikh Religion and Just War Theory: An Analytical Study", Institute of Sikh Studies, available at: www.sikhinstitute.org/jan_2014/3-gurpreetsingh.html; Gurtej Singh, "The Sikh War Code, Its Spiritual Inspiration and Impact on History", Sikh24, 8 February 2019, available at: www.sikh24.com/2019/02/08/the-sikh-war-code-its-spiritual-inspiration-and-impact-on-history/#.Xl4qqEqnzIU.

the Islamic jus ad bellum and the Islamic jus in bello.[40] Islam has played a major role in some conflicts in the region, such as in Indonesia's Aceh.[41] From the work done in the Philippines by Santos Jr and others, we can see that the common points between the Islamic law of war and IHL have provided a basis for dialogue with some Islamist fighters, notably the Moro National Liberation Front and the Moro Islamic Liberation Front, although not the more hard-line Abu Sayyaf group.[42]

A closer examination of India, China and Japan explains further why, at an intellectual and cultural level, the concept of humanity in war has traction in the region. The use of force in ancient India was highly regulated. Sinha explains that "[i]n ancient times ... the laws of war were designed to bring out the best and not the worst of human traits."[43] Largely based on *Manu's Code of Law* (*Manava Dharmashastra or Manu Smriti*), which started to be compiled around 200 BC from earlier sources, these rules included the following:

1. "a warrior (*Kshatriya*) in armour must not fight one who is not so clad";
2. "one should fight only one enemy and cease fighting if the opponent is disabled";
3. "aged men, women and children, the retreating, or one who held a straw in his lips as a sign of unconditional surrender should not be killed";
4. it was prohibited to attack "the fruit and flower gardens, temples and other places of public worship";

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[40] Notable examples include Mohamed Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace*, Cambridge University Press, New York, 2015; Ahmed Al-Dawoody, *The Islamic Law of War,* Palgrave Series in Islamic Theology, 2011; Mashood A. Baderin (ed.), *International Law and Islamic Law*, Ashgate, Aldershot, 2008.

[41] See, generally, Edward Aspinall, *Islam and Nation: Separatist Rebellion in Aceh, Indonesia*, Stanford University Press, Stanford, CA, 2009; Human Rights Watch, *Indonesia: The War in Aceh*, Vol. 13, No. 4(C), 2001.

[42] Soliman M. Santos Jr, *"Jihad* and International Humanitarian Law: Three Moro Rebel Groups in the Philippines", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12. For a theoretical framework on how to engage with jihadist groups, see Matthias Vanhullebusch, "Dialoguing with Islamic Fighters about International Humanitarian Law: Towards a Relational Normativity", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

[43] M. Sinha, above note 37, p. 110.

5. "poisonous weapons should not be used, inasmuch as they involve treachery"; and
6. it was prohibited to use weapons that cause unnecessary suffering, such as poisoned or barbed arrows.[44]

China is another country with an ancient tradition of humanitarianism in philosophy and the military sciences that predates Henry Dunant and even medieval European knights, so the advent of modern IHL was conceptually acceptable there.[45] Some of these rules have been identified as far back as the Spring and Autumn Period (770–476 BC) and the Period of the Warring Kingdoms (475-221 BC).[46] These were eventually recorded, and two sources are particularly well known: Sun Tzu's *The Art of War* and Sima Rangju's *The Precepts of War*. *The Art of War* counselled a strategic approach reconciling fighting, a necessary evil, with Taoist principles. It recommended that (1) captured soldiers should be kindly treated and kept alive; (2) it is better to recapture an entire army than to destroy it, and to capture an entire regiment, a detachment or a company than to destroy them; and (3) the skilful leader subdues the enemy's troops without any fighting.[47] *The Art of War* described the noble commander as one who obtained victory with minimal violence, including to the enemy fighters; "a commander should not seek the total annihilation of the enemy."[48] Rangju's work is "considered by all as a code of war which

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[44] *Ibid*., pp. 108–109, direct sources omitted. For more, see V. S. Mani, above note 37; Lakshmikanth R. Penna, "Traditional Asian Approaches: An Indian View", *Australian Year Book of International Law*, Vol. 9, 1980.

[45] For more on China, see Ru Xue, "Humanitarianism in Chinese Traditional Military Ethics and International Humanitarian Law Training in the People's Liberation Army", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12; Ping-Cheung Lo and Sumner B. Twiss (eds), *Chinese Just War Ethics: Origin, Development, and Dissent*, Routledge, London, 2015; Ralph D. Sawyer, *Ancient Chinese Warfare*, Basic Books, New York, 2011.

[46] Li-Sun Zhu, "Traditional Asian Approaches: A Chinese View", *Australian Year Book of International Law*, Vol. 9, 1980.

[47] Sun Tzu, *The Art of War*, trans. Lionel Giles, available at: http://classics.mit.edu/Tzu/artwar.html.

[48] Sumio Adachi, "The Asian Concept", in *International Dimensions of Humanitarian Law*, Henri Dunant Institute & United Nations Educational, Scientific and Cultural Organization, Geneva and Paris, 1988, p. 13.

codified rules of law on warfare in Ancient China."[49] Scholars have also documented other ancient rules and practices concerning humane treatment of the disabled, the wounded, the sick and the dead in war.[50] The Russo-Japanese War of 1904–05 saw the establishment of the Shanghai International Red Cross Committee (which became the Red Cross Society of China in 1912).[51] 1904 was also the year that China became a party to the Geneva Convention of 1864.[52] Of the other early treaties, China is party to Hague Convention III on Maritime Warfare (1899), Hague Declaration IV (1) prohibiting Projectiles from Balloons (1899), the Hague Convention on Hospital Ships (1904), the Geneva Convention on the Wounded and Sick (1906), and Hague Convention XI on Restrictions of the Right of Capture (1907).[53] Today, China is also party to Additional Protocols I and II to the Geneva Conventions (AP I and AP II),[54] and hosts the East Asia Delegation of the International Committee of the Red Cross (ICRC). Since November 2007, China has had a national committee on IHL as well as academic institutions dedicated to the study of IHL (for example, at Wuhan and Peking universities). As for practice, Ru Xue argues that the People's Liberation Army (PLA) has long embraced humanitarianism in war, and has an active programme of IHL instruction.[55]

Japan's notorious inability to reconcile traditional practices with the international protection regime for prisoners of war (PoWs) in World War II has obscured a far more complex picture.[56] Sun Tzu's *Art of War*, with its Taoist principles balanced with shrewd pragmatism, was first introduced to Japan in the eighth century by the monk Kibino Makibi; "Since then, 'Art of War' has received the devoted attention of political

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[49] *Ibid.*

[50] L.S. Zhu, above note 46, pp. 144–145.

[51] P. Yeophantong, above note 32, pp. 4–6, also analyzing Chinese literature on humanitarianism in China.

[52] See China's treaty participation at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties HistoricalBCountrySelectedxsp?xp_countrySelected=CN.

[53] *Ibid.*

[54] *Ibid.*

[55] R. Xue, above note 45, especially pp. 98–106.

[56] Sumio Adachi, "Traditional Asian Approaches: A Japanese View", *Australian Year Book of International Law*, Vol. 9, 1980, p. 159; Oleg Benesch, *Inventing the Way of the Samurai: Nationalism, Internationalism, and Bushidō in Modern Japan*, Oxford University Press, Oxford, 2014.

and military leaders of Japan."[57] Knutsen has shown how in the fourteenth and fifteenth centuries, Japanese masters of *Heiho* (the Art of War) were catalysts for the dissemination of Sun Tzu's teachings within the warrior community.[58] These teachings are said to have influenced Japanese military philosophy in World War II, including the surprise attack on Pearl Harbour in 1941.[59]

IHL is about humanitarianism, and Japan's earliest IHL treaty participation dates back to its participation in the 1864 Geneva Convention, in 1886.[60] The Japanese Red Cross Society was founded in 1877 as the Hakuaisha, or Philanthropic Society, to provide humanitarian assistance during a domestic armed rebellion.[61] It later changed its name to the Japanese Red Cross Society and joined the Red Cross family in 1887.[62] Japan indicated agreement with the principles of IHL by becoming party to almost all the IHL treaties between 1899 and 1907.[63] Furthermore, Japan was the first Asian country to participate in the International Conference of the Red Cross and Red Crescent (the fourth, held in Karlsruhe, Germany).[64] The Empress Shôken Fund, created in 1912 by the Empress of Japan, has since then been allocating grants to National Red Cross and Red Crescent Societies for projects involving disaster preparedness, health care, blood transfusion services, young

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[57] Yoichi Hirama, "Sun Tzu's Influence on the Japanese Imperial Navy", paper presented at the 2nd International Symposium on Sun Tzu's Art of War (16–19 October 1990), Beijing, 1990, available at: http://hiramayoihi.com/yh_ronbun_senryaku_sonshi.htm.

[58] Roald Knutsen, *Sun Tzu and the Art of Medieval Japanese Warfare*, Brill, Leiden, 2008.

[59] Y. Hirama, above at note 57.

[60] See the ICRC's ratification records at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties HistoricalByCountrySelected.xsp?xp_countrySelected=JP&nv=8.

[61] Several articles published in the ICRC Mission in Tokyo's Newsletter have addressed the historical relationship between Japan and the ICRC under the title "Historical Relationship between Japan and the ICRC." See *ICRC Newsletter,* No. 11, Autumn 2010, p. 6, available at: www.icrc.org/eng/assets/files/2010/icrc-bulletin-eng-vol11.pdf); *ICRC Newsletter*, No. 14, 2013, p. 6, available at: http://jp.icrc.org/wp-content/uploads/sites/92/2013/11/japan-newsletter-eng-vol14.pdf; *ICRC Newsletter*, No. 15, 2013, p. 3, available at: http://jp.icrc.org/wp-content/uploads/sites/92/2013/11/icrc-japan-newsletter-english-vol15.pdf.

[62] See above note 61.

[63] See ratification table at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties HistoricalBCountrySelectedxsp?xp_countrySelected=CN.

[64] See *ICRC Newsletter*, No. 11, above note 61, p. 6.

people and first aid.[65] Today, it is hard to deny that Japan's humanitarian credentials in East Asia continue to be tainted by the shadow of World War II, but even so, the country presents itself as a champion of IHL and actively urges States from the region to enter into the Additional Protocols.[66]

These three country illustrations – India, China and Japan – do not stand in isolation. In 1996, Judge Weeramantry from Sri Lanka reminded the world about Hinduism's two pivotal morality epics, the *Ramayana* (the story of Rama's journey) and *Mahabarata* (*The Great Chronicle of the Bharata Dynasty*); these are morality tales involving profound reflections on human nature, law and justice, including the norms and practices of fighting in accordance with Manu's Code.[67] Hinduism (and also Buddhism, which has not been discussed in the preceding section due to lack of space) spread beyond India.[68] Scenes from both epics are memorialized on stone inscriptions and adorn temples across Southeast Asia, from the oldest Hindu kingdom of the region (Funan, spanning parts of today's Vietnam, Cambodia and Thailand) to Pagan (Burma/Myanmar), Angkor Wat (Cambodia), the temples of Bali (Indonesia) and Ayodhya (Thailand). The *Ramayana* and *Mahabarata* have been adapted for local audiences in Burma/ Myanmar, Thailand, Cambodia, Laos, peninsular Malaysia, Java and Bali, "and the story continues to be told in dance-dramas, music, puppet and shadow theatre throughout Southeast Asia."[69] As for the dissemination of Sinic

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[65] See ICRC, "Legal and Financial Advisors", available at www.icrc.org/en/support-us/audience/legal-and-financial-advisors.

[66] Also see Hitomi Takemura, "The Post-War History of Japan: Renouncing War and Adopting International Humanitarian Law", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

[67] Dissenting Opinion of Judge Weeramantry, above note 32, pp. 478–480. Other insightful publications are Kaushik Roy, *Hinduism and the Ethics of Warfare in South Asia: From Antiquity to the Present*, Cambridge University Press, Cambridge, 2012; Michael Jerryson and Mark Juergensmeyer (eds), *Buddhist Warfare*, Oxford University Press, Oxford and New York, 2010; Venkateshwara Subramaniam Mani, "International Humanitarian Law: An Indo-Asian Perspective", *International Review of the Red Cross*, Vol. 83, No. 841, 2001.

[68] "The Indianisation of Southeast Asia: An Interactive Online Museum", available at: http://sea-indianisation-museum.weebly.com/.

[69] Jana Igunma, "The Ramayana in Southeast Asia", 21 April 2014, available athttps://blogs.bl.uk/asian-and-african/2014/04/the-ramayana-in-southeast-asia-1-cambodia-.html.

approaches to armed conflict, Sun Tzu's teachings influenced Chinese fighting for centuries and have been traced in Mao Tse Tung's own instructions; both inspired the operational approaches of modern Chinese, North Korean and Vietnamese armed forces.[70] The *Art of War*'s influence in Japan has previously been considered. The use of Sun Tzu's military strategies and tactics by the North Vietnamese general Vo Nguyen Giap, notably in the areas of knowledge of oneself and the foe, use of deception, and use of the strategic goal of breaking the enemy's will, has been well studied.[71]

Assertion 2: There has been meaningful participation in IHL law-making in the Asia-Pacific region[72]

Treaties

The historic engagement of Thailand, China and Japan in the early IHL treaties has already been considered above.

Scrutiny of the three volumes of the *Final Record of the Diplomatic Conference of Geneva of 1949* show that some Asia-Pacific States were active in the crafting of the Geneva Conventions.[73] The Conference took place at the start of the age of decolonization, and eight out of the fifty-nine participating States (13.5%) were from the Asia-Pacific: Australia, the

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[70] Manuel Poejo Torres, "Sun Tzu: The Art of War", *The Three Swords Magazine*, Vol. 33, 2018, p. 47, available at: www.jwc.nato.int/images/stories/threeswords/SUNTZU_2018.pdf.

[71] *The Art of War* apparently became an American military education staple after the Vietnam War (for example, the Marine Corps teaching on strategic warfighting is founded on ideas about manoeuvre warfare taken directly from *The Art of War*): see "The American Experience and Sun Tzu: Highlights of Ways Americans Have Felt the Impact of Sun Tzu's Philosophies", available at: www.artofwarsuntzu.com/america_experiences_sun_tzu.htm. See also Mark McNeilly, *Sun Tzu and the Art of Modern Warfare*, Oxford University Press, New York, 2014, pp. 11, 12, 21, 114; Mark Cartwright, "The Art of War", *Ancient History Encyclopedia*, available at: www.ancient.eu/The_Art_of_War/.

[72] The definitive study is Sandesh Sivakumaran, "Asia-Pacific States and the Development of International Humanitarian Law", in S. Linton, T. McCormack and S. Sivakumaran (eds.), above note 12.

[73] *Final Record of the Diplomatic Conference of Geneva of 1949*, 3 vols, Federal Political Department, Berne, 1949 (Diplomatic Conference Final Record). See the following footnotes for specific references.

Republic of the Union of Burma, China, India, New Zealand, Pakistan and Thailand.[74] The Philippines did not participate officially, but was present and signed all four Conventions.[75] Ceylon, later to be known as Sri Lanka, took the same approach, but it did not sign the fourth Convention on civilians.[76] The extent of the Asia-Pacific countries' participation ranged from light (Thailand) to active (Pakistan, Burma, China) to very active (Australia, New Zealand, India) engagement. Some delegations were one-person (e.g. Burma), while others were on the large side (e.g. China). Participation of the Asia-Pacific States took various forms. Several delegations were represented in leadership positions and on committees. Colonel W. R. Hodgson, head of the Australian Delegation, was appointed first vice-president of the whole Conference. India's Sir Dhiren Metra chaired Committee I on the Wounded and Sick and Maritime Warfare Conventions, and Pakistan was a member of this committee. Thailand and Burma were on the Coordination Committee. Delegations from India and Pakistan assisted in the work of the Medical Experts Committee.

Two of the many activities of Asia-Pacific States at the conference can be cited at some length to show that these States' participation in the making of the Geneva Conventions was genuine, and not ornamental. The first is the combined effort by India and Burma to seek to replace the Red Cross on a white background with a single new emblem that could be accepted by all as being neutral, thus avoiding the need for exceptions such as the Red Crescent, the Persian lion, and the Star of David that Israel was seeking. India's proposal had been voted down in Committee I. General Tun Hla Oung, the Burmese delegate, tabled its re- examination in the Plenary Assembly, alternatively suggesting an amendment to Article 31 to the effect that all red symbols on white grounds whose use had been duly notified should be given recognition as distinctive emblems. General Oung then addressed himself to "a vast majority of delegates of this

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[74] *Ibid.,* Vol. 1, pp. 158–170.

[75] Official Ceremony for the Signature of the Geneva Conventions of 12 August 1949, for the Protection of War Victims, in Diplomatic Conference Final Record, above note 73, Vol. 2(B), p. 534.

[76] *Ibid.,* p. 533.

Conference who belong to one definite race and one definite religion."[77] He claimed that he, like everyone else (possibly not including the Israelis, who were apparently being contradictory), wanted to remove multiplicity of emblems. With the existing symbol being a reversal of the Swiss flag, General Oung cautioned against the use of "national emblems in the international field," and of religious signs. Speaking to "a religious feeling" and pressures from home about the "religious significance of the red cross," he explained: "I cannot now conscientiously go back to my country and to my men and tell them that it has no religious significance."[78] General Oung and India lost the battle of the emblem. Today, we still have the Red Cross on a white background as the visible sign of protection in IHL, the Red Crescent continues to be formally recognized as having the same function, and since 2005 the red crystal has been available for situations where the existing emblems are not acknowledged.

Despite being Burma's one and only representative, General Oung's voice is to be heard repeatedly across the records, bringing incision, directness, command of documents and real-life experiences of what it was like to be a soldier and a prisoner of war (PoW).[79] General Oung also provides the second example of the engagement of Asia-Pacific delegates in the 1949 process. He submitted a motion to reject the whole of common Article 2A (later to become common Article 3).[80] The motion was rejected and Article 2A was adopted by thirty-four votes to twelve, with one abstention. General Oung spoke forcefully and at unusually great length against the existing draft, describing it as an incitement and encouragement to insurgency.[81] It was "an Article which happens to be

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[77] Wounded and Sick, 9th Plenary Meeting, in Diplomatic Conference Final Record, above note 73, Vol. 2, p. 227.

[78] *Ibid.*

[79] General Oung was at that time the only Burman to have been educated at Sandhurst, and had been a prisoner of war held in Rangoon Jail by the Japanese. He was deputy inspector-general of police and chief of the Criminal Investigation Department at the time of the killing of Burma's independence leader, Aung San. In August 1949, he was appointed deputy supreme commander of the Burmese Armed Forces. Shelby Tucker, *Burma: Curse of Independence*, Pluto Press, London, 2001, p. 150.

[80] See S. Sivakumaran, above note 72, pp. 120–121.

[81] 19th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 337.

one of the longest, vaguest and most dangerous to the security of the state in the Convention."[82] In addition to his opposition to the regulation of non- international armed conflicts (NIACs), General Oung also identified, with immense foresight, weaknesses in the draft that would come to haunt IHL for years to come and would only be clarified in the celebrated *Tadić* decision.[83] General Oung noted that "no attempt has been made to define the phrase 'armed conflicts not of an international character'."[84] He observed that, through the phrase "parties to the conflict", the insurgent party was being, "rightly or wrongly, given a place in international law,"[85] an issue that would re-emerge at the Diplomatic Conference of 1974–77 and which led to AP II being stripped of the language "parties to the conflict."[86] After referring to the words "each Party to the conflict shall be bound to apply," General Oung posed the question: "May I ask how it is proposed to bind the rebels?"[87] This is, of course, a question that is still giving the international community difficulty today.[88] He also opined that the simple fact of having such an article in an international convention "will automatically give the insurgents a status as high as the legal status which is denied to them."[89] It was a far-sighted intervention, but common Article 3 was adopted and did go on to become what is arguably the most important provision in all of IHL.[90]

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[82] 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 330.

[83] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Duško Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

[84] 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 329.

[85] *Ibid.*

[86] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, p. 1344.

[87] 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 329.

[88] Also see Sandesh Sivakumaran, "Binding Armed Opposition Groups", *International and Comparative Law Quarterly*, Vol. 55, No. 2, 2006.

[89] 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2(B), p. 330.

[90] See the commentary on common Article 3 in ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016.

There were many other interventions from Asia-Pacific countries. For example, in the Plenary Assembly on the wounded and sick convention, New Zealand revisited earlier concerns with Article 22.[91] There had been long discussions in Committee I about the status of medical personnel and chaplains after capture, and New Zealand delegate Mr Quentin-Baxter again suggested amendments to the Committee's text, but these were rejected.[92] Representing China in Committee III on civilians, Mr Wu considered that even after the conclusion of hostilities or the occupation, protected persons should not be transferred to a country where they had legitimate reasons to fear persecution. The granting of asylum to political refugees was in accordance with international usage.[93] Mr Wu, in the same committee, pointed out that placing "the offence of destruction of property under the title of reprisal would minimise the crime of wanton destruction and sheer vandalism," and sought for the provision's omission, or alternate formulation. He expressed his concern to alleviate the suffering of war victims, and in principle he supported a Soviet amendment that "provided for the prohibition of destruction of all categories of property except in the case of military necessity."[94]

The Asia-Pacific role increased in the 1974–77 discussions on revising the Geneva Conventions. The region's numbers had been significantly boosted by the decolonization process, and the Conference was famously able to expand the application of IHL in AP I to peoples engaged in armed conflicts in the exercise of their right to self-determination.[95] Several provisions of AP I are linked to this extension. One of them is Article 44, loosening the principle of distinction in certain situations. Kittichaisaree charts the evolution of greater protection for "freedom fighters" in international law, and notes how during the negotiations, North Vietnam, North Korea and Pakistan insisted that guerrilla fighters in national liberation situations need not distinguish

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[91] Diplomatic Conference Final Record, above note 73, Vol. 2(B), p. 214.

[92] *Ibid.*

[93] Committee III on Civilians, 15th Meeting, in Diplomatic Conference Final Record, above note 73, Vol. 2 (A), p. 662.

[94] Committee III on Civilians, 12th and 13th Meetings, in Diplomatic Conference Final Record, above note 73, Vol. 2(A), p. 651.

[95] Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1979).

themselves; "otherwise, they would be subjected to counterattacks and overwhelming repression by the latter's better equipped armed forces."[96]

Ironically, AP I, ratified globally by 174 States, has not been very popular in a region that has also had its fair share of post-liberation internal conflicts.[97] The dwindling number remaining outside the Protocol include Bhutan, Burma/ Myanmar, India, Indonesia, Malaysia, Marshall Islands, Nepal, Singapore, Sri Lanka, Thailand, Pakistan and Tuvalu. Of those that are party, there are reservations/declarations/understandings from Australia, China, Japan, Mongolia, the Philippines and the Republic of Korea.[98] New Zealand entered a substantial interpretative declaration.[99]

There is another noteworthy example of the region's contribution to IHL treaties. Sivakumaran observes how the delegate for Pakistan is often given credit for "saving" AP II.[100] As many know, this instrument had been through a difficult drafting process, and there was much disagreement about NIACs. During the Conference, a decision was taken to negotiate two protocols in committee, one for internal and one for international armed conflicts (IACs). However, "the day before the adoption of Protocol II by the Conference in plenary session, the draft submitted by the committees was considered to be too detailed and was unacceptable to certain delegations."[101] There was genuine concern about

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[96] Kriangsak Kittichaisaree, "International Humanitarian Law and the Asia-Pacific Struggles for National Liberation", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, p. 149.

[97] *Ibid.*

[98] For more, see Suzannah Linton, "International Humanitarian Law and International Criminal Law", in S. Chesterman, H. Owada and B. Saul (eds), above note 12.

[99] The declaration addressed the situations to which Article 44(1) could apply (only in occupied territory or in armed conflicts covered by Article 1(4)) and the meaning of "deployment" in para. 3(b); the responsibility of military commanders and others responsible for planning, deciding upon or executing attacks to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time in relation to Articles 51 to 58 inclusive; the meaning of "military advantage" in Articles 51(5)(b) and 57(2)(a)(iii); and the meaning of "total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage" in Article 52. See ratification table at: https://tinyurl.com/rxdvj4w.

[100] S. Sivakumaran, above note 72, p. 21.

[101] Frits Kalshoven, "The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977",

the possibility of not being able to agree a protocol for NIACs. The delegation from Pakistan then played an important role in facilitating the adoption of a "simplified draft".[102] The Pakistanis canvassed other delegations and submitted amendments to the Committee draft, and eventually submitted a compromise draft protocol. The last-minute intervention led to AP II being adopted. Even so, this protocol is even more warily regarded in the Asia-Pacific than AP I. There are 169 States Parties, but Asia-Pacific States comprise almost all of those remaining outside: Bhutan, Burma/ Myanmar, India, Indonesia, Kiribati, Malaysia, the Marshall Islands, Nepal, Papua New Guinea, Singapore, Sri Lanka, Thailand, Tuvalu and Vietnam.[103]

The Asia-Pacific contribution can also be seen in the matter of nuclear weapons, which have a particular resonance in the region. Not only were the world's first atomic bombs used in wartime against the cities of Hiroshima and Nagasaki, but nuclear weapons came to be tested by the United States, the United Kingdom and France in the Pacific and Australia, with devastating environmental and human consequences.[104] As a result, the affected and neighbouring nations have long been vocal in their opposition to nuclear weapons and testing. The Pacific Island nations have been instrumental in anti-nuclear treaty-making processes, notably the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT), the 1996 Comprehensive Nuclear Test

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Netherlands Yearbook of International Law, Vol. 8, 1977, pp. 107, 111, cited in Sivakumaran, above note 72, p. 265.

[102] *Final Record of the Diplomatic Conference of Geneva of 1977*, Federal Political Department, Berne, Vol. 7, 1977, p. 61, para. 11, and p. 311, para. 159.

[103] See ratification table at: https://tinyurl.com/y77xzvdf.

[104] Masao Tomonaga, "The Atomic Bombings of Hiroshima and Nagasaki: A Summary of the Human Consequences, 1945–2018, and Lessons for *Homo Sapiens* to End the Nuclear Weapon Age", *Journal for Peace and Nuclear Disarmament*, Vol. 2, No. 2, 2019; Ministry of Foreign Affairs of Japan, *Research Study on Impacts of the Use of Nuclear Weapons in Various Aspects*, 2013, available at: www.mofa.go.jp/files/000051562.pdf; Sue Rabbitt Roff, *Hotspots: The Legacy of Hiroshima and Nagasaki*, Cassell, London and New York, 1995. The testimony of Marshall Islander Lijong Eknilang to the ICJ on the devastation of the tests is unforgettable: see ICJ, *Legality of Threat or Use of Nuclear Weapons in Armed Conflict (Request for an Advisory Opinion)*, CR 1995/33 (Public Sitting), 14 November 1995, pp. 25–28, available at: www.icj-cij.org/files/case-related/95/095-19951114-ORA-01-00-BI.pdf.

Ban Treaty and the TPNW (not in force).[105] Litigation has ranged from New Zealand and Australia's challenge of French nuclear tests[106] to the most recent attempt, that of the Marshall Islands against India, Pakistan and the United Kingdom.[107] New Zealand, fuelled by an active civil society movement, played a pivotal role in the co-called "World Court Project" which led to the ICJ's 1986 Advisory Opinion on the threat or use of nuclear weapons.[108] The Pacific Island States and ASEAN have

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[105] Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161, 1 July 1968 (entered into force 5 March 1970); Comprehensive Nuclear-Test-Ban Treaty, adopted at the 50th session of the UN General Assembly by UNGA Res. A/RES/50/245, as contained in UN Doc. A/50/1027, 26 August 1996 (not yet in force); Treaty on the Prohibition of Nuclear Weapons, opened for signature 20 September 2017 (not in force).

[106] ICJ, *Nuclear Tests (Australia v. France)*, Judgement, 20 December 1974, *ICJ Reports* 1974; ICJ, *Nuclear Tests (New Zealand v. France)*, Judgement, 20 December 1974, *ICJ Reports* 1974. Professor Clark notes, for the record, that in 1995, New Zealand endeavoured, unsuccessfully, to reopen its 1973 case considering new information about escape of underground radiation. See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case (New Zealand v France)* (Order of 22 September 1995) [1995] ICJ Rep 288. Samoa, Solomon Islands, Marshall Islands and Micronesia tried, with even less success, to intervene in this effort. Since the Court ignored them, their materials do not appear on the Court's website. See "Applications Submitted by the Governments of Samoa, Solomon Islands, Marshall Islands and Federated States of Micronesia", in New Zealand Ministry of Foreign Affairs and Trade (Manatu Aorere), *New Zealand at the International Court of Justice: French Nuclear Testing in the Pacific* (1996) 115. R. Clark, above note 16, p. 201, fn. 10.

[107] ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Decision (Preliminary Objections), 5 October 2016, *ICJ Reports* 2016; ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India),* Decision (Jurisdiction of the Court and Admissibility of the Application), 5 October 2016, *ICJ Reports* 2016; ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan),* Decision (Jurisdiction of the Court and Admissibility of the Application), 5 October 2016*, ICJ Reports* 2016. The first-hand litigator's account – in R. Clark, above note 16, pp. 213–218 – is particularly insightful.

[108] ICJ, above note 25. Much insight into the role of the Pacific islands is contained in Roger S. Clark and Madeleine Sann (eds), *The Case against the Bomb: Marshall Islands, Samoa, and Solomon Islands before the International Court of Justice in Advisory Proceedings on the Legality of the Threat or Use of Nuclear Weapons,* Rutgers University School of Law, Camden, NJ, 1996. On the role of civil society in New Zealand, see Catherine Dewes, "The World Court Project: The Evolution and Impact of an Effective Citizens' Movement", PhD thesis, University of New England, 1998, on file with the author.

declared their regions to be nuclear-weapons-free zones.[109] However, as noted in this article's introduction, the situation is more complicated. The wider region is home to four nuclear powers, and Japan's approach as a victim State is notable. Japan is party to the NPT as a non-nuclear-weapon State, yet the Japanese government refused to participate in the negotiations for the TPNW and voted against it when it was adopted at the UN General Assembly in July 2017.[110] Singapore was the only participating country to abstain from the TPNW. However, Singapore is part of the ASEAN nuclear- free zone and stands against nuclear weapons; the abstention was because of unhappiness about the short time frame, and the failure to include Singaporean proposals.[111] And of course, the Asia-Pacific's nuclear-weaponized States, most notably North Korea, India and Pakistan, continue to pose acute threats to regional and global well-being.[112]

The Vietnam War provides a final example of a conflict in the region that played a major role in the development of IHL.[113] The legal issues that arose were many, including:

1. whether IHL was applicable in the first place (North Vietnam challenged IHL's applicability to what it called a war of aggression) and, if so, what kind of conflict it was (i.e., an IAC between North and South Vietnam, a NIAC, a national liberation struggle, or an internationalized or mixed conflict);
2. whether the IHL rules in force at the time were adequate in protecting civilians and civilian objects;

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[109] The treaty details are at note 16.

[110] S. Hirose, above note 16, p. 451. Hirose also emphasizes the testimony of the mayors of Hiroshima and Nagasaki at the ICJ in 1995, to show the disconnect between politicians and ordinary people on the matter of nuclear weapons. *Ibid.,* p. 448.

[111] Statement by Ms Andrea Leong, Delegate to the 72nd Session of the UN General Assembly Thematic Discussion on Cluster One: Nuclear Weapons, 12 October 2017.

[112] See the collection of seventeen reflections in the Australian National University's 2017 publication on "Nuclear Asia", available at: https://asiapacific.anu.edu.au/sites/default/files/News/nuclear-asia-publication-web.pdf.

[113] Keiichiro Okimoto, "The Viet Nam War and the Development of International Humanitarian Law", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

3. whether the IHL rules of the time could adequately regulate means and methods of warfare that were employed during the conflict; and
4. how combatants captured while fighting clandestinely should be dealt with under IHL.

These questions would later feed into the development of IHL. Another important example is the environment. Sir Kenneth Keith, who took part in the negotiations at the 1974–77 Diplomatic Conference on behalf of New Zealand, has recalled how environmental issues had become a matter of international concern in the years leading up to the Conference:

> It is also true of course that the widespread use of Agent Orange and other defoliants in Viet Nam were having an impact as well. That haunting photograph of the young girl running down the road naked after she had been bombed with napalm is an iconic image of the Viet Nam War and had a huge impact on the international community. There was a sense that, in a general way, quite apart from armed conflict, the environment was being threatened and specifically in relation to some of the methods that were being used in Viet Nam and Laos at the time of the Diplomatic Conference.[114]

Some of the practices during the Vietnam War "directly prompted States to develop new rules of IHL."[115] Concretely, the American use of napalm "significantly influenced the subsequent development of IHL to regulate the use of incendiary weapons."[116] The most striking example in terms of treaty law is of course Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (on

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[114] Tim McCormack, "Negotiating the Two Additional Protocols of 1977: Interview with the Right Honourable Sir Kenneth Keith", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, p. 26.

[115] K. Okimoto, above note 113, p. 179.

[116] *Ibid.,* p. 179; see also pp. 167, 170–172, 174–175, 178.

incendiary weapons).[117] Also, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted a year before the Additional Protocols, "was an important development in preventing the use of environmental modification techniques, such as the cloud seeding operations during the Viet Nam War."[118] In AP I, Article 35's direct line to the use of defoliants in the Vietnam War is well known.[119] Some of the other rules adopted in AP I, such as the protection of civilians and civilian objects from direct as well as indiscriminate attacks, the principle of distinction, and the rules on attacking works or installations containing dangerous forces and the status of captured combatants, also link to experiences from this conflict.[120]

Custom: *Opinio Juris* and State Practice

There has been both invisibility and visibility in respect of custom in the Asia-Pacific region.

World War II notoriously played out in enormous swathes of the region, with countless atrocities. After the war was over, there were many war crimes trials. Readers of this journal will know about Nuremberg and that tribunal's poor relation, the underestimated International Military

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[117] Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (on Prohibitions or Restrictions on the Use of Incendiary Weapons), 1342 UNTS 171, 10 October 1980 (entered into force 2 December 1983).

[118] K. Okimoto, above note 113, p. 179; see also pp. 174–176. Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1108 UNTS 151, 10 December 1976 (entered into force 5 October 1978).

[119] For example, as directly stated in the Dutch Military Manual, cited in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 76, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule76. On the use of herbicides, see K. Okimoto, above note 113, pp. 167–168, 172–174.

[120] On the protection of civilians and civilian objects, see T. McCormack, above note 114 (interviewing Sir Kenneth Keith), pp. 17–18; K. Okimoto, above note 113, pp. 166–167. On carpet/aerial bombing, see T. McCormack, above note 114, pp. 34–35. On captured fighters, see T. McCormack, above note 114, p. 174. On captured combatants, see K. Okimoto, above note 113, pp. 175–177. On guerrilla warfare, see K. Okimoto, above note 113, pp. 177–178. On attacking works or installations containing dangerous forces, see K. Okimoto, above note 113, p. 168.

Tribunal at Tokyo, which tried on the leaders of Japan apart from the emperor. But until recently, few knew about the approximately 2,300 war crimes proceedings in more than fifty locations (not counting trials of collaborators) by ten different authorities including the returning colonial administrators, the Philippines and China, with trials spread out over a ten-year period: around 5,700 Japanese, Koreans and Formosans were prosecuted, with approximately 4,500 found guilty and just over 900 executed.[121] This was evidence of *opinio juris* and State practice from the Asia-Pacific region and could have been used for identifying the content of concrete rules of customary international law to be applied at the *ad hoc* international tribunals that began operating in the 1990s.[122] Some of these cases, had they been considered, could have resulted in different analysis and outcome. Sadly, it is only in the last ten years or so that this wealth of *opinio juris* and State practice from the World War II trials has been brought out of the dusty archives by scholars.[123]

To what extent was the practice and *opinio juris* of Asia-Pacific States considered in the ICRC's Customary Law Study?[124] Sivakumaran reports on a mixed picture.[125] The Study "made good use of the practice of Asia-Pacific States and there was representation of States generally,"[126] but the domestic case law of Asia-Pacific States on matters of IHL

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[121] Statistics from Sandra Wilson *et al., Japanese War Criminals: The Politics of Justice After the Second World War*, Columbia University Press, New York, 2017, pp. 1, 78–79 (Table 3.2).

[122] For recent scholarship, see for example, *ibid.*; Daqun Liu and Binxin Zhang (eds), *Historical War Crimes Trials in Asia*, Torkel Opsahl Publishers, Brussels, 2016; Kerstin von Lingen (ed.), *War Crimes Trials in the Wake of Decolonization and Cold War in Asia*, 1945–1956, Palgrave Macmillan, Basingstoke, 2016; Suzannah Linton, "Post Conflict Justice in Asia", in M. Cherif Bassiouni (ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimisation and Post-Conflict Justice*, Vol. 2, Part III, Intersentia NV, Brussels, 2010, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2036245. Jurisdiction-specific studies include Fred L. Borch, *Military Trials of War Criminals in the Netherlands East Indies 1946–1949*, Oxford University Press, New York, 2017; Georgina Fitzpatrick, Tim McCormack and Narelle Morris (eds), *Australia's War Crimes Trials 1945–51*, Brill, Leiden 2016; Wui Ling Cheah, "An Overview of the Singapore War Crimes Trials (1946–1948): Prosecuting Lower-Level Accused", *Singapore Law Review*, Vol. 34, 2016; Suzannah Linton (ed.), *Hong Kong's War Crimes Trials*, Oxford University Press, Oxford, 2012.

[123] See above note 122.

[124] ICRC Customary Law Study, above note 119.

[125] S. Sivakumaran, above note 72, pp. 126, 137–138.

[126] *Ibid.,* p. 137.

"appears to be less prominent than the case law of other states."[127] An electronic search of the Study's citations of random Asia-Pacific countries reveals that Australia was cited 508 times, the Philippines 168 times, Indonesia 136 times, China 114 times, India ninety-eight times, Bangladesh seventy-nine times, Malaysia seventy-four times, Sri Lanka twenty- eight times, Thailand sixteen times and Myanmar nine times. By way of further comparison, the United States was cited 952 times, and the United Kingdom 626 times. This does not correlate to the depth of engagement with armed conflict. Sivakumaran provides one plausible explanation: readily available military manuals have a significant role in making national practice accessible for inclusion in such evaluations of customary IHL.[128]

The then newly adopted Geneva Conventions were tested in the Korean War of 1950–53, and practice in relation to repatriation of PoWs led to a softening of Geneva Convention III's Article 118 on repatriation of PoWs. Article 118 is based on the assumption that PoWs would be eager to return home and provides that PoWs "shall be released and repatriated without delay after the cessation of hostilities."[129]

None of the parties had ratified the Geneva Conventions at that stage, but they made unilateral declarations pledging to abide by the terms of the Conventions.[130] Kim argues:

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[127] *Ibid.,* p. 138. For fresh work on IHL in domestic legal systems, from which national practice and *opinio juris* on particular issues may be discerned, see the following chapters in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12: Sedfrey M. Candelaria, "International Humanitarian Law in the Philippines Supreme Court;" S.M. Santos Jr., above note 42; Sanoj Rajan, "International Humanitarian Law in the Indian Civilian and Military Justice Systems;" Tek Narayan Kunwar, "Application of the Geneva Conventions in Nepal: Domestication as a Way Forward;" Kristin Rosella, Göran Sluiter and Marc Tiernan, "Application of Grave Breaches at the Extraordinary Chambers in the Courts of Cambodia;" S. Linton, above note 15; M. Rafiqul Islam and Nakib M. Nasrullah, "The Application of International Humanitarian Law in War Crimes Cases by the International Crimes Tribunals of Bangladesh."

[128] S. Sivakumaran, above note 72, p. 138.

[129] Unjustifiable delay in the repatriation of PoWs became a grave breach under AP I's Article 85(4)(b).

[130] Hoedong Kim, "The Korean War (1950–1953) and the Treatment of Prisoners of War", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, pp. 362–363.

> To some extent, and despite their pledges, all sides behaved as if the convention did not exist. ... [T]he soldiers of both sides seemed not to know what a POW was, the rights that a POW had, and the way that impacted on how the individual soldier could behave towards the POW.[131]

The practice was, in other words, abysmal. Against this backdrop, the issue of PoWs who do not wish to be returned or repatriated or wish to seek asylum arose, delaying the reaching of an armistice.[132] The problem was that Geneva Convention III does not contain a provision that is the equivalent of Article 45(4) of Geneva Convention IV protecting civilians; it has no protection against *refoulement*. What it does have is a provision that sick and wounded PoWs cannot be repatriated against their will, but this is obviously not the same thing as a prohibition against *refoulement*.

Thousands of North Korean and Chinese PoWs did not want to be returned home. The United States, negotiating for the United Nations (UN) force in its command role, argued that there should be freedom of choice for the individual PoW; the Communists took a literal reading of Article 118 and insisted that they had the right to have all their PoWs returned, regardless of the personal wishes of individuals.[133] As the negotiations were going on, the UN General Assembly adopted Resolution 610 (VIII) on 3 December 1952, affirming that unwilling PoWs should not be forced back to their home countries.[134] Rifts in the UN coalition led to South Korea's Prime Minister, Syngman Rhee, unilaterally liberating more than 27,000 North Korean PoWs who did not wish to be repatriated.[135] The compromise reached on PoWs was set out

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[131] *Ibid.,* p. 371.

[132] Howard S. Levie, "Prisoners of War in International Armed Conflict", International Law Studies, Vol. 59, 1978, p. 421, fn. 134.

[133] For consideration of the PoW issue from the US perspective, see Walter G. Hermes, *United States Army in the Korean War: Truce Tent and Fighting Front*, Center of Military History, US Army, 1992, Chaps VII, VIII, XVIII, XIX.

[134] Also see Richard Baxter, "Asylum to Prisoners of War", *British Year Book of International Law*, Vol. 30, 1950, p. 489.

[135] See the biography of Syngman Rhee at: http://www.koreanwar60.com/biographies-syngman-rhee; Man- ho Heo, "North Korea's Continued Detention of South Korean

in Article III of the Panmunjom Armistice Agreement of 27 July 1953.[136] All the sick and injured PoWs who insisted on repatriation were to be returned home with priority, and "each side shall, without offering any hindrance, directly repatriate and hand over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture."[137]

In international law, subsequent State practice can affect the way that treaty provisions are interpreted.[138] The practice on voluntary repatriation of PoWs that began in the Korean War does appear to have adapted the interpretation of Article 118 beyond its text. Sassòli asserts that State practice has continued to develop in the direction of respecting the PoW's wishes.[139] This confirms the ICRC's Customary Law Study, which reports that the ICRC's practice of requiring repatriation to be voluntary is accepted by States. The practice

> has developed to the effect that in every repatriation in which the ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC's conditions for participation, including that the ICRC be able to check prior to repatriation (or release in case of a non-international armed conflict), through an

POWs since the Korean and Vietnam Wars", *Korean Journal of Defense Analysis*, Vol. 14, No. 2, 2002, p. 146.

[136] Military Armistice in Korea, 4 UST 234, TIAS 2782, signed at Panmunjom, 27 July 1953 (entered into force 27 July 1953), available at: http://peacemaker.un.org/sites/peacemaker.un.org/files/KP%2BKR_530727_AgreementConcerningMilitaryArmistice.pdf.

[137] *Ibid.,* Art. III, para. 51.

[138] Vienna Convention on the Law of Treaties, 1155 UNTS 182, 23 May 1969, Art. 31(3)(b) (on the use of subsequent practice for treaty interpretation) and Arts 39, 40 (on formal amendment). See the reports of the International Law Commission's Special Rapporteur on the treaties over time, and subsequent agreements and subsequent practice in relation to interpretation of treaties, available at: http://legal.un. org/ilc/guide/1_11.shtml

[139] Marco Sassòli, "Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 1055, para. 40.

> interview in private with the persons involved, whether they wish to be repatriated (or released).[140]

The Vietnam War, discussed in the previous section in relation to treaties, also features strongly in the ICRC's Customary Law Study. It has been considered in relation to the identification of rules such as Rule 44 ("Due Regard for the Natural Environment in Military Operations"), Rule 75 ("Riot Control Agents"), Rule 45 ("Causing Serious Damage to the Natural Environment"), Rule 54 ("Attacks against Objects Indispensable to the Survival of the Civilian Population"), and Rule 23 ("Location of Military Objectives outside Densely Populated Areas").

Assertion 3: Some Asia-Pacific States are contributing to emerging or evolving areas relevant to IHL: The examples of weapons, outer space, cyberspace and the protection of the environment in armed conflict

The Geneva Conventions were agreed years before the majority of Asia-Pacific States gained their independence. As many know, the lack of global participation in the making of older treaties has for some time been the subject of criticism from this part of the world.[141] Doctrinally, new States are bound by international law that exists at State creation; in relation to multilateral treaties such as in the area of IHL, they may either

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[140] ICRC Customary Law Study, above note 119, Rule 128, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule128#refFn_E202C038_00020.

[141] This is strongly tied to the movement known as TWAIL (Third World Approaches to International Law). The voluminous literature associated with this movement includes Bhupinder S. Chimni, International Law and World Order, 2nd ed., Cambridge University Press, Cambridge, 2017; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*, Cambridge University Press, Cambridge, 2011; Anthony Anghie, Imperialism, Sovereignty and the Making of International Law, Cambridge University Press, Cambridge, 2004; David P. Fidler, "The Asian Century: Implications for International Law", *Singapore Year Book of International Law*, Vol. 9, 2005; Antony Anghie et al. (eds), The Third World and International Order, Brill, Leiden, 2003; David P. Fidler, "Revolt Against or from Within the West? TWAIL, the Developing World, and the Future Direction of International Law", *Chinese Journal of International Law*, Vol. 2, No. 1, 2003; Muthucumaraswamy Sornarajah, "The Asian Perspective to International Law in the Age of Globalization", *Singapore Journal of International and Comparative Law*, Vol. 5, 2001; Ram P. Anand, *New Nations and the Law of Nations, Vikas Publications*, New Delhi, 1978.

join without reservation, join with lawful reservations, or not become party.[142]

The 1970s provided the first opportunity for many emerging nations to shape new treaties governing armed conflict, including in the area of weapons control. We have already seen how the Additional Protocols bear the imprint of the Asia-Pacific region. Another example is the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention, CWC), which was negotiated through several decades in the Conference on Disarmament.[143] Chemical weapons are of course not a new challenge, but this treaty was a radical revision of outdated treaties. During its war against China in the 1930s and 1940s, Japan employed chemical weapons against enemy combatants and civilians, including riot control agents, phosgene, hydrogen cyanide, lewisite and mustard agents.[144] It also launched biological attacks where plague-infested fleas were released on Chinese cities such as Ningbo; it released plague-infested rats into other urban areas, and deliberately spread diseases through "field tests" and by handing out contaminated food items.[145] There were also the notorious human experiments carried out by Unit 731 outside Harbin in Manchuria.[146] Despite Chinese efforts, these crimes were not prosecuted at Tokyo, and were later addressed by the USSR and China in domestic proceedings.[147] Ironically, when the

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[142] Ram P. Anand, "New States and International Law", *Max Planck Encyclopaedia of Public International Law*, available at: https://tinyurl.com/umr5jpu.

[143] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1975 UNTS 45, 13 January 1993 (entered into force 29 April 1997). This discussion draws from Treasa Dunworth, "The Chemical Weapons Convention in the Asia-Pacific Region", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

[144] Walter E. Grunden, "No Retaliation in Kind: Japanese Chemical Warfare Policy in World War II", in Bretislav Friedrich et al. (eds), *One Hundred Years of Chemical Warfare: Research, Deployment, Consequences*, Springer, 2017.

[145] Sheldon Harris, *Factories of Death: Japanese Biological Warfare, 1932–1945, and the American Cover-up*, revised ed., Routledge, London and New York, 2002, pp. 69, 88–90, 99, 101–104, 126–133, 142–143.

[146] Boris G. Yudin, "Research on Humans at the Khabarovsk War Crimes Trial: A Historical and Ethical Examination", in Jing-Bao Nie et al. (eds), *Japan's Wartime Medical Atrocities: Comparative Inquiries in Science, History, and Ethics*, Routledge, London, 2010.

[147] Barak Kushner, Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice, Harvard University Press, Cambridge, MA, 2015, Chap. 7; Jeanne Guillemin,

negotiations for the Conference on Disarmament started, Japan was one of the four Asia-Pacific States participating, but not China. During the decades of the negotiations, chemical weapons were allegedly used in several Asia-Pacific armed conflicts.[148] Dunworth argues that Australia played an important role in the negotiations for the CWC. She cites Australia's 1988 Chemical Weapons Regional Initiative, which attempted to promote "broader regional support for the future Convention" and to assist the ASEAN and Pacific Island countries in their preparations for implementation, as well as its hosting of the 1989 Canberra Conference aimed at engaging with the chemical industry about the treaty, and in March 1992, its proposal of a compromise text that facilitated the adoption of the treaty text.[149]

Today, evolving technologies are leading to emerging issues that provide fresh opportunities for Asia-Pacific States to shape the direction and content of the law, and IHL is relevant to some of these areas. Outer space is an example. The advances in both civilian and military-related space technology over the years since Sputnik was launched have been astounding. Investment into developing capabilities in outer space has become a priority across the Asia- Pacific region, particularly in China, India and Japan. Freeland and Gruttner observe that "the shift towards small satellite technology has drawn the interest of other Asia-Pacific nations such as South Korea, Pakistan, Singapore and Viet Nam."[150] Running alongside these developments are fears that outer space will be used to facilitate armed conflict and may become a theatre of war. This obviously raises the issue of IHL's applicability in outer space.

It is well known that the law of outer space is thin, vague and subject to different interpretations, and that the laws of war are inherently, although not exclusively, territorial in their application. Can they be calibrated for space, in the way that they have been for naval warfare? In light of all the activity in space, it is astounding that there is not even an agreed notion of where space begins. Freeland and Gruttner argue that the

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"The 1925 Geneva Protocol: China's CBW Charges against Japan at the Tokyo War Crimes Tribunal", in B. Friedrich et al. (eds), above note 144.

[148] T. Dunworth, above note 143, pp. 269–270.

[149] *Ibid.,* p. 269.

[150] Steven Freeland and Elise Gruttner, "Critical Issues in the Regulation of Armed Conflict in Outer Space", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

definitional ambiguities urgently need to be clarified, ideally in the form of treaty norms: clear definitions are needed for concepts such as "space weapons", "military uses" and "peaceful purposes".[151] They also identify "a divergence of views as to the interplay between the relevant principles that might apply to an armed conflict in space, as between the international laws of space and the existing *jus in bello* principles."[152] Given the increase in strategic and militarized use of outer space (this is not the same as the weaponization of outer space, although the linkage is obvious), "the lack of clarity gives rise to a heightened sense of uncertainty and (perceived) threats to security."[153] Freeland and Gruttner argue that existing treaties are not sufficiently robust in laying down "absolutely specific rules or incentives to prevent an arms race in outer space, let alone a conflict involving (and perhaps "in") space although the object and purpose of the space law regime is directed towards peaceful activities."[154]

Some Asia-Pacific States have been supporting a new treaty. China, Vietnam and Indonesia were among the six States that joined with Russia in submitting a working paper to the Conference on Disarmament in 2002 on *Possible Elements for a Future International Legal Agreement on the Prevention of the Deployment of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects*.[155] In 2008, this was developed by China and Russia into a draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects.[156] This emphasizes outer space as a weapons- free zone, defines terms such as "weapons in outer space" and proposes a mechanism to establish measures of verification of compliance with the Treaty. This, of

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[151] *Ibid.,* p. 195.

[152] *Ibid.,* p. 189.

[153] *Ibid.*

[154] *Ibid.,* p. 195. There are efforts under way to improve the legal situation. The leading endeavour is the Woomera Manual project, named after a village in south Australia that has long been associated with Australian and multinational military space operations. The project is spearheaded by the universities of Adelaide, Exeter, Nebraska and New South Wales – Canberra. The experts involved are working on developing a manual that objectively gathers, articulates, clarifies and streamlines existing international law applicable to space exploration, development and militarization. The project website is available at: https://law.adelaide.edu.au/woomera/.

[155] UN Doc. CD/1645, 6 June 2001, available at: https://tinyurl.com/u3ugygu.

[156] The draft treaty was updated in 2014 and can be viewed at the website of the Chinese Ministry of Foreign Affairs, available at: https://tinyurl.com/w7kubqx.

course, sits rather interestingly alongside China's remarkable investment into developing military capabilities in space in recent decades. In 2007, China caused international concern when it was able to destroy one of its own satellites by using the SC-19 direct-ascent anti-satellite system.[157] It has a specialized structure within the PLA, the Strategic Support Force, which is responsible for the development and execution of the PLA's space capabilities and also its cyber- and electronic warfare capabilities.[158] By contrast, the remaining two of the 2002 trio, Indonesia and Vietnam, are newcomers to outer space. However, Indonesia has since 2013 had a National Space Law which makes a direct link between its space ambitions and the defence of the nation, and authorizes the Ministry of Defence to utilize all of the nation's space assets in the event of a national emergency or for the sake of national defence and security.[159] As for Vietnam, it supports the policy of "no first placement of weapons in outer space" in the absence of a legally binding international agreement aimed at eliminating the weaponization of outer space, the predictable arms race that will follow, and the transformation of outer space into a venue of armed confrontation.[160]

Another area attracting attention from certain parts of the region is cyberspace, meaning an "environment composed of physical and non-physical components, characterized by the use of computer units and electromagnetic spectrum to store, modify and exchange data through a computer network."[161] The invention and development of the Internet, relying on cyberspace, has opened a new vista for hostile and harmful activity in the private, public and mixed spheres. Hacking into computers for the purposes of spying may be done by individuals for private

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[157] Center for Strategic and International Studies, "Space Threat 2018: China Assessment", 12 April 2018, available at: https://aerospace.csis.org/space-threat-2018-china/.

[158] *Ibid.*

[159] Space Act of the Republic of Indonesia, Law No. 21/2013, 2013, available at: http://ditjenpp.kemenkumham.go.id/arsip/terjemahan/11.pdf.

[160] Letter dated 9 August 2017 from the Permanent Representative of the Russian Federation, Addressed to the Secretary General of the Conference on Disarmament, Transmitting the Joint Statement by President of the Russian Federation Vladimir Putin and President of the Socialist Republic of Viet Nam Tran Dai Quang of 29 June 2017, with Regard to the No First Placement of Weapons of Any Kind in Outer Space, UN Doc. CD/2098, available at: https://undocs.org/cd/2098.

[161] Michael N. Schmitt (ed.), *Tallinn Manual on the International Law applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013, p. 258.

purposes, and it may be done by individuals on behalf of a State. Viruses and worms may be planted in computers, and when activated these may or may not result in physical damage. The WannaCry ransom attack in 2017 affected computers around the world and has been tied to North Korea,[162] and there was also the NotPetya malware attack, blamed on Russia.[163] "Cyber-war" is a term used to describe the computer-based attacks that have happened against national institutions in Estonia, Georgia and Ukraine, all alleged to have been conducted by Russia.[164] There is at present no global agreement that regulates cyberspace, although there are some regional-level agreements such as the Convention on Cybercrime, also known as the Budapest Convention on Cybercrime.[165] Not surprisingly, as is the case with outer space, the question of whether and how IHL can apply to cyberspace is controversial on multiple levels. The laws of war have traditionally been territorial, tied to land, water and air space, but have been extended to conflict on the high seas. Cyberspace, like outer space, is a new frontier.

China is regularly mentioned in discussions about international hacking, malware and cyber-attacks, and their global regulation. The Chinese academic Binxin Zhang identifies "a dividing line between the 'East' (arguing that IHL does not apply to cyberspace) and the 'West' (arguing that IHL applies to cyberspace)," with China and Russia often taking the same position on the Eastern side of the line.[166] The Chinese

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[162] Deirdre Shesgreen and Bill Theobald, "Alleged North Korean Spy Charged with 2014 Hacking of Sony, Bank Theft, WannaCry Cyberattack", *USA Today*, 6 September 2018, available at: www.usatoday.com/story/news/world/2018/09/06/report-u-s-officials-charge-north-korean-spy-cyberattack-case/1210204002/.

[163] Andy Greenberg, "The Untold Story of NotPetya, the Most Devastating Cyberattack in History", Wired, 22 August 2018, available at: www.wired.com/story/notpetya-cyberattack-ukraine-russia-code-crashed- the-world/.

[164] D. Shesgreen and B. Theobald, above note 162.

[165] Convention on Cybercrime, ETS No. 185, 23 November 2001 (entered into force 1 July 2004).

[166] Binxin Zhang, "Cyberspace and IHL: The Chinese Approach", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, p. 337. More generally, see ICRC, *International Humanitarian Law and Cyber Operations during Armed Conflict*, 28 November 2019, available at: www.icrc.org/en/document/ international-humanitarian-law-and-cyber-operations-during-armed-conflicts; Eitan Diamond, "Applying International Humanitarian Law to Cyber Warfare", *Law and National Security: Selected Issues*, Vol. 67, No. 128, 2014; articles in the symposium on "Cyber War and International Law", *International Law Studies*, Vol. 89, 2013; Jabbar Aslani, "Study on

position, explains Zhang, is more concerned "with the resort to self-defence by more powerful States against cyber-attacks, and not to specific IHL issues *per se*," because recognizing the applicability of IHL "would be an acknowledgement of the possible existence of armed conflict in cyberspace."[167] China actually provides an interesting example of an Asia-Pacific State deliberately shaping the legal trajectory with practice: the government has been issuing regulations, declarations and statements, and making domestic laws setting out a clear position that cyberspace should be used only for peaceful purposes. China's opinio juris is being demonstrated through public emphasis on the need to prevent a "cyber arms race", expressions of reluctance to accept the applicability of IHL and other existing regimes in cyberspace, and advocating "that cyberspace should only be used for peaceful purposes, and that discussion about the use of force in cyberspace would give rise to the militarisation of cyberspace."[168]

Finally, we can see the imprint of the region in the evolving area of environmental protection in armed conflict. In July 2019, the International Law Commission (ILC) provisionally adopted on first reading twenty-eight legal principles aimed at enhancing protection before, during and after armed conflicts (that is, throughout the entire conflict cycle).[169] This is not going to be a binding document. Even so, the principles are a landmark in the journey towards enhanced protection of the environment and natural resources in armed conflict. Some of the principles have certainly been progressive and consequently contentious. The draft goes beyond environmental damage to include misuse of environmental resources, covers both IAC and NIAC, extends the Martens Clause to environmental protection, draws from IHL's concept of protected zones, and envisages designation of significant environmental

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the Legal Dimensions of the Cyber Attacks from IHL Perspective", *International Studies Journal*, Vol. 10, No. 4, 2013–14; Cordula Droege, "Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians", *International Review of the Red Cross*, Vol. 94 No. 886, 2012.

[167] B. Zhang, above note 166.

[168] *Ibid.*

[169] See "Analytical Guide to the Work of the International Law Commission: Protection of the Environment in Relation to Armed Conflicts", available at: http://legal.un.org/ilc/guide/8_7.shtml.

and cultural areas as protected zones. It addresses the particular situations of indigenous people and mass displacement, illegal exploitation of natural resources in armed conflict, the restoration of the environment after armed conflicts and the responsibility of States. The draft does not directly address the responsibility of non-State armed groups, or corporate responsibility as such ("due diligence" and "liability" are the preferred terms, and the relevant principle simply makes a recommendation to States).

Over the six years that the project has been on the ILC's programme of work, several Asia-Pacific States have consistently played an active role: Singapore,[170] Palau,[171] the Federated States of Micronesia,[172] Vietnam,[173] Malaysia,[174] the Republic of Korea[175] and New

[170] For example, Singapore, UN Doc. A/C.6/70/SR.23, para. 122, expressing concern about phrasing the principles in too absolute terms that went beyond what it considered to be a reflection of customary international law; UN Doc. A/C.6/70/SR.23, para. 121, urging that the ILC should concentrate on analyzing how IHL relates to the environment, cautioning about the implications of addressing human rights as part of the topic, and expressing concerns about including NIACs within the scope of the principles.

[171] For example, Palau, UN Doc.A/C.6/70/SR.25, para. 27, offering examples of national and regional practice in the form of legislation, case law, military manuals and cooperation through the SIDS Accelerated Modalities of Action (SAMOA) Pathway.

[172] For example, Federated States of Micronesia, UN Doc. A/C.6/73/SR.29, para. 147, expressing support for the then draft principle 19 (on the general obligations of an Occupying Power to respect and protect the environment of the occupied territory), and desiring specific reference to be made to the link between the protection of human rights and the protection of the environment.

[173] For example, Vietnam, UN Doc. A/C.6/70/SR.25, para. 41m expressing concern about the inclusion of NIACs; UN Doc. A/C.6/70/SR.25, para. 42, stressing the need to address rehabilitation efforts, toxic remnants of war and depleted uranium; UN Doc. A/C.6/70/SR.25, para. 40, suggesting that the draft principles should explore environmental impact assessments for deploying weaponry.

[174] For example, Malaysia, UN Doc. A/C.6/73/SR.30, para. 67, stressing that "environmental issues were not limited to the natural environment; they included human rights, sustainability and cultural heritage;" UN Doc. A/C.6/73/SR.30, para. 73, commenting in relation to the then draft principle 20 (on the use of natural resources), expressing support for the requirement to engage in sustainable use of natural resources, and underlining the importance of the principles of permanent sovereignty over natural resources and of self- determination, which provide the general framework for the administration and use of an occupied territory's natural resources by an Occupying Power.

[175] For example, Republic of Korea, UN Doc. A/C.6/73/SR.30, para. 29, stressing the importance of ensuring that the ILC's work in this area remains in line with the existing rules of IHL; UN Doc. A/C.6/73/SR.30, para. 31, welcoming the tackling of the

Zealand.[176] Some, such as Malaysia[177] and the Republic of Korea,[178] contributed to the discussions and shared their national and international experience – for example, national legislation, military practice, and international commitments through treaties and other legally binding documents. A particularly meaningful contribution was made by the Federated States of Micronesia, when it provided a thirty-one-page document with its views on the importance of protecting the marine environment in armed conflict.[179] Micronesia also explained its position on a number of international rules and principles, for instance:

- that the "no-harm principle" applies in armed conflict "including during the build-up to actual military hostilities and after those hostilities end";[180]
- that "'hazardous wastes' produced by military activities of Parties (e g, military vessels with intact and flammable fuel caches that are decommissioned and subject to scrapping) are subject to the conditions and obligations of the [Basel] Convention, whether such wastes are produced before, during, or after armed hostilities";[181] and
- that the obligations of the Stockholm Convention "persist for its Parties during all temporal phases of an armed conflict – i.e., during actual armed

protection of the environment in NIACs; UN Doc. A/C.6/69/SR.27, para. 73, emphasizing that the principles should address NIACs.

[176] For example, New Zealand, UN Doc. A/C.6/70/SR.25, para. 102, stressing that reparation and compensation for the post-conflict phase should be included, and expressing support for the then draft principle II-4 prohibiting reprisals against the environment.

[177] For example, Statement by Malaysia to the Sixth Committee, 69th Session, 5 November 2014, cited in *Second Report on the Protection of the Environment in Relation to Armed Conflicts*, submitted by Marie G. Jacobsson, Special Rapporteur, UN Doc.A/CN.4/685, 28 May 2015, para. 63.

[178] Note verbale from the Permanent Mission of the Republic of Korea to the United Nations addressed to the Secretariat, 19 February 2015, cited in *ibid.,* paras 54–56.

[179] Note verbale from the Permanent Mission of the Federated States of Micronesia to the United Nations Secretariat, 29 January 2016, available at: http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/poe_micronesia.pdf&lang=E.

[180] *Ibid*., para. 12.

[181] *Ibid*., para. 11.

> hostilities as well as in the build-up to and aftermath of those hostilities."[182]

Some of these States, such as Vietnam, Japan and the Federated States of Micronesia, have had experiences of severe environmental damage in armed conflict that gives their input particular resonance. Reflection on the selection of views expressed (see notes 170–179) confirms the plurality of perspectives from across the region. Some, such as Singapore, take a conservative approach, while others, like Vietnam, Malaysia and Micronesia, are willing to push the boundaries and develop the law that exists as well as to fill existing gaps with fresh rules. The engagement of the identified States has been sustained, indicating genuine commitment to shaping this matter, and we can expect that they will continue to try to influence the draft principles as they move to the General Assembly for debate, and will be active in the ILC's consultation process prior to the second reading.

What of the Contradictory IHL Practice?

The author has thus far argued and justified three assertions: (1) the norm of humanity in armed conflict, which underpins IHL, has deep roots in the region; (2) there has been meaningful participation by some States from the region in IHL law-making; and (3) several Asia-Pacific States are among those actively contributing to the development of new or emerging areas relevant to IHL, such as outer space, cyberspace and the protection of the environment in armed conflict. It is then obviously necessary to address the paradox of how this positivity can exist in conjunction with the region's many armed conflicts, and its problematic implementation of IHL. The list of barbarity is long and includes the horrors of World War II, decolonization-related atrocities such as the Indonesian war of independence, Pakistan's devastation of breakaway Bangladesh in 1971, the atrocities of the Khmer Rouge in Cambodia from 1975 to 1979, the crimes in occupied East Timor from 1975 to 1999, the perpetual ethnic conflicts and the persecution of the Rohingya in Burma/Myanmar, and the decades-long struggle in Northern Sri Lanka, culminating in the

[182] *Ibid.*, para. 13.

government's unrestrained military annihilation of the Tamil Tigers in 2009. Saul's work on terrorism adds another dimension in clearly showing how many regional States have been twisting the conceptualization of terrorism beyond recognition to allow draconian powers to be deployed against a much broader category of persons in armed conflict, while Lassée and Anketell show how one State, Sri Lanka, attempted to distort IHL in order to justify its conduct of hostilities against the Tamil Tigers and the Tamil civilian population.[183]

How can we reconcile this depressing picture with what has been demonstrated in the preceding parts of the present article? One way of theorizing the inconsistency is to see a hierarchy of accepted fundamental norms in the region, and due to incomplete internalization of the humanitarian norm, the sovereignty norm – as understood by those in power – is able to trump in armed conflict. As long ago as 1949, the representative to the Geneva Conference of the newly independent Republic of the Union of Burma articulated the approach that would come to reflect the views of many other States in the region, and in his own country, up to the present:

> I do not understand why foreign governments would like to come and protect our people. Internal matters cannot be ruled by international law or Conventions. We say that external interference in purely domestic insurgency will but aggravate the situation, and this aggravation may seriously endanger the security of the State established by the people. Each Government of an independent State can be reasonably expected to treat its own nationals with due humanity, and there is no reason to make special provisions for the treatment of persons who had taken part in risings against the national government as distinct

[183] See Ben Saul, "Counter-Terrorism Law and Armed Conflict in Asia", and Isabelle Lassée and Niran Anketell, "Reinterpreting the Law to Justify the Facts: An Analysis of International Humanitarian Law Interpretation in Sri Lanka", both in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

> from the treatment of other offenders against the laws of the State.[184]

This captures the core aspect of the so-called "ASEAN way" that is now crystallized in the ASEAN Charter's Article 2(2).[185] The ten member States have pledged allegiance to the "fundamental importance" of "respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States," "non-interference in the internal affairs of ASEAN Member States" and "respect for the right of every Member State to lead its national existence free from external interference." Textually, the ASEAN Charter bears resemblance to the UN Charter (Preamble and Article 1)[186] and the Friendly Relations Declaration,[187] but the practice of ASEAN States and their regional organizations has always been to prioritize Westphalian notions of statehood above all else.

Sovereignty concerns are manifested in the tardy Southeast Asian ratification of the two Additional Protocols that has already been discussed. There continues to be a definite chill in respect of aspects that potentially encroach on independence, sovereignty or territorial integrity, or that smack to these States of Western neo-colonialism. These aspects are, of course, subjectively evaluated by each State.[188] In practical terms, this frostiness can be seen in responses to certain issues in other branches of international law that have an impact on IHL:

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[184] 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 330.

[185] Charter of the Association of Southeast Asian Nations, 20 November 2007, available at: http://www. aseansec.org/21069.pdf. Also see Simon S. C. Tay, "The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment", *Singapore Year Book of International Law*, Vol. 12, 2008, p. 151.

[186] Charter of the United Nations, 1 UNTS XVI, 26 June 1945, as amended.

[187] UNGA Res. 2625 (XXV), "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations", UN Doc. A/RES/2625/XXV, 24 October 1970.

[188] For an examination of the region's two most populous countries' approach to the International Criminal Court, see Suzannah Linton, "India and China *Before, At* and *After* Rome", *Journal of International Criminal Justice*, Vol.16, No. 2, 2018, pp. 283–286, 291.

- external threats of accountability against political leaders, in particular the immunities of heads of State;[189]
- the exercise of extra-territorial jurisdiction;[190]
- Security Council referrals to the International Criminal Court[191] and the Court's exercise over non-States Parties;[192]
- Pillar Three of the "Responsibility to Protect" doctrine;[193] and

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[189] As an illustration, see Statement by Mr David Low, Delegate to the 71st Session of the United Nations General Assembly, on Agenda Item 78 on the Report of the International Law Commission on the Work of Its Sixty-Eighth Session (Cluster 3: Chapters X, XI and XII of A/71/10), Sixth Committee, 1 November 2016, para. 4.

[190] See, for example, UN General Assembly and UN Security Council, *13th Summit Conference of Heads of State or Government of the Non-Aligned Movement: Final Document*, UN Doc. A/57/759–S/2003/332, Kuala Lumpur, 18 March 2003, Annex I, para. 124. Written information and comments expressing reservations on the ILC's work on "The Scope and Application of the Principle of Universal Jurisdiction" were provided by several regional States: see UN Docs A/C.6/66/SR.12, 13, 17 and 29, and also UN Doc. A/65/181 and UN Doc. A/66/93 with Add.1. The cautious approach can also be seen in the Sixth Committee discussions on the scope and application of universal jurisdiction (64th to 72nd Sessions of the General Assembly): UN Doc. A/C.6/64/SR.12, 25 November 2009 (China, Thailand); UN Doc. A/C.6/65/SR.12, 10 November 2010 (India); UN Doc. A/C.6/65/SR.11, 14 January 2011 (Thailand, Republic of Korea, China, Vietnam); UN Doc. A/C.6/67/SR.12, 6 December 2012 (India); UN Doc. A/C.6/67/SR.13, 24 December 2012 (China, Sri Lanka, Bangladesh, Malaysia); UN Doc. A/ C.6/69/SR.12, 9 December 2014 (India, Vietnam); UN Doc. A/C.6/71/SR.14, 31 October 2016 (India, China, Vietnam, Bangladesh); UN Doc. A/C.6/71/SR.13, 21 December 2016 (Iran speaking for the Non-Aligned Movement, Singapore); UN Doc. A/C.6/72/SR.14, 13 November 2017 (Malaysia, Vietnam); UN Doc. A/C.6/72/SR.13, 6 December 2017 (Iran speaking for the Non-Aligned Movement, Singapore, Thailand, Bangladesh, China).

[191] See, for example, Statement by Mr Wang Guangya (China), 5,158th Meeting of the Security Council, UN Doc. S/PV.5158, 31 March 2005, p. 5.

[192] See, for example, Statement by Mr Nambiar (India), 4,568th Meeting of the Security Council, UN Doc. S/ PV.4568, 10 July 2002, p. 14; Statement by Mr Vinay Kumar (India), 6,778th Meeting of the Security Council, UN Doc. S/PV.6778, 5 June 2012, pp. 12–13; Statement by Mr Dilip Lahiri (India), UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 16 June 1998, para. 10; Statement by Mr Wang Guangya, above note 191. However, on 26 February 2011, China did not exercise the veto and India voted in favour of UNSC Res. 1970 referring the situation in Libya to the ICC. China also declined to veto the referral of Sudan to the ICC in UNSC Res. 1593 of 31 March 2005.

[193] Alex J. Bellamy and Catherine Drummond, "The Responsibility to Protect in Southeast Asia: Between Non- Interference and Sovereignty as Responsibility", *Pacific Review*, Vol. 24, No. 2, 2011. Twenty-two States, including India, Pakistan, Indonesia and Malaysia, are members of the Non-Aligned Movement, which has taken a strong position on

- certain formulations of international crimes (for example, war crimes in NIAC).[194]

The particular understanding of sovereignty that results from these patterns has been dubbed Eastphalian by scholars since Sung Won Kim first coined the phrase in 2009.[195] It is not as simple as the geopolitical ambitions of powerful States such as India and China or claims to be seeking to make international law more international. It is about encouraging Asian countries to look to themselves for solutions that cannot be found in the present framework, using the different approaches from the region, such as Confucian communitarianism. Eastphalia is not about dismantling the existing order, based as it is on established concepts, rules, principles and structures underpinned by international law. The emphasis on maintaining the State as a leviathan is, of course, not the only possible reason for the apparent disconnect with the implementation of humanitarianism in armed conflict. There are different reasons why norms that seem to be internalized are obeyed, violated or adapted, and they do not necessarily involve rejection of the norm itself. However, understanding what is going on is extremely important work that must be encouraged and tested in the contradictory landscape of the Asia-Pacific. For example, tapping into Axelrod's seminal games theorizing in relation to an evolutionary approach to norms, Villatorro and his co-authors have confirmed fluidity in the way that States relate to norms, and that this can

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sovereignty. The Movement's collective position on the right to protect is succinctly summarized in the European Parliament Factsheet on the Responsibility to Protect, available at: www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/factsheet_ resptoprotect_6may/factsheet_ resptoprotect_6may05.pdf.

[194] During the Rome Statute negotiation, China, India and Pakistan were among those refuting the claim that war crimes can be committed in NIAC. See "Article 8: War Crimes", in William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, Oxford and New York, 2016; Knut Dörmann, "War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes", *Max Planck Yearbook of United Nations Law*, Vol. 7, 2003, available at: www.mpil.de/files/pdf3/ mpunyb_doermann_7.pdf.

[195] Sung Won Kim, "Eastphalia Revisited: The Potential Contribution of Eastphalia to Post-Westphalian Possibilities", *Inha Journal of International Studies*, Vol. 33, No. 3, 2018; David P. Fidler, "Eastphalia Emerging", *Indiana Journal of Global Legal Studies*, Vol. 17, 2010; Sung Won Kim, David P. Fidler and Sumit Ganguly, "Eastphalia Rising? Asian Influence and the Fate of Human Security", *World Policy Journal*, Vol. 26, No. 2, 2009.

be a process of ongoing change, even of mutation. The notions of process and movement are important, and this seems to match what we see in the Asia-Pacific region. Academics have argued that "norm internalization is not an all-or-none phenomenon, but a *multi-step* process which consists of degrees and levels characterized by different mental ingredients;" it is a "*flexible* phenomenon, allowing norms to be de-internalized, automatic compliance blocked, and deliberation restored in certain circumstances."[196] Importantly, Villatorro and his co-authors point out that even internalized norms "are not inexorably bound to remain as such" and that they can evolve over time, including under extreme conditions.[197] If this understanding of norm dynamics is indeed correct when applied to the IHL hotspots of the Asia-Pacific, it offers an important new approach to strengthening norm internalization and compliance, and for designing interventions that are more effective.

The norm internalization avenue should be considered along with other attempts to rationalize and understand some of the egregious behaviour that has arisen in a number of Asia-Pacific IHL situations. For example, the present author recently analyzed wartime military sexual enslavement in the region, focusing on three of the most ignominious manifestations of the phenomena: the so-called "comfort women" of World War II, the abuse of Bangladeshi girls and women during the break-up of Pakistan in 1971, and the criminal and inhumane treatment of sexually enslaved women and girls in occupied East Timor.[198] That study identifies commonalities between these geographically and temporally diverse phenomena, and these commonalities allow for a broader understanding that is important for control of behaviour and prevention of abuses. Notably, the three phenomena all share aspects of the root causes identified in modern scholarship, such as all illustrating symbolic or representative sexual violence that is meant to humiliate the wartime opponent through the victim, and sexual violence as a concrete

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[196] See, for example, Daniel Villatoro et al., "Self-Policing through Norm Internalization: A Cognitive Solution to the Tragedy of the Digital Commons in Social Networks", *Journal of Artificial Societies and Social Simulation*, Vol. 18, No. 2, 2015, available at: http://jasss.soc.surrey.ac.uk/18/2/2.html.

[197] *Ibid.,* para. 1.5.

[198] Suzannah Linton, "Wartime Military Sexual Enslavement in the Asia-Pacific", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

strategy of war, to reward fighters and boost morale. Three other features are clearly identifiable from this study: problematic institutional handling of sex and aggression in the armed forces; linkage to historical precedents and institutional cultures that socialize their members and influence their behaviour; and differing conceptions of what good leadership entails. In Burma/Myanmar,[199] Indonesia,[200] Sri Lanka,[201] the Korean Peninsula[202] and the Southern Philippines,[203] there are more than enough cases for a generation of multidisciplinary researchers to carry out work that facilitates our understanding of root causes and of why there has not been a complete internalization of the norm of humanity in armed conflict, and that helps us to develop insights and approaches which can really make a difference to limiting the man-made harms that occur in armed conflict.

Concluding Reflections

The region clearly has a roughly textured and multifaceted relationship with IHL, and its underlying norm of humanity in armed conflict. We have seen that there is no single Asia-Pacific perspective on IHL and that there are contradictions in approach and practice. However, we have also seen that this does not mean that the region does not have a significant and varied contribution to make. On the contrary, the broad acceptance, at an intellectual and cultural level, of the norm of humanity in armed conflict has facilitated a meaningful contribution to IHL law-making, and engagement in new areas of actual and potential application. In addition to the contributions pointed out in this paper, McCormack argues that the region can offer

> significant experience and expertise ... in relation to effective national implementation of IHL; engagement with non-state armed groups ... to increase awareness of

[199] Megumi Ochi and Saori Matsuyama, "Ethnic Conflicts in Myanmar: The Application of the Law of Non- International Armed Conflict", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.
[200] S. Linton, above note 15.
[201] I. Lassée and N. Anketell, above note 183.
[202] H. Kim, above note 130.
[203] S. M. Santos Jr., above note 42; S. M. Candelaria, above note 127.

> and respect for IHL; and drawing on the experience, history, culture and values of other, non-Western societies to broaden IHL and help dilute some of the Western Judeo-Christian stigma associated with it.[204]

The present contribution suggests that the non-linear process of norm internalization may be one reason for the contradiction between conceptual or rhetorical acceptance and actual practice on the ground in many Asia-Pacific armed conflicts. This may explain how it is that sovereignty, another norm of great importance, is able to trump the norm that requires humanity in armed conflict. This enigma is not necessarily a "problem" but could be seen as simply a feature of social and political existence. The region actually presents diverse and complex situations that do require more "thinking outside of the box" and non- linear approaches. Linked to this is the reality that the wealth of regional practice in armed conflict should not be dismissed for being an IHL disaster zone. The dense practice with high levels of atrocity undeniably presents a schizophrenic picture, but it also provides case studies for deeper reflection on and understanding of human behaviour in armed conflict. This study discussed one example, military sexual enslavement, spanning three paradigmatic case studies spread out over some sixty years. From that, we have seen that there are more common than unique features. Broad and trans-disciplinary country-specific studies – for example, in the atrocity-rich conflicts of Burma/Myanmar, Sri Lanka and Indonesia – will surely yield exceptional insight, going well beyond the simplistic belief that dissemination and more enforcement are what is needed. Such studies can also be brought together for comparative purposes, and to identify shared features that warrant a common approach in the effort to facilitate norm acceptance and atrocity prevention.

The humanitarian community around the world has just commemorated and reflected on the 70th anniversary of the Geneva Conventions. The work that is emerging from the region shows that the challenge of the Asia-Pacific is not really that the region needs to be disseminated to about IHL or "capacity-developed" on humanitarianism

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[204] Tim McCormack, "International Humanitarian Law in the Asia-Pacific", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, p. 2.

in armed conflict. The countries of the region are not unaware of IHL, and it is misguided to approach their conduct in armed conflict as if it were all about ignorance. It may be hard for those who hold to a vision of the "civilizing" role of laws adopted in Geneva and The Hague to accept, but this part of the world has much to offer the world of IHL, such as humanitarianism from its countries' cultures and religions, and the demonstrable expertise of a growing community of practitioners and academics. The real challenge for progressive humanitarianism is to traverse disciplines and build on recent important scholarship in order to develop more informed and nuanced approaches to understanding the countries and societies of the region, moving on to study the process of norm internalization, and then to develop creative and meaningful strategies for strengthening the links between that internalization, actual conduct on the ground, and norm socialization in the wider community.

Crime and Omission: Command Responsibility from Manila to Rome

Raphael Lorenzo A. Pangalangan[*]

ABSTRACT

Philippine criminal law is commonly associated with positive conduct. The powers that be purport that having never ordered extra-judicial killings, liability cannot be incurred therefor. That view is mistaken. It ignores how both domestic and international law criminalizes actions and omissions alike. This is aptly illustrated through the doctrine of command responsibility: a mode of omission liability echoed throughout International Criminal Law and embedded in the Philippines' domestic history and jurisprudence. The doctrine attaches criminal liability to military commanders, persons effectively acting as military commanders, and "other" superiors for a distinct actus reus: the dereliction of duty—the failure to prevent or repress a subordinates' unlawful conduct or submit the matter to the competent authorities. It is thus not the order alone but the failure to order otherwise that may trigger individual criminal liability. By tracing the doctrine's development from Manila to Rome, the paper cures the common misconception of crime and illustrates how omissions have long been punished in Philippine legal order.

Keywords: command responsibility, omission liability, Philippine criminal law, international criminal law

Introduction

Crime is often conceived in terms of positive conduct.[1] This may be explained by the fact that Philippine criminal law penalizes mostly overt

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1 SC, G.R. No. 190912, *Fantastico v. Malicse Sr.,* 745 SCRA 126.

acts. Though the Revised Penal Code (RPC)—the country's time-honored *lex generalis* on crime—expressly embraces actions and omissions alike, only six *delitos* out of the 367-articled RPC contemplate pure omissions.[2] Indeed, a case search through the Philippine Supreme Court database[3] reveals that the term "crime of omission" and variations thereof have only been utilized once; in the *obiter* of *US v. Igpuara*—an archaic case decided back when the Philippines' legal framework was an adjunct to the United States of America's system.[4]

Yet in that same breath, as evidenced by the doctrine of command responsibility, "omission liability" has likewise been entrenched in the nation's history and jurisprudence. This will be illustrated through two parts: Part I delves into the chronicle of the "doctrine born in sin"[5] with the Trial of Tomoyuki Yamashita, the Commanding General of the 14th Army Group of Japan during the Second World War.[6] It then proceeds to review the doctrine's more modern iterations in both Customary and Conventional International Law. Part II shifts its focus to Philippine domestic law and explores how command responsibility has been historically applied. By reviewing the mode of liability's evolution from *Yamashita* to its current contemplations, the paper illustrates how omissions have long been punished in Philippine legal order.[7]

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[2] *See* e.g., The Revised Penal Code, Act No. 3815, 8 December 1930 (effective on 1 January 1932), Arts. 116 (Misprision of treason), 186 (Monopolies and combinations in restraint of trade), 213 (Frauds against the public treasury and similar offenses), 233 (Refusal of assistance), 234 (Refusal to discharge elective office) and 275 (Abandonment of person in danger and abandonment of one's own victim); *see also* Luis B. Reyes, *The Revised Penal Code: Criminal Law*, *Book I*, Rex Book Store, Inc., Quezon City, 2017, pp. 34-35.

[3] "Supreme Court E-Library", available at: www.elibrary.judiciary.gov.ph (all internet references were accessed June 2020).

[4] SC, G.R. No. 7593, *US v. Igpuara*, 27 Phil. 619.

[5] Guénaël Mettraux, *The Law of Command Responsibility*, Oxford University Press, Oxford, 2009, p. 5.

[6] SC, G.R. No. L-129, *Yamashita v. Styer,* 75 Phil. 563; U.S. SC, No. 61, misc., *In re Yamashita*, 327 U.S. 1.

[7] *See* Fr. Joaquin G. Bernas S.J., "Command Responsibility," *Philippine Center for Investigative Journalism,* 5 February 2007, available at: www.perma.cc/M38W-V23C.

I. Doctrinal Development: From Manila to Rome

A. "Born in Sin": The Trial of Tomoyuki Yamashita

Command responsibility is a mode of criminal liability imposed on superiors for failing to prevent or repress the unlawful conduct of their subordinates or to submit the matter to the competent authorities.[8] It imputes criminal responsibility for an *actus reus* distinct from that of the direct perpetrators, i.e., the dereliction of duty—the failure of responsible command.[9] Though long recognized as an international law doctrine, command responsibility was first applied domestically in the trial of General Tomoyuki Yamashita.

Yamashita was incarcerated in the City of Muntinlupa for having "failed to discharge his duty as commander" and "permitting" his subordinates "to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines."[10] Though the record had not clearly established that he was aware of the crimes of his subordinates at the time they were committed, the American Military Commission held Yamashita criminally liable for "fail[ing] to … control the troops under his command for the prevention of … violations of the law of war."[11]

Without having clearly established the element of *mens rea*, the application of the doctrine in *Yamashita* came close to a form of "strict liability."[12] While that approach would be later affirmed by the Philippine

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[8] International Criminal Court (hereinafter, "ICC"), *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision (Pre-Trial Chamber), 15 June 2009, para. 405 *citing* International Criminal Tribunal for the former Yugoslavia (hereinafter, "ICTY"), *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement (Trial Chamber), 16 November 1998, para. 334.

[9] Florin T. Hilbay, "The Philippine President as Tortfeasor-in-Chief: Establishing Civil Liability for Constitutional Negligence", *Asian Journal of Comparative Law* Vol. 4, No. 1, 2009, p. 19.

[10] *Yamashita v. Styer* (Perfecto *J* concurring and dissenting), above note 6.

[11] *In re Yamashita*, above note 6.

[12] ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgement (Trial Chamber), 30 June 2006, para. 141; *see* Carsten Stahn, *A Critical Introduction to International Criminal Law*, Cambridge University Press, Cambridge, 2018, p. 141 *contra* William H. Parks, "Command Responsibility for War Crimes", *Military Law Review*, Vol. 62, No. 1, 1973, p. 37; *see generally* Michael J. Sherman, "Standards in Command Responsibility Prosecutions: How Strict, and Why?", *New Illinois University Law Review*, Vol. 38, No. 2, 2018.

and US Supreme Courts in Yamashita's *Habeas Corpus* petitions,[13] it has since been rejected in international law.[14]

B. Command Responsibility in International Law: Two Iterations

1. The Ad Hoc Tribunal Approach: Customary International Law

Both the International Criminal Tribunal of the former Yugoslavia (ICTY) and International Criminal Tribunal of Rwanda (ICTR) are creations of customary international law.[15] In addition to the objective elements of (i) an underlying offense by a subordinate, (ii) a superior-subordinate relationship, and (iii) the superiors' failure to control their subordinates properly, the ICTY and ICTR Charters expressly codify a subjective element of intent in their "superior responsibility" provisions.[16] For a charge based on command responsibility to prosper before the *ad hoc* Tribunals, it must be shown that the accused-superior "knew or had reason to know" of the underlying criminal offense of his or her subordinates.[17]

Further, while the doctrine originally contemplated an armed conflict context,[18] the *ad hoc* Tribunals' jurisprudence expanded command

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[13] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. IV, His Majesty's Stationery Office, London, 1948, pp. 35-36.

[14] *See e.g.,* ICTY, *Prosecutor v. Mucic et al*. (hereinafter "*Celebici*"), Case No. IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, para. 226 "Thus, as correctly held by the Trial Chamber, as the element of knowledge has to be proved in this type of cases, command responsibility is not a form of strict liability."; *see also* Antonio Cassese and Paolo Gaeta, *Cassese's International Criminal Law,* Oxford University Press, Oxford, 2013, p. 190.

[15] UN Security Council, *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002) (25 May 1993) (hereinafter, "ICTY Charter") *cf.* ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision (Appeals Chamber), 2 October 1995, p. 143; UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006, (8 November 1994) (hereinafter, "ICTR Charter") *cf.* ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgement and Sentence (Trial Chamber II), 22 January 2004, para. 692.

[16] *Celebici*, above note 14, paras. 189-198 *cf.* ICTY Charter, above note 15, Art. 7(3); ICTR, *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Judgement (Appeals Chamber), 28 November 2007, paras. 791, 840 *cf.* ICTR Charter, above note 15, Art. 6(3).

[17] *Ibid*.

[18] Jamie A. Williamson, "Command Responsibility in the Case Law of the International Criminal Tribunal of Rwanda", *Criminal Law Forum*, Vol. 13, 2002, p. 366.

responsibility beyond military lines. The superior's responsibility over his subordinates is thus now applicable in both times of armed conflict as well as peacetime,[19] and to military and civilian leaders alike,[20] whether *de jure* or *de facto*.[21]

2. The International Criminal Court Approach: Treaty Law

The Rome Statute diverges from the unitary approach in customary international law[22] by bifurcating the rules of command responsibility between two categories: first, under Article 28(a), the military commander or "person effectively acting as a military commander" ("military-like commander"), and second, under Article 28(b), "civilians occupying *de jure* and *de facto* positions of authority" ("civilian superiors").[23] The distinction was drawn in recognition of the different rules and assumptions that exist within civilian and military(-like) contexts, especially with regard to the relatively less stringent disciplinary structures in civilian life.[24]

The elements of command responsibility under Article 28(a) were identified by the Pre-Trial Chamber of the International Criminal Court (ICC) in *Prosecutor v. Bemba*:

> (i) That the accused-military commander or a person effectively acting as such must have (ii) effective

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[19] G. Mettraux, above note 5, p. 97 citing ICTY, *Prosecutor v. Hadžihasanović et al.*, Case No IT-01-47-PT, Decision on Interlocutory Appeal (Appeals Chamber), 16 July 2003, para. 20.

[20] ICTY, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgement, para. 580.

[21] ICTR, *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement (Appeals Chamber) 23 May 2005, para. 85.

[22] ICTY, *Prosecutor v. Orić*, Case No IT-03-68-T, Judgement (Trial Chamber), 30 June 2006, para. 308.

[23] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Art. 28; *see* Gideon Boas, James L. Bischoff and Natalie L. Reid, *Forms of Responsibility in International Criminal Law*, Cambridge University Press, Cambridge, 2007, p. 254; *Bemba*, above note 8, para. 406.

[24] Summary Record of the 1st Meeting of the Committee of the Whole (hereinafter "Summary Record"), UN Doc.A/CONF.183/C.1/SR.1, 20 November 1998, paras. 67-68; *see also* Jelena Plamenac, "ICC Statute Article 28(b)", *Center for International Law Research and Policy*, 16 March 2017, p. 2, available at: www.legal-tools.org/doc/cf24cb/.

> command and control, or effective authority and control over the subordinates who, (iii) resulting from the superior's failure to exercise control properly over them, (iv) committed a crime within the Court's *jurisdiction materiae* and (v) the superior either knew or, owing to the circumstances at the time, should have known of the subordinates offense, and failed to take the necessary and reasonable measures to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.[25]

While ICC jurisprudence has yet to interpret Article 28(b), the text of the Statute and its *travaux préparatoires* reveal that the same elements are generally required for both categories (i.e., a superior-subordinate relationship, knowledge, and failure to control properly). Yet in that same breath, civilian superior liability deviates from its military(-like) counterpart in both doctrine and degree.[26] For instance, while effective control of a superior over a subordinate is a *sine qua non* for either category,[27] a hierarchical command structure may be better assumed for military(-like) forces, but would require greater evidence in civilian contexts.[28] Neither are the superiors' duties exercised in the same manner.[29] While the body of international humanitarian law (IHL) generally defines the duties of a military commander, the scope of authority and obligations of civilian leaders is particularized by domestic law.[30]

The two categories are also distinguishable as to the ambit of the subordinate's conduct. While military(-like) commanders are generally responsible for acts of forces under their effective control or authority, a

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[25] *Bemba*, above note 8, para. 407.

[26] Summary Record, above note 24, paras. 67-68; J. Plamenac, above note 24, p. 5.

[27] *Bemba*, above note 8, para. 414; ICTY, *Prosecutor v Prlić,* Case No IT-04-74-T, Judgment (TC), 29 May 2013, para. 240.

[28] Otto Triffterer, "Article 28: Responsibility of commanders and other superiors," in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court,* Beck, Nördlingen, 2008, p. 1085.

[29] ICTY, *Prosecutor v. Popovic*, Case No IT-05-88-A, Judgement (Appeals Chamber), 30 January 2015, para. 1892; *Celebici* above note 14, para. 266.

[30] G. Mettraux, above note 5, p. 108-109.

civilian superior is only responsible for official acts committed by subordinates related to their function.[31]

The most apparent distinction, however, is found in the element of *mens rea.* While a commander may be held liable under Article 28(a) if he or she "knew or should have known" of the subordinates' underlying offense, Article 28(b) holds a civilian superior liable only "if he or she knew or consciously disregarded the information which clearly indicated that subordinates were committing or about to commit such crimes."[32] The distinction draws on the reality that a military(-like) leader within a command structure "would have far more possibilities of receiving information on the conduct of their subordinates."[33] Thus, while "commanders may be held liable not only in light of actual or constructive knowledge, but when he should have known," civilian leaders are subjected to a higher *mens rea* threshold, i.e., that the superior "must have known or consciously disregarded such crimes (i.e., willful blindness)."[34]

C. International Law in Philippine Legal Order

Throughout the nation's sovereign existence, international law has been given equal juridical status with domestic law. The Philippines is thus bound by both customary international law and ICC doctrinal iterations.

1. Customary International Law Incorporated

Philippine legal order has directly applied international law in domestic proceedings. This is aptly illustrated not only in the *Yamashita* cases, but in the trial of Shigenori Kuroda—the former Lieutenant General of the Japanese Imperial Army and Commanding General of the Japanese Imperial Forces in the Philippines.

In *Kuroda v. Jalandoni*, Lieutenant General Kuroda was similarly charged before the American Military Commission for having "unlawfully disregarded and failed to discharge his duties [over his subordinates and] permitting them to commit brutal atrocities and other

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[31] O. Triffterer, above note 28, p. 1102.
[32] Rome Statute, above note 23, Art. 28.
[33] G. Mettraux, above note 5, p. 31
[34] Nora Kasten, "Distinguishing Military and Non-military Superiors: Reflections on the Bemba Case at the ICC", *Journal of International Criminal Justice*, Vol. 7, No. 5, p. 986.

high crimes against noncombatant civilians and prisoners of the Imperial Japanese Forces in violation of the laws and customs of war."[35] Kuroda challenged the jurisdiction of the Commission on the principle of *nullum crimen sine lege*. He claimed that because "the Philippines [was] not a signatory nor an adherent to the Hague Convention on Rules and Regulations covering Land Warfare," he could not be criminally charged for violations thereof.

The Philippine Supreme Court rejected Kuroda's plea. According to the Court, the "generally accepted principle[s] of international law of the present day including the Hague Convention, the Geneva Convention, and significant precedents of international jurisprudence" form part of Philippine legal order through the incorporation clause enshrined in Section 3, Article 2 of the 1935 Constitution. The rules on responsible command recognized in these instruments thus form part of the "law of the nation" even though the Philippines was not a State Party thereto.[36]

Today, the incorporation clause is found in Section 2, Article II of the 1987 Constitution. As in the 1935 and 1973 Constitutions before it,[37] the doctrine of command responsibility continues to form part of the law of the land without need for enabling legislation.[38]

2. The Rome Statute: Ratified, Withdrawn, Binding

The Rome Statute came into force in the Philippines on 1 November 2011, though its effectivity was short-lived. On 17 March 2018, President Rodrigo Duterte unilaterally ordered the Philippines' withdrawal from the ICC.[39] Pursuant to Article 127 of the Statute, the withdrawal took effect one year thereafter.[40]

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[35] SC, G.R. No. L-2662, *Kuroda v. Jalandoni*, 83 Phil. 171.

[36] 1935 Constitution, art. II, §3.

[37] *See also* 1973 Constitution, art. II, §3.

[38] SC, G.R. No. 118295, *Tanada v. Angara*, 272 SCRA 18; Merlin Magallona, *The Philippine Constitution and International Law*, University of the Philippines College of Law, Quezon City, 2013, p. 64.

[39] ICC Public Affairs Unit, "ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law," *ICC*, 20 March 2018, available at https://www.icc-cpi.int/Pages/item.aspx?name=pr1371.

[40] Jason Gutierrez, "Philippines Officially Leaves the International Criminal Court", *New York Times*, 17 March 2019, available at: https://www.nytimes.com/2019/03/17/ world/asia/ philippines-international-criminal-court.html.

The constitutionality of the Philippines' withdrawal from the Rome Statute remains pending before the Supreme Court.[41] Yet regardless of its outcome, the crimes committed until 17 March 2019 remain within the jurisdiction of the ICC. Article 127 clearly states that withdrawing from the treaty shall not "prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective."[42]

II. Command Responsibility in Local Law

The nation is no stranger to the notion of command responsibility. The doctrine was first codified in the Philippine jurisdiction as early as 1876—seventy years before Yamashita was tried, sentenced, and executed. Article 244(2) of the Old Penal Code, a Filipinized rendition of Spain's *Codigo Penal*,[43] held rebel leaders liable for the individual felonies of their subordinates "in case the real perpetrators could not be found."[44]

The provision was subsequently repealed by the Revised Penal Code, which was in turn passed during the American regime. The Revised Penal Code continues to apply as the Philippines' *lex generalis* on crime.

Command responsibility would only next emerge in the Philippine jurisdiction through the trial of General Yamashita, but would again thereafter fade into the background.[45] It was briefly entertained as a constitutional principle during the drafting of the 1987 Constitution, but

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[41] SC, G.R. No. 238875, *Pangilinan v. Cayetano*, Petition, 16 May 2018; *see generally* Ryan Hartzell Carino Balisacan, "Was President Duterte's Unilateral Withdrawal of the Philippines from the Rome Statute Legally Valid?", *Cambridge International Law Journal Blog*, 21 June 2018, available at: www.cilj.co.uk/2018/06/21/was-president-dutertes-unilateral-withdrawal-of-the-philippines-from-the-rome-statute-legally-valid/ *cf.* Raphael Lorenzo A. Pangalangan, "VFA Withdrawal and the Faults of Philippine Formalism", Philippines Law Journal Vol 93 No. __ (forthcoming); Raphael Lorenzo A. Pangalangan, "Mishearing the Sound of Constitutional Silence: Defining Unspoken Limits to Presidential Treaty Power" Ateneo Law Journal (forthcoming).

[42] Rome Statute, above note 23, Art. 127 *cf.* ICC Office of the Prosecutor, "Report on Preliminary Examination Activities 2018", *ICC*, 5 December 2018, paras. 51-53.

[43] Jose A. Javier, "A Short Study of the Philippine Revised Penal Code", *Philippine Law Journal*, Vol. 14, No. 4, 1934, p. 161.

[44] SC, G.R. No. L-8936, *People v. Geronimo*, 100 Phil. 90.

[45] Vicente V. Mendoza, "Criminal Law", *Philippine Law Journal*, Vol. 32, No. 1, 1957, p. 13.

was "met with vigorous objections on the grounds of due process and the principle of *nullum crimen sine lege*."[46]

Its rejection notwithstanding, command responsibility presently finds itself in Philippine law through criminal,[47] administrative,[48] and investigative mechanisms.[49]

This chapter will address these species of command responsibility in *seriatim*.

A. Command Responsibility as a Mode of Criminal Liability

For sixty years post-World War II, Philippine criminal law fell silent on the doctrine of command responsibility. It has however recently resurfaced through two special laws: the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity (RA 9851 or the Philippine IHL Act) and the Anti-Enforced or Involuntary Disappearance Act of 2012 (RA 10353 or the Anti-Enforced or Involuntary Disappearance Act).

1. The Philippine IHL Act

RA 9851 is a *de facto* localization of the Rome Statute. Both laws and their respective provisions are intertwined. Historically, RA 9851 was passed at

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[46] J. Bernas, above note 7, p. 5. "It read thus: 'In the case of grave abuses committed against the right to life by members of the military or the police forces or their adversary, the presumption of command responsibility shall apply, and the state must compensate the victims of government forces.'"

[47] An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes, Rep. Act No. 9851, 11 December 2009 (hereinafter "RA 9851"); An Act Defining and Penalizing Enforced or Involuntary Disappearance, Rep. Act No. 10353, 21 December 2012 (hereinafter "RA 10353").

[48] Institutionalization of the Doctrine of 'Command Responsibility' in all Government Offices, Particularly at all Levels of Command in the Philippine National Police and Other Law Enforcement Agencies, Executive Order No. 226 s. 1995, 17 February 1995 (hereinafter "EO 226").

[49] The Rule on the Writ of Amparo, A.M. No. 07-9-12-SC, 25 September 2007 (effective on 24 October 2007) (hereinafter "Writ of Amparo") *cf.* SC, G.R. No. 191805, *Rodriguez v. Macapagal-Arroyo*, 660 SCRA 84, p. 128.

a time when the Philippines had signed but not yet ratified the Statute.[50] Under the Philippine constitutional framework, treaty law must be concurred in by at least two-thirds of all the Members of the Senate to be valid and effective.[51] Textually, Sections 4,[52] 5,[53] and 6[54] of RA 9851 adopt the definitions of the Statute's core crimes nearly verbatim.[55] What is more, Section 15(g) looks to the Rome Statute for interpretative guidance of its own provisions.[56]

The Philippine IHL Act likewise echoes the modes of liability of the Statute,[57] including that on command responsibility:

> Section 10. *Responsibility of Superiors.* In addition to other grounds of criminal responsibility for crimes defined and penalized under this Act, a superior shall be criminally responsible as a principal for such crimes committed by subordinates under his/her effective command and control, or effective authority and control as the case may be, as a result of his/her failure to properly exercise control over such subordinates, where:
>
> (a) That superior either knew or, owing to the circumstances at the time, should have known that the subordinates were committing or about to commit such crimes;
> (b) That superior failed to take all necessary and reasonable measures within his/her power to prevent or repress their commission or to submit the

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[50] The Philippines signed the *Rome Statute of International Criminal Court* on 28 December 2000 and ratified the same on August 30 2011. The Statute entered into force from 1 November 2011; *see* R. Pangalangan above note 41.

[51] 1987 Philippine Constitution, Art VII §21.

[52] *Cf.* Rome Statute, above note 23, Art 8.

[53] *Cf.* Rome Statute, above note 23, Art 6.

[54] *Cf.* Rome Statute, above note 23, Art 7.

[55] SC, G.R. No. 159618, *Bayan Muna v. Romulo*, 641 SCRA 244 (Carpio, *J.*, dissenting).

[56] RA 9851, above note 47, §15(g); *see Bayan Muna* (Carpio, *J.*, dissenting), above note 55. "The Rome Statute is the most relevant and applicable international human rights instrument in the application and interpretation of RA 9851."

[57] *See* RA 9851, above note 47, §8 "Individual Criminal Responsibilities" *cf.* Rome Statute, above note 23, Art. 25.

> matter to the competent authorities for investigation and prosecution.[58]

As pronounced in *Boac v. Cadapan*, Section 10 of RA 9851 "imputes criminal liability to those superiors who, despite their position, still fail to take all necessary and reasonable measures within their power to prevent or repress the commission of illegal acts or to submit these matters to the competent authorities for investigation and prosecution." The Philippines, however, only partially adopts the Rome Statute definition. It combines elements from conventional and customary international law by imposing the ICC Statute's higher "should have known" standard unitarily to all superiors of both state and non-state groups, regardless of their military or civilian nature.[59] Command responsibility under RA 9851 thus takes a hybrid form, adopting elements from conventional and customary international law alike. It likewise goes further than its international law counterpart by expressly defining "effective command and control" or "effective authority and control" as "the material ability to prevent and punish the commission of offenses by subordinates."[60]

2. The Anti-Enforced or Involuntary Disappearance Act

RA 10353 imposes an iteration of the command responsibility standard upon the *immediate* commanding officer of the concerned unit of the Armed Forces of the Philippines (AFP), the Philippine National Police (PNP), and other law enforcement agencies. Section 14 holds such superiors liable as principals of the crime of enforced or involuntary disappearance if it is shown that they had "knowledge of or, owing to the circumstances at the time, should have known that an enforced or involuntary disappearance is being committed, or has been committed by subordinates or by others within the officer's area of responsibility and, despite such knowledge, did not take preventive or coercive action either before, during or immediately after its commission, when he or she has the authority to prevent or investigate allegations of enforced or

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[58] RA 9851, above note 47, §10.

[59] ICTR, *Prosecutor v Radovan Karadžić*, Case No. IT-95-5/18-T, Public Judgement (Trial Chamber), 24 March 2016, para. 580; *Kajelijeli*, above note 21, para. 85.

[60] RA 9851, above note 47, §3(f).

involuntary disappearance but failed to prevent or investigate such allegations, whether deliberately or due to negligence."[61] Those "who allowed the act… when it is within their power to stop or uncover the commission thereof" are prescribed the penalty of *reclusion perpetua*—the most severe penalty in the Philippines' criminal law framework.[62]

Similar to RA 9851, RA 10353 only partially reflects the command responsibility doctrine of the Rome Statute. It likewise adopts a "should have known" *mens rea* element yet diverges in *jurisdictions materiae* and *personae*. First, the command liability contemplated in RA 10353 is only applicable if the underlying crime of the subordinate officer constitutes *enforced or involuntary disappearance*.[63] Second, as to *jurisdiction personae*, the accused contemplated therein are AFP and PNP officials or superiors of "law enforcement agencies" alone. Lastly, of all military or civilian leaders in the chain of command, only the *immediate* superior may be held liable for command responsibility.[64]

B. Command Responsibility in Administrative Law

Command responsibility has likewise been utilized for non-prosecutorial purposes. Indeed, its juridification within the Philippine legal order is most apparent as a mode of administrative liability. Executive Order No. 226, s. 1995 (EO 226)[65] was issued to deliberately institutionalize the doctrine within the Philippines' ranks.

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[61] RA 10353, above note 47, §14.

[62] RA 10353, above note 47, §15.

[63] RA 10353, above note 47, §3(b). "*Enforced or involuntary disappearance* refers to the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such person outside the protection of the law."

[64] *Cf.* Yael Ronen, "Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings", *Vanderbilt Journal of Transnational Law*, Vol. 13, No. 43, 2010, p. 318. "[T]he ILC had explained that 'this principle [of responsibility of superiors] applies not only to the immediate superior of a subordinate, but also to his other superiors in the military chain of command or the governmental hierarchy if the necessary criteria are met.'"

[65] EO 226, above note 48.

EO 226 holds "any government official or supervisor, or officer of the Philippine National Police or that of any other law enforcement agency… accountable for 'neglect of duty'." Similar to the post-*Yamashita* formula, Section 1 contains an *actual knowledge* element by holding a superior liable only if "he has knowledge that a crime or offense shall be committed, is being committed, or has been committed by his subordinates, or by others within his area of responsibility and, despite such knowledge, he did not take preventive or corrective action either before, during, or immediately after its commission."[66] The stringent knowledge standard is however tempered by a subsequent section, which creates a legal presumption of knowledge when: (a) the irregularities or illegal acts are widespread within his area of jurisdiction or (b) have been repeatedly or regularly committed within his area of responsibility; or (c) When members of his immediate staff or office personnel are involved.[67]

Notably, EO 226 applies the doctrine not solely for the military but "in ensuring responsive delivery of services by the government, especially in police matters" as well.[68]

C. Command Responsibility as a Remedial Tool

Command responsibility has likewise been utilized as a judicial tool of analysis in *Writ of Amparo* cases. The *Writ of Amparo*[69] is a "remedial measure"[70] designed for the issuance of interim measures for the provision of expeditious and effective procedural relief against violations of the basic rights to life, liberty, and security of persons or threats thereto.[71] It was judicially created in 2007 amidst a spate of extralegal killings and enforced disappearances.[72]

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[66] EO 226, above note 48, §1.

[67] EO 226, above note 48, §2.

[68] EO 226, above note 48, Recitals.

[69] Writ of Amparo, above note 49.

[70] SC, G.R. No. 230324, *Callo v. Morente*, 840 SCRA 191 citing SC, G.R. No. 205039, *Spouses Santiago v. Tulfo*, 773 SCRA 558. "[T]he remedy of a writ of *amparo* is an extraordinary remedy that is meant to balance the government's awesome power and to curtail human rights abuses."

[71] SC, G.R. No. 181796, *Republic v. Ca Yanan*, 844 SCRA 183.

[72] SC, G.R. No. 180906, *Secretary of National Defense v. Manalo*, 568 SCRA 1. "On October 24, 2007, the Court promulgated the *Amparo* Rule in light of the prevalence of extralegal killing and enforced disappearances."

The *Writ of Amparo* is a remedy in times of uncertainty.[73] It compels the respondent, under the threat of contempt,[74] to identify what steps or actions had been taken to determine the fate or whereabouts of the aggrieved party and the person or persons responsible for the threat, act or omission; and all "other matters relevant to the investigation, its resolution and the prosecution of the case."[75] To this end, command responsibility has been utilized to identify the accountable officer to whom the *Writ* may be served.[76] Distinct from its use in criminal proceedings,[77] *Amparo* cases only "loosely apply" command responsibility.[78] It does not impute any form of liability *per se*, but is only relied on by the court of law to "pinpoint the superiors it considers to be in the best position to protect the rights of the aggrieved party."[79]

Command responsibility in *Amparo* proceedings is utilized as a syllogistic tool to assist the judiciary trace liability from (direct) perpetrator-subordinates to their commanding officers who would have the concomitant duty to address the disappearance and harassments complained of. In gist, the doctrine of omission liability is morphed into an investigatory tool used to identify those who are responsible[80] "to abate any transgression on the life, liberty or security of the aggrieved party"[81] and thus accountable[82] "to implement whatever processes an *Amparo* court

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[73] SC, G.R. No. 221862, *Bautista v. Dannug-Salucon*, 852 SCRA 446; SC, G.R. No. 182498, *Razon Jr. v. Tagitis*, 606 SCRA 598.

[74] Writ of Amparo, above note 49, §16.

[75] Writ of Amparo, above note 49, §9.

[76] SC, G.R. No. 191805, *Rodriguez v Macapagal-Arroyo*, 660 SCRA 84.

[77] SC, G.R. No. 183871, *Rubrico v. Macapagal-Arroyo*, 613 SCRA 233.

[78] SC, G.R. Nos. 184461-62, *Boac v Cadapan*, 649 SCRA 618.

[79] *Ibid*.

[80] SC, G.R. No. 189155, *In the Matter of the Petition for the Writ of Amparo and the Writ of Habeas Data in Favor of Melissa Roxas*, 630 SCRA 211. "Responsibility refers to the extent the actors have been established by substantial evidence to have participated in whatever way, by action or omission, in an enforced disappearance, as a measure of the remedies this Court shall craft, among them, the directive to file the appropriate criminal and civil cases against the responsible parties in the proper courts."

[81] *Boac* above note 78.

[82] SC, G.R. No. 184467, *Navia v. Pardico*, 673 SCRA 618. "Accountability, on the other hand, refers to the measure of remedies that should be addressed to those who exhibited involvement in the enforced disappearance without bringing the level of their complicity to the level of responsibility defined above; or who are imputed with knowledge relating to the enforced disappearance and who carry the burden of disclosure; or those who

would issue."[83] Further, akin to a Preliminary Examination of the ICC-Office of the Prosecutor, determinations made through command responsibility are a "preliminary determination of criminal liability which… is still subject to further investigation by the appropriate government agency"[84] and subject to the concomitant evidentiary threshold.[85] It is without prejudice to the filing of separate criminal, civil or administrative actions,[86] and its reliefs may be made available by motion in criminal proceedings.[87]

Even the Philippine president is recognized as part of that chain of command. Indeed, in *Saez v. Arroyo*, the former President Gloria Macapagal-Arroyo was named respondent in an *Amparo* proceeding for the AFP's alleged violations of the rights of Franciz Saez—a listed member of the Communist Party of the Philippines. The Supreme Court ruled that a *Writ* may be issued against Arroyo as the commander-in-chief of the AFP at the time the violations occurred, but subject to the constitutionally ordained privilege of presidential immunity.[88] The *Writ of Amparo* may thus be issued in light of substantial evidence showing:

> (a) the existence of a superior-subordinate relationship between the accused as superior and the perpetrator of the crime as his subordinate;
> (b) the superior knew or had reason to know that the crime was about to be or had been committed; and
> (c) the superior failed to take the necessary and reasonable measures to prevent the criminal acts or punish the perpetrators thereof.[89]

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carry, but have failed to discharge, the burden of extraordinary diligence in the investigation of the enforced disappearance."

[83] SC, G.R. No. 186050, *Balao v. Macapagal-Arroyo*, 662 SCRA 312.

[84] *Balao* (Sereno *J.* dissenting), above note 83.

[85] SC, G.R. No. 180906, *Secretary of National Defense v. Manalo*, 568 SCRA 1.

[86] Writ of Amparo, above note 49, §21.

[87] SC, G.R. No. 182165, *Castillo v. Cruz*, 605 SCRA 628.

[88] SC, G.R. Nos. 146710-15, *Estrada v. Desierto*, 353 SCRA 452**.** "[I]ncumbent Presidents are immune from suit or from being brought to court during the period of their incumbency and tenure but not beyond."

[89] SC, G.R. No. 183533, *Saez v. Macapagal-Arroyo*, 681 SCRA 678.

Saez establishes that even the president may be held to answer for the acts of his or her subordinates in *Amparo* proceedings under the doctrine of command responsibility. Though the case involves the President acting as commander-in-chief of the AFP,[90] absent any qualification as to the civilian or military nature of the superior-subordinate relationship,[91] command responsibility equally applies to the president as chief executive head over the PNP.[92]

Conclusion

Rodrigo Duterte won the Philippine presidency on a law-and-order campaign promise to fatten the fish in Manila Bay "with the corpses of criminals."[93] Four years and an estimated body count of 30,000 thereafter,[94] he is accused of crimes against humanity for his ruthless "drug war".[95] Duterte, however, argues that he had nothing to do with it.[96] He claims that he has never ordered, and thus cannot be held liable for, extrajudicial killings.[97]

The *Dutertian* defense assumes that crimes are committed through positive conduct alone. It is mistaken. Pursuant to the doctrine of command responsibility, superior officers may be held criminally liable for the failure to act as well. While the fine nuances of the doctrine may vary from one instrument to the other, this paper has established how omission liability has long been recognized in Philippine legal tradition.

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[90] *Ibid*.

[91] *Cf.* M. Sherman, above note 12, p. 318. "The statute speaks of 'superior' and 'subordinates,' designations which exist outside the military context."

[92] 1987 Philippine Constitution, Art VII, §17. "The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed."

[93] ICC Office of the Prosecutor, above note 42.

[94] Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Philippines, A/HRC/44/22, 4 June 2020, para. 20.

[95] Rise Up for Life and for Rights, "Communication and Complaint in re. The Situation in the Philippines," 27 August 2018.

[96] Aaron Recueno, "Duterte never ordered killing of drug suspects — PNP Chief," *Manila Bulletin*, 29 September 2018, available at: www.perma.cc/HLN4-CMRU; Rambo Talabong, "Don't believe dead suspects fought back? Look at killed cops, says PNP," *Rappler,* 28 September 2017, available at: www.perma.cc/QJ84-SP9R.

[97] Allan Nawal, "Duterte: I didn't order police to kill," *Philippine Daily Inquirer*, 29 December 2016, available at: www.perma.cc/X3PF-4CUV.

Malaysia and the Rome Statute of the International Criminal Court: A Call for Ratification

Kelisiana Thynne and Fiona Barnaby[*]

ABSTRACT

Malaysia recently withdrew its accession to the Rome Statute of the International Criminal Court citing constitutional and judicial concerns. This article discusses these concerns and the possible implications of the Rome Statute on Malaysia's implementation of international and domestic criminal justice. Beginning with a brief summary of existing Malaysian law dealing with international crimes and an overview of the main crimes under the Rome Statute, the article analyses the outcome of accession or otherwise on Malaysia. The article considers elements that could already be put in place in Malaysian law while Malaysia again considers whether to embark on the road to eventual accession to the Rome Statute. Several concerns such as the position of the United States and sovereign immunity have consistently been raised as barriers to Malaysia's accession to the Rome Statute. These issues are discussed with reference to different States' approaches to this challenge. Possible options available to Malaysia apart from accession to the Rome Statute are also outlined.

Keywords: Asia-Pacific, international humanitarial law, international criminal law, Rome Statute, International Criminal Court.

Introduction

Malaysia announced on 4 March 2019[1] that it was acceding to the Rome Statute of the International Criminal Court (Rome Statute).[2] On 5 April

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[1] Depositary Notification of Malaysia's Accession to the Rome Statute of the International Criminal Court, UN Doc. C.N.69.2019.TREATIES-XVIII.10, 17 July 1998, available at: https://treaties.un.org/doc/Publication/CN/2019/CN.69.2019-Eng.pdf (all internet references were accessed on 16 July 2020).

[2] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (hereinafter "Rome Statute").

2019, the decision was made to withdraw Malaysia's instrument of accession. The prime minister referred to "political confusion about what it entails"[3] while certain quarters observed that consent had not been granted by the Conference of Rulers. Interestingly, the notice of withdrawal by the minister of foreign affairs speaks of Malaysia's enduring commitment to:

> [T]he rule of law and justice for the perpetrators of genocide, crimes against humanity, war crimes; and crime of aggression. This is in line with the policy of the new government to firmly espouse the principles of truth, human rights, rule of law, justice, good governance, integrity and accountability.

Murmurs continue that Malaysia might yet again accede to the Rome Statute. The time is ripe to examine Malaysia's interest and challenges with the International Criminal Court (ICC).

Malaysia has a somewhat contradictory relationship with international criminal law (ICL) and international humanitarian law (IHL). It is a staunch member of the Association of Southeast Asian Nations (ASEAN) and thereby embraces the inconsistency of adhering to human rights and humanitarian law under the ASEAN Charter, while also being a strong supporter of the principle of non-interference in a State's internal affairs.[4] On the one hand, it has ratified few IHL treaties[5]

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[3] Depositary Notification of Malaysia's Withdrawal of the Instrument of Accession to the Rome Statute, UN Doc. C.N.185.2019.TREATIES-XVIII.10, 29 April 2019, available at: https://treaties.un.org/doc/Publication/CN/2019/CN.185.2019-Eng.pdf; "Malaysia Withdraws from the Rome Statute", *Star Online*, 5 April 2019, available at: https://www.thestar.com.my/news/nation/2019/04/05/malaysia-withdraws-from-the-rome-statute.

[4] Association of Southeast Asian Nations Charter, 2007, Art. 2(2)(a), available at: http://www.asean.org/wp-content/uploads/2012/05/11.-October-2015-The-ASEAN-Charter-18th-Reprint-Amended-updated-on-05_-April-2016-IJP.pdf (hereinafter "ASEAN Charter").

[5] The current list at 2019 consists of six: Geneva Conventions of 1949, Hague Convention on the Protection of Cultural Property of 1954 and its First Protocol, Convention on the Prohibition of Biological Weapons of 1972, Convention prohibiting Chemical Weapons of 1993, Anti-Personnel Mine Ban Convention of 1997. On a quick count, there are over fifteen treaties related to IHL which the Malaysian government may possibly ratify or

and has not become a party to the Rome Statute. On the other hand, it has hosted war crimes trials after the Second World War[6]—more recently, influential former politicians have established an organisation entitled the "Kuala Lumpur War Crimes Tribunal", which indicted persons over the commencement of the Iraq War. The Malaysian government has also been supportive of ongoing discussions to prosecute persons for the attack upon a Malaysian Airlines aeroplane in the Ukraine in 2014, and Malaysian investigators are part of the team which is currently assisting prosecutors in the Netherlands on this case.[7] Indeed, the government has gone on to sponsor a draft resolution on this topic.[8] The Malaysian government had previously made claims that they are yet to ratify the Rome Statute due to an ongoing process of review.[9] The time taken to finally decide to ratify the Rome Statute was understandable considering the intricacies and inherent contradictions between State sovereignty and an international court. The decision to accede on the arrival of the new government in 2018 was seen by many as demonstrating that the review process had been completed, and that Malaysia was willing to accept more international law treaties and their consequent obligations.

The ICC was established in 2004 after its constitutive treaty, the Rome Statute, was adopted on 17 July 1998. It has jurisdiction over war crimes, crimes against humanity and genocide committed after the Rome Statute entered into force on 1 July 2002. From 17 July 2018, the Court also has jurisdiction over the crime of aggression.[10] In the years since its

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accede to. Since the new government of May 2018, Malaysia has also ratified a number of human rights treaties.

[6] Regulations for the Trial of War Criminals, Royal Warrant 0160/2498, A.O. 81/1945, 18 June 1945, available at: http://www.legal-tools.org/doc/386f77/.

[7] Australian Associated Press, "Russian-made missile downed MH17", *SBS Australia*, 13 October 2015, available at: http://www.sbs.com.au/news/article/2015/10/13/russian-made-missile-downed-mh17; Toby Sterling, "Trials over downing of flight MH17 to be held in Netherlands," *Reuters*, 13 October 2015, available at: http://www.reuters.com/article/us-ukraine-crisis-mh-idUSKBN19Q0SQ.

[8] United Nations Security Council, "Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims," *United Nations*, 29 July 2015, available at: https://www.un.org/press/en/2015/sc11990.doc.htm.

[9] Report of the Working Group on the Universal Periodic Review: Malaysia, UN Doc. A/HRC/11/30, 5 October 2009 (hereinafter "UN Doc. A/HRC/11/30").

[10] Rome Statute, above note 3, Art. 5; Depositary Notification of the Amendments to the Rome Statute of the International Criminal Court, Kampala and the Adoption of

establishment, it has heard eleven cases to conclusion, opened thirteen situations to investigate, and is also conducting preliminary investigations into another nine situations.[11] The overriding principle of jurisdiction of the ICC is that of complementarity. If a State is willing and able to investigate and prosecute a case in its national courts, the ICC will declare a case inadmissible before it and allow the national court to take precedence.[12] Moreover, if national courts have tried a person, that person cannot be brought for the same crime before the ICC.[13]

The Preamble provides that the international community adopted the Rome Statute:

> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes…[14]

Given that Malaysia is a strong supporter of pursuing international justice, and understands the importance of State sovereignty, it is arguably an anomaly that it has not yet become a party to the Rome Statute. However, this is not so surprising in the regional context—as of 2019, there are 123

Amendments on the Crime of Aggression, UN Doc. C.N.651.2010.TREATIES-8, 11 June 2010, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/AMENDMENTS/CN.651.2010-ENG-CoA.pdf; Activation of the Jurisdiction of the Court over the Crime of Aggression, Resolution ICC-ASP/16/Res.5, 14 December 2017, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-eng.pdf.

[11] International Criminal Court (ICC), Preliminary Investigations, available at: https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx.

[12] Rome Statute, above note 3, Arts. 1 and 17.

[13] Rome Statute, above note 3, Art. 20.

[14] Rome Statute, above note 3, Preamble, paras. 3-5.

States party to the Rome Statute, of which nineteen are from the Asia Pacific, and, of the ASEAN States, only Cambodia is a party.[15]

This article discusses some of the legal and political reasons behind Malaysia's decision not to become a party to the Rome Statute and the arguments that could be made to counter these positions to demonstrate that these are not the legal hurdles that the government has alleged. Starting with an overview of the history of Malaysia's engagement with ICL, the article considers how Malaysia has already included war crimes in its current law and what its existing legal obligations are to prosecute and punish those who have committed war crimes. The article addresses the key challenges for Malaysia in acceding to the Rome Statute before concluding with some arguments as to why Malaysia should become a party, and the next steps in the accession and implementation process should this come about. In so doing, it should give a comprehensive overview of ICL as it currently stands in Malaysia and the principles of justice which underpin the Rome Statute.

The Context

The Rome Statute seeks to have complementary jurisdiction over the most serious crimes that affect the international community. It seeks to ensure that if war crimes, genocide or crimes against humanity occur, and the State responsible or in which they take place is unable or unwilling to prosecute those responsible, justice is not denied to the victims. ICL draws significantly from IHL. The four Geneva Conventions of 1949[16] (Geneva

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[15] ICC, States Parties to the Rome Statute, available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. The Philippines withdrew on 17 March 2018. The withdrawal took effect from 17 March 2019, available at: https://www.icc-cpi.int/philippines.

[16] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (Geneva Conventions or GC I, GC II, GC III, GC IV).

Conventions), their Additional Protocols of 1977 and 2005[17] (Additional Protocols) and a host of treaties regulating weapons form the backbone of IHL. It is significant that all States in the world are a party to the Geneva Conventions. The adoption of the Rome Statute, considered a watershed development in ICL, describes war crimes by reference to the "grave breaches" under the Geneva Conventions and Additional Protocol I and other serious violations of the laws and customs of war.

"Grave breaches" of the Geneva Conventions are the most serious offences under IHL for which States undertake to provide effective penal sanctions and to either prosecute or extradite, regardless of their nationality, alleged offenders suspected of committing such grave breaches. They include: wilful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health, destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, wilfully depriving a prisoner of war or civilian the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement of a civilian and taking civilians as hostages (Articles 50/51/130/147 of GCI, GCII, GCIII, GCIV).

Grave breaches are part of the wider category of serious violations of IHL that States are exhorted to suppress in both international and non-international armed conflicts. The grave breaches are different from other war crimes in that they are an exhaustive list of offences in the Geneva Conventions and Additional Protocol I and only apply in international armed conflict. The grave breaches stand on the shoulders of war crimes elaborated by the Nuremberg and Tokyo tribunals. With the creation of international criminal tribunals[18] and the ICC in the 1990s which were empowered to prosecute war crimes, including grave breaches, the list of grave breaches and other violations of the Geneva Conventions has fuelled the development of a rich source of jurisprudence on the interpretation and prosecution of international crimes and has served to

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[17] Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (hereinafter "Additional Protocol I").

[18] Such as the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and the Special Court for Sierra Leone.

entrench the status of grave breaches as crimes to be criminalized internationally and nationally.

The crimes are outlined in Article 8 of the Rome Statute. These include crimes from Common Article 3 of the Geneva Conventions (dealing with non-international armed conflicts) and from customary international law (dealing with both international and non-international armed conflict). These offences form part of a web of international crimes made up of serious violations of IHL and gross violations of human rights such as crimes against humanity and genocide. The link between IHL and ICL is thus unmistakable and symbiotic, where there is an armed conflict, both international and non-international.

While the majority of ASEAN States, including Malaysia, are yet to become a party to the Rome Statute, the region has not been immune from such war crimes, genocide and crimes against humanity in the past. South East Asia was badly affected by the Second World War and, as will be discussed below, a number of war crimes trials were held in Malaysia. There was also sporadic violence in Malaysia as it came out of colonialism and fought communism.

There are still a number of non-international armed conflicts in Southeast Asia today, most notably in Myanmar and the Philippines. The latter shares a sea border with Malaysia. Malaysia, Indonesia and the Philippines have agreed on measures at the highest level to prevent spill-over of the conflicts in Southern Philippines.[19] Malaysia has also increased its aid to Southern Philippines to help the humanitarian response to the conflict.[20] In relation to Myanmar, Malaysia is host to a number of refugees from the various conflicts, and indeed the former Malaysian prime minister, Dato' Sri Haji Mohammad Najib bin Tun Haji Abdul Razak, had called the situation in Rakhine State in 2017 a "genocide" and had urged Myanmar government and world action.[21] The rest of the

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[19] Kyodo News, "Indonesia, Malaysia, Philippines to discuss Marawi issue," *ABS-CBN News*, 20 June 2017, available at: http://news.abs-cbn.com/news/06/20/17/indonesia-malaysia-philippines-to-discuss-marawi-issue.

[20] Melissa Goh, "Malaysia to send more aid to Philippines as Marawi standoff enters third month," *Channel News Asia*, 25 July 2017, available at: http://www.channelnewsasia.com/news/asiapacific/malaysia-to-send-more-aid-to-philippines-as-marawi-standoff-9061900.

[21] Associated Press, "Malaysia PM urges world to act against 'genocide' of Myanmar's Rohingya," *The Guardian*, 6 December 2016, available at: https://www.theguardian.

region is also not immune to pockets of sporadic violence which have arguably not necessarily met the threshold of an armed conflict including on another of Malaysia's borders in Southern Thailand.

In the past thirty years, Malaysia has sent peacekeepers (from the Malaysian Armed Forces and the Royal Malaysian Police) to thirty United Nations (UN)-mandated peacekeeping missions, beginning in 1960 when they sent a contingent of Special Forces to the Congo.[22] In Cambodia, where Malaysia had a substantial peacekeeping presence as part of the UN Transitional Authority, there was a genocide[23] and a UN hybrid court is still investigating and prosecuting those responsible for some of the atrocities (The Extraordinary Chambers in the Courts of Cambodia).[24] Peacekeepers are responsible for violations of IHL including for the commission of war crimes if they engage in hostilities.[25] Peacekeepers often have the mandate to support the government in its investigations and prosecutions for war crimes, crimes against humanity, genocide and other violations of IHL and human rights law (e.g., UN Security Council Resolution on the Renewal of the MONUSCO Mission, para 10, 2017).[26] Indeed, Malaysia is operating in the Democratic Republic of the Congo and Sudan, both of which are, as of 2019, subject to investigation by the ICC.[27]

The Malaysian government has stated that the "deployment of Malaysia's military and police personnel in various UN Peacekeeping Operations is a manifestation of Malaysia's strong commitment to shared responsibilities towards the early and peaceful resolution of conflicts." In

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com/world/2016/dec/04/malaysia-pm-urges-world-to-act-against-genocide-of-myan mars-rohingya.

[22] "Strengthening the UN Peacekeeping Operations", *Malaysia – United Nations Security Council*, available at: http://malaysiaunsc.kln.gov.my/index.php/malaysia-at-the-unsc/malaysia-s-commitment/strengthening-the-un-peacekeeping-operations.

[23] The Extraordinary Chambers of the Courts of Cambodia has convicted persons of genocide in Cambodia: ECCC, Case No. 002/02, *Prosecutor v. Nuon Chea and Khieu Samphan*.

[24] *See* https://www.eccc.gov.kh/en.

[25] UN Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, 6 August 1999, Section 4, available at: https://conduct.unmissions.org/sites/default/files/keydoc1.pdf.

[26] UNSC Res. 2348, 31 March 2017, para. 10. Malaysia is subject to this resolution as a troop-contributing country.

[27] Preliminary Investigations, above note 12.

1998, Malaysia participated in the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC in Rome.[28] Since then, Malaysia has participated in successive review conferences of the Rome Statute. In recent years, the Malaysian government has shown a willingness to consider ratification, looking into the appropriate implementing legislation to be put in place.[29] Malaysia clearly takes such responsibilities seriously, and indeed has made an increasing number of statements and launched a number of operations and investigations into regional areas of tension and conflict. This demonstrates a commitment to the rule of law, ending conflict and ensuring justice, which would be in line with Malaysia also committing to the Rome Statute and implementing its provisions into its domestic law, as is discussed further in this article.

Malaysia and its History with ICL

Malaysia's history with ICL began just after the Second World War and before the country came into being as an independent State. After the Second World War, the British conducted 131 war crimes trials in Singapore and other parts of then Malaya, such as Jesselton (modern-day Kota Kinabalu), Alor Setar, Labuan and Johor Bahru.[30] They dealt with war crimes of the Second World War committed in Singapore, Indonesia, Cambodia, Thailand, Myanmar and the Andaman and Nicobar Islands. This included the area known as the Straits Settlements under the rule of the British in pre-independence Malaysia.[31] The accused were of different ranks and positions, and almost all were Japanese. Among the international crimes they were charged with were the mass killing of civilians, abuse and ill treatment of individuals, directly or indirectly causing the deaths of civilians and prisoners of war, the ill treatment and

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[28] UN Diplomatic Conference of Plenipotentiaries On The Establishment Of An International Criminal Court, Rome, U.N. Doc.A/CONF.183/10*, Final Act, 17 July 1998, available at: http://www.un.org/law/icc/index.html.

[29] UN Doc. A/HRC/11/30, above note 10.

[30] Frances Tay, *Japanese War Crimes in British Malaya and British Borneo 1941-1945*, 2017, available at: http://www.japanesewarcrimesmalayaborneo.com.

[31] Regulations for the Trial of War Criminals, above note 7.

deaths of POWs and civilians forced to work on construction projects such as the Burma-Siam railway.[32]

During the Second World War, the United States of America (US), the United Kingdom (UK), the then Union of Soviet Socialist Republics and China declared at the 1943 Moscow Conference that "their united action, pledged for the prosecution of the war against their respective enemies, will be continued for organisation and maintenance of peace and security" and that "those of them at war with a common enemy will act together in all matters relating to the surrender and disarmament of that enemy."[33] They established the UN War Crimes Commission (UNWCC) in 1943 to compile evidence on Axis war crimes and drew up lists of suspected war criminals for prosecution after the war. It was notable that even in the midst of war, the Allies decided to execute justice rather than having mass executions or trials *in absentia*. This was the foundation for the war crimes trials after the Second World War. They also adopted a "Statement on Atrocities", signed by President Roosevelt, Prime Minister Churchill and Premier Stalin[34] where they declared that they would punish German and Nazi war criminals by returning the accused to jurisdictions where the crimes were alleged to have been committed, "that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein."[35] Where crimes could not be geographically located, the Allies would jointly punish these crimes. Although only applying to war crimes committed by the Nazis, the Statement on Atrocities was subsequently applied by the Allies in prosecuting the crimes of the Second World War in the Far East as well.

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[32] Cheah Wui Ling and Ng Pei Yee, *The Singapore War Crimes Trials*, 2016, available at: http://singaporewarcrimestrials.com/case-summaries.

[33] The Moscow Conference, *Joint Four-Nation Declaration*, Arts. 1 and 2, October 1943, available at: http://avalon.law.yale.edu/wwii/moscow.asp.

[34] *Ibid*.

[35] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 280 (entered into force 8 August 1945), available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf.

On 26 July 1945, the Allies called for Japan's surrender by issuing the Potsdam Declaration.[36] It made clear that justice for the atrocities of the Japanese would be pursued while not intending "that the Japanese shall be enslaved as a race or destroyed as a nation." Once Japan agreed to the terms of surrender under the Potsdam Declaration, war crimes investigations and trials were organised in various places in Asia. The Tokyo Trials charged high-ranking suspects from the military and the government while lower-ranking suspects were charged by national authorities of the Allies in various places in Asia. Therefore, in addition to the well-known joint trials of senior military and political leaders of the Axis at the Nuremberg Trial (19 November 1945-1 October 1946) and at the Tokyo Trial (3 May 1945-12 November 1945), the Allied Powers held national trials of Axis defendants in various locations, which is how they came to be held in then Malaya.

Among the national authorities that conducted such trials were China, the US, the Netherlands, the UK, Australia, the Philippines and France. It is important to note that these trials did not employ the national law of the place where the trials occurred but referred to the national laws of the Allied power conducting the prosecutions. This meant that these prosecutions presumed extra-territorial jurisdiction of the national laws of the various Allied countries.[37]

In Malaysia, the British conducted national war crimes trials and had travelling courts in certain areas with Singapore as the centre for British war crimes investigations and trials in South East Asia. Similar trials were held in Rangoon, Borneo and Hong Kong. The 1945 Royal Warrant combined with the Allied Land Forces South East Asia (ALFSEA) War Crimes Instructions No. 1: Investigation of War Crimes and Trials of War Criminals[38] authorized the establishment of military courts to prosecute "violations of the laws and usages of war" committed in armed conflict involving the British after 2 September 1939. Since these courts were considered as Courts-Martial, they referred to a combination

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[36] *Proclamation Defining Terms for Japanese Surrender (Potsdam Declaration)*, 26 July 1945, available at: http://www.ndl.go.jp/constitution/e/etc/c06.html.

[37] Suzannah Linton, "Rediscovering the War Crimes Trials in Hong Kong, 1946–48", *Melbourne Journal of International Law*, Vol. 1, 2012, p. 14, available at: http://law.unimelb.edu.au/__data/assets/pdf_file/0006/1687254/Linton.pdf.

[38] Regulations for the Trial of War Criminals, above note 7.

of international law, British Military law and English national criminal law in their trials.[39]

Malaysia's Implementation of IHL and ICL

A. Geneva Conventions of 1949

All States have agreed on the prosecution of "grave breaches" of the Geneva Conventions on the basis of universal jurisdiction due to the seriousness of these crimes. This includes ensuring that the relevant mechanisms are in place to implement such universal jurisdiction under the Geneva Conventions. Malaysia currently has existing obligations under the Geneva Conventions to prosecute those who commit grave breaches of the Geneva Conventions and any violations of Common Article 3. If Malaysia becomes party to the Rome Statute, these obligations will continue with the addition of the full list of crimes under the Rome Statute.

While Malaysia is already a party to the four Geneva Conventions it is yet to become party to their two Additional Protocols of 1977 and 2005. Nonetheless, as a party to the Geneva Conventions, Malaysia is obliged to implement a range of measures to fulfil its obligations "to respect and ensure respect" of the Conventions (Common Article 1, Geneva Conventions). These measures include instruction within the armed forces to disseminate the Geneva Conventions by inclusion in study programmes of the military, official translation of the Geneva Conventions, the enactment of domestic legislation for the suppression of grave breaches of the Geneva Conventions, adopting measures to prevent and stop abuses of the emblems of the Geneva Conventions, making legal advisers available to the armed forces, instruction to the civilian population and concluding agreements with particular groups to ensure respect for the rules of the Geneva Conventions.[40] The general duty to ensure respect is part of Malaysia's

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[39] Cheah Wui Ling, "An Overview of the Singapore War Crimes Trials (1946-1948): Prosecuting Lower-Level Accused", *Singapore Law Review*, Vol. 34, 2016, p. 16, available at: https://ssrn.com/abstract=2861802.

[40] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., ICRC, Geneva,

duty to ensure that its nationals abide by IHL in times of armed conflict. In addition to positive obligations, Malaysia has a negative obligation to refrain from encouraging, aiding or abetting the commission of violations of the Geneva Conventions.[41]

Malaysia's international legal obligations under the Geneva Conventions of 1949 have been implemented into domestic legislation through the Geneva Conventions Act of 1962, Act 512 of the Laws of Malaysia (GCA 1962). Section 3 of the GCA 1962 provides:

> 3. (1) Any person, whatever his citizenship or nationality, who, whether in or outside Malaysia, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions:
>
> (a) article 50 of the convention set out in the First Schedule;
> (b) article 51 of the convention set out in the Second Schedule;
> (c) article 130 of the convention set out in the Third Schedule; or
> (d) article 147 of the convention set out in the Fourth Schedule, shall be guilty of an offence and shall, on conviction,[42]
>
> (i) in the case of such a grave breach as aforesaid involving the wilful killing of a person protected by the convention in question, be sentenced to imprisonment for life;

2016, paras. 146-149 and 181, available at: https://ihl-databases.icrc.org/ihl/full/GCI-commentary (hereinafter "2016 Commentary to GCI").

41 2016 Commentary to GCI, above note 41, paras. 158-173.

42 The articles list the various grave breaches of each of the four Geneva Conventions of 1949.

(ii) in the case of any other such grave breach as aforesaid, be liable to imprisonment for a term not exceeding fourteen years.

These provisions refer directly to the relevant grave breaches provisions of the four Geneva Conventions and therefore make the grave breaches directly prosecutable under Malaysian law.

The Malaysian Penal Code does not refer to offences committed specifically in the context of an armed conflict, except those relating to Offences against the State in Chapter VI. Under Chapter VI of the Penal Code, "Offences Against the State" which can be committed in times of 'war', include waging war against the King under the Penal Code Act 574 of the Laws of Malaysia. Sections 121-123 and 125-130 list offences against the person or authority of the King, collecting arms, '…', with the intention of waging war against the King, concealing with intent to facilitate a design to wage war, waging war against any power in alliance with the King, harbouring any person in Malaysia or person residing in a foreign State at war or in hostility against the King, committing depredation on the territories of any power at peace with the King, receiving property taken by war or depredation, a public servant voluntarily allowing a prisoner of State or war in his custody to escape, a public servant negligently causing suffering to a prisoner of State or war in his custody to escape, and aiding escape of, rescuing, or harbouring such a prisoner. Under the Penal Code, a "public servant" includes any commissioned officer in the Malaysian Armed Forces and "every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience." This last category would include police officers.

From the above, clearly, grave breaches of the Geneva Conventions and/or offences against the State can be prosecuted in Malaysia. However, unlike offences against the State outlined in the Penal Code, grave breaches of the GCA 1962 are not listed in the Malaysian Penal Code and neither are they listed in the Schedule on Penalties of the Criminal Procedure Code which stipulates modes of arrest, bail and sentencing. Therefore, prosecutors would need to have specific knowledge of the existence of the GCA 1962 and a court would

need to rule on the relevant criminal procedure to apply to such crimes should anyone in Malaysia be charged with grave breaches. Nonetheless, prosecutions of grave breaches will likely mirror prosecutions of offences against the State. Persons accused of offences against the State can be arrested without a warrant. These are offences which are not subject to bail provisions and are subject to some of the heaviest penalties, such as the death penalty and imprisonment for life.[43]

Presently, only the grave breaches of the Geneva Conventions are criminalized in Malaysian law under GCA 1962. The additional grave breaches listed under the First Additional Protocol to the Geneva Conventions (Articles 11 and 85[2], [3] and [4]) should also be included in the GCA 1962 if Malaysia becomes party to the Rome Statute, or be considered when Malaysia contemplates ratification. Currently, a number of grave breaches of the First Additional Protocol are not criminalized in Malaysian law. Among them, making civilians the object of attack, making non-defended localities and demilitarized zones the object of attack, indiscriminate attacks affecting civilians committed "in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects" (Article 85[3][b]) API) (especially relevant if Malaysia is invaded by militants who target civilians or the civilian population), the non-repatriation of prisoners of war and the crime of starvation. Although the principles of distinction, proportionality and precautions, which are key to the application of IHL on the battlefield and derive from Additional Protocol I and customary international law,[44] are not stated in Malaysian law, these key principles of IHL are part of Malaysia's military manuals and doctrine and would therefore inherently

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[43] Criminal Procedure Code, Act 593, First Schedule, 1935, available at: http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20593%20-%20Criminal%20Procedure%20Code.pdf.

[44] Examples include the Principle of Distinction between Civilians and Combatants and between Civilian objects and Military Objectives, the Prohibition of Indiscriminate Attacks, the Principle of Proportionality in Attack, the Principle of Precautions in Attack: Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1, Cambridge University Press, Cambridge, 2005, Rules 1, 14 and 15 (hereinafter "ICRC's Customary Law Study").

be part of any justification or defence of military personnel charged with grave breaches under Malaysian law.[45]

B. Universal Jurisdiction

While States have been ready to adopt legislation to criminalize grave breaches domestically, there has been no corresponding enthusiasm to prosecute or extradite perpetrators of the grave breaches. This is despite the fact that under the grave breaches provisions of the Geneva Conventions, universal jurisdiction is required. Universal jurisdiction means that a State should be prepared to prosecute and punish anyone who commits a grave breach of the Geneva Conventions anywhere in the world, regardless of their nationality, and connection to the prosecuting State. States are ready to embrace universal jurisdiction in theory but find it politically challenging to implement. An example of the exercise of universal jurisdiction are the national prosecutions of grave breaches that occurred related to the former Yugoslavia which took place in Germany, Denmark and Switzerland after the break-up of the former Yugoslavia.[46] The International Court of Justice (ICJ) has also considered Belgium's exercise of universal jurisdiction in relation to crimes committed in the Democratic Republic of the Congo.[47]

Malaysia is one of the few States to provide for universal jurisdiction in its laws, although such jurisdiction has never been formally exercised. Universal jurisdiction in respect of the prosecution of grave breaches is provided by Section 3(2) of the GCA 1962. In terms of prosecutions, the GCA 1962 provides that the Magistrates' Court will not have jurisdiction to try offences under the GCA 1962 (Section 3[3]). Similar to offences against the State, grave breaches under the GCA 1962 are likely to be tried at the level of the High Court, while other serious violations of IHL are subject to possibly being charged at the level of the Sessions Court. However, in respect of international criminal

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[45] These Military Manuals are protected by the Official Secrets Act 1972 but Malaysia's practice in relation to IHL can be summarized from the State practice contained in ICRC's Customary Law Study, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_my.

[46] 2016 Commentary to GCI, above note 41, para. 2909.

[47] International Court of Justice (ICJ), *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* Judgement, 14 February 2002, *ICJ Reports 2002*, p. 3.

prosecutions, it is likely that the Malaysian legal system will adopt similar procedures to those used for the prosecution of serious crimes under the Penal Code such as offences against the State and terrorist offences. This primarily means prosecutions at the level of the High Court. Where Malaysian courts would have universal jurisdiction for grave breaches, the decision to prosecute is placed squarely in the hands of the public prosecutor (Section 3[4] GCA 1962) and the accused is allowed legal representation (Section 5).

C. Other Rome Statute Crimes

While criminalizing the various grave breaches and other serious violations of IHL, under Malaysian law, there is no reference to the criminalization of the crime of genocide nor to crimes against humanity. In relation to genocide, when Malaysia became party to the Genocide Convention in 1994, it made a reservation.[48] Before a dispute can be submitted to the jurisdiction of the ICJ, the specific consent of Malaysia is required in each case. The government further registered an understanding that the pledge to grant extradition in accordance with a State's laws and treaties in force extends only to acts which are criminal under the law of both the requesting and the requested State. The effect the government would seek to promote of both the reservation and the understanding is that Malaysia can refuse the jurisdiction of the ICJ in relation to genocide prosecutions. This is debatable given the compulsory nature of Article IX and the general principle that reservations should not be made that are contrary to the object and purpose of a treaty.[49] Nonetheless, Malaysia need not comply with an extradition request for the crime of genocide, as even where the act is criminal under the law of the State requesting extradition, it is currently not a crime in Malaysia, which is consistent with general principles of extradition law. If Malaysia were to fully implement the Rome Statute, it would need to ensure that

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[48] Convention on the Punishment and Prevention of the Crime of Genocide, 78 UNTS 277, 9 December 1948 (entered into force 12 January 1951), Reservation and Understanding, Malaysia, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=4378A9A5467C779AC125642F0038EB7D.

[49] Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force on 27 January 1980), Art. 19(d).

genocide was listed as a crime under the relevant Rome Statute law or revision of the Penal Code.

Guidance on implementing legislation for Malaysia in relation to international crimes of the Rome Statute can be found in the Commonwealth Model Law to Implement the Rome Statute of the ICC and the accompanying revised Report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the ICC.[50] The model details a number of examples on how Commonwealth States have dealt with the issue of sovereign immunity.

D. Compatibility with Syariah Law

Although Islam is the official religion of Malaysia, Malaysia does not apply Islamic law in relation to criminal matters (it is applied to select family and religious matters). Presently, the federal government is vested with legislative authority to enact laws for the administration of justice, including criminal law (Section 74 and 77, Item 4, Federal List, Federal Constitution of Malaysia, 1957). In Malaysia, criminal law is enacted by the Federal government as regulated by Item 4 of the Federal List. Therefore, the Federal Government is responsible for enacting legislation criminalizing international crimes. Despite previous controversy related to the incorporation of Syariah law into criminal law,[51] the principles of IHL and Islamic law (and therefore the prosecution of war crimes) remain compatible. In an article on the Geneva Conventions, the late Professor Ahmad Ibrahim described the links between Islam and IHL:

> Perhaps it would help in the appreciation and acceptance of the Geneva Convention to know that its principles are certainly in accord with the teachings of Islam and those of the other major religions practised in the Federation.[52]

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[50] Office of Civil and Criminal Justice Reform, *Model Law – Rome Statute of the International Criminal Court*, Commonwealth Secretariat, 2017, available at: http://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_ROL__Model_Rome_Statute.pdf/.

[51] Malik Imtiaz Sarwar and Surendra Ananth, "Confronting the Constitutionality of Hudud", *Malayan Law Journal*, Vol. 4, No. XII, 2016.

[52] Ahmad Ibrahim, "Traditional Asian Approaches: A Malaysian View", *Australian Yearbook of International Law*, 1980, available at: http://austlii.edu.au/au/journals/AUYrBkIntLaw/1980/46.pdf .

He compared Islamic tenets on armed conflict with similar principles found in the Geneva Conventions, reaffirming that the principles of IHL are compatible with the principles of Syariah law.[53] Both IHL and Syariah law provide for specific judicial and procedural guarantees to be observed in prosecutions for violations.

Challenges for Malaysia to Accede to the Rome Statute

A. State Sovereignty

As has been mentioned, there is a general ASEAN sentiment of non-interference in domestic concerns (Article 2[2][a], ASEAN Charter 2007) which underpins the majority of interactions between States in the region and indeed influences the treaties to which they are likely to become a party, particularly in the human rights and humanitarian law domain. At the 50th anniversary celebrations of ASEAN, the then Malaysian prime minister said that "the 'ASEAN Way' is a series of principles that were adopted when ASEAN was formed in 1967, which places extreme emphasis on national sovereignty and the commitment to non-intervention in the affairs of member countries."[54] Indeed, it has been suggested that Malaysia maintains these concerns over sovereignty in its consideration of accession to the Rome Statute.[55]

The principle of State sovereignty comes from the Westphalian concept that States exist independently under their own ruler or sovereign who can make decisions for the interests and well-being of the State. In the *Lotus Case,* the Permanent Court of International Justice held that States may exercise their jurisdiction in their country with a wide measure of discretion; "In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon

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[53] Ahmed Al-Dawoody, "IHL and Islam: An Overview", *ICRC Humanitarian Law & Policy Blog*, 14 March 2017, available at: http://blogs.icrc.org/law-and-policy/2017/03/14/ihl-islam-overview/.

[54] Karen Arukesamy, "'ASEAN way' brings stability, prosperity to region: Najib," *The Sun Daily,* 14 August 2017, available at: http://www.thesundaily.my/news/2017/08/14/asean-way-brings-stability-prosperity-region-najib-updated.

[55] Free Malaysia Today Reporters, "Kula: Speed up International Criminal Court membership move", *Free Malaysia Today News*, 9 November 2016, available at: http://www.freemalaysiatoday.com/category/nation/2016/11/09/kula-speed-up-international-criminal-court-membership-move/.

its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[56] Therefore, a State has the capacity under this principle to enact most laws and prosecute most people without the censorship or limitation by other States or the international community, as long as it abides by international law which it itself has accepted through ratification or accession to a treaty.

Currently, Malaysia has not ratified or acceded to the Rome Statute and therefore has no inherent international law obligation to cooperate with the ICC. It can exercise its State sovereignty through the prosecution of anyone it chooses, within the limits of its existing obligations under IHL and international human rights law. Nonetheless, the contention of the authors of this article is that, in acceding to the Rome Statute, Malaysia would not relinquish this right to prosecute whomever it wishes.

The ICC is specifically established so as not to breach state sovereignty. As one commentator noted on the drafting of the Rome Statute, "The concept of sovereignty still has a great impact on international law and international relations; States are not yet ready to give up these privileges."[57] As has been stated above, the ICC shall declare a case inadmissible where "[th]e case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution" (Article 17, Rome Statute). This implies that the State's sovereignty remains paramount over any investigation and prosecution of serious international crimes. Indeed, Lüder has suggested that the ICC's jurisdiction will always be subsidiary to a State's jurisdiction, unlike other international criminal tribunals which have been established on an *ad hoc* basis.[58] Solera confirms, "States continue to play the central role. But if they fail or find

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[56] Permanent Court of International Justice, *The Case of the SS Lotus (France v. Turkey*), Judgement, 7 September 1927, *1927 P.C.I.J. (ser. A) No. 10*, para. 47, available at: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm.

[57] Oscar Solera, "Complementary jurisdiction and international criminal justice", *International Review of the Red Cross*, Vol. 84, No. 845, 145, 2002, p. 170.

[58] Sasch Rolf Lüder, "The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice," *International Review of the Red Cross*, Vol. 84, No. 845, 2002, p. 90.

it impossible to assume that role, or show disinterest or bad faith, the ICC will step in to ensure that justice is done."[59]

This approach is in line with historical concerns over State sovereignty in achieving international prosecutions for IHL violations. Gaeta, writing a commentary to the Geneva Conventions of 1949, has suggested that "After the Second World War the victorious [S]tates were mainly keen to maintain unfettered their sovereignty over the punishment of enemy war criminals"[60] so "they considered that the most appropriate forum to deal with this form of criminality was the one of the victim [S]tate"[61] when drafting the grave breaches and penal sanctions provisions of the Geneva Conventions. States are required to implement the grave breaches into their national legislation, but the choice of jurisdiction and penalties remain the choice of each individual State (ICRC updated Commentary of the First Geneva Convention).[62] Indeed, implementation of the grave breaches and other serious violations of IHL can be guided by the Rome Statute, but it remains up to each State how to undertake such implementation.[63]

As of 2016 more than 125 out of the 196 States party to the Geneva Conventions had some form of implementing legislation for grave breaches and the International Committee of the Red Cross' updated commentary on Geneva Convention I suggests that "States Parties have largely complied with the obligation contained in Article 49(1) to enact implementing legislation. However, they have not often followed through on the obligation to either prosecute or extradite perpetrators of the grave breaches listed in Article 50."[64] Kapur, writing in relation to the ICC, has noted that the "core" human rights relating to freedom from torture, cruel, inhuman or degrading treatment and indeed even the right to a fair trial have been recognized as part of Asian values and should be respected.[65]

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[59] O. Solera, above note 58, p. 148.

[60] Paola Gaeta, "Grave Breaches of the Geneva Conventions", in Andrew Clapham, Paola Gaeta and Marco Sassoli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 617.

[61] *Ibid*.

[62] 2016 Commentary to GCI, above note 41, para. 2844.

[63] 2016 Commentary to GCI, above note 41, para. 2858.

[64] 2016 Commentary to GCI, above note 41, para. 2908.

[65] Amrita Kapur, "Asian Values v. The Paper Tiger: Dismantling the Threat to Asian Values Posed by the International Criminal Court," *Journal of International Criminal*

She also notes that many IHL principles are also already accepted and must be implemented in Asia.[66] As has been mentioned, Malaysia has incorporated some war crimes into its national legislation. Indeed, it is this obligation under Malaysia's existing obligations under the Geneva Conventions to enact legislation to penalize war crimes which would negate concerns about losing sovereignty to the ICC.

Outside the specific realm of international criminal jurisdiction, commentators have suggested that there is an interconnectivity to Asia which has surpassed much of the rest of the world which will require Asia, including Malaysia, to "re-think their traditional assumptions about regional and international cooperation."[67] Thakur has suggested, "In today's seamless world, political frontiers have become less salient both for international organizations, whose rights and duties can extend beyond borders, and for member States, whose responsibilities within borders can be held to international scrutiny. The gradual erosion of the once sacrosanct principle of national sovereignty is rooted today in the reality of global interdependence: no country is an island unto itself anymore."[68] Indeed, one of the aims of ASEAN is to have greater connectivity in terms of economy and security. In the context of international crimes, ASEAN has made arms smuggling a key issue regionally when the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) was established as the highest Sectoral Body in ASEAN with one of its pillars to address arms smuggling. Therefore, ASEAN recognizes the need for States to coordinate on this international issue,[69] which could also imply that ASEAN is expanding its engagement on international issues and require States to relinquish some of their sovereignty for the international good, under which Malaysia will follow suit.

Justice, Vol. 11, Issue 5, 2013, p. 1068, available at: https://doi.org/10.1093/jicj/mqt067.

[66] A. Kapur, above note 66, p.1069.

[67] David P. Fidler, "The Asian Century: Implications for International Law", *Singapore Yearbook of International Law*, Vol. 9, 2005, pp. 30 and 33, available at: https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1397&context=facpub.

[68] Ramesh Thakur, "Global norms and international humanitarian law: an Asian perspective", *International Review of the Red Cross,* Vol. 841, 2001, p. 8.

[69] ASEAN Security Outlook, ASEAN Secretariat, Jakarta, 2015, pp. 7 and 56, available at: http://www.asean.org/storage/2015/12/ASEAN-SECURITY-OUTLOOK-2015.pdf/

Furthermore, Malaysia has accepted the jurisdiction of several international bodies and courts to resolve its disputes with other nations. For example, Malaysia brought a case against Singapore before the ICJ over sovereignty of an island between the two States in 2008.[70] Malaysia has recently asked the Court to assist further in relation to the dispute.[71] Malaysia has also engaged in trade disputes at the World Trade Organisation.[72] Both examples demonstrate that when it comes to its national interests, Malaysia is prepared to rely on an international body to determine its rights and obligations under the treaties to which it is a party.

Therefore, Malaysia, in considering whether to become a party to the Rome Statute, can adopt its own legislation to ensure that it maintains the sovereignty to prosecute its own nationals or those who commit any violations on its territory without the involvement of the ICC. For example, a number of States have made declarations when ratifying the Rome Statute that their legislation requires their attorney-general or relevant minister for justice to make a full investigation to determine if they can prosecute or not before the ICC will have jurisdiction, which seeks to adhere to the requirement of admissibility under Article 17 of the ICC Statute.[73] It will still be the role of the ICC judges to determine the applicability of that declaration if a case were ever to reach the ICC. The Rome Statute indeed represents a guidance for national legislation rather than requiring the jurisdiction of an international tribunal over Malaysia if Malaysia were able and willing to prosecute its nationals should they have allegedly committed war crimes or other serious crimes. Becoming a

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[70] ICJ, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore),* Judgement, *ICJ Reports 2008*, p. 12, available at: http://www.icj-cij.org/files/case-related/130/130-20080523-JUD-01-00-EN.pdf.

[71] ICJ, "Malaysia requests an interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) – negotiations on the judgment have reached an impasse," 30 June 2017, available at: http://www.icj-cij.org/files/case-related/170/170-20170630-PRE-01-00-EN.pdf.

[72] "India etc versus US: shrimp-turtle", *World Trade Organization (WTO)*, available at: https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm; "Malaysia—Prohibition of Imports of Polyethylene and Polypropylene", *WTO*, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds1_e.htm.

[73] "Rome Statute State Signatories", *UN Treaty Collection*, available at: https://treaties.un.Org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en.

party to the Rome Statute would also not interfere with Malaysia's sovereign right to try its own nationals, but rather its capacity to do so would be enhanced.

B. Immunity of the King

Should Malaysia become party to the Rome Statute, the sovereign immunity of Malaysia's king or "Yang di-Pertuan Agong" will have to be considered because the king is constitutionally, the commander-in-chief of the military as the defender of the State. This has been the real sticking point in the recent discussions over accession. In Malaysia, the king is nominated by the nine rulers of the Council of Rulers on a rotation basis for a term of five years (Article 38[4], Federal Constitution).[74] The king is a constitutional monarch and acts in accordance with the advice of the Cabinet or of a minister acting under the authority of the Cabinet (Article 40, Federal Constitution). Article 40(1A) entrenches this further by providing that the King "shall accept and act in accordance with such advice." In certain cases, he acts specifically on the advice of the prime minister in particular on the appointment of judicial commissioners, judges and the attorney-general (Articles 122 and 145, Federal Constitution). He is the supreme head of the Federation and is immune from all proceedings except under a special court established under the Constitution (Article 32(1), Federal Constitution). With regard to possible ICC prosecutions for international crimes alleged to have been committed by the king in his personal capacity, while in office as king, he enjoys head of State immunity in relation to foreign criminal jurisdiction under Malaysian law.[75]

Until 1993, both the traditional Malay rulers and the king also enjoyed immunity from civil and criminal prosecution in Malaysian courts in their personal capacity. However, under amendments to the Federal Constitution in 1993, proceedings by or against the Yang di-Pertuan Agong or the ruler of a State in his personal capacity, are brought

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[74] "No law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers."

[75] Asad G. Kiyani, "Al-Bashir & the ICC: The Problem of Head of State Immunity", *Chinese Journal of International Law*, Vol. 12, No. 3, 2013, p. 467, available at: https://doi.org/10.1093/chinesejil/jmt035.

to a special court (Article 182[2], Federal Constitution). Under Section 183 of the Federal Constitution, the prosecutorial discretion lies with the attorney general:

> No action, *civil or criminal*, shall be instituted against the Yang di-Pertuan Agong or the Ruler of a State in respect of *anything done or omitted* to be done by him in his personal capacity *except with the consent of the Attorney General* personally. (*emphasis added*)

In *Faridah Begum v. Sultan Ahmad Shah*, the Federal Court of Malaya held that:

> [T]he new Article 182 not only has taken away the legal indemnity enjoyed by HRH from being sued, but also abolished his rights to sue in the ordinary courts. HRH's capacity to sue or be sued, cannot now be recognized by the ordinary Court. As far as the ordinary Courts under Part IX of the Constitution are concerned, they continued as before to have no jurisdiction to hear any civil case against HRH, and in addition they also cease to have jurisdiction to hear all civil cases by HRH. The jurisdiction over these matters, even if the immunity is waived, has now been conferred exclusively on this Special Court.[76]

Thus, civil and criminal legal proceedings could be instituted against the sovereign for his personal actions but only in the special court and at the discretion of the attorney-general.

As mentioned, the king is the commander-in-chief of the Armed Forces under Article 41 of the Federal Constitution, making him theoretically responsible for any war crimes, genocide or crimes against humanity committed by members of the Malaysian Armed Forces. Under Malaysian law, these commands would be given in his official capacity,

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[76] Malaysia Special Court, *Faridah Begum Bte Abdullah v. Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'Ayatuddin Al Mu'adzam Shah*, 1 MLJ 617, p. 629.

and therefore not subject to prosecution. Article 27 of the Rome Statute clearly refers to the irrelevance of official capacity in exempting a person from responsibility for international crimes, which has caused some concern in the Malaysian government. Could the king therefore be required to face the ICC in the case that Malaysian forces commit violations of IHL or ICL? One approach is that because his "commands" are given on the advice of the prime minister, who would also receive advice from the minister of defence and the chief of the Defence Forces, it can be argued that the king would not be responsible for the actions of the armed forces and therefore not subject to prosecution. Moreover, if the king were to take steps to prosecute and punish those directly responsible for the violations, he would have satisfied the requirements of the charge of superior responsibility and would not be responsible for such violations (Article 27, Rome Statute; Article 86[2] Additional Protocol I; Prosecutor v. Jean-Pierre Bemba Gombo).[77]

Additionally, a way to stave off a request to surrender a person accused of an ICC crime (including the king), is to use the principle of complementarity. Prosecutions before the ICC will only proceed if Malaysia is shown to be unable or unwilling to handle these prosecutions domestically. The first step to demonstrate Malaysia's ability to prosecute international crimes would be to criminalize the ICC crimes in the Malaysian Penal Code. Paragraph 163 of the Report of the Commonwealth Expert Group on the ICC advises that "each State will need to adopt the appropriate language for a domestic context."[78] For States that provide unlimited constitutional immunities for persons in office, a number of approaches are available. Firstly, if there is an option to override or waive these immunities, then this would suffice. Secondly, the Constitution can be amended to stipulate that the immunities cannot "impede the State's obligations under the Rome Statute."[79] Lastly, States could consider that the likelihood of their head of State committing an international crime is so remote that no amendment to the Constitution is needed. This latter approach could be the most practical approach. And while the Rome Statute does not allow for reservations, Malaysia could

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[77] ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo,* Case No. ICC-01/05-01/08, Decision (Pre-Trial Chamber II), 15 June 2009, paras. 432-433.

[78] Office of Civil and Criminal Justice Reform, above note 51, para. 163.

[79] Office of Civil and Criminal Justice Reform, above note 51, para. 166.

make a declaration that it exempts the king from prosecution for international crimes on the basis that he is in a ceremonial position.

C. The Position of the US

Some States have indicated concerns about the position of the US on the ICC.[80] The US has not become a party to the Rome Statute. In the early 2000s, it indicated a strong opposition to the Rome Statute and the ICC, even enacting legislation to ensure that the ICC could not try US nationals (American Service Members Protection Act 2002). The US entered into over 100 bilateral immunity agreements with States around the world, including in the Asian region in the early 2000s.[81] The effect of such agreements is that a State subject to such an agreement will submit a US citizen wanted by the ICC to the US rather than to the ICC. These are Article 98 Agreements. Article 98 of the Rome Statute requires States not to surrender persons to the ICC, if it would be in breach of existing international obligations under an agreement with another State. Few of these agreements have been formally executed by the Parliaments in the States that have signed them, and none have been implemented to date.[82] The US has also withdrawn its legislation on sanctions against any State that does not implement or accept such an agreement.[83]

Currently, as a non-State party to the Rome Statute, Malaysia has no obligations to surrender anyone to the ICC or to cooperate in any way with the ICC. If Malaysia were to become a party to the Rome Statute, the bilateral immunity agreement issue would not affect Malaysia. Malaysia has not signed such an agreement with the US and is able to surrender a national of the US to the ICC, if such a person were on Malaysian territory and Malaysia receives a request from the ICC. If the

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[80] "Coalition for the International Criminal Court intensifies efforts on Malaysia to ratify the Rome Statute," *The Malaysian Bar*, 11 May 2007, available at: http://www.malaysianbar.org.my/human_rights/coalition_for_the_international_criminal_court_intensifies_efforts_on_malaysia_to_ratify_the_rome_statute_.html.

[81] ASEAN States that have signed a Bilateral Immunity Agreement with the US include Thailand, Singapore, Laos, Philippines and Cambodia; "Bilateral Immunity Agreements", *Coalition for the International Criminal Court*, available at: www.iccnow.org.

[82] "Bilateral Immunity Agreements", *American NGO Coalition for the International Criminal Court*, available at: https://www.amicc.org/bilateral-immunity-agreements-1.

[83] *Ibid.*

US could demonstrate they were willing and able to prosecute the individual in Malaysia or in the US, Malaysia would only be obliged to surrender the US national back to the US according to the usual extradition laws under the terms of the Rome Statute.

One other concern the Malaysian government has raised is that the US is a permanent member of the UN Security Council which has the power to refer a situation to the ICC, even when the usual forms of nationality and territorial jurisdiction do not apply (Article 13[b], Rome Statute). The UN Security Council can also ask the ICC not to investigate a matter (Article 16, Rome Statute). The Security Council has referred two cases to the ICC so far: Darfur, Sudan[84] and Libya.[85]The concern of Malaysia and similar-minded States is that although the US (and indeed Russia and China as non-States party to the Rome Statute) does not accept the jurisdiction of the ICC, it can refer other States to the ICC through the Security Council. This is seen as a hypocritical position.

Nonetheless, this ability of the UN Security Council to refer situations to the ICC is part of its mandate under the UN Charter to respond to threats to peace and security. Resolutions adopted under Chapter VII of the UN Charter in response to such threats are binding on all member States (Article 25, UN Charter). The Security Council has formed the two *ad hoc* tribunals for the former Yugoslavia and for Rwanda[86] in response to "widespread and flagrant violations" of IHL.[87] It has been suggested that in fact the Security Council is "the obvious body for ensuring compliance with fundamental humanitarian rules during extreme situations."[88]

If any decisions of the Security Council are contradictory to other international obligations that a State may owe, the decisions of the Security Council will prevail (Article 103, UN Charter). Therefore, the US as well as other non-States party to the Rome Statute, in referring a situation to the ICC, is in fact recognizing and giving legitimacy to the ICC, however much they may generally not wish to cooperate with the

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[84] UNSC Res. 1593, 31 March 2005.

[85] UNSC Res. 1970, 26 February 2011.

[86] UNSC Res. 827, 25 May 1993; UNSC Res. 955, 8 November 1994.

[87] UNSC Res. 827, above note 87.

[88] Aurélio Viotti, "In Search of Symbiosis: The Security Council in the Humanitarian Domain," *International Review of the Red Cross*, Vol. 89, No. 865, 2007, p. 143.

ICC or not have any obligation to do so under existing treaty law. Malaysia and other States have relied on the Security Council resolutions under Chapter VII for peacekeeping mandates and other responses to threats to international peace and security, and it is unlikely that Malaysia or the US would object to a decision which would ensure the upholding of IHL and act as a peaceful response to a threat to peace and security. Moreover, Malaysia has been a member of the Security Council four times[89] and has the opportunity to influence such decisions both as a member and as an observer, whether or not it is a party to the Rome Statute.

Why Should Malaysia Become a Party to the Rome Statute?

One of the core principles of the Rome Statute is to achieve accountability for the most serious violations of international law and end impunity for such crimes.[90] States have also indicated that they do not want to become safe havens for war criminals (another form of ending impunity)[91] and that they want to prevent violations of IHL (a form of deterrence).[92]

Ensuring accountability for violations of IHL and ending impunity for those responsible, whether at the domestic or international level, are goals which victims of current conflicts adhere to,[93] as well as

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[89] "Strengthening the UN Peacekeeping Operations", above note 23.

[90] "Statement by EU High Representative Catherine Ashton on the ratification of the Rome Statute of the ICC by Côte d'Ivoire," *European Council*, February 2013, available at: https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/135585.pdf; "Accession of Tunisia to the Rome Statute of the ICC – Statement by H.E. Ambassador Christian Wenaweser, President of the Assembly of States Parties to the Rome Statute of the International Criminal Court," *Coalition for the International Criminal Court*, 24 June 2011, available at: http://iccnow.org/documents/PASP-TUN-24062011-ENG.pdf.

[91] Kelisiana Thynne, "The Universality of IHL – Surmounting the Last Bastion of the Pacific", *Victoria University of Wellington Law Review*, Vol. 41, No. 2, 2010, p. 135.

[92] Chris Jenks and Guido Acquaviva, "Debate: The role of international criminal justice in fostering compliance with international humanitarian law," *International Review of the Red Cross*, Vol. 96, 2014, p. 788.

[93] Mark Lattimer, Shabnam Mojtahedi and Lee Anna Tucker, *A Step towards Justice: Current accountability options for crimes under international law committed in Syria*, CEASEFIRE Centre for Civilian Rights, Syria Justice and Accountability Centre, 2015, pp. 9-10; Annika Jones, "Seeking International Criminal Justice in Syria", *US Naval War College Journal of International Law Studies,* Vol. 89, p. 803; Stanley Ibe, "Addressing Impunity for

governments coming out of conflicts.[94] As one commentator in relation to the conflict in Sri Lanka has said, "making the perpetrators accountable for IHL and IHRL violations is vital for many reasons: to ensure such blatant violations are not repeated, to prevent collective retribution, … for punishment as well as to deter future criminals."[95] The UN Panel of Experts on Accountability in Sri Lanka has suggested: "achieving accountability for crimes under international law involves the right to truth, the right to justice and the right to reparations."[96] They went on to say that "Accountability for serious violations of international humanitarian or human rights law is not a matter of choice or policy; it is a duty under domestic and international law.[97] This statement accords with the general obligation under the Geneva Conventions to investigate and prosecute those who have committed serious violations of IHL.

The Preamble to the Rome Statute states:

> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes

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Serious Crimes: The Imperative for Domesticating the Rome Statute of the ICC in Nigeria," *African Journal of International Criminal Justice*, Vol. 1, Issue 2, 2016, p. 190.

[94] Suzannah Linton, "New approaches to international justice in Cambodia and East Timor", *International Review of the Red Cross*, Vol. 84, No. 845, 2002, p. 93; Jamie A. Williamson, "An overview of the international criminal jurisdictions operating in Africa", *International Review of the Red Cross,* Vol. 88, No. 861, 2006, p. 131.

[95] Wasantha Seneviratne, "Challenges for Ensuring Accountability for International Humanitarian Law and Human Rights Law Violations in Post-War Situations: A Critical Appraisal with Reference to Sri Lanka", *Sri Lanka Journal of International Law,* Vol. 2, No. 2, 2010, p. 165.

[96] "Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka," *UN*, 31 March 2011, p. ii, available at: http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.

[97] *Ibid*.

Broomhall, has said that greater accountability can lead to a greater affirmation of the "dignity of the victims", "social healing" and "historical rectification" in the context of the ICC.[98] Cassese has said that the purpose of international trials is "not so much retribution as stigmatization of deviant behaviour."[99]

This stigmatization of behaviour does not necessarily sit well with a State, such as Malaysia, which resolves international concerns through consensus and is conscious not to "name and shame". However, the ICC's jurisdiction is on individuals who have committed crimes, and the ICC does not consider the attribution of actions to States, except to the extent that this would elevate a non-international armed conflict into an international armed conflict through the "effective control" test.[100] At the Preparatory Commission for the Rome Statute, it was said that an international court was necessary to avoid impunity, and "that this was so, notwithstanding the awareness that the Court (ICC) should intervene only in those cases where the solution would not be satisfactory at the domestic level."[101]

The legal theorist, Rawls, has argued that individuals will establish just institutions in the interest of creating justice.[102] Indeed, Malaysia has recognised that international justice must be served by international investigations and prosecutions, where national alternatives do not exist. It is worth noting that Malaysia's legal system is based on common law and therefore on the Rawlsian theory of justice against individuals committing breaches of the law. While Malaysia is currently not directly involved in an armed conflict, it would be in Malaysia's interests to have legislation in place, as well as an international framework under which to hold nationals accountable for war crimes and other serious crimes under the jurisdiction of the ICC, which they may have

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[98] Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford University Press, Oxford, 2003, p. 55.

[99] Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2008, p. 440.

[100] Shane Darcy, "Assistance, direction and control: Untangling international judicial opinion on individual and State responsibility for war crimes by non-State actors," *International Review of the Red Cross*, Vol. 96, No. 893, 2014, p. 260.

[101] O. Solera, above note 58, p. 150.

[102] John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, 1971, p. 474.

committed overseas. Becoming a party to the Rome Statute can assist in this process.

Conclusion: Next Steps

As mentioned above, Malaysia's legislation covers international crimes such as grave breaches under the Geneva Conventions of 1949. However, other breaches of the Geneva Conventions, violations of the laws and customs of war in international and non-international armed conflicts, crimes against humanity and genocide are not criminalized under Malaysian Law. Nevertheless, Malaysia has adopted the position that States remain obliged "to cooperate with relevant international courts and tribunals, in ensuring accountability for war crimes and other serious violations of IHL, in accordance with their international commitments."[103] In this regard, Malaysia has made several statements in support of accountability for international crimes, and despite recent setbacks, it has said that it will become party to the Rome Statute in due course. Possible stumbling blocks related to sovereign immunity, State sovereignty and the position of the US have been addressed in this article. The conclusions reached are that these are not impediments to Malaysia eventually becoming a party to the Rome Statute. Moreover, there are strong arguments that Malaysia's adherence to the rule of law and justice would lead naturally to Malaysia becoming a party to the Rome Statute.

In relation to sovereign immunity, the challenges can be mitigated by engaging the traditional Malay rulers and the king in an open and transparent manner. Opposition to ratification by Malaysian royalty may be stemmed if juxtaposed against Malaysia's strong and vocal statements in relation to the situation of Palestine[104] (Statement by Malaysia to the

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[103] "Statement by Deputy Permanent Representative Of Malaysia To The United Nations, Madam Siti Hajjar Adnin , UNSC Draft Resolution On Healthcare And Armed Conflict, New York," *Malaysia – United Nations Security Council*, 3 May 2016, available at: http://malaysiaunsc.kln.gov.my/index.php/news-documents/malaysiastatements/item/408-3-may-2016-statement-by-mdm-siti-hajjar-adnin-deputy-permanent-representative-of-malaysia-to-the-united-nations-unsc-draft-resolution-on-healthcare-and-armed-conflict-new-york.

[104] "Statement by Permanent Representative of Malaysia To The UN, H.E. Ambassador Ramlan Ibrahim, UNSC Meeting On Situation in the Middle East (Including The Palestinian Question)," *Malaysia – United Nations Security Council*, 19 October 2016, available at: http://malaysiaunsc.kln.gov.my/index.php/news-documents/malaysia

UN on the Situation in the Middle East, 2016), and the downing of the Malaysian Airlines aircraft in the Ukraine.[105] Additionally, a number of approaches used by other States to address the issue of sovereign immunity, and as proposed by the Commonwealth Secretariat, may be employed.

As a State which upholds the rule of law and seeks to end impunity for serious crimes, Malaysia has been vocal on international matters through its engagement in the UN Security Council and in UN peacekeeping missions. Malaysia's support for the ICC and the implementation of the provisions of the Rome Statute into domestic law would enhance its existing legal framework and international legal policy, rather than diminish it.

Ultimately, the decision on whether to become a party to the Rome Statute is a question of policy. However, given the current political fallout attached to accession, a mid-point step could be the criminalization of international crimes in Malaysian law. As this article has outlined, Malaysia already has certain war crimes criminalized in its national laws through the GCA 1962. However, to cover the range of the Rome Statute, Malaysia would need to implement the criminal provisions of the Geneva Conventions of 1949, the First Additional Protocol, the crime of genocide and crimes against humanity, into Malaysian penal law. This would leave the policy question of whether Malaysia becomes a party to the Rome Statute to politicians, while lawmakers, enforcement authorities, the judiciary and related government machinery can put in place those procedures and regulations necessary to enable Malaysia to prosecute international crimes domestically.

In 2009 during their Universal Period Review hearing, the Malaysian government said that:

> Malaysia has undertaken a detailed study and held consultations to study the legal implications arising from the provisions of the Rome Statute. Despite several

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statements/item/527-19-october-2016-statement-by-he-amb-ramlan-ibrahim-perm-rep-of-malaysia-to-the-un-unsc-meeting-on-situation-in-the-middle-east-including-the-palestinian-question-new-york.

[105] Australian Associated Press, above note 8.

> concerns, Malaysia is fully committed to the principles and the establishment of the ICC and their integrity.[106]

However, the issue was not raised in the next UPR process in 2013, despite being exhorted to become a party to the Rome Statute by many States.[107]

The government has demonstrated that it is willing to become a party to the Rome Statute and has taken more direct steps than any previous government in Malaysia. This article attempts to reconcile various contradicting positions on ICL for Malaysia. Implementation of the crimes under the Rome Statute and accession itself, should not be difficult. Like other States, Malaysia can become party to the Rome Statute without compromising its sovereignty; as this article has shown, there should indeed be no concerns in this regard. Existing Malaysian criminal law can begin by including the crimes of the Rome Statute in Malaysian law, thus giving Malaysian courts, judges and lawyers the ability to prosecute international crimes. This may encourage policy makers to eventually take the momentous step of becoming party to the Rome Statute.

[106] UN Doc. A/HRC/11/30, above note 10.

[107] Report of the Working Group on the Universal Periodic Review: Malaysia, Human Rights Council Twenty-fifth Session Agenda item 6, UN Doc. A/HRC/25/10, 4 December 2013.

Gunshot Wound Reporting Legislation in the Asia-Pacific Region: A Need to Ensure Better Consistency with IHL

Kelisiana Thynne and Sahar Haroon[*]

ABSTRACT

This article builds upon a report compiled by the Swiss Institute of Comparative Law entitled, "Legal Opinion on the Obligation of Healthcare Professionals to Report Gunshot Wounds" covering 22 countries. The report drew three main conclusions: (1) that there is a universal obligation of doctor-patient confidentiality; (2) that most countries either incorporate a duty of healthcare professionals to report gunshot wounds or have more general reporting obligations that might include the reporting of gunshot wounds; and (3) that very few States have specific legislation protecting healthcare professionals and access to healthcare. Should mandatory gunshot wound reporting legislation require reporting prior to treatment it could impede access to healthcare for gunshot wound victims and lead to unnecessary suffering or death. This article shows that under IHL information sharing is indeed not prohibited and, in many cases, may be necessary. It argues therefore that while legislation affecting doctor-patient confidentiality is not consistent with medical ethics and arguably contrary to IHL in many cases it would be compatible with IHL to have appropriately nuanced reporting legislation that also protects confidentiality. Furthermore, this article draws some conclusions as to how legislation can operate to not impede access to healthcare. This article considers three States in the Asia Pacific region, Pakistan, Papua New Guinea and the Philippines and assesses how their laws on medical ethics and gunshot wound reporting have been or should be adapted to adequately reflect these IHL principles. Broadly speaking, States should revisit their reporting laws to ensure consistency with IHL, and while such contextualized legislation should be adopted by all States, it should ensure patient confidentiality and afford better clarity to healthcare professionals on when and how they are required to report.

Keywords: Asia-Pacific, international humanitarian law, gunshot wound reporting.

* Legal advisers, International Committee of the Red Cross (ICRC). The views expressed in this article do not necessarily reflect the position of the ICRC.

Gunshot wounds have been part of modern conflict and peacetime injuries for several hundred years. Eleven years before Henry Dunant wrote his treatise, A Memory of Solferino, which instigated the development of modern international humanitarian law (IHL), in 1848, The Lancet had already published clinical notes on gunshot wounds and how to treat them.[1] Indeed, the first Geneva Convention of 1864 is dedicated to the protection of those injured as a result of war and those who treat them. Studies have found that while explosive weapons cause the most damage in modern conflicts, in the early stages of conflict, gunshot wounds are most prevalent.[2]

Given the number of gunshot wounds around the world, it is perhaps not surprising that governments would like to document and monitor such occurrences as part of gun violence prevention programs. Gunshot wounds can also be indicative of criminal or conflict activity, and it is necessary for governments to be able to deal with such problems. Under IHL, sick or wounded persons should receive healthcare, healthcare professionals[3] should be protected when giving that care, and patient confidentiality should be respected. Reporting of wounds may be done but only after treatment has been given, and consistently with IHL and medical ethics. Mandatory gunshot wound reporting legislation could otherwise impede access to healthcare for gunshot wound victims and lead to unnecessary suffering or death.[4] Mandatory reporting legislation,

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1 "Clinical Lectures on Gunshot Wounds", *The Lancet,* Vol. 52, No. 1308, 23 September 1848, available at: https://doi.org/10.1016/S0140-6736(02)70840-4 (all internet sources accessed 9 July 2020).

2 IJ Lewin, "Contingency: the likely spectrum of injuries based upon a review of 3 recent undeveloped theatres of operations; the Falklands," *Journal of the Royal Naval Medical Services,* Vol. 100, No. 1, 2014; Jowan G. Penn-Barwell, Kate V. Brown and C. Anton Fries, "High velocity gunshot injuries to the extremities: management on and off the battlefield," *Current Reviews in Musculoskeletal Medicine*, Vol. 8(3), 2015. A global study estimated that 251,000 people died globally from firearm injuries in 2016: Mohsen Naghavi et al., "Global Mortality From Firearms, 1990-2016", *Journal of the American Medical Association*, Vol. 320, No. 8, available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6143020/.

3 The term encompasses "not only … doctors, but also … any other persons professionally carrying out medical activities, such as nurses, midwives, pharmacists and medical students who have not yet qualified." Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 4686.

4 *See* e.g., *ibid*. para. 4683.

where it is inconsistent with medical ethics (whether treatment is given first before reporting or not), may be similarly inconsistent with existing domestic implementation of the IHL obligations that all governments have.[5] However, as this article will show, under IHL, information sharing is indeed not prohibited and in many cases may be necessary. It argues therefore that while some mandatory reporting legislation is not consistent with medical ethics and arguably contrary to IHL, in many cases it would be consistent with IHL to have appropriately nuanced reporting legislation.

In 2018, the International Committee of the Red Cross (ICRC) commissioned the Swiss Institute of Comparative Law (mandated by the Government of Switzerland) to draft a report on the obligation of healthcare professionals to report gunshot wounds (the report).[6] Finalized in 2019, the report did not focus solely on situations of conflict or on IHL obligations which is the ICRC's usual remit, but rather presented a global overview of domestic laws in regard to when and where healthcare professionals have to report gunshot wound victims to government authorities. The report also considers what medical ethical responsibilities affect adherence to such laws, and how they modify such laws.

The report is excellent and deserves greater study by all those interested in how legislation is formulated on reporting, medical ethics and protection of healthcare under IHL. However, the report does not answer some key questions which require further reflection, particularly in relation to IHL. One of the purposes of this article is to highlight the relevance of this Report for the Asia-Pacific region, while attempting to highlight contextual issues that require further deliberation.

Between the years 2006 and 2010, States in Asia and Oceania were reported to be the largest importers of major conventional weapons.[7] As many as 610,000 unregistered or "loose" firearms are said to be in

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[5] The Geneva Conventions have been universally ratified.

[6] Swiss Institute of Comparative Law, *Legal Opinion on the Obligation of Healthcare Professionals to Report Gunshot Wounds covering Australia, China, Colombia, Egypt, El Salvador, France, Lebanon, Mexico, Nepal, Niger, Nigeria, Pakistan, Papua New Guinea, Philippines, Russia, South Africa, South Sudan, Spain, Tunisia, Ukraine, United Kingdom*, 30 June 2019, available at: https://www.isdc.ch/media/1834/17-120-final-nov19.pdf (hereinafter "The Report").

[7] Melissa Gillis, *Disarmament: A Basic Guide*, 3rd ed., United Nations, New York, 2012, p. 58.

private hands in the Philippines.[8] The estimated total number of guns (both licit and illicit) held by civilians in Papua New Guinea in 2017 was 79,000.[9] In Pakistan in 2017, the number is 43,917,000.[10] The United Nations (UN) Register on Conventional Weapons recorded that Pakistan had imported 10,103 revolvers and self-loading pistols in 2017.[11] Papua New Guinea imported 103 assault rifles for the same year.[12] In 2018, the Philippines imported 85,126 revolvers and self-loading pistols.[13] Pakistan, the Philippines and Papua New Guinea are three States in the Asia-Pacific region which the Report presented.

All three States either suffer from armed conflict and/or situations of violence where gunshot wounds are prevalent. The article highlights the IHL implementation of each of these States as well as their legislative frameworks, and gives recommendations for further study and proposals for new laws in line with IHL. The article spends the most time on Pakistan and then presents Papua New Guinea and the Philippines as comparative examples. The reason for this is that Pakistan, as a federal system, is the most complex State legally speaking and has done the most work (than almost all other States) to amend its laws on mandatory reporting of gunshot wounds.

As the example of Pakistan shows, States in the Asia-Pacific region are considering amending their laws on healthcare protection, specifically as regards access to healthcare and gunshot wound reporting. With sophisticated laws now in place in Pakistan, States in the region may turn to this country for guidance. This article demonstrates some additional considerations that can guide Asia-Pacific States in the legislative process. It draws some conclusions as to how legislation can

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[8] Matt Schroeder, "Illicit Small Arms and Light Weapons in the Philippines" in The Graduate Institute of International and Development Studies, *Small Arms Survey 2013: Everyday Dangers*, Cambridge University Press and the Small Arms Survey, Cambridge, 2013, p. 302.

[9] Aaron Karp, "Civilian Firearms Holdings, 2017: Estimating Global Civilian-Held Firearms Numbers," Small Arms Survey and the Graduate Institute of International and Development Studies, Geneva, 2018.

[10] *Ibid*.

[11] UN Register on Conventional Weapons, available at: http://www.un.org/disarmament/convarms/Register/.

[12] *Ibid*.

[13] *Ibid*.

operate to not impede access to healthcare. The example of the Philippines is useful to demonstrate the high level of IHL adherence and implementation which can be achieved in a country in conflict, in contrast with the few statistics and laws around gunshot wound reporting. Similarly, the Papua New Guinea example demonstrates that while assumptions can be made about gunshot wounds, without relevant laws, statistics cannot be collected, and relevant legal and policy decisions become more complex. It is hoped that the three examples provided also cover a wide range of legal and administrative systems which can be found in the Asia-Pacific region and can therefore be useful for other States seeking to learn from their neighbours' experiences (or the authors' recommendations for those States).

The report has demonstrated that there are a range of legislative, administrative and ethical practices around the world in relation to gunshot wound reporting and the protection of healthcare professionals. Going beyond the report, this article briefly outlines the IHL and international human rights law aspects of reporting, addresses the three State context, considers what the next steps are to ensure better access to healthcare for gunshot victims in these contexts and, by extrapolation, in other contexts around the world, and gives recommendations to ensure that there is more consistency with IHL obligations in relation to disclosure of information and protection of healthcare.

The Obligation to Protect Access to Healthcare and Protect Medical Professionals under International Law

The report looked at situations in armed conflict and outside of armed conflict (peace or situations of violence which have not reached the threshold of an armed conflict). As will be discussed in more detail below, the report did not attempt to distinguish between these different contexts and circumstances in their examination of the law and did not assess the laws in each State against the international legal obligations of the State. However, some gunshot wound reporting legislation (or legislation which affects doctor-patient confidentiality or requires reporting of otherwise criminal activity) might be in contradiction to the IHL and international human rights obligations of the relevant State if not appropriately nuanced, as will be explained below.

If the gunshot wound occurs in a context that has not reached the threshold of an armed conflict, the legal framework will be quite different; a law enforcement paradigm, not an IHL/conflict paradigm, will apply on the understanding that "human rights law regulates the resort to force by State authorities in order to maintain or restore public security, law and order."[14] Moreover, the State will have greater power to enforce its own laws in which ethical considerations may play a role depending on the applicable constitutional and legal framework (as discussed in the examples below). It can be that gunshot wounds occur in a country that is in conflict, but the wound and gun activity is in fact unrelated to the conflict—a law enforcement paradigm will apply here too. This might raise other legal and ethical considerations and concerns. These are the types of situations that our three State case studies face in gunshot wound reporting.

Armed Conflict and Protection of Healthcare and Access to Healthcare: IHL

An armed conflict exists where "there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups."[15] "A resort to armed force between States" denotes an international armed conflict (also see Article 3 common to the four Geneva Conventions of 1949).[16] "[P]rotracted armed violence between governmental authorities and organised armed groups or between such groups" denotes a non-

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[14] Gloria Gaggioli (ed.), "Expert Meeting Report: The Use of Force in Armed Conflicts Interplay between the Conduct of Hostilities and Law Enforcement Paradigms," ICRC, Geneva, 2013, p. 7, available at: https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4171.pdf.

[15] International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadic*, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

[16] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (Geneva Conventions or GC I, GC II, GC III, GC IV).

international armed conflict where there must be organized armed groups and a certain intensity to the fighting. The Philippines for example has a number of non-international armed conflicts in its territory.

Geneva Convention I (GC I) (which, like all four Geneva Conventions, is universally ratified) provides for a wide range of protection of healthcare professionals, facilities, transportation and access to healthcare by wounded and sick soldiers in an international armed conflict. Geneva Conventions II-IV (GC II, GC III, GC IV) likewise provide specific protection of access to healthcare in international armed conflict for the wounded, sick and shipwrecked at sea (and hospital ships), detainees and civilians in the hands of the enemy.

In an international armed conflict, under the principle of *lex specialis*, IHL will override human rights law.[17] If the domestic law is in contradiction to IHL and the gunshot wound occurs in relation to hostilities during armed conflict, then depending on the State's international obligations or constitutional law, IHL obligations may override the domestic law. In a non-international armed conflict, there are two legal systems that continue in play—domestic law and IHL—the State is potentially fighting a non-State armed group with conduct of hostilities rules under IHL and yet also enforcing its domestic law against the fighters.[18] Minimum standards of humanity should continue to apply and in particular the treatment of the wounded and sick, including gunshot wound victims.

Protection of the Wounded and Sick: Gunshot Wound Victims

Under Article 12 of GC I, the wounded and sick enjoy a general right to be:

- respected (not to be subject to, for instance, being killed or ill-treated);[19]

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[17] International Court of Justice (ICJ), *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, 9 July 2004, p. 136.

[18] *See* e.g., Jan Roemer, *Killing in a gray area between humanitarian law and human rights: how can the national police of Colombia overcome the uncertainty of which branch of international law to apply?* Springer, Berlin, 2009, p. 37.

[19] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., 2016, paras. 1353-1359 (hereinafter "2016 Commentary to GCI").

- protected (to be assisted, including protection against third parties);[20] and
- cared for (similarly subject to what is possible in terms of security conditions and capacities, but with the least possible delay).[21]

For each of these categories, States and non-States Parties to the conflict and healthcare personnel have corresponding obligations and responsibilities. Of note is the duty to provide impartial healthcare to all persons based on their injury or illness, not their membership of a particular armed group—the wounded and sick of the adverse party receive the same treatment and care as members of a party's own armed forces.[22]

"Wounded and sick" means persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, need medical assistance or care and who refrain from any act of hostility. These terms also cover other persons who may need immediate medical assistance or care and who do not directly participate in hostilities.[23] There is no threshold of severity of medical condition.[24]

Common Article 3 (CA 3) to the Geneva Conventions and Additional Protocol II (AP II) to the Geneva Conventions of 1977 (where a State has ratified it and the additional classification element of control of territory by a non-State armed group is satisfied) apply to non-international armed conflicts. CA 3 provides for non-discrimination and impartiality in the treatment of the wounded and sick, and this would of course include gunshot wound victims.

Article 7 of AP II provides for applicable standards of care in non-international armed conflicts as in international armed conflicts under Article 12 of GC I. In an armed conflict of an international or non-international character, all gunshot wound victims must be treated with

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[20] 2016 Commentary to GCI, above note 19, paras. 1360-1362.

[21] 2016 Commentary to GCI, above note 19, para. 1380.

[22] 2016 Commentary to GCI, above note 19, para. 1392.

[23] Geneva Conventions, above note 16, Common Art. 3(1).

[24] Protocol Additional (I) to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 8 (hereinafter "API").

respect, protected and provided with care, with no distinction as to how they received the wound and indeed without delay. This is consistent with Article 12(3) which provides that only urgent medical reasons can justify prioritization of care. Reporting obligations before medical treatment are excluded, but not after treatment has been given.[25] Care should be given regardless of the classification of the conflict or the nexus to the conflict—that is, whether the gunshot wound victim received the injury in the armed conflict or outside it, for example, during criminal activity).

Protection of Healthcare Professionals

Healthcare professionals exclusively engaged in the search for, collection, transport, or treatment of the wounded and sick members of the armed forces, prevention of disease, and staff exclusively engaged in the administration of medical units and establishments are entitled to respect and protection under IHL (GC I, Article 24; GC IV, Article 20; Additional Protocol I [AP I], Article 15). Reprisals against healthcare workers for any acts they undertake in their duties are prohibited (AP I, Article 20). States should ensure that healthcare professionals are protected under the law and respected for decisions they make in their professional duties. Such decisions should include whether to treat patients before reporting, and to abide by medical ethics (in so doing they would likewise be acting consistently with IHL) as well as whether to report details of the wounds to authorities as required under legislation.

Medical Ethics

Healthcare professionals are also asked not to be compelled to carry out tasks incompatible with their humanitarian mission (AP II, Article 9). Under IHL, healthcare professionals shall not be punished under any circumstances for carrying out medical activities compatible with medical ethics, regardless of the persons benefiting therefrom. They should also not be compelled to carry out activities which are contrary to medical ethics (AP I, Article 16; ICRC Customary law study Rule 26).[26] Key

[25] 2016 Commentary to GCI, above note 19, para. 1425.

[26] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1, Cambridge University Press, Cambridge, 2005; ICRC's

principles of medical ethics are beneficence, justice and autonomy,[27] which in turn require treatment of all with no discrimination, doing no harm, ensuring that the needs and views of the patient are respected, and requiring due process. For example, as a principle of IHL consistent with the principle of beneficence, they shall specifically not be compelled to give anyone from any belligerent party information concerning the wounded and sick under their care if such information would be harmful to these wounded and sick or their families (AP I, Article 16).

Therefore, during an armed conflict, healthcare professionals should pay particular attention to their medical ethics and not breach patient confidentiality if patients present with gunshot wounds. In particular, they should not give information about such patients if the patients will be subjected to punishment or ill-treatment. In the debates around AP II, and the specific protection of medical ethics, it was noted:

> If there is any doubt regarding a doctor's obligations towards the authorities, many of the wounded would risk suffering and dying, rather than risk being denounced. An obligation to systematically reveal the identity of the wounded and sick would divest the principle of the neutrality of medical activities of all meaning.[28]

Nonetheless, this does not mean that reporting cannot occur. Again, it was felt during the debates on AP II that "[i]n ethical terms, the rule against denunciation does not mean that information may never be given; the doctor has a certain measure of freedom of action to follow his own conscience and judgment."[29] Under the ethical principle of justice, due process is supposed to be followed, meaning that if the law requires reporting, it should be done, as long as it is consistent with the other medical ethical principles, and in the case of an armed conflict, with IHL. Therefore, it was precisely accepted under AP II that healthcare

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Customary Law Database, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.

[27] Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 4th ed., Oxford University Press, Oxford, 1994.

[28] Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 3, para. 4700.

[29] Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 3, para. 4697.

professionals should inform about certain activities and findings during their work in an armed conflict consistent with medical ethics.

Situations of Violence Below the Threshold of an Armed Conflict and Protection of Healthcare and Access to Healthcare: Human Rights and Law Enforcement

In situations that have not reached the intensity required for a non-international armed conflict and lack circumstances involving organized armed groups, such as riots, internal disturbances and so on (see AP II, Article 1[2]), or without armed confrontation between two or more States resulting in an international armed conflict, IHL does not apply. Thus, the provisions listed above do not apply. Domestic law is applicable as well as human rights law (which is certainly also applicable during times of armed conflict in conjunction with IHL). The report addressed domestic law applicable to the reporting of gunshot wounds in predominantly (but not all) situations of peace or violence that did not amount to an armed conflict. A law enforcement paradigm operates in situations of violence, such as in Pakistan and Papua New Guinea for the most part (as noted above, in the Philippines there are several armed conflicts where IHL would apply, and yet a law enforcement paradigm might also operate in some parts of the Philippines rather than IHL). State authorities and police have their usual power to enforce national laws. The use of force is constrained, but so can human rights be. These laws are discussed briefly below.[30]

International human rights law provides several principles relevant to the protection of gunshot wound victims, the protection of healthcare professionals, and the protection of confidentiality. The International Covenant on Economic, Social and Cultural Rights (ICESCR)[31] in Article 12 provides that States must provide the highest possible attainable level of healthcare in their territory. The UN

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[30] For an overview of "other situations of violence" in relation to healthcare laws, *see* Eve Massingham and Kelisiana Thynne, "Promoting Access to Healthcare in 'Other Situations of Violence' Time to Reignite the Debate on International Regulation," *Journal of International Humanitarian Legal Studies*, Vol. 5, No. 1, 2014.

[31] International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, (entered into force 3 January 1976) (hereinafter "ICESR").

Committee on Economic and Social Rights has said that, read in relation to the principle of non-discrimination:

> The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote. The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.[32]

The obligation to respect requires respect for medical ethics in the promotion of health, and the UN Committee has particularly noted that the duty to protect means ensuring that healthcare professionals meet appropriate medical ethical standards.[33] As Peel has said:

> Human rights and medical ethics are parallel mechanisms, the former working at the sociopolitical level and the latter more at the level of the doctor-patient relationship. Human rights place a duty on the state and on healthcare providers to comply with minimum standards. Medical ethics place a duty on individual doctors to comply with parallel standards. Human rights and medical ethics are complementary, and use of the two

[32] Committee on Economic, Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/2000/4, 11 August 2000, para. 33 (hereinafter "General Comment No. 14").

[33] General Comment No. 14, above note 32, para. 35.

> together maximizes the protection available to the vulnerable patient.[34]

Therefore, healthcare professionals should be allowed to treat gunshot wound victims immediately without discrimination and without needing to report beforehand. This would enable them to comply with both the State-enforced human rights standards of respect and protection. The principles under human rights of fulfilling the full standards of health and the medical ethical principle of justice, however, do not mean that healthcare professionals cannot report the nature of the injury to ensure good record keeping and statistics. Indeed, it might be necessary under both systems to do so.

The right to privacy (International Covenant on Civil and Political Rights, Article 17) similarly would prevent release of confidential information, but it is constrained by the wording "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy." It could be argued that reporting of certain information about gunshot wounds would not be arbitrary (certainly it is not unlawful as it mandated under laws that the report had considered). Thus, in times of non-conflict, even when the situation amounts to violence, human rights might and should nuance the application of laws and influence amendments to those laws.

The Report: A Summary

Looking solely from a legal perspective, while slightly touching on some issues of medical ethics, the report addressed the following questions paraphrased below:[35]

1. What is the general framework for confidentiality/ duties of disclosure of healthcare professionals towards State authorities?
2. Is there a duty of healthcare professionals to disclose gunshot wounds of patients to authorities, and if so, under what conditions?

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[34] Michael Peel, "Human rights and medical ethics", *Journal of the Royal Society of Medicine*, Vol. 98, No. 4, 2005, p. 173.

[35] The Report, above note 6, pp. 8-9.

i. If so, when and how should the reporting take place?
ii. What is the scope of disclosure: what information must be revealed?
iii. For what purpose (criminal prosecution, statistics, etc.) and to whom (police, security forces, administrative bodies, others) must the information be reported?
iv. What are the consequences of non-compliance with duties of disclosure of gunshot wounds?

3. Is there specific legislation protecting the provision of healthcare in line with ethical principles of healthcare? If so, does domestic legislation provide any guidance on how to resolve the potential tension between protecting medical ethics and providing for duties of disclosure of gunshot wounds of patients?

As the authors note, the purpose of the Report's conclusions and analysis:

> is to provide an outline of certain tendencies and types of approach taken to the issues of confidentiality and disclosure, in general, as well as to the conditions and modalities of the duty to report gunshot wounds, in particular, as well as highlighting interesting examples where provided by the authors of the national reports.[36]

The report did not have the capacity to address issues of global legal norms of protection of access to healthcare around the world, addressing as it did only twenty-two States. The States were chosen to cover different continents and legal traditions, as well as representing a standard for other States in their national legislation, or those experiencing armed conflict or situations of violence where ICRC had a particular interest in exploring the effects of national legislation on access to healthcare and on medical ethics.

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[36] The Report, above note 6, p. 206.

Although the report concludes that there are few similarities between the legislation in each country on mandatory reporting,[37] three broad areas of conclusion could be reached in line with the original questions asked. This section addresses the three conclusions of the report and then identifies some further questions and avenues that need exploring beyond the report. The following sections consider how some of these avenues have already been explored particularly in the relevant case studies presented, or what still needs to be done.

Conclusion 1: General Legal Framework on Disclosure by Healthcare Professionals to State Authorities

The one concrete conclusion the report drew was that there is a universal obligation of doctor-patient confidentiality.[38] This duty has existed since the Hippocratic Oath, now contained in the Geneva Declaration.[39] All States covered in the report have such a duty protected in different forms—legislation[40] or ethically,[41] or implicitly in the right to privacy.[42] The principle of confidentiality is not absolute in any situation. However, it can be breached if there is a legal obligation to disclose information[43] or if there is evidence of criminality in some cases.[44] In some States there is an inherent contradiction between a constitutional duty to maintain confidentiality and the legal obligation to report criminal activity, of which gunshot wounds might be evidence. In other cases, there is no contradiction, as the duty to disclose information to State authorities is explicitly excluded from the duty of confidentiality.[45]

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[37] *Ibid*.

[38] *Ibid*.

[39] World Medical Association, "Declaration of Geneva", 1947, available at: https://www.wma.net/what-we-do/medical-ethics/declaration-of-geneva/.

[40] For the purposes of this article, this includes the Philippines and Papua New Guinea.

[41] For the purposes of this article, this includes Pakistan.

[42] The Report, above note 6, pp. 207-8. For example, in Papua New Guinea.

[43] This is the case in the Philippines and Pakistan, for example.

[44] The Report, above note 6, p. 207.

[45] The Report, above note 6, p. 208.

Conclusion 2: Duty to Report Gunshot Wounds

The report found that "all but a few countries (i) provide for a duty of healthcare professionals to report gunshot wounds, or (ii) have more general reporting obligations that might include the reporting of gunshot wounds."[46] Papua New Guinea is one of only four States covered where there is no duty on healthcare professionals to report gunshot wounds or any other information more generally, but there are indications that such reporting may happen in practice in any case.[47] Indeed, in Papua New Guinea, healthcare professionals can make an exception to the duty of confidentiality "where non-disclosure may result in a danger to society" under medical guidelines.[48]

More common is the obligation under law to report gunshot wounds to authorities. Although in most cases, there is no explicit reference to gunshot wounds.[49] In many cases the requirement for reporting arises on suspicion that a crime has been committed. As the report authors point out, this is a subjective test requiring that healthcare professionals put themselves in the minds of police and lawyers and make an assumption as to what has happened to incur a gunshot wound. In many cases, it is opined, professionals report out of caution.[50]

How and when healthcare professionals do report differ among States. There are few laws which set deadlines for reporting, meaning that the healthcare professional could treat the patient and then report the injury. No State makes "reporting as a precondition to the emergency treatment of the patient."[51] Pakistan in fact ensures that patients receive treatment before reporting:

> Pakistan has adopted legislation specifically aimed at insuring that the duty of disclosure does not interfere with essential medical treatment. It provides, inter alia that emergency medical treatment has priority over reporting

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[46] The Report, above note 6, p. 209.
[47] *Ibid*.
[48] *Ibid*.
[49] The Report, above note 6, p. 210.
[50] *Ibid*.
[51] The Report, above note 6, p. 211.

> requirements and that police may not interfere with medical treatment or even approach a gunshot wound victim without the doctor's permission.[52]

Where there is a duty to report, there are different forms and means (e.g., telephone, writing etc.) to report. There are different levels of information that is required to be given to authorities. In most cases, detailed information about the patient and the injuries are to be given. In some cases, the report is anonymized to protect the confidentiality of the patient, and yet ensure adequate data collection—on crime, broadly, to determine patterns, as is the case in the Philippines, to act as a preventive measure or to contribute to criminal prosecutions.[53]

In many cases, healthcare professionals who do not report when they have a legal obligation to do so may be subject to administrative or criminal sanctions themselves under the law (i.e., Philippines).[54]

Conclusion 3: Protection of Healthcare Professionals

Despite the fact that all but five of the twenty-two States studied have ratified or acceded to the two Additional Protocols to the Geneva Conventions (Pakistan and Papua New Guinea being two of the five), the report found that very few States have specific legislation protecting healthcare professionals and access to healthcare (the report did not distinguish between armed conflict or situations of violence where IHL protections are not applicable). The human right to healthcare for individuals and the duty of healthcare professionals to provide emergency assistance are recognized in a number of States constitutionally or under statutory law.[55]

Sometimes the protection of healthcare professionals is put into question when they are likely to be prosecuted for not reporting gunshot wound victims or injuries. There are few cases that the report found where there is a balancing of the duty of confidentiality and the duty to report.

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[52] The Report, above note 6, p. 214.
[53] The Report, above note 6, p. 212.
[54] *Ibid*.
[55] The Report, above note 6, p. 213.

Only Nigeria and Pakistan have specific legislation to allow for emergency medical treatment before any reporting is commenced.

Further Areas to Explore Beyond the Report

As mentioned above, the report did not attempt to make conclusions across the world. The focus is solely on the twenty-two States. There are a number of similarities, but enough differences in approach that it might be worth conducting a further report with fifty or more States to get a more global overview of the legal issues around access to healthcare for gunshot victims, mandatory reporting of gunshot wounds, and protection of healthcare professionals.

The report by its nature left a number of practical questions unanswered too, such as:

- What are the practical ramifications of the law?
- Do people comply with the law and report?
- Does the fact that reporting occurs stop people from accessing healthcare?
- Does anyone die or have complications as a result of the law?
- Do healthcare professionals who do not report get punished in practice?

As noted, this is beyond the scope of the original report, which focused on the laws in each State and not how they are practically implemented. The ICRC and others will need to do further on-the-ground research in key contexts to determine the answers to these questions to guide future policies and laws, as well as protection and assistance work in this area. Some further points on this are outlined in the case studies below.

Finally, while noting the few States that have adequately implemented the Additional Protocols to the Geneva Conventions, the report did not address the different applications of domestic law in times of armed conflict and times of peace.

Country Case Study: Pakistan

Pakistan: Overview of the Legal System

Pakistan's history is speckled with varying degrees and natures of conflict—between international and non-international armed conflicts as well as other situations of violence that do not rise to the threshold of an armed conflict. These changing situations have affected the legal system as much as the political landscape and resulted in a multitude of legislation. Without going into its complex history, the prevalent legal system of Pakistan post-2010 is much different and in certain cases more complex than it was before. This decade brought with it the Constitution (Eighteenth Amendment) Act, 2010 (18th Amendment),[56] which sought to devolve legislative power to the federating units—the provinces—instead of being centred at the federal level. Although a widely commended democratic step by all concerned, and appreciated by the provinces and rightly so, the 18th Amendment has led to certain complexities. Such intricacies are most prominent in cases where the centre retains the mandate for implementing treaties[57] and for enacting national legislation on international treaties, conventions, and agreements,[58] while the topics covered in such international instruments fall exclusively within the legislative and executive domain of the provinces, such as the provision of healthcare and the right to education.

This issue is further amplified by the absence of coordination mechanisms among these units of the State, thereby leading to adverse consequences not just for national implementation of international obligations and standards, but also for reporting of such implementation. Therefore, although, the right to health as derived from Article 12 of the ICESCR[59] and the protection of the medical mission as well as healthcare

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[56] The Constitution (Eighteenth Amendment) Act, Act No. X, 2010, available at: https://pakistanconstitutionlaw.com/18th-amendment-2010/.

[57] Constitution of the Islamic Republic of Pakistan, 1973, Fourth Schedule, Point 3, available at: https://pakistanconstitutionlaw.com/4thschedule-legislative-lists/ (Pakistan Constitution 4th Schedule).

[58] Pakistan Constitution Fourth Schedule, above note 57, Point 32.

[59] ICESR, above note 31.

personnel in times of armed conflicts[60] do exist and apply in principle, their implementation and enforcement remain a challenge. This is despite Pakistan being a party to the ICECSR[61] and to the four Geneva Conventions,[62] and especially so in the absence of explicit and comprehensive implementing legislation. It may further be noted that the Constitution of Pakistan (1973) does not explicitly recognize the "right to health." However, this has since been read into the "right to life"[63] by various superior courts,[64] thus bringing domestic legislation into conformity with international standards and/or obligations while requiring concerted and continuous effort with evidence-based advocacy and recommendations tabled at multiple legislative assemblies.

Pakistan: Update and Comparative Analysis since the Report

Duty of Disclosure and the Provision of Emergency Medical Care

As identified in the report,[65] the legal position in Pakistan on the duty of disclosure can be bifurcated into the period prior to and after the enactment of the Injured Persons (Medical Aid) Act, 2004.

Before delving into the discussion on the changes that followed this enactment, it is necessary to have an overview of the country and its component federating units. Following the 2018 merger of the Federally and Provincially Administered Tribal Areas (FATA and PATA),[66] the Republic of Pakistan is composed of the Federal Capital, the provinces of Balochistan, Khyber Pakhtunkhwa, Punjab and Sindh, as well as other

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[60] *See* GC I, above note 16, Arts. 19, 20, 23, 24, 26 and 35; *see also* GC II, above note 16, Arts. 36 and 37; *see also* GC III, above note 16, Arts. 18 and 20.

[61] Ratified by Pakistan on 17 April 2008.

[62] Ratified by Pakistan on 12 June 1951.

[63] *Article 9. Security of Person – No person shall be deprived of life or liberty save in accordance with law*, Constitution of the Islamic Republic of Pakistan, 1973, available at: https://pakistanconstitutionlaw.com/article-9-security-of-person/ (hereinafter "Pakistan Constitution").

[64] *See* LHC, *M/S Getz Pharma (Pvt) Ltd. v. Federation of Pakistan*, PLD 2017 Karachi 157; LHC, *Nadir Ali v. Medical Superintendent, Civil Hospital, Larkana*, PLD 2017 Karachi 448, para. 6; SC, *Shehla Zia v. the State*, PLD 1994 SC 693, pp. 712, 714.

[65] The Report, above note 6.

[66] The Constitution (Twenty-Fifth Amendment) Act, Act No. XXXVII 2018, available at: https://pakistanconstitutionlaw.com/25th-amendment-2018/.

States or territories that are or may be included in Pakistan whether by accession or otherwise. [67]

Since the devolution of legislative power to the provinces pursuant to the 18th Amendment as previously discussed, the Injured Persons (Medical Aid) Act, 2004 (Act 2004) is prevalent in the federal capital and in Balochistan, until such time as the latter legislates on it. Amended and adapted versions of this legislation are prevalent in the provinces of Punjab and Khyber Pakhtunkhwa since 2004 and 2014, respectively. Similar legislation was also applicable in Sindh up until its repeal in 2019 through the since applicable Sindh Injured Persons Compulsory Medical Treatment Act, 2019 (Act 2019). The Act 2004 and its provincial versions prioritized the provision of emergency medical assistance in various cases[68] including gunshot wounds over the duty of disclosure, which is enshrined as mandatory medico-legal procedures.

The Act 2019 in Sindh followed the refusal by a private hospital of emergency care to a minor girl who had been in a shooting incident involving security forces and was asked to move to a government hospital where medico-legal formalities could be initiated (the Amal Umer case of August 2018).[69] Police and judicial enquiries followed the child's demise within hospital premises following such refusal.[70] This incident illustrates the inadequate implementation as well as the unintended adverse ambiguities present in the existing law, which at that time was known as

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[67] Pakistan Constitution, above note 63, Art. 1.

[68] *See* The Injured Persons (Medical Aid) Act, Act No. XII, 2004, Section 2(e) *"injured person" means a person injured due to traffic incident, assault or any other cause who is in need of an immediate treatment"* and Section 2(k) *"injured person" means a person injured due to a traffic accident, assault or any other cause and who has an emergency medical condition"* (hereinafter "Medical Aid Act"); Sindh Injured Persons Compulsory Medical Treatment Act, Act No. VIII, 2019, Section 2(g) *"emergency medical condition" means the health condition of an injured person which requires immediate medical attention and/or compulsory medical treatment and denial of which is likely to aggravate the health of an injured person or cause the death of an injured person"* (hereinafter "SIPCMTA").

[69] Beenish Umer, "How the System Failed Us", *Dawn News*, 16 September 2018, available at: https://www.dawn.com/news/1433274; The News Web Desk, "Amal death Case: Sindh Healthcare Commission's Report Raises Questions," *The News International*, 15 December 2019, available at: https://www.thenews.com.pk/latest/583931-amal-death-case-sindh-health-care-commissions-report-raises-questions.

[70] "Supreme Court Orders Trial Court to Decide Amal Umer Murder Case in Three Months," *Daily Times*, 8 January 2020, available at: https://dailytimes.com.pk/535150/sc-orders-trial-court-to-decide-amal-umer-murder-case-in-three-months/.

the Sindh Injured Persons (Medical Aid) Act 2014 ("the Act 2014"). This Act was promulgated to prioritize emergency medical care until the injured person was stabilized but before undertaking medico-legal formalities, and was intended to cover both private and government hospitals. However, the language contained in the law is ambiguous with respect to private hospitals, and only seems to create this obligation for government hospitals.[71] The Amal Umer case further highlights the inconsistency between legal obligations and prevalent practice.

Comparative Analysis of the Act 2014[72] and the Act 2019:[73]

Through its strict phrasing, the Act 2019 seeks to further cement the obligation of providing compulsory and life-saving medical care on healthcare personnel and medical units in order to avoid incidents such as the Amal Umer case. For instance, even in their respective Preambles where the Act 2014 lays down the purpose of the legislation as "expedient to make provision for medical aid and treatment of injured persons to save their lives and protect their health during emergency,"[74] the Act 2019 goes much further in an attempt to address the gaps that led to the unfortunate demise of Amal Umer. A notable difference between the phrasing in the two Acts is that the Act 2019 refers to emergency medical care as "compulsory medical treatment".

The Preamble to the latter legislation iterates its purpose to remove misconceptions about the applicable law and procedure with respect to the provision of healthcare to injured persons before the completion of medico-legal formalities, and states:

> It is compulsory to provide medical aid and treatment without fear, to any injured person, to save his or her life and protect his or her health during an emergency … it is the duty of every citizen to assist an injured person in a time of peril and emergency.[75]

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[71] Medical Aid Act, above note 68, Sections 2(c), and 7.
[72] Medical Aid Act, above note 68.
[73] SIPCMTA, above note 68.
[74] Medical Aid Act, above note 68, Preamble.
[75] SIPCMTA, above note 68, Preamble.

In order to give effect to this Preamble, the legislation categorically includes private hospitals.[76] While private hospitals were broadly understood to be under this obligation pursuant to the Act 2014, the lack of explicit mention led to ambiguity. The Act 2019 further obligates both private and government facilities to provide compulsory medical care on a priority basis without first complying with medico-legal formalities, or demanding payment,[77] and in certain circumstances involving life-threatening cases, to even proceed before obtaining consent from the victim's relatives.[78]

Both the Acts of 2014 and 2019 stipulate non-interference by the police during the provision of compulsory medical care without the permission of the in-charge of the hospital, while the Act 2019 also requires clearance by the attending doctor on whether the injured person is out of danger before proceeding with interrogation.[79] Corresponding duties on law enforcement personnel intend to strengthen respect for the duty of necessary medical care over the duty of disclosure.

While in most cases, the Act 2019 seems to improve the protections provided in comparison to the earlier legislation, it is not the case in one instance of particular note. In addition to the prohibition against taking an injured to the police station or undertaking medico-legal formalities before the provision of compulsory medical treatment found in the Act 2019,[80] the Act 2014 had previously gone a step further and laid down that:

> The police officer is bound to ensure that the injured person is treated in a hospital as provided in this Act before any medico-legal procedure is undertaken and he shall not in any way influence the doctor or to give any opinion about the type and details of injury of the injured person.[81]

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[76] SIPCMTA, above note 68, Section 2(j), 2(l).
[77] SIPCMTA, above note 68, Section 3.
[78] SIPCMTA, above note 68, Section 4.
[79] Medical Aid Act, above note 68, Section 4; SIPCMTA, above note 68, Section 6.
[80] SIPCMTA, above note 68, Section 8.
[81] Medical Aid Act, above note 68, Section 8(2).

This provision previously strengthened the obligation of prioritizing emergency medical care over the duty of disclosure by imposing corresponding duties on police personnel. It also protected healthcare personnel and prohibited police officers to exert influence over doctors to breach medical confidentiality. It is pertinent to note that this provision is presently only missing from the law applicable to the province of Sindh, while the federal law of 2004 and its other provincial versions still incorporate this provision.[82]

Medical Confidentiality

As previously mentioned, the report[83] shows that varying degrees of legislation codifying mandatory reporting overriding medical confidentiality in cases of gunshot wounds is prevalent in a majority of the twenty-two countries studied. In Pakistan, however, where the duty of disclosure is incorporated in primary domestic legislation, the duty for healthcare personnel to maintain medical confidentiality is found in regulations with certain exceptions. The duty of providing indiscriminate emergency medical care to injured persons before disclosing such cases to authorities is also present.

Through the above examples of prevalent legislation, it is apparent that while the duty of disclosure and that of the provision of emergency medical care on humanitarian grounds are codified, the duty of healthcare personnel to maintain medical confidentiality is not found within primary domestic legislation. Instead, medical confidentiality along with other medical ethics is part and parcel of the different ethical codes for healthcare personnel.

One of these is the "Code of Ethics" to be observed by registered medical and dental practitioners in Pakistan, which is adopted in the form of regulations by the concerned authority.[84] It enshrines the duty of

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[82] Medical Aid Act, above note 68, Section 8(2); The Khyber Pakhtunkhwa Injured Persons and Emergency (Medical Aid) Act, Khyber Pakhtunkhwa Act No.XXXVI, 25 November 2014 (effective 1 December 2014), Section 8(2) (hereinafter "Khyber Pakhtunkhwa Medical Aid Act"); The Punjab Injured Persons (Medical Aid) Act 2004 Section 8(2) (hereinafter "Punjab Medical Aid Act").

[83] The Report, above note 6.

[84] Pakistan Medical and Dental Council, *Code of Ethics of Practice for Medical and Dental Practitioners*, 24-25 August 2002, available at: http://www.pmdc.org.pk/Link

confidentiality and further goes on to stipulate that "no one has the right to demand information" except only when information is demanded under a statutory or legal obligation.[85]

This Code is not applicable to all healthcare personnel operating within the country but is limited only to medical and dental practitioners. There is a separate Code of Ethics for nursing staff that enunciates the duty of medical confidentiality while creating broad and subjective exemptions by stipulating that the staff in relation to the patient:

> [H]olds in confidence personal information about the client and uses judgment in disclosing information by seeking the client's consent … or by judicial rule where the information is required by law or by the order of a Court, or as necessary in the public interest.[86]

Such subjective exceptions tend to treat healthcare personnel as police, requiring them to make decisions on their own reasoning and understanding of the issue. Faced with such a situation, it would be safe to assume that most would err on the side of caution and disclose information rather than be held criminally liable for not reporting. Additionally, it is important to note that the duty to disclose information codified in legislation would prevail over the ethical duty of medical confidentiality found in regulations.

That said, as explained previously, a corresponding duty on police personnel to respect medical confidentiality is found in the Act 2004 and its provincial versions,[87] except in the Act 2019, which is only applicable to Sindh. It would, nevertheless, be significant to amend the Act 2019 to promulgate this duty for Sindh police personnel.

What remains unclear is whether this duty, which extends to police personnel at a police station where an injured person is brought,

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Click.aspx?fileticket=v5WmQYMvhz4%3d&tabid=292&mid=845 (hereinafter "PMDC Code of Ethics").

[85] PMDC Code of Ethics, above note 84, Regulation 27.

[86] Pakistan Nursing Council, Professional Code of Ethics for the Registered Nurse, Midwife, Lady Health Visitor and Nursing Auxiliary, Regulation 1.4, available at: https://www.pnc.org.pk/admin/uploaded/Code%20of%20Ethics%20Page2.jpg.

[87] Medical Aid Act, above note 68, Section 8(2); Khyber Pakhtunkhwa Medical Aid Act, above note 82, Section 8(2); Punjab Medical Aid Act, above note 82, Section 8(2).

equally applies to all law enforcement and security agencies that might pursue healthcare personnel to divulge confidential information.

Pakistan Recommendations

Aligning practice with law goes beyond legislating reactively. While it remains a crucial step in addressing humanitarian problems, it is pertinent among other measures to underscore the need of wide knowledge and dissemination of existing laws to all concerned authorities, including hospital administrations, healthcare personnel, and investigating and law enforcement agencies. Such dissemination through awareness campaigns is also provided for in the Acts of 2004 (Section 10), 2014 (Section 10) and 2019 (Section 17) but not as widely in practice as anticipated or needed. In addition to dissemination of laws, it is also crucial to dig into the realities of the various concerned authorities and their interaction with each other. Refusal of healthcare personnel to provide emergency medical care over the duty of disclosure in contravention of legal obligations is a matter of much concern and the root causes for such practice must be determined.

It must also be noted that although the efficacy of the Act 2019 is yet to be seen, it is only applicable in the province of Sindh, while more or less similar versions of the Act 2004 remain applicable across the rest of the country. This fact further highlights the reactive attitude of legislative assemblies instead of being proactive and seeking to prevent or mitigate possible humanitarian issues in their own jurisdiction(s) which have been reported in other areas of the country. That said, it would be futile and inadequate to draw conclusions from the few incidents that are widely reported. Effective law and policy measures must be based on comprehensive analytical research at various levels to address humanitarian issues and curb contradictory practices.

Lastly, a unified mechanism for coordination among the various federating units should also be considered by the State in order to not only better address humanitarian problems, but to do so in a uniform, standard manner. This would assist the provinces in learning from each other's experiences, identify common lacunae, and prevent foreseeable humanitarian issues. Just as importantly, such measures would pave the way for increased compliance with international legal obligations—

whether under IHL or human rights law—thereby enhancing protection of healthcare and ensuring provision of healthcare services to the population in times of conflict by strengthening compliance in peacetime.

Country Case Study: Papua New Guinea

Papua New Guinea: Overview of the Legal System

After a chequered history of colonialism, Papua New Guinea became independent from Australia in 1975. It retains a common law legal system with reference to United Kingdom and Australian case law, and some residual laws from Australia. It also has reliance on customary legal practice, which takes into account the precedents of village courts.[88]

Papua New Guinea has had a non-international armed conflict in the past in Bougainville and continues to have a high level of violence including knife crime, sexual violence, domestic violence and election related violence.[89] There has been an upsurge in inter-community violence leading to some massacres in 2019.[90] Homicides are not disaggregated by type of weapon,[91] but it seems that knives and machetes are the majority of causes. The lack of disaggregation could indeed be a factor of lack of reporting of such information.

In terms of international legal obligations, treaties only have the force of law in Papua New Guinea if they are adopted in specific legislation by Parliament.[92] Papua New Guinea is a party to the four Geneva Conventions and has a Geneva Conventions Act 1975 but it is

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[88] Papua New Guinea Underlying Law Act 2000, No. 13, 2000, Section 3(1); for an explanation of the law *see* Bruce L Ottley, "Reconciling Modernity & Tradition: PNG's Underlying Law Act", *Reform*, Issue 80, Autumn, 2002.

[89] Human Rights Watch, "World Report 2019: Papua New Guinea", available at: https://www.hrw.org/world-report/2019/country-chapters/papua-new-guinea.

[90] Jo Chandler, "The Karida massacre: fears of a new era of tribal violence in Papua New Guinea", *The Guardian*, 23 July 2019, available at: https://www.theguardian.com/world/2019/jul/23/the-karida-massacre-the-start-of-a-new-era-of-tribal-violence-in-papua-new-guinea.

[91] E.g., Gunpolicy.org (NGO addressing international firearm prevention and policy which collects data around the world on gun injuries and availability) does not have data on gunshot wounds for Papua New Guinea, available at: https://www.gunpolicy.org/firearms/region/papua-new-guinea.

[92] Constitution of the Independent State of Papua New Guinea, Art. 117 (7).

not a party to the Additional Protocols to the Geneva Conventions as yet, although there are indications that they are interested in becoming a party. Papua New Guinea would therefore be able to apply (subject to the limited scope of the Geneva Conventions Act which mostly addresses grave breaches of the Geneva Conventions) the principles related to the protection of wounded and sick and the protection of healthcare professionals in an international and non-international (CA 3; although the Act is not clear on its application to CA 3) armed conflict.[93]

Papua New Guinea: Update and Comparative Analysis since the Report

Papua New Guinea is one of the only four States studied which impose no explicit duty to disclose gunshot wounds or crimes. Indeed, it is also one of seventeen States studied where the duty of confidentiality has the force of law under common law as adjudicated by the courts under the constitutional right of privacy.[94] The exception is where there is patient consent, or the patient brings the case to court.[95] There is an inherent contradiction between the common law and the professional code in Papua New Guinea. The non-legally binding Code of Medical Ethics says "doctors owe their patients absolute confidentiality on all matters, with exceptions for disclosures where the patient gives his/her consent; in the interest of all concerned; where required by law; and where there is a question of danger to society."[96] Therefore, there is no clarity in the current position on gunshot wound reporting in Papua New Guinea, whether in peacetime or during armed conflict.

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[93] *See* ICRC, State Practice of Papua New Guinea, *IHL Database: Customary IHL*, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_pg. Indeed, at the time of the Study, ICRC classified Papua New Guinea as having an armed conflict: Sandesh Sivakumaran, "Asia-Pacific States and the Development of International Humanitarian Law", in Suzannah Linton, Sandesh Sivakumaran and Tim McCormack (eds), *Asia Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge, 2019, p. 126.

[94] The Report, above note 6, pp. 207-208; Constitution of the Independent State of Papua New Guinea, Art. 49.

[95] S.C.R. No. 2 of 1984; Re Medical Privilege, PNGLR 247, cited in The Report, above note 6, p. 134.

[96] The Report, above note 6, p. 134.

The extent to which people do not access healthcare as a result of injuries or reporting requirements is not known by the authors, but there remain problems of accessible healthcare and protection of healthcare for all, let alone gunshot wound victims. For example, the ICRC 2018 report on Papua New Guinea noted that "[i]n 2018, the ICRC ran a number of public awareness campaigns seeking to prevent ... attacks against public infrastructure like schools or hospitals, encouraging respect for human life. ... The ICRC also supplied medical equipment to health-care facilities in Hela and Enga while running training and development programmes for staff."[97]

Papua New Guinea: Recommendations

Some recommendations for Papua New Guinea and for future work pose a challenge since the necessary first step is to collect more information on the practical situation in Papua New Guinea—are people treated for their gunshot wounds, are they reported, and if so how and does this affect their access to healthcare? After these issues are addressed on the ground, the more practical policy recommendations can be made. One way to collect information is to require reporting of gunshot wounds by medical professionals. Papua New Guinea could adopt laws on the reporting of violent injuries in an anonymized way to allow for collection of statistics but not lead to prosecutions or punishment of those affected. Such laws could also strengthen the patient confidentiality (currently only in common law and soft instruments) by ensuring that data collected is only for statistical purposes and it will also clarify the circumstances in which aspects of confidentiality can be breached which are otherwise very unclear under the law as it stands. As has been outlined above, such collection would be consistent with IHL ((in an armed conflict) and human rights in peacetime) and with current medical ethics duties in the State. Papua New Guinea is not a party to the Additional Protocols to the Geneva Conventions, but the duty to comply with medical ethics is a customary IHL duty (ICRC Customary law study Rule 26).

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[97] ICRC, "Papua New Guinea: Operational Highlights", 2018, available at: https://www.icrc.org/en/document/papua-new-guinea-operational-highlights-2018.

A further recommendation would be for Papua New Guinea to ratify and implement the Additional Protocols to the Geneva Conventions to provide for greater clarity in the obligations that should attach to strengthen protection for healthcare professionals and victims of conflict and violence and on the application of medical ethics and information sharing rules under those treaties. If Papua New Guinea were to then amend its Geneva Convention Act to apply AP I and II, the laws would be able to be applied alongside the principles of medical ethics that already exist in Papua New Guinea, and would allow for greater clarity of the law as it can be directly applied in the country around application of medical ethics and reporting obligations in conflict.

Country Case Study: Philippines

Philippines: Overview of the Legal System

Previously a Spanish colony and ceded to the United States of America after the Spanish-American War, the Philippines was granted Commonwealth status in 1935. It was subsequently occupied by the Japanese during the Second World War. It became one of the founding members of the United Nations and in 1946 was officially recognized as independent. The legal system is a mix of civil and common law with the Congress passing legislation approved by a Senate and courts having great power of review over the interpretation of the 1987 Constitution and legislation.[98]

The Philippines has around five non-international armed conflicts underway at the present time. In his recent chapter on the consideration of IHL by national courts in the Philippines, Candelaria usefully characterizes two main groups of conflicts: Moro secessionist movements and the communist insurgency.[99] There is also considerable gun violence outside of the armed conflict. According to Gunpolicy.org, the estimated total number of guns (both licit and illicit) held by civilians in the Philippines is between 2,666,4181 and 3,977,237. Gunshot wounds were only reported until 2011.

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[98] Sedfrey M. Candelaria, "International Humanitarian Law in the Philippines Supreme Court", in S. Linton, S. Sivakumaran and T. McCormack (eds), above note 96, p 540.

[99] S. Candelaria, above note 101, pp. 545-554.

The Philippines is party to the Geneva Conventions and all three of its Additional Protocols. It has recently withdrawn from the Rome Statute of the International Criminal Court.[100] Treaties are ratified by the President, subject to the concurrence of a two-third majority of the Senate[101] and thereby have the force of law in the Philippines with no further legislation required. Nonetheless, the Philippines has enacted several pieces of legislation to promote and protect IHL, including Republic Act 9851, which criminalizes all relevant war crimes and other international crimes which can be adjudicated in national courts that have been given special jurisdiction.

Philippines: Update and Comparative Analysis since the Report

In the Philippines, the legislation requires healthcare professionals to report the existence of an injury, the criminal character of which is apparent.[102] The reporting requirements are designed to maintain statistics on criminal activity.[103] The provisions to enforce this used to be quite draconian but have been reduced to a fine, although if healthcare professionals do not report, the third offence can result into suspension of their licence to practise.[104] The report notes that Presidential Decree No. 169, issued 4 April 1973, on "Requiring Doctors, Hospitals, Clinics, etc. to Report Treatment for Physical Injuries" (amended on 10 July 1987 by Executive Order No. 212) states that the health practitioner of any health facility who has treated any person for serious or less serious physical injuries (as defined in Articles 262-265 of the Revised Penal Code) shall report the fact of such treatment to government health authorities.[105]

There is less of a concern for healthcare professionals if they do report to a health authority rather than a law enforcement agency as was the case previously. However, it does seem to be the case in the report that in practice, police officers are sent to the bedside of the patient recovering

[100] The Philippines was a party until 17 March 2018 when it withdrew, available at: https://www.icc-cpi.int/philippines.
[101] 1987 Philippine Constitution, Art. VII, Section 21.
[102] The Report, above note 6, p. 210.
[103] The Report, above note 6, p. 212.
[104] The Report, above note 6, pp. 137, 213.
[105] The Report, above note 6, p. 136.

from a gunshot wound to collect data for criminal prosecutions.[106] This means that the healthcare professional is not implicated, and therefore somewhat protected, but it places a lot of pressure on a wounded person. If indeed the healthcare professional were required to corroborate information about the patient's treatment and wounds, this could be inconsistent with IHL and medical ethics, as it would put the patient at risk of prosecution.

It also seems to mean somehow that statistics have not been collected or shared publicly as the data is from 2011. There is no information as to whether the quite lengthy information that must be collected[107] dissuades gunshot victims from seeking medical care.

Despite a strong law on Red Cross, Red Crescent and Red Crystal emblem protection,[108] there are no laws which implement protection of healthcare personnel or the principle of confidentiality or impartiality. Nonetheless, the ICRC Customary IHL Study (ICRC CIHL Study) notes in its State practice for the Philippines that:

> An agreement, concluded in 1990 between several Philippine governmental departments, the National Police, and a group of NGOs involved in the delivery of medical services, provides for the protection of health workers from harassment and human rights violations. The preamble to the agreement states that the parties are adhering to generally accepted principles of IHL and human rights law.[109]

The ICRC CIHL Study State practice also notes that in practice, healthcare professionals are given protection when conducting medical

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[106] The Report, above note 6, p. 137.

[107] The Report, above note 6, pp. 136-137.

[108] An Act Defining The Use And Protection Of The Red Cross, Red Crescent, And Red Crystal Emblems, Providing Penalties For Violations Thereof And For Other Purposes, Republic Act No. 10530, 7 May 2015.

[109] J. Henckaerts and L. Doswald Beck (eds), above note 26, citing Memorandum of Agreement on the Delivery of Health Services between the Departments of Foreign Affairs, Justice, Local Government, National Defense and Health and the Philippines Alliance of Human Rights Advocates (PAHRA), the Free Legal Assistance Group (FLAG) and the Medical Action Group (MAG), 10 December 1990.

duties in the conflict. There is no information about whether they are required to treat patients impartially in the conflict and to ensure patient confidentiality at this time as required under IHL.

Philippines: Recommendations

Once again there are a number of questions which remain to be answered by further study: are patients deterred from seeking healthcare assistance if they are confronted by a police officer? How many people die from gunshot wounds because they fail to seek healthcare?

Healthcare professionals in the Philippines should be given training or awareness-raising about the reality of the law: that they report to a health authority and not to the police. They should also be better protected under the law, and not just under a soft agreement.

Particularly in the Philippines, as it is currently involved in several armed conflicts, legislative and policy steps should be taken to ensure that laws related to injury reporting can be applied consistently with IHL or amended for times when they occur in armed conflict. As noted, the Philippines has an applicable IHL law that requires prosecutions for war crimes in specially-mandated courts. However, to not have alongside or in this law requirements for the protection of healthcare professionals means that much of the ability of the courts to have a full overview of IHL principles and protections is stymied. Impartial healthcare should be protected in a coherent law that is able to be applied by courts in the Philippines so that the law is consistent with IHL when applied during armed conflict. Finally, the reporting requirements that currently exist are potentially inconsistent with IHL—while they allow treatment before reporting, they do not take into account the principles of beneficence and justice under medical ethics, and do not account for consistent reporting of information which would be allowed under IHL. They should be amended to allow for a more coherent approach to reporting on wounds.

Conclusions and Recommendations

The point of the initiative on healthcare in danger is to enhance the many protections for healthcare professionals and their work, and for the wounded and sick, that apply during conflicts by taking measures in

peacetime to ensure domestic implementation. In some contexts, domestic laws might not be consistent enough with IHL protections or might require some nuancing to ensure that they are applied correctly in times of armed conflict. This article has given an overview of an important report into global gunshot wound reporting legislation which has not been done before.[110] It should assist us to understand where States are positioned with regard to reporting on gunshot wounds, protection of patient confidentiality and protection of healthcare professionals, which as has been outlined are key provisions of IHL. It takes a step towards going beyond the existing guidelines on national legislation on healthcare protection, and attempts to thresh out some inconsistencies and concerns around mandatory reporting and barriers to healthcare. Nonetheless, as this article also points out, there are a number of recommendations which can be made to go even further in exploring the complexities of gunshot wound reporting legislation and patient confidentiality. Particularly in armed conflicts and other situations of violence, these include ensuring that gunshot wound victims receive better and faster care, protecting healthcare professionals, and even ensuring that better data on gunshot wounds can be collected so that better understanding of the extent of the problem around the world may be attained and IHL is better upheld.

In that regard, there are a number of practical questions that require in-depth field work to ensure better understanding of the application of the laws in reality. These questions were addressed above in the section devoted to the report and need no repetition here. However, there are questions which each of the States that we addressed in this article also need to pose in order to have a better understanding as to how the law works in hindering accessible healthcare.

There are also a number of recommendations for each of the States that we considered in this article—Pakistan, Papua New Guinea and the Philippines—that could serve as a platform for action for those working on healthcare access, gunshot wound reporting and IHL implementation.

Overall, there are two main recommendations which we would say are global, arising from the gunshot wound reporting report and from

[110] The Report, above note 6.

our analysis further of each of these three contexts in the Asia-Pacific region.

First, we propose that States revisit their gunshot wound reporting laws to ensure that they are consistent with IHL when gunshot wounds occur in times of armed conflict. The report looked very briefly at the protection of healthcare professionals, but it did not consider the two other aspects of IHL highlighted in this article—protection of medical ethics and impartial treatment. More work could be done on studying the laws around the application of these principles in times of armed conflict. The principle of impartiality and following medical ethics should be enshrined into law in particular. In many contexts in Asia-Pacific and beyond, there is a continual overlap or blurring of the lines between when IHL applies and when it does not. Basic principles of humanity, human rights laws and ethical principles should all be protected at all times to ensure fewer gaps in protection of victims as well as healthcare professionals. States should look at amending their laws to ensure consistency of application of IHL.

Second, we recommend that gunshot wound reporting legislation be adopted by States around the world. IHL provides that healthcare professionals can give information to the authorities.[111] Moreover, IHL requires healthcare personnel to act consistently with medical ethics (API, Article 16; APII, Article 10) and while they should not be obliged to disclose information that would be detrimental to a patient, if certain conditions are adhered to, it would not be inconsistent with medical ethics to require reporting of gunshot wounds. Indeed, it would in the authors' contention be consistent with the medical ethical principle of justice, with the complementary human rights principle of due process and fulfilment of legislative measures, to have laws which require reporting of a certain amount of information on gunshot wounds. There is a paucity of data around gunshot wounds and if there was greater data, there could be better prevention measures which likewise would not only ensure justice for victims, but also ensure that more victims receive appropriate medical treatment. The data must be collected in a consistent and effective way to be of any use, and in line with the concerns this article has highlighted, there are several caveats to this recommendation:

[111] J. Henckaerts and L. Doswald Beck (eds), above note 26, Rule 26.

- The laws should ensure that adequate patient confidentiality is accorded—anonymising details of patients so that it is the gunshot wound information that is collected, but the person is not affected directly by the reporting.
- Greater information is needed by healthcare professionals on when they are required to report and when they are not, and what information they are required to report, so that emergency treatment is provided, and the right authorities are notified of the injury with relevant details.

As we have said numerous times, more work is needed on this important topic, but perhaps our recommendations, if implemented, could go some way to ensuring that gunshot wound victims receive the necessary medical care that they require in an impartial and confidential manner, regardless of whether the injury occurs in relation to an armed conflict or not. They should then also ensure greater protection of the medical mission around the world and therefore better adherence to and respect for IHL.

The Road to Ongwen: Consolidating Contradictory Child Soldiering Narratives in International Criminal Law

Jonathan Kwik[*]

ABSTRACT

The trial of Dominic Ongwen, an ex-child soldier turned perpetrator, has attracted debate concerning the position of international criminal law (ICL) on perpetrators of war crimes with a complex background of childhood victimization. From some perspectives, such persons are accountable adults responsible for unspeakable crimes, while from others, the lack of regard for their oppressive and corrupting upbringing in a violent armed group does a disservice to their victim status. This article explores the development of the narrative in ICL on three key subjects related to the Ongwen discussion: (1) the traditional prosecutorial focus on adults vis-à-vis children; (2) to what extent children's agency is recognized; and (3) the long-term effects of child soldiering. Several potential inconsistencies are identified with respect to each subject. While it is found that most inconsistencies have formed as a result of positive intentions, they could nevertheless negatively impact future ex-child soldier perpetrator cases if left unaddressed. The article subsequently discusses the ramifications of each diverging narrative and whether they can be consolidated. It is demonstrated how most contradictions are theoretically reconcilable but that ICL must make deliberate efforts to do so, in order to guarantee the adoption of a consistent and congruent narrative moving forward.

Keywords: International Humanitarian Law, International Criminal Law, Child Soldier.

In March 2020, a defence counsel underlined for Trial Chamber IX of the International Criminal Court (ICC) where the prosecution had ostensibly strayed: they had "totally forgotten" the cumulative effect of what his

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client had been through since he was abducted at the young age of 10.[1] This counsel, Krispus Ayena Odongo, was pleading on behalf of Dominic Ongwen, an ex-child soldier-turned-adult perpetrator accused of committing numerous international crimes. On behalf of the prosecution, Benjamin Gumpert rejected this assertion; Ongwen may have been a victim in his youth, but this should be no reason to relieve the accused of accountability—at most, the matter could be revisited during sentencing. He presented an analogy: perpetrators of sexual crimes are not excused because they were themselves sexually abused in the past.[2]

Ongwen belongs to a specific subset of perpetrators, having walked through two phases of life: as a child soldier and, later, an adult soldier. Not all fighters experience both. Many child soldiers fight only as children, and many others only join in adulthood. Ongwen notably experienced both phases consecutively.[3] For brevity, these persons shall henceforth be referred to as "Ex-Child soldier Perpetrators" (ECP).

Ongwen is distinct, but not unique. For example, his fate is shared by Thomas Kwoyelo, who, at 13, was similarly abducted on his way to school by the Lord's Resistance Army (LRA), but who was tried at the national level.[4] In light of the scope of child soldiering still taking place today, many have and will follow in their footsteps;[5] as the first case of an ECP standing trial internationally, therefore, it is not unexpected that *Ongwen* would spark controversy.

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[1] Tom Maliti, "Closing Statements Conclude in Ongwen Trial; Defense Ask for One of Three Outcomes", *International Justice Monitor*, 16 March 2020, available at: www.ijmonitor.org/2020/03/closing-statements-conclude-in-ongwen-trial-defense-ask-for-one-of-three-outcomes (all internet references were accessed 20 May 2020).

[2] Tom Maliti, "In Closing Statements, Prosecutors Say Ongwen Willingly Committed Crimes", *International Justice Monitor*, 10 March 2020, available at: www.ijmonitor.org/2020/03/in-closing-statements-prosecutors-say-ongwen-willingly-committed-crimes.

[3] Ledio Cakaj, "The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander", *Justice in Conflict*, April 2016, available at: www.justiceinconflict.org/2016/04/12/the-life-and-times-of-dominic-ongwen-child-soldier-and-lra-commander.

[4] *See* UGSC, Constitutional Appeal No. 1 of 2012, *Uganda v. Thomas Kwoyelo*, UGSC 5, 8 April 2015.

[5] In 2002, the United Nations International Children's Emergency Fund (UNICEF) estimated that approximately 300,000 children were actively involved in armed conflicts. UNICEF East Asia and Pacific Regional Office, *Adult Wars, Child Soldiers*, UNICEF, Bangkok, 2002, p. 8.

The complexity of ECPs lies primarily in the fact that they transcend several classic compartmentalisations in international criminal law (ICL). They are complex perpetrators difficult to delineate with one label. They have clearly been victims of recruitment, but have also committed many atrocities themselves as child soldiers. A significant part of their personality and morality could have been formed under oppressive and corrupting social circumstances, but this surely should not give them a "lifetime pass to commit crimes just because crimes were committed against them some time in the past."[6] As a result, their proper treatment by international criminal tribunals and courts (ICT/C) has attracted debate.[7]

This article takes a step back and examines the development of ICL on the issue of child soldiering, which narratives have been solidified over the years, and which are relatively new innovations. Through this dissection, the article identifies the positions of ICL with respect to several related matters: how are child soldiers and recruiters viewed in the victim-perpetrator duality? Are child soldiers, the first "stage" an ECP lives through, ever held accountable for their actions, and why (or why not)? How does ICL view the long-term effects of child soldiering?

The article considers all statutory and jurisprudential sources of ICL up to March 2020, when closing arguments were presented for *Ongwen*. Analysis is supplemented by official policy statements, other sources of international law, and supporting secondary sources and opinions. As a convention, "child soldier" is used to refer to persons below

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[6] T. Maliti, above note 2.

[7] Gumpert's closing statement can still be considered moderate, as it left open the question of victimhood as one that could be revisited during sentencing. More extreme positions have been taken, such as those maintaining that Ongwen's situation is manifestly ordinary, which should not even merit a sentencing consideration. Alex Whiting, "There is Nothing Extraordinary about the Prosecution of Dominic Ongwen", *Justice in Conflict*, April 2016, available at: www.justiceinconflict.org/2016/04/18/there-is-nothing-extraordinary-about-the-prosecution-of-dominic-ongwen; *see also* Paul Robinson, "Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and 'Rotten Social Background'," *Alabama Civil Rights & Civil Liberties Law Review*, Vol. 2, 2011. On the other hand, some have strongly argued for adopting a full defence for perpetrators in situations of "strong sociopsychological coercion that seems to have influenced their behavior." Ziv Bohrer, "Is the Prosecution of War Crimes Just and Effective? Rethinking the Lessons from Sociology and Psychology", *Michigan Journal of International Law*, Vol. 33, 2012, p. 817.

18.[8] Conclusions drawn also do not refer to anything other than the ICL position, and may differ substantially with those of human rights law, domestic law, and scientific consensus.

The following sections explore different aspects of child soldiering in detail. The article identifies three major issues which feature (potentially) contradictory propositions: (1) a focus on recruiters and not child soldiers; (2) whether children can consent to become child soldiers, and thus have a certain amount of agency; and (3) what long-term effects can be attributed to child soldiering. The final section analyses the ramifications of each potential diverging narrative, and how they could be resolved in future ECP cases before an ICT/C. The contradictions are not found to be irreconcilable, but it would be desirable to develop ICL in such a way that they do converge to improve consistency and legal certainty.

I. Condemnation and Action

In *Children at War*, Peter Singer laments the widespread use of children in contemporary conflict as violating "the once universal rule that they simply have no part in warfare."[9] Until very recently, the general trend indeed leaned towards their exclusion from active participation, if not the battlefield entirely.[10] The latter half of the twentieth century introduced a dramatic shift, with child soldiering changing from "isolated incident[s]

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[8] The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, § 2.1. While authoritative, the Principles remain only soft law. Gus Waschefort, *International Law and Child Soldiers*, Hart Publishing, Oxford, 2015, p. 13. The IHL standard remains 15 years. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 77(2). Note also that the notion of "minor" varies per context and legal culture.

[9] Peter Singer, *Children at War*, Pantheon Books, New York, 2005, p. 7.

[10] However, *see also* Rachel Harvey, *Children and Armed Conflict: A Guide to International Humanitarian and Human Rights Law*, International Bureau for Children's Rights, 2010, p. 48 (explaining the use of children in the Greek and Roman forces); Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy*, Oxford University Press, Oxford, 2012, p. 27 (explaining their use in supporting roles during the XVIIth-XIXth centuries).

happening here and there" to a systematic strategy, particularly adopted by non-state armed groups.[11]

Modern child soldiering is maligned for more than its widespread nature. Children are recruited at increasingly young ages, occasionally below the age of 10,[12] and frequently through abduction, coercion, or the slaughter of their family.[13] Once recruited, they are often exposed to brutal inductions designed to imbue them with the "new worldview of a soldier".[14] Training is often marked with physical and psychological abuse, beatings and indoctrination, while alcohol and drug abuse is employed to make them more fearless.[15] Children are deliberately exposed to extreme violence, sometimes against their own kin, as a method of desensitisation.[16]

Nevertheless, child soldiers are not merely passive victims. They themselves are responsible for a great number of atrocities and gross human rights violations. As child soldiers, they loot, kill, torture, maim, and rape.[17] Perversely, ECPs often contribute to recruiting the next wave of children, as was the case with Ongwen: an example of how one generation of abuse and atrocities only breeds the next.[18]

The international community has reacted vocally in condemnation of the architects of these practices, seen not only as

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[11] Alcinda Honwana, "Children's Involvement in War: Historical and Social Contexts", *Journal of the History of Childhood and Youth*, Vol. 1, 2008, p. 146. Note however that some national armies have employed child soldiers as well. Report of the Expert of the Secretary-General, Impact of armed conflict on children, UN Doc. A/51/306, 26 August 1996, para. 36 (hereinafter "Impact of Armed Conflict on Children Report").

[12] Impact of Armed Conflict on Children Report, above note 11, para. 35.

[13] Report of the Secretary-General to the Security Council, UN Doc. A/69/926–S/2015/409, 5 June 2015, paras. 6-10.

[14] P. Singer, above note 9, p. 70.

[15] Impact of Armed Conflict on Children Report, above note 11, paras. 44, 47-48; P. Singer, above note 9, pp. 70-75.

[16] Impact of Armed Conflict on Children Report, above note 11, para. 48; P. Singer, above note 9, pp. 70-74.

[17] Matthew Happold, "Child Soldiers: Victims or Perpetrators?" *University of La Verne Law Review*, Vol. 29, 2008, p. 79; Monique Ramgoolie, "Prosecution of Sierra Leone's Child Soldiers: What Message is the UN Trying to Send?" *Journal of Public and International Affairs*, Vol. 12, 2001, p. 148.

[18] IRIN News, "Analysis: Should child soldiers be prosecuted for their crimes?" *The New Humanitarian*, 6 October 2011, available at: www.thenewhumanitarian.org/analysis/2011/10/06/should-child-soldiers-be-prosecuted-their-crimes.

atrocities committed against our weakest and most innocent, but also as an attack against humanity's future. United Nations (UN) Expert Graça Machel wrote:

> [M]ore and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values; a space in which children are slaughtered, raped, and maimed; a space in which children are exploited as soldiers; a space in which children are starved and exposed to extreme brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink.[19]

Perhaps more succinctly, Colombian Minister Estrada emphasized: "[Child soldiering] is a demonstration of ruthlessness and cruelty. It's scary because these people could one day be governing this country."[20]

The international community did not resign itself to mere rhetoric. Treaties, conventions and agreements in the field of human rights law and international humanitarian law (IHL) have developed over time to improve the protection of child soldiers. Since 1977, the internationally accepted minimum age for recruitment has slowly risen from 15 to 18 years.[21] Notable international instruments for the protection of children include the Additional Protocols to the Geneva Conventions,[22] the Convention on the Rights of the Child (CRC) and its Protocol (OPAC),[23]

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[19] Impact of Armed Conflict on Children Report, above note 11, para. 3.

[20] "Brutality of child army film shocks Colombia", *The Independent*, 2 May 2001, available at: www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=186500.

[21] *See* notes 8, 66 and 89.

[22] Additional Protocol I, above note 8; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).

[23] Convention on the Rights of the Child (CRC), 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), 2173 UNTS 222, 25 May 2000 (entered into force 12 February 2002).

and the African Children's Charter.[24] The International Committee of the Red Cross database lists the prohibition on child soldiering as falling under customary IHL.[25] The UN has also been active in putting child soldiering on its agenda, predominantly since 1999.[26] Finally, in 2002, child soldiering was adopted as an international crime through the Rome Statute. It is to this final branch of international law which we now turn.

II. Adults as Perpetrators, Children as Victims

Child soldering is not a monolithic crime; rather, it establishes a perverted social situation which births a wide spectrum of harms, both against and by children. ICT/Cs have the freedom to choose which crimes and which actors to prioritize, as long as they fall under their material and personal jurisdiction. In practice, for a significant period, ICT/Cs have focused on the adults deemed responsible for the harm inflicted upon the children, either directly or, after novel legal reasoning, through the "original sin" of recruitment. Child soldiers, on the other hand, are rarely prosecuted.

The Recruitment Equivalency

Recently, a very directed effort has developed, both through the adoption of international instruments and the jurisprudence of ICT/Cs, to protect children as victims of the "original crime" of recruitment. Nevertheless, the condemnation on the use of children during hostilities is not new. Rules prohibiting child soldiering can be found in the Geneva Conventions and its Protocols,[27] with Additional Protocol II specifically

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[24] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, 11 July 1990 (entered into force 29 November 1999), Art. 22(2).

[25] ICRC, "Customary International Humanitarian Law Database", 2020, available at: www.icrc.org/customary-ihl/eng/docs/home, Rules 136-137. The ICRC stresses that development of international norms and standards is a priority. Kirstin Barstad, "Preventing the recruitment of child soldiers: The ICRC approach", *Refugee Survey Quarterly*, Vol. 27, 2008, § 5.

[26] The UN Security Council has passed a number of resolutions in this context. *See* UNSC Res. 1379, 20 November 2001, § 16; UNSC Res. 1460, 30 January 2003, § 4; UNSC Res. 1612, 26 July 2005, § 8.

[27] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949 (entered into force 21 October 1950), Arts. 14, 24, 51; Additional Protocol I, above note 8, Art. 77(2).

establishing that children below 15 "shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."[28] The CRC establishes a similar obligation for States to ensure that children under 15 are not used in such a capacity.[29] However, while the prohibition under international law is evident, it has been heavily contested whether recruitment also entailed *individual criminal responsibility* under ICL.[30]

Before continuing, it must be clarified under ICL, three different *actus rei* are distinguished: conscription, enlistment, and use.[31] *Conscription* and *enlistment* both refer to the act of recruiting children into an armed group,[32] but are differentiated by the voluntariness factor.[33] Conscription pertains to *forcible* recruitment, achieved through abduction, threats, and even legal means (e.g. conscription laws).[34] In contrast, enlistment is reactive and non-coercive.[35] *Use*, as its name implies, refers to actively using children during hostilities.[36] Somewhat unintuitively, therefore, the crime of "use" does not necessarily require the perpetrator to engage in the physical act of recruiting. Within the context of this article, the words "conscription", "enlistment" and "use" are applied as defined above, while "recruitment" is used to refer to the overall crime of "child recruitment."

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[28] Additional Protocol II, above note 22, Art. 4(3)(c).

[29] CRC, above note 23, Art. 38(2-3).

[30] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone (SCSL Report), S/2000/915, 4 October 2000, para. 17. *See also* SCSL, *Prosecutor v. Sam Hinga Norman*, SCSL-2004-14-AR72(E), Decision (Lack of jurisdiction), 31 May 2004, para. 30.

[31] Note that non-ICL texts, and occasionally even official sources, can contain inconsistencies in terminology. *See* e.g., G. Waschefort, above note 8, p. 109; *Norman*, above note 30, para. 4(c).

[32] SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* ("RUF"), SCSL-04-15-T, Judgement (Trial Chamber), 2 March 2009, para. 190(i).

[33] *See Norman*, above note 30, Robertson Dissent, para. 27.

[34] *Norman,* above note 30, paras. 1, 5; *RUF* Trial Judgement, above note 32, para. 186; SCSL, *Prosecutor v. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu* ("AFRC"), SCSL-04-16-T, Judgement (Trial Chamber), 20 June 2007, para. 734.

[35] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision (Confirmation of Charges), 29 January 2007, para. 246; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment (Trial Chamber), 14 March 2012, para. 608.

[36] *RUF* Trial Judgement, above note 32, para. 193(i).

The Rome Statute was the first international instrument to explicitly include a criminalization of recruitment.[37] Under the Rome Statute, recruitment comprises "[c]onscripting or enlisting children under the age of 15 years into armed forces [or groups] or using them to participate actively in hostilities."[38] Two points merit some emphasis. First, child soldiers are defined as persons younger than 15, which is consistent with the minimum permitted age for recruitment in most international instruments (15 or older).[39] Second, it explicitly lists the three *actus rei* disjunctively, using "or". This is a subtle but important detail. The differentiation between conscription and enlistment, and the choice to include both actions in the provision, suggest that something "more passive, such as putting the name of a person on a list" was also being criminalized.[40] This formulation is commonly interpreted as being progressive and more expansive than what customary international law (CIL) prescribed at the time.[41] We shall refer to it as the "recruitment equivalency".

The Special Court for Sierra Leone (SCSL) Draft Statute was originally formulated more conservatively, and did not criminalize enlistment.[42] Eventually, however, it was amended to mirror the Rome Statute wording.[43] The SCSL strenuously but successfully defended this position when in *Norman*, the accused contested that enlistment had not

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[37] This inclusion, notably, was made very late in its drafting stage. Julie McBride, *The War Crime of Child Soldier Recruitment*, Springer-Verlag, The Hague, 2014, p. 47.

[38] Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002), Arts. 8(2)(b)(xxvi) and 8(2)(e)(vii).

[39] The OPAC and Paris Principles set the age at 18. OPAC, above note 23, Art. 4(1); Paris Principles, above note 8, § 2.1.

[40] William Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2001, p. 50. *See also* SCSL Report, above note 30, para. 18.

[41] M.C. Bassiouni, "The Normative Framework of International Humanitarian Law Overlaps, Gaps and Ambiguities", *International Law Studies*, Vol. 75, 2000, p. 20; G. Waschefort, above note 8, p. 109. *See also Norman*, above note 30, Robertson Dissent, para. 4.

[42] SCSL Report, above note 30, Enclosure art. 4(c). See also *Norman*, above note 30, para. 8.

[43] G. Waschefort, above note 8, p. 107; *Norman*, above note 30, para. 8. *See* Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, 22 December 2000, Annexed Statute, Art. 4(c).

acquired the status of an international crime under CIL.[44] While some commentators have criticized the decision of upholding enlistment as a separate crime as being legal fiction,[45] it had achieved its aim: it was a pragmatic, if legally questionable, effort that safeguarded the SCSL's jurisdiction over future child soldiering cases,[46] and was thereby responsible for holding many other Sierra Leonean perpetrators accountable for recruitment.[47] One author argues: "If for the wrong reasons (…) the Appeals Chamber did come to the right result."[48]

The recruitment equivalency had significant consequences. In both *CDF* and *Lubanga* it was held that each act constitutes a distinct *actus reus*,[49] implying that they can be charged together and only one needs to be proven to obtain a conviction under recruitment.[50] It also removed the special purpose requirement which originally required the perpetrator to have had recruited the child *for the purpose of* using them in hostilities. In *Lubanga*, it was reaffirmed that no specific intent is needed with respect to conscription and enlistment.[51]

One can notice a very directed effort throughout this jurisprudence to protect child soldiers under criminal law, almost to a fault, categorically targeting any contribution to child soldiering

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[44] *Norman*, above note 30, paras. 1-3, 53. Norman argued that this violated the principle of legality.

[45] *See* e.g. G. Waschefort, above note 8, p. 109; J. McBride, above note 37, p. 104.

[46] J. McBride, above note 37, p. 107.

[47] G. Waschefort, above note 8, pp. 110-111.

[48] Matthew Happold, "International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone's Decision in *Prosecutor v. Samuel Hinga Norman*," *Leiden Journal of International Law*, Vol. 18, 2005, p. 289.

[49] SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa* ("CDF"), SCSL-04-14-A, Judgment (Appeals Chamber), 28 May 2008, para. 139; *Lubanga* Trial Judgment, above note 35, para. 609.

[50] *See* ICTY, *Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo and Zejnil Delalić*, IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, para. 412.

[51] *Lubanga* Trial Judgment, above note 35, para. 609; *see also* SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa* ("CDF"), SCSL-04-14-T, Judgment (Trial Chamber), 2 August 2007, para. 195; *RUF* Trial Judgement, above note 32, para. 190; SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, Judgement (Trial Chamber), 18 May 2012, para. 439 note 1055; compare SCSL Report, above note 30, Enclosure, Art. 4(c): "Abduction and forced recruitment of children under the age of 15 years into armed forces or groups *for the purpose of* using them to participate actively in hostilities." (emphasis added)

irrespective of the actual role played in the process. The underlying motivation is expressed clearly in *Lubanga*, where it was held that the "principal historical objective" of the prohibition had always been the protection of children in armed conflict from harm.[52]

Children

While ICL utterly condemns the adults responsible for child soldiering, it is in practice the children under their command who commit many of the atrocities. These child soldiers, however, are almost universally spared from responsibility under ICL. In several situations, this did not occur for procedural reasons. Only the ICC features a flat statutory minimum age of 18.[53] In contrast, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) were not beholden to any jurisdictional limitation based on age.[54] The SCSL could try minors aged 15-18, but under a specific juvenile procedure,[55] an approach replicated by the UN Transitional Administration in East Timor (UNTAET) Panels with a modified range (12-16).[56] The SCSL and UNTAET Panels were therefore not procedurally barred from prosecuting child soldiers.

Despite there being no positive prohibition on trying child soldiers,[57] no child soldier has ever been tried internationally.[58] Even in cases where the court had personal jurisdiction *de jure*, ICT/Cs have been extremely reluctant.[59] This extends beyond child soldiers: no person under

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[52] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on Sentence (Trial Chamber), 10 July 2012, para. 38; *see also* Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 3rd ed., Cambridge University Press, Cambridge, 2014, p. 303.

[53] Rome Statute, above note 38, Art. 26.

[54] *See* Fanny Leveau, "Liability of Child Soldiers Under International Criminal Law", *Osgoode Hall Review of Law and Policy*, Vol. 4, 2013, p. 41; Magne Frostad, "Child Soldiers: Recruitment, Use and Punishment", *International Family Law, Policy and Practice*, Vol. 1, 2013, p. 86; IRIN News, above note 18.

[55] Like most domestic juvenile proceedings, it emphasized restoration, rehabilitation, education and juvenile guarantees. Statute of the Special Court for Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000, 16 January 2002, Art. 7(1-2); *see* SCSL Report, above note 30, paras. 32-35.

[56] UNTAET Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, UNTAET/REG/2000/30, 25 September 2000, § 45.1.

[57] M. Drumbl, above note 10, pp. 103, 106.

[58] F. Leveau, above note 54, p. 37.

[59] M. Frostad, above note 54, p. 86.

18 has ever been brought before the ICTY and ICTR.[60] The SCSL, despite active requests from the population to do so,[61] has never tried a child soldier. Chief Prosecutor David Crane's position on the matter was quite clear: "I am not interested in prosecuting children".[62] Before the UNTAET Panels, one case arose featuring an ex-child soldier tried for crimes committed when he was 14, but this was resolved through a plea bargain.[63] Drumbl alleges that this resolution, too, is indicative of *de facto* reluctance in ICL to try minors.[64]

It must be underlined that this unwillingness is not a product of hard law, but largely a matter of policy. Nevertheless, it is reflective of a broader propagated position viewing the prosecution of child soldiers by way of ICL as "unimportant, embarrassing, and unhelpful."[65] The Paris Principles state that "[c]hildren should not be prosecuted by an international court or tribunal."[66] Even courts that provide for special juvenile procedures are distrusted: children "have no place at a war crimes tribunal, no matter how benevolent such a tribunal may be towards them."[67] Authors broadly condemn trying child soldiers internationally, suggesting they be tried at most domestically, through rehabilitation or even not at all, in light of what they went through.[68] David Crane added:

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[60] IRIN News, above note 18.

[61] *See* SCSL Report, above note 30, para. 35.

[62] SCSL Public Affairs Office, "Special Court Prosecutor Says He Will Not Prosecute Children," *OTP Press Release*, 2 November 2002.

[63] Judicial System Monitoring Programme, "The Case of X: A Child Prosecuted for Crimes Against Humanity", January 2005.

[64] M. Drumbl, above note 10, p. 125.

[65] M. Drumbl, above note 10, p. 127.

[66] Paris Principles, above note 8, § 8.6. Coomaraswamy also argued that "there is an emerging consensus that children below the age of 18 should not be prosecuted for war crimes and crimes against humanity by international courts." Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/HRC/12/49, 30 July 2009, para. 49.

[67] Save the Children Sweden, cited in Ilene Cohn, "The Protection of Children and the Quest for Truth and Justice in Sierra Leone", *Journal of International Affairs*, Vol. 55, 2001, note 28; *see and compare*: United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33, 29 November 1985 (Beijing Rules), Rule 17.1(b); Paris Principles, above note 8, §§ 3.7, 8.9.0; ECtHR, *T. and V. v. United Kingdom*, App nos. 24724/94 and 24888/94, 16 December 1999, para. 84.

[68] G. Waschefort, above note 8, p. 139; Nienke Grossman, "Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations", *Georgetown Journal of International Law*, Vol. 38, 2007, p. 351. The only prominent counterargument in favour

"The children of Sierra Leone have suffered enough both as victims and perpetrators. (…) I want to prosecute the people who forced thousands of children to commit unspeakable crimes."[69] Despite only being a statement of prosecutorial policy, this position has become quite authoritative and widely supported internationally,[70] and summarizes this section nicely.

III. When Does Agency Start?

Prosecutor Crane's statement above contains a hidden element: that the children were "forced" to commit their crimes, implying they had no "choice" in the matter. This brings us to a possibly more fundamental reason for excluding child soldiers from prosecution, besides prosecutorial policy: the question of children's agency. From what point do they possess the necessary intent to commit a crime according to ICL? The answer can lead to a single threshold, either high or low, or a spectrum. The inquiry is relevant because the question of agency has surfaced several times in child soldiering cases: if there is "choice" (e.g., choice to stay, choice to kill), there is culpability.[71] In this section, it is demonstrated that ICL applies inconsistent approaches, but that generally, it does acknowledge some degree of agency much earlier than the ICC's 18-year-old statutory minimum.

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of trying them internationally rests on victim's justice: "Justice for the victims may be the most relevant justification when dealing with prosecution of child soldiers." F. Leveau, above note 54, p. 49.

[69] SCSL Public Affairs Office, above note 62.

[70] G. Waschefort, above note 8, p. 139.

[71] In *RUF*, the Court held Kallon and Sesay were not entitled to mitigation due to their conscription, because they could have "chosen another path" than that of committing crimes. SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T, Sentencing (Trial Chamber), 8 April 2009 ("RUF"), paras. 220, 250. In *Ongwen*, the Court maintained that there was no duress because "the circumstances of Ongwen's stay in the LRA … cannot be said to be beyond his control." ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Decision (Confirmation of Charges), 23 March 2016, para. 154.

Legal Responsibility

Legal responsibility in criminal law has always been inextricably linked with the core matter of *mens rea*.[72] From which point in their lifetime do children possess the necessary intent to commit a crime? Different legal cultures have vastly diverging views on the exact threshold,[73] although the global average is relatively low (13-15).[74] Some jurisdictions recognize transitory stages. Scottish courts, for example, can apply a doctrine of diminished responsibility as a mitigating circumstance that describes children as independent agents, but with "defective or incomplete" responsibility.[75] International instruments are not in agreement. The CRC only asks States to "establish (…) a minimum age,"[76] while the Beijing Rules ask for a qualitative test "bearing in mind the facts of emotional, mental and intellectual maturity."[77]

Although criminal law has not traditionally based its policies on scientific research,[78] it could be worthwhile to briefly explore psychological findings on the issue. Studies generally support a casuistic approach. "[U]p to a certain age, a child is not fully able to understand his or her acts, nor the consequences attached to it."[79] UN Expert Coomaraswamy places the threshold at somewhere "younger than eighteen,"[80] although the exact moment when this occurs is undetermined and likely varies between individuals.[81] External factors, such as

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[72] David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed., Oxford University Press, Oxford, 2011, p. 340.

[73] There is no general agreement on this matter. *See* Gerry Maher, "Age and Criminal Responsibility", *Ohio State Journal of Criminal Law*, Vol. 2, 2005, p. 496.

[74] F. Leveau, above note 54, p. 42.

[75] G. Maher, above note 73, p. 508.

[76] CRC, above note 23, Art. 40(3). Its commentaries suggest an absolute minimum age of 12, however. UN Committee on the Rights of the Child, "CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice," CRC/C/GC/10, 25 April 2007, para. 32.

[77] Beijing Rules, above note 67, Rule 4.

[78] Naomi Cahn, "Poor Children: Child Witches and Child Soldiers in Sub-Saharan Africa", *Ohio State Journal of Criminal Law*, Vol. 3, 2006, p. 429. For a comprehensive summary of neuroscientific findings on this issue, *see ibid.*, pp. 424-430.

[79] F. Leveau, above note 54, p. 38.

[80] G. Waschefort, above note 8, p. 124 note 104.

[81] F. Leveau, above note 54, p. 38. It has also been stated that "even within adolescence, there are varying levels of maturity and understanding, with eleven to thirteen-year olds

upbringing, experiences, and abuse and neglect, also influence the mental maturity age.[82]

In this respect, ICL does not deny some level of agency with respect to children. As discussed above, all courts except the ICC do not exclude the possibility of trying persons under 18 if *mens rea* can be proven. In addition, the SCSL and UNTAET incorporated a spectrum of transitory stages, which would be more in line with Coomaraswamy's report. There are also indications that the ICC standard, sometimes criticized for its flat transition between non-liable to liable at the turn of one's 18th birthday,[83] was more the product of policy than a belief in the polarising dichotomy between minor and adult for the purposes of determining accountability.[84]

Children Volunteering

One interesting anomaly with regard to the concept of child soldiers as victims is the phenomenon of voluntary recruits. Not all child soldiers are forcibly recruited in the sense of "conscription". Some are "enlisted" and volunteer to join. They do this knowingly for a variety of reasons. Children may preventively join an armed group to protect their family or themselves.[85] As organizations that provide safety, shelter, food, and social connections, armed groups may be enticing as a medium for self-preservation, employment, the pursuit of material gain, and to combat feelings of exclusion.[86] True—it is debatable whether these are

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showing significantly poorer reasoning skills than sixteen to seventeen-year olds." N. Cahn, above note 78, p. 425.

[82] N. Cahn, above note 78, p. 426-247.

[83] J. McBride, above note 37, p. 149.

[84] The choice was largely practical, to avoid having to make a compromise between the different legal traditions of Signatories. Office of the Special Representative of the Secretary-General for Children and Armed Conflict, "Working Paper No 3: Children and Justice During and in the Aftermath of Armed Conflict," September 2011, p. 37.

[85] Rachel Brett, "Adolescents volunteering for armed forces or armed groups," *International Review of the Red Cross*, Vol. 85, 2003, p. 861; ILO, "Wounded Childhood: the use of children in armed conflict in Central Africa," 1 December 2003, available at: www.ilo.org/ipecinfo/product/download.do?type=document&id=948. The UNTAET case actually features a good example of this, as the defendant claimed to have joined the militia to protect his father. *Case of X*, above note 63, p. 18.

[86] R. Brett, above note 85, pp. 859-861; ILO, above note 85, pp. 29, 31, 34.

"voluntary" reasons or just brought about by the need to survive.[87] Others, however, are decidedly deliberate: many children join for ideological reasons, desires for revenge, or fascination with the prestige of war.[88] How ICL responds to voluntary recruits can serve as an indicator as to whether it awards agency to children below 15 years, the age below which recruitment is prohibited.[89]

The first conclusion that may be drawn from our previous discussion would be that it does not. The equivalency between conscription and enlistment in fact suggests the opposite. It is "legally irrelevant" whether the child consented.[90] Such an elimination of the voluntariness factor has been justified in *Lubanga* through the argument that children "cannot give 'informed' consent when joining an armed group, because they have limited understanding of the consequences of their choices,"[91] and that within armed conflict, "children's participation in armed forces will always involve some form of pressure."[92] This narrative is supported by the firmly established rule that consent, as an expression of voluntariness, can never be a valid defence to a charge of recruitment.[93]

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[87] Michael Wessels, *Child soldiers: From violence to protection*, Harvard University Press, Harvard, 2006, p. 4; David McNair, "Historical and Psychological Origins of Child Soldiering in Ba'athist Iraq", *Digest of Middle East Studies*, Vol. 19, 2010, p. 39.

[88] ILO, above note 85, pp. 31-35.

[89] There has been some debate whether this should be 18 instead. *See* Megan Nobert, "Children at War: The Criminal Responsibility of Child Soldiers", *Pace University Law Review*, Vol. 3, 2011, p. 7.

[90] *Lubanga* Trial Judgment, above note 35, para. 612. *See also CDF* Appeals Judgment, above note 49, Winters Opinion, para. 11 note 1207.

[91] *Lubanga* Trial Judgment, above note 35, para. 610.

[92] No Peace Without Justice and UNICEF Innocenti Research Centre, "International Criminal Justice and Children", 2002, available at: www.unicef.org/emerg/files/ICJC.pdf, pp. 73-74. See *Lubanga* Trial Judgment, above note 35, paras. 611-612. Graça Machel also stated that "[i]t is misleading (…) to consider this voluntary. While young people may appear to choose military service, the choice is not exercised freely. They may be driven by any of several forces, including cultural, social, economic or political pressures." Impact of Armed Conflict on Children Report, above note 11, para. 38.

[93] *Lubanga* Trial Judgment, above note 35, para. 617; *Lubanga* Confirmation of Charges, above note 35, para. 247; *AFRC* Trial Judgement, above note 34, para. 735; *CDF* Appeals Judgment, above note 49, para. 192. The Geneva Conventions also proscribe that protected persons can never renounce their rights under the Convention. Geneva Convention IV, above note 27, Art. 8.

Something interesting, however, occurred during Lubanga's sentencing judgement. As a reference, SCSL sentences for recruitment relied on relatively standard aggravating factors, such as drug abuse, the scale and brutality of the acts, and long-term harm to the victims.[94] The ICC opted for a curious, different approach. In 2012, Lubanga was given three individual sentences: twelve, thirteen and fifteen years of imprisonment for enlistment, conscription and use, respectively.[95] The rationale was not explicitly given in the judgement. Kurth suggests that it reflected the Chamber's views on the different gravities of the offences, clearly establishing "some sort of hierarchy".[96] He speculates that conscription was likely given a higher sentence than enlistment to acknowledge the added element of compulsion. Use was punished most severely because it directly exposes children to danger, whilst conscription and enlistment can be viewed as mostly "preparatory."

Judge Odio-Benito appended two major points of dissent to the judgement. Odio-Benito "firmly disagree[d]" with the choice to establish a hierarchy between the three *actus rei*.[97] In her view, all three acts cause "severe physical and emotional" damage to the victims, regardless of whether the children are actually forced to fight or not.[98] Jørgensen agrees that the majority's choice to introduce a hierarchy was artificial and that there is "no clear basis for applying a gravity scale";[99] they are, after all, alternative forms of the "same" offence. Odio-Benito's second objection is discussed below.

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[94] *See generally*: SCSL, *Prosecutor v. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu* ("AFRC"), SCSL-04-16-T, Sentencing (Trial Chamber), 19 July 2007, paras. 53(ii), 85; SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, Sentencing (Trial Chamber), 30 May 2012; SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa* ("CDF"), SCSL-04-14-T, Sentencing (Trial Chamber), 9 October 2007, para. 97; *RUF* Trial Sentencing Judgement, above note 71, paras. 180-186.

[95] *Lubanga* Decision on Sentence, above note 52, para. 98.

[96] Michael Kurth, "The Lubanga Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age, and Gravity", *Goettingen Journal of International Law*, Vol. 5, 2013, p. 452. *See Lubanga* Trial Judgment, above note 35, para. 608.

[97] *Lubanga* Decision on Sentence, above note 52, Odio-Benito Dissent, para. 3.

[98] *Lubanga* Decision on Sentence, above note 52, Odio-Benito Dissent, para. 25.

[99] Nina Jørgensen "Child Soldiers and the Parameters of International Criminal Law", *Chinese Journal of International Law*, Vol. 11, 2012, paras. 43-44.

While it is true that sentencing can fundamentally involve different factors than that of responsibility, the *Lubanga* divide somewhat confounds the issue of agency. The recruitment equivalency was motivated by the position that children cannot consent. They are impressionable and must be protected from themselves by adults carrying the positive obligation to deny them admission, even if they apply voluntarily. "Volunteering is presented as an illusion."[100] They cannot apply voluntarily, because they have insufficient capacity to do so. It is then inconsistent to acknowledge enlistment as a "lesser" offence for sentencing. If agency is denied, it should be invariably immoral and irresponsible to recruit children into an armed group, regardless of whether they ostensibly "volunteer" or not. The position that enlistment is "less severe" than conscription is only justifiable if some degree of juvenile agency is presupposed.

To complicate matters further, there are indicators that, with the exception of the recruitment equivalency, ICL has consistently supported the recognition of children's agency. A "hierarchy" has always existed.[101] Most telling is the fact that enlistment was not criminalized until the Rome Statute,[102] signifying that conscription had always been regarded as the more "severe" crime. In *Norman*, Justice Robertson opined that "forcible recruitment is always wrong, but enlistment (…) might be excused if they are accepted (…) only for non-combatant tasks,"[103] and described "use" as "taking the more serious step" *vis-à-vis* conscription and enlistment.[104]

So, which is it?

IV. Does Child Soldiering Shape Its Victim?

Answer: Significantly So

Odio-Benito, it must be recalled, had a second objection. She argued that the sentences failed to take into consideration the "abundant evidence" of

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[100] M. Drumbl, above note 10, p. 13.

[101] Gus Waschefort, "Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone", *International Humanitarian Legal Studies*, Vol. 1, 2010, p. 195; *Lubanga* Trial judgment, above note 35, para. 582.

[102] SCSL Report, above note 30, para. 18.

[103] *Norman*, above note 30, Robertson Dissent, para. 9.

[104] *Norman*, above note 30, Robertson Dissent, para. 5(c).

long-term harm caused to ex-child soldiers.[105] She is correct that this evidence had indeed been adduced.

During the trial, the Court upheld expert testimonies underlining the "devastating long-term consequences" of child soldiering to accentuate the gravity of Lubanga's acts.[106] The Court also accepted, in the same paragraph, that child soldiering "can hamper children's healthy development and their ability to function fully even once the violence has ceased." Prosecutor Moreno-Ocampo delivered a similar, slightly dramatized account during his opening statement.[107] The child soldiering experience was cast as linear: "[I]t rendered the children as victims damaged for life, with their reality today as derivative of their previous suffering. Once a child soldier in fact, always a child soldier in mind, body, and soul."[108] Long-term harm was also recognized by the SCSL in the *RUF* case.[109]

There is more evidence suggesting this outside of *Lubanga* and *RUF*. One is reminded that much of the international condemnation is based on the notion of long-term harm and the threat that this new "risk generation" poses to a country's, and humanity's, future.[110] Much has been written about how a past of child soldiering is greatly damaging to that person's personality and morality. They suffer from a lack of education and social upbringing, physical and mental disabilities, PTSD,

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[105] *Lubanga* Decision on Sentence, above note 52, Odio-Benito Dissent, para. 19. Note that in this specific case, this objection was unfounded as harm had already been acknowledged in the determination of the gravity of the offence: Odio-Benito's proposal would therefore have resulted in unjustifiably "double-counting" the harm factor in the final sentence. See *ibid*., para. 35; *see also* ICTY, *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Sentencing (Appeal Judgement), 8 March 2006, para. 58.

[106] *Lubanga* Decision on Sentence, above note 52, para. 39.

[107] "They cannot forget the beating they suffered. They cannot forget the terror they felt and the terror they inflicted. They cannot forget the sounds of their machine-guns, that they killed. They cannot forget that they raped and that they were raped." Cited in Tracey Gurd, "And here's what the Prosecutor's Opening Statement said…….," *International Justice Monitor*, 2010, available at: www.ijmonitor.org/2010/01/and-heres-what-the-prosecutors-opening-statement-said.

[108] Mark Drumbl, "Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering", 20 April 2016, available at: justiceinconflict.org/2016/04/20/shifting-narratives-ongwen-and-lubanga-on-the-effects-of-child-soldiering.

[109] *RUF* Trial Sentencing Judgment, above note 71, paras. 184-186.

[110] *See above* Section I.

STDs, drug dependency, and social stigmas.[111] Reportedly, effects persist even after demobilization, with psychological trauma sometimes staying with the ex-child soldier for a lifetime.[112] Post-traumatic stress has been reported to be severe and widespread;[113] in one study conducted in Uganda and the DRC, 34% of respondent ex-child soldiers were diagnosed with PTSD.[114] According to Schauer, long-term effects of child soldiering include a chronic absence of social skills, difficulties in suppressing aggressiveness, and cognitive and moral distortion, caused by an internalisation of perverse moral codes.[115]

Writers report on how easily child soldiers can become permanently moulded by spending their formative years in armed groups. Communities have described them as "bad", "disrespectful", "violent", and "out of control", and how the violence from their childhoods had become entrenched and irrevocable.[116] Ex-child soldiers have been found to be trapped in a form of moral atavism, being "'stuck' in a primitive stage of moral development."[117] "Increasing aggressive behavior, emotional numbing and loss of empathy, and changes in attitudes, beliefs, and personality," as well as proneness to categorical thinking and violence, have been cited.[118] Another research group stated that wartime experiences "deform [children's] sense of right and wrong."[119] Of course, this is exactly the aim of most recruiters: they prey on the unformed,

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[111] *See* Elisabeth Schauer and Thomas Elbert, "The Psychological Impact of Child Soldiering", in Erin Martz, *Trauma Rehabilitation After War and Conflict*, Springer-Verlag, New York, 2010.

[112] E. Shauer, above note 111, p. 327.

[113] *See* Christopher Blattman and Jeannie Annan, "The Consequences of Child Soldiering", *Review of Economics and Statistics*, Vol. 92, 2010, pp. 884, 890; E. Schauer, above note 111, pp. 323-327; P. Singer, above note 9, pp. 193-195.

[114] C.P. Bayer, F. Klasen and H. Adam, "Association of trauma and PTSD symptoms with openness to reconciliation and feelings of revenge among former Ugandan and Congolese child soldiers," *Journal of the American Medical Association*, Vol. 298, 2007, p. 558.

[115] E. Schauer, above note 111, pp. 335-336.

[116] Jo Boyden, "The Moral Development of Child Soldiers: What Do Adults Have to Fear?" *Journal of Peace Psychology*, Vol. 9, 2003, pp. 345-348.

[117] J. Boyden, above note 116, p. 352.

[118] *Ibid.,* see also G. Straker et al., Faces in the revolution: The psychological effects of violence on township youth in South Africa, David Phillip, Claremont, 1992.

[119] B. Auster et al., "A fight over child soldiers", *US News and World Report*, 24 January 2000, p. 8.

pliable, easily influenced minds of children and their underdeveloped morality,[120] making them vulnerable to indoctrination and other psychosocial abuse designed to make them more effective killers.[121]

Answer: Not So Much?

If one accepts the position that child soldiering has permanent, morality-destroying effects on its demobilized victims, one would expect the same to have occurred to ECPs. The argument could in fact be made that their situation is worse, as they remained within the armed group until adulthood, never having the opportunity to leave the perverse social circumstances which shaped them. This should raise questions with regard to their capacity to appreciate the unlawfulness of their actions: does passing an arbitrary limit for "adulthood" suddenly make such persons accountable for (all of) their actions, or should their past become a consideration, either for responsibility or sentencing?

At least for responsibility, it seems that ICL does not accept that an ECP's past would preclude their capacity to appreciate the unlawfulness or nature of their crime.[122] During the *Ongwen* Confirmation of Charges, the Court rejected several Defence arguments that relied on the appreciation of how Ongwen's past had compromised who he had become.[123] One interesting detail concerns the Court's contention that

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[120] J. Boyden, above note 116, p. 348; E. Schauer, above note 111, p. 316.

[121] *See* J. Boyden, above note 116, pp. 351-357; Erin Baines, "Complex political perpetrators: reflections on Dominic Ongwen," *Journal of Modern African Studies*, Vol. 47, 2009, p. 170; Morton Deutsch, "Psychological Roots of Moral Exclusion", *Journal of Social Issues*, Vol. 46, 1990, p. 24.

[122] Rome Statute, above note 38, Art. 31(1)(a); *see also* Raphael Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", *American University International Law Review*, Vol. 33, 2018, pp. 619-629.

[123] The Defence argued separately for complete exclusion of criminal liability and of duress. *Ongwen* Confirmation of Charges, above note 71, paras. 150, 153. The Defence also requested the Court to look "more holistically in light of the indoctrination that child soldiers have to undergo," adding that "the LRA's spiritual indoctrination had a profound impact on young abductees by shaping their beliefs and perceptions of right and wrong." Cited in Sharon Nakandha, "Ongwen Confirmation of Charges Hearing Continues at ICC", International Justice Monitor, 26 January 2016, available at: www.ijmonitor.org/2016/01/ongwen-confirmation-of-charges-hearing-continues-at-icc.

evidence had demonstrated how "Ongwen shared the ideology of the LRA, including its brutal and perverted policy."[124] The Court here fails to consider *why* Ongwen shared this ideology, and whether this was a result of conscious choice or his compromised childhood circumstances—an omission which can point to a disregard of the long-term effects on an ECP's morality.

That (adult) defendants' pasts in armed groups are given insignificant weight during sentencing is displayed in *RUF*.[125] Kallon's Defence claimed that he was "completely brainwashed" into the RUF ideology,[126] which did not even merit Kallon a mitigation.[127] Sesay had only been an "adult" for one year when he was conscripted into the RUF as a 19-year-old,[128] which was also dismissed.[129] A counterpoint must however be added to this: Kallon and Sesay were not ECPs (they did not spend their childhood in an armed group). This finding does not therefore necessarily indicate that courts will adopt the same position *vis-à-vis* ECPs: in fact, the Office of the Prosecutor (OTP) for *Ongwen* has consistently not excluded the possibility of its relevance during sentencing, although they have been adamant that it cannot play a role for responsibility.[130]

V. Narrative Contradictions

As the previous sections have demonstrated, ICL has adopted a number of positions with regard to several aspects related to child soldiering. Not all are in harmony and some appear to be irreconcilable. In this section, an attempt is made to analyse these narratives, determine their legal ramifications, and if possible, provide a solution to reconcile them.

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[124] *Ongwen* Confirmation of Charges, above note 71, para. 154.

[125] Courts have, in the past, issued mitigations based on the youthful age of the defendant; these mitigations, however, were not granted for reasons pertaining to indoctrination or compromised ideology. *See* ICTY, *Prosecutor v. Drazen Erdemović*, IT-96-22-A, Judgement (Appeals Chamber), 7 October 1997, para. 10(b); ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Judgement (Trial Chamber), 10 December 1998, para. 284.

[126] *RUF* Trial Sentencing Judgment, above note 71, para. 85.

[127] *RUF* Trial Sentencing Judgment, above note 71, para. 250.

[128] *RUF* Trial Sentencing Judgment, above note 71, para. 69.

[129] *RUF* Trial Sentencing Judgment, above note 71, para. 220.

[130] S. Nakandha, above note 123; T. Maliti, above note 2.

(1) ICL focuses its efforts on adult recruiters. Child soldiers are victims. A significant body of ICL attributes to children enough agency to be prosecuted *de jure*, but they are never tried in practice for policy reasons.

Two matters are relevant for discussion here. First, how can this policy be justified on legal grounds, and second, what is the basis for drawing the line between "child victims" and "adult perpetrators"?

Absent procedural reasons, two possible justifications come to mind that can support the tendency to forego children. First, ICL places priority on prosecuting only major criminals, such as senior leaders and perpetrators of the gravest international crimes.[131] This rationale could seem convincing based on the intuition that for child soldiers "it is difficult to believe that they bear the greatest responsibility."[132] However, it does raise the question of how ICL would react in the hypothetical case that a child soldier commits crimes on the scale of Ongwen. By itself, it does therefore seem insufficient as a basis for excluding children *in abstracto*.

The second possibility is the interests of justice guideline,[133] a countervailing principle that allows proceedings to be discontinued if this would be in the interests of justice, even if other admissibility and jurisdictional criteria are fulfilled.[134] Even individuals deemed "most responsible" can be excluded from prosecution by virtue of this principle, including the theoretical "major" child soldier criminal discussed

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[131] SCSL Report, above note 30, paras. 29-31; Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 82 UNTC 280, 8 August 1945, Art. 1; UNSC Res. 1534, 26 March 2004, para. 5; UNSC Res. 1315, 14 August 2000, para. 3; Rome Statute, above note 38, Art. 1. It is also included explicitly in the title of the Nuremberg Charter.

[132] Ilona Topa, "Prohibition of child soldiering – international legislation and prosecution of perpetrators," *Hanze Law Review*, Vol. 3, 2007, p. 115. Note this does not mean that they would go unpunished, but that their cases would be delegated to national courts.

[133] *See* Rome Statute, above note 38, Art. 53; *see also* Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev.50, 11 February 1994, last amended 8 July 2015, Rules 4, 15*bis*, 44; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, ITR/3/REV.1, 29 June 1995, last amended 10 April 2013, Rules 4, 15*bis*, 45*quater*; SCSL Statute, above note 55, Arts. 17(4), 23; UNTAET Rules, above note 56, § 28.2; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976), Art. 14; European Convention on Human Rights, ETS 5, 4 November 1950 (entered into force 3 September 1953), Art. 6.

[134] Office of the Prosecutor, "Policy Paper on the Interests of Justice", September 2007, § 3.

above.[135] The ICC OTP has said that "international justice may not be served by the prosecution of (…) a suspect who has been the subject of (…) serious human rights violations."[136] This would seem a more robust justification for the position.

This, however, creates an inconsistency *vis-à-vis* ECPs. They too have been the subject of serious human rights violations. Why then are they "exempted" from this clemency? The simple answer would be that they are adults. Prosecutor Gumpert correctly underlines: the case of the victim-perpetrator is only "new" for ICL.[137] In that case, the next question would be where to draw the line. Making nominal age the ultimate factor presents problems. Adulthood is a cultural concept: Which cultural standard should be used and why?[138] Even in a purely ICL context, one can ask if 15 (the IHL standard) or 18 (the ICC standard) should be applied.[139] Appling arbitrary thresholds, for example, 18, also leads to awkward scenarios whereby "acts committed by child soldiers prior to their 18th birthday are not eligible for prosecution but for those who do not escape until they are adults, the law holds them responsible (…) regardless of how they came to be fighters."[140]

This matter raises interesting considerations particularly for future decisions to prosecute ECPs internationally. The author would encourage further reflections on this issue.

(2) ROThe recruitment equivalency establishes a paternalistic duty to always refuse voluntary recruits because they do not have the ability to give informed consent. However, conscription is a graver crime than enlistment, implying the recognition of some degree of agency.

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[135] Office of the Prosecutor, above note 134, § 5(c): "It is possible however, that even an individual deemed by the OTP to be among the 'most responsible' would not be prosecuted in the 'interests of justice.'"

[136] *Ibid.*

[137] T. Maliti, supra note 2.

[138] P. Singer, above note 9, p. 7.

[139] *See* M. Nobert, above note 89, p. 7.

[140] Kimberly Curtis, "This child soldier grew up to become a hardened war criminal. Should he go to jail?" *UN Dispatch*, 9 January 2015, available at: www.undispatch.com/child-soldier-grew-become-hardened-war-criminal-go-jail.

This particular contrast is intriguing but not necessarily irreconcilable. There are two possibilities that can be adopted, but which both carry ramifications that must be respected.

The first is to acknowledge that children (can) indeed give consent to volunteer. This option would be more in line with the general position in ICL that some level of agency is assigned to children. It is consistent with the lower or non-existent statutory limits of ICT/Cs, as well as the classic recognition that conscription is graver than enlistment (which until recently, had not even been criminalized). The recruitment equivalency can be justified as a practical way to penally protect the interests of children, by dissuading (potential) perpetrators from becoming involved with child soldiering in any capacity, pursuant to ICL's deterrent function.[141] For example, Prosecutor Moreno-Ocampo once proclaimed that the *Lubanga* trial would "make clear that (…) [i]f you conscript, enlist or use child soldiers you will have a problem, you will be prosecuted."[142] This position however entails that courts must respect the hierarchy between conscription and enlistment during sentencing to stay consistent. Additionally, questions can be raised with respect to labelling. Due to the recruitment equivalency, a convicted person would simply be labelled as a "recruiter", lacking the nuance of whether he committed the "graver" crime of conscription, or merely enlistment.

The second option, which the author does not recommend, is to maintain the notion that the recruitment equivalency applies in general. This would be a novel approach and potentially contrary to other previous developments in ICL. It would also entail that courts should avoid repeating the gravity hierarchy made in *Lubanga*: the alternative to this would be to simply make general calculations, such as those based on the

[141] Note however that the deterrent effect of ICL in practice has been very questionable. Immi Tallgren, "The Sensibility and Sense of International Criminal Law", *EJIL*, Vol. 13, 2002, p. 569; David Bosco, "The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?" *Michigan State Journal of International Law*, Vol. 19, 2011, p. 177.

[142] "Lubanga trial will open eyes to child soldiers: ICC prosecutor – Interview," *Lanka Business Online*, 23 January 2009, available at: www.lankabusinessonline.com/lubanga-trial-will-open-eyes-to-child-soldiers-icc-prosecutor-interview.

actual treatment of the children and the scale and brutality of abuse, as the SCSL has done.[143]

(3) ICL acknowledges the devastating long-term effects of child soldiering with respect to the perpetrator's victims, but not if the accused himself had experienced it.

Drumbl has astutely marked the crux of this contradiction to be one between a "continuous" and "contingent" narrative,[144] referring to how the relationship between the two phases of the ECP is presented. Both narratives are well-represented in *Ongwen*. From the start, Ongwen's Defence adopted the continuous narrative: Ongwen's brutal past would have influenced his adult decisions and culpability.[145] In contrast, the OTP maintained the contiguous narrative, one which emphasizes agency, choice and action: Ongwen was fully conscientious of his membership in the LRA and their crimes. When he committed his crimes, he was an adult, fully in control, and willingly shared the perverse LRA ideology.[146]

It is certainly expected for the Defence and the Prosecution to adopt narratives pursuant to their respective roles in the courtroom, but a noteworthy contrast must be drawn with *Lubanga*, wherein the Court upheld a continuous narrative to accentuate the gravity of Lubanga's acts—here, it was the *prosecution* which relied on the continuous narrative.[147] Drumbl correctly points out that this juxtaposition is jarring, and even suspects opportunistic "instrumentali[sation of narratives] to suit the prosecutorial impulse."[148]

The author joins Drumbl's concerns that the Prosecution and the Court may, perhaps unwittingly and with good intentions, be applying a double standard with respect to this matter. In a vacuum, however, the propositions are not inherently irreconcilable. A troubled past or a

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[143] *See AFRC* Trial Sentencing Judgment, above note 94; *Taylor* Trial Sentencing Judgment, above note 94; *RUF* Trial Sentencing Judgment, above note 71, paras. 180-186.

[144] M. Drumbl, above note 108.

[145] *See* note 123.

[146] *Ongwen* Confirmation of Charges, above note 71, paras. 150-156. It was held that Ongwen "shared the ideology of the LRA, including its brutal and perverted policy with respect to civilians" and that "the circumstances of Ongwen's stay in the LRA … cannot be said to be beyond his control." *See also* S. Nakandha, above note 123.

[147] *See* Section IV.

[148] M. Drumbl, above note 108.

compromised moral upbringing does not necessarily preclude a person's capacity to appreciate the wrongfulness of their actions in all circumstances. However, it would also be too simplistic to simply ignore the possibility that it could. ECPs experience all of the same processes as child soldiers, including those cited to induce long-term damage, but on a longer and more intensive scale.

The author endorses calls from authors not to prematurely fall back on traditional compartmentalisations in law. Drumbl points out how the law often draws "bright-lines" for convenience: persons are either perpetrator or victim, adult or child, culpable or not culpable.[149] The major issue in this regard is how ECPs have clearly been victims of recruitment in their past, but have equally undeniably become perpetrators of atrocities in adulthood.[150] There is a danger of falling into "binary reductionist"[151] views that deny ECPs the recognition of their "much coarser reality".[152] Pangalangan adds that Ongwen-the-victim and Ongwen-the-perpetrator cannot and ought not be separated: "[T]he child who suffers from the soldiering cannot be separated from the soldier he grew up to become."[153]

In the author's opinion, the best compromise would lie in casuistically assessing an ECP's capacity to appreciate the wrongfulness of their actions.[154] A genuine attempt should be made to assess the effect child soldiering had on that person's mental capacity to commit crimes in light of their exceptional background. Cases should not be decided through presuppositions, but in its totality, through the "enforcement of

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[149] Mark Drumbl, "Victims who victimise", *London Review of International Law*, Vol. 4, 2016, p. 22.

[150] For example, can a person such as Ongwen truly be regarded as a "perpetrator" in the same sense of Lubanga, a university graduate who eventually became the president of the UPC? *See Lubanga* Trial Judgment, above note 35, para. 81.

[151] M. Drumbl, above note 10, p. 214.

[152] M. Drumbl, above note 149, p. 22.

[153] R. Pangalangan, above note 122, p. 621.

[154] There is scientific support that effects of child soldiering are extremely varied and that the only way to accurately determine its impact on particular persons is to consider them individually. *See* Alcinda Honwana, *Child soldiers in Africa*, University of Pennsylvania Press, Pennsylvania, 2007 (how child soldiers retain tactical agency through micro-decisions); E. Schauer, above note 111, p. 316 (internalisation of an armed group's morality); C. Blattman, above note 113 (pointing to resilience instead of permanent damage); J. Boyden, above note 116 (ex-child soldiers are generally neither amoral nor antisocial, and through "doubling" can revert back to old moral codes once demobilised).

individual measures in each particular case after a thorough, personal and individual investigation."[155] The Beijing Rule qualitative test "bearing in mind the facts of emotional, mental and intellectual maturity,"[156] which recognizes a spectrum of agency and individual differences among children, consistent with Coomaraswamy's findings, can serve as a point of departure.

This casuistic analysis need not necessarily result in a reduction of responsibility. It may not even need to result in a mitigation if the case does not warrant it. However, performing the individual analysis respects the position in ICL that child soldiering can cause long-lasting moral damage to its victims and, through this, also pays respect to the victim-perpetrator themselves by not denying them this reality. At the very least, it avoids inequitable situations wherein an ECP is equated with purely adult perpetrators such as Joseph Kony.[157]

Final Remarks

ICL needs to carefully consider how it should proceed with future ECP cases. Upon closer examination of the various aspects related to child soldiering, a number of potential discrepancies have been highlighted. Instead of attributing the frictions to opportunism, however, the author would like to assume that most of these were constructed with the best of intentions, perhaps incognisant of the different signals they transmit. On the one hand, one finds a strong desire to protect the child soldiers' interests: their captors are prosecuted regardless of their role in the wicked enterprise, while they are to be reintegrated or at most tried domestically.[158] On the other hand, there is an equally strong desire not to

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[155] R. Pangalangan, above note 122, p. 631. Taking this line of logic to heart, this could also mean that rigid statutory age limits for imputing criminal liability should be removed, following the example of the ICTY and ICTR, opting instead for an individual analysis per defendant.

[156] Beijing Rules, above note 67, Rule 4.

[157] *See also* Windell Nortje, "Victim or Villain: Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court", *International Criminal Law Review*, Vol. 17, 2017, pp. 205-206.

[158] N. Grossman, above note 68, p. 351; ICRC, "Child victims of armed conflict: the view of the International Committee of the Red Cross", 23 May 2000, available at: www.icrc.org/eng/resources/documents/statement/57jqrc.htm.

let grave crimes, such as those of Ongwen, rest unpunished. This duality comes into conflict when one faces an ECP, who demands both.

ICL finds itself in an interesting position with regard to ECPs which it should take advantage of not only to provide the best possible justice to everyone involved—victims, child soldiers, and ECPs—but also to present a congruent position. ICL expresses itself primarily through statutes, trial judgements and sentencing judgements, which would ideally be properly aligned. A consistent narrative is beneficial for legal certainty, possibly avoiding future situations such as those in *Norman* and *Ongwen* where ICL is accused of opportunism or violations of legality. Policy also plays a major role in practice. ICL is selective in nature.[159] The choice to prosecute, refraining from doing so, or delegating the case to domestic courts forms part of the broader narrative. Particularly, ICL should pay attention to its position on children's agency and the long-term effects of child soldiering, as those were found to contain the most potential frictions.

For future ECPs, ICL should carefully consider the best course of action. It has been said that ICT/Cs are not the optimal forum to try victims of gross human rights violations and compromised perpetrators,[160] and it should strongly be considered whether ECPs such as Ongwen would fall under this category, or alternatively, if reconciliation or domestic proceedings would be more desirable.[161] In any situation, should ECPs be tried internationally in the future, the author encourages courts to adopt a casuistic analysis of their culpability— either for responsibility or sentencing—bearing in mind their personal experiences and an individual examination of how their past as a victim has shaped them as adults.

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[159] Patrick Keenan, "The Problem of Purpose in International Criminal Law", *University of Illinois Legal Studies Research Paper 15-33*, 2015, available at: ssrn.com/abstract=2655631.

[160] M. Drumbl, above note 10, p. 127

[161] F. Leveau, above note 54, p. 61.

Justice for Syrians Under the International Criminal Court: Applying the Myanmar Model of Territorial Jurisdiction for Cross-Border Crimes

Natasha Chabbra[*]

ABSTRACT

The ongoing civil war in Syria has come at a great cost to the people of Syria who have been subjected to atrocities and violence. To date, there has been limited recourse for crimes against humanity committed by the Assad regime. This article assesses whether the International Criminal Court Pre-Trial Chamber statement of September 2018 that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh has created a precedent for jurisdiction over crimes committed at least partially in the territory of a State party by nationals of a State not party to the Statute. By comparing the legal elements of the crime of deportation as it has affected the Rohingya and Syrian populations, this article suggests that precedence could exist for the International Criminal Court to exercise its jurisdiction over responsible senior officials in Syria.

Keywords: International Criminal Court, Rohingya, Myanmar, Bangladesh, Syria, deportation, genocide, crimes against humanity, international criminal jurisdiction.

Introduction

This article concerns international criminal law as it applies to nationals of States that are not party to the Rome Statute of the International Criminal Court[1] (the Rome Statute), and for whom, therefore, options for triggering International Criminal Court (ICC or the Court) jurisdiction are

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[1] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (hereinafter "Rome Statute").

more limited. The Syrian Arab Republic (Syria), a country from which evidence of large-scale and systemic international crimes have been emerging for a number of years, is one of these States.[2] Many international legal scholars, as well as the United Nations (UN) and human rights organisations, have contemplated the need for criminal accountability for the atrocities that have taken place in Syria. Several proposed avenues for justice in this context have been suggested but progressed with limited success.[3] For example, while the UN Security Council has the power to refer matters to the ICC, seven draft resolutions on the war in Syria have been vetoed by at least one permanent member at any given time, creating a sense of urgency in the international community to find an alternative path of action.[4]

In September 2018, the ICC Pre-Trial Chamber issued a decision in relation to jurisdiction over crimes committed against the minority Rohingya population of Myanmar.[5] The Chamber held that despite Myanmar not being party to the Rome Statute, the Court could exercise jurisdiction relating to crimes committed against Rohingya refugees currently residing in the territory of Bangladesh where part of the *actus reus* of the crime has occurred, given that it is a State party to the Rome Statute.[6] This article will assess the applicability of this finding to Syrian refugees in Jordan, considering that while Syria is also not party to the Rome Statute, Jordan is.

This article argues that the statement made in relation to Rohingya refugees has relevance for Syrian refugees by nature of the

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[2] Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/42/51, 15 August 2019.

[3] Annika Jones, "Seeking International Criminal Justice in Syria," *International Law Studies,* Vol. 89, 2013, p. 802; Ingrid Elliot, "'A meaningful Step towards Accountability'? A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria," *Journal of International Criminal Justice*, Vol. 15, No. 2, 2017, 239.

[4] Christian Wenaweser and James Cockayne, "Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice," *Journal of International Criminal Justice,* Vol. 15, 2017, 211.

[5] International Criminal Court (ICC), *Request under Regulation 46(3) of the Regulations of the Court*, Case No. ICC-RoC46(3)-01/18, Decision (Jurisdiction, Pre-Trial Chamber I), 6 September 2018.

[6] *Request under Regulation 46(3) of the Regulations of the Court*, above note 5, p. 42.

common crime of deportation, and should be used to argue for the jurisdiction of the ICC in order to prevent criminal impunity of the Assad regime. This finding therefore supports the proposition that the Pre-Trial Chamber has created precedent for the prosecution of crimes against humanity committed at least partially in the territory of a State party against nationals of States not party to the Rome Statute. Counterarguments to this emerging proposition, as well as challenges and risks of the approach, are considered in this article.

This article begins by considering the key findings of the Pre-Trial Chamber and the possible applicability of these findings to Syrian refugees by virtue of crimes against humanity of a cross-border nature being committed in both contexts. The following more substantial section conducts an analysis of the law of crimes against humanity as it would apply to events involving Rohingya and Syrian refugees, and the implications for ICC jurisdiction of the prosecution of crimes committed in Syria thereafter.

The approach of the Pre-Trial Chamber is a novel and innovative one for establishing jurisdiction for serious international crimes that may otherwise go unpunished. This approach is not without risks and challenges, including whether States are likely to support an approach to establishing jurisdiction that may be seen as conflicting with the principle of State sovereignty. These practical issues are considered in the third and final section of this article. While non-State actors have also been involved in the Syrian civil war, the persecution of the Rohingya and breaches of international law that have occurred in these respective contexts, the scope of this article is confined to acts perpetrated by the State and its related agencies as the primary actor in the international legal system.

ICC Pre-Trial Chamber Statement

Following a submission by Global Rights Compliance on 31 March 2018 and a request by the ICC Prosecutor in April 2018, the Pre-Trial Chamber considered the matter of jurisdiction for crimes against humanity committed against the Rohingya. The submission included a report filed on behalf of 400 Rohingya women and children from the Tula Toli village in Myanmar, alleged victims of the crime against humanity of

deportation.[7] The ICC Office of the Prosecutor exercised its independent discretion to seek a ruling from the Pre-Trial Chamber given the "consistent and credible public reports" of ethnic cleansing and genocide, as to the jurisdiction of the Court over crimes crossing an international border onto the territory of a State which is party to the Rome Statute.[8]

In its statement, the Pre-Trial Chamber held that the violent persecution of the minority Rohingya population in the Rakhine State by the Myanmar military may amount to deportation, and that since this deportation has been to Bangladesh, a State party to the Rome Statute, jurisdiction exists to take these claims to the ICC.[9] Jurisdiction was established in this case under Articles 5, 11 and 12 of the Rome Statute, which deal with jurisdiction *rationae materiae, ratione temporis and ratione loci*, respectively.

The territorial element of jurisdiction (*ratione loci*) found in Article 12(2)(a) requires that "the conduct in question occurred" in the territory of a State party.[10] In the case of *Ruto and Sang* in 2012, the Court found that deportation is an open-conduct crime, and "that the perpetrator may commit several different conducts which can amount to 'expulsion or other coercive acts,' so as to force the victim to leave the area where he or she is lawfully present."[11]

In September 2018, the Chamber stated that the crime of deportation necessarily involves "displacement across international borders, which means that the conduct related to this crime necessarily takes place on the territories of at least two States."[12] By virtue of the deportation of the Rohingya population directly from Myanmar where the crime was initiated, to Bangladesh where the crime was completed, the Court found that it could, in principle, exercise jurisdiction over the relevant crimes.[13]

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[7] *Request under Regulation 46(3) of the Regulations of the Court*, above note 5, p. 5.

[8] ICC, *Application under Regulation 46(3)*, ICC-RoC46(3)-01/18-1, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018.

[9] *Request under Regulation 46(3) of the Regulations of the Court,* above note 5, p. 6.

[10] Rome Statute, above note 1.

[11] ICC, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11, Decision (Confirmation of Charges), 23 January 2012, p. 91.

[12] *Request under Regulation 46(3) of the Regulations of the Court,* above note 5, p. 6.

[13] *Request under Regulation 46(3) of the Regulations of the Court,* above note 5, p. 14.

In November 2019, the Court authorized the Prosecutor to initiate investigation into the matter of alleged crimes in Bangladesh and Myanmar. In this decision, the Court recalled its interpretation of Article 12(2)(a) in its prior decision of 2018 and reaffirmed its applicability due to conduct that occurred in more than one territory. On the basis of this determination the Court authorized the commencement of investigations "for crimes committed at least in part on the territory of Bangladesh."[14] The Court also considered the meaning of the word "conduct" in the context of Article 12(2)(a) to be encompassing of more than the notion of an act, and inclusive of a victim's behavior that is caused by or attributable to the alleged perpetrator.[15]

Victims' representations of the alleged coercive acts that underpinned the mass deportation of 2017 were also considered and included alleged killings, alleged arbitrary arrests and infliction of pain and injuries, destruction of houses and other buildings and alleged discriminatory intent.[16] The decision considered that such coercive acts must result in the victim leaving the area in order to constitute deportation and it was this act of fleeing that was completed in the territory of Bangladesh.[17]

The Guernica Centre for International Justice (Guernica) in London filed a submission with the ICC Prosecutor in July 2018 arguing the case that Syrian civilians have been deported to Jordan in a manner akin to that of the Rohingya. Guernica emphasized the gravity of the crimes committed and the need for accountability in the case of Syria. In their *Amicus Curiae Observations,* Guernica argued that like Bangladesh, Jordan is a party to the Rome Statute and therefore capable of conferring

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[14] ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Case No. ICC-01/19, Decision (Authorisation of an Investigation, Pre-Trial Chamber III), 14 November 2019, pp. 53-54.

[15] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, above note 14, p. 22.

[16] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, above note 14, pp. 13-17.

[17] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, above note 14, pp. 23-24.

jurisdiction for the crime of deportation committed against Syrians into Jordanian territory.[18]

In the case of justice for crimes committed against the Syrian population, the Guernica Centre highlights that there are a number of parallels between the situation concerning the Rohingya in Bangladesh and Syrians in Jordan, the most important common factor being deportation.[19] In a press statement, Guernica expressed hopefulness that the Court would "accept the argument that it has jurisdiction over certain crimes suffered by the Syrian civil population."[20] This article conducts the requisite legal analysis of the elements of the relevant crimes against humanity to support the claim, and show that indeed while the acts committed against the Rohingya and Syrian populations may be different in terms of specific factual circumstances, both events satisfy the legal elements required; thus, the ICC should find that jurisdiction also exists for Syrian refugees in Jordan to take a claim to the ICC.

Contestation exists as to whether this line of reasoning is feasible. For example, Payam Akhavan argues that "such expansive interpretations of jurisdiction under the ICC are misplaced if they fail to appreciate that because 'deportation or forcible transfer' is a distinct crime, they also have different *mens rea* requirements."[21] He argues that the situation of the Rohingya is uniquely distinct as it involves deportation on the basis of illegality. However, as this article proves, it is the comparable nature of the *actus reus* and *mens rea* elements of the crime against humanity of deportation and the transboundary nature of the crime that gives rise to jurisdiction.

In relation to the decision of the Pre-Trial Chamber itself, scholars express broad support for the approach and discovery of a possible new

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[18] ICC, *Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules)*, ICC-RoC46(3)-01/18, 18 June 2018, 61.

[19] Guernica Centre for International Justice, "Press Statement - The Guernica Centre for International Justice Files Article 15 Communication with the ICC Office of the Prosecutor on the Situation in the Syrian Arab Republic," *Pro Justice*, 4 March 2019, available at: https://pro-justice.org/wp-content/uploads/2019/03/Microsoft-Word-190301-Syria-Press-Statement-Final-Version-EL-.doc.pdf (accessed 23 June 2020).

[20] Guernica Centre for International Justice, above note 19, p. 3.

[21] Payam Akhavan, "The Radically Routine *Rohingya* Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute," *Journal of International Criminal Justice,* Vol. 17, No. 2, 2019, p. 331.

referral mechanism to pursue justice for the crime of deportation even where the likelihood of the Myanmar government being tried may still be low.[22] Some scholars express more serious reservations about the risk associated with the Court's reasoning, including that States will resist the finding and that voluntary participation is a necessary element of successful prosecution.[23] This argument is considered in section V and is balanced against the need for justice and accountability. The approach of this article is to accept the reasoning of the Pre-Trial Chamber despite the possible risks.

Crimes against Humanity

International legal scholarship and human rights reports indicate that the persecution of the Rohingya Muslim population in Myanmar is likely to constitute genocide, as it was accompanied by "intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[24]

Over 700,000 Rohingya were forced to flee to Bangladesh following attacks in August 2017 by the military. The Rohingya were systematically portrayed as aliens, dangerous, influenced by Islamic extremism, and intent on "overtaking the homeland" by political authorities.[25] Such forms of dehumanization are often precursory to genocide and can be evidence of an intention to commit genocide.[26] Conversely, the war in Syria is heavily characterized by breaches of

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[22] Victoria Colvin and Phil Orchard, "The Rohingya jurisdiction decision: a step forward for stopping forced deportations," *Australian Journal of International Affairs*, Vol. 73, No. 1, 2018, p. 16.

[23] Douglas Guilfoyle, "The ICC re-trial chamber decision on jurisdiction over the situation in Myanmar," *Australian Journal of International Affairs*, Vol. 73, No. 1, 2019, p. 2.

[24] Convention on the Prevention and Punishment of the Crime of Genocide, 2187 UNTS 78, 9 December 1948 (entered into force 12 January 1951), Art. 2; Fortify Rights, "They gave them long swords: Preparations for Genocide and Crimes Against Humanity Against Rohingya Muslims in Rakhine State, Myanmar," July 2018; International Court of Justice (ICJ), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Order (Provisional Measures), 23 January 2020.

[25] Elliot Higgins, "Transitional Justice for the Persecution of the Rohingya," *Fordham International Law Journal*, Vol. 42, 2018, p. 102.

[26] Penny Green, Thomas MacManus and Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar*, International State Crime Initiative, London, 2015.

international humanitarian law including attacks against civilians and civilian objects such as schools and hospitals.[27]

This essay focuses on the third main category of international crimes, crimes against humanity, as the facts of both case studies give rise to crimes against humanity. Deportation, by its transboundary nature, is the specific crime that gives rise to the possibility of ICC jurisdiction in both these cases. The approach of the Pre-Trial Chamber is a novel one with regard to jurisdiction but builds on existing case law on the matter of deportation. Deportation has been recognized as a crime against humanity in several international legal instruments, in addition to the Rome Statute.[28]

Article 7 of the Rome Statute is the substantive provision for crimes against humanity and provides an expansive list of specific acts that can give rise to criminal liability. The statute requires "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present"[29] and for such acts to be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[30] The key elements—of (a) forcible expulsion; (b) lawful presence; (c) awareness of the factual circumstances that established the lawfulness of the presence; (d) part of a widespread or systematic attack against a civilian population; and (e) knowledge or intent of the fact that the acts were part of a widespread or systematic attack—are assessed below in light of the situation in Myanmar and Syria to show that such acts have indeed occurred in these respective territories.

(a) Forcible Expulsion

With respect to this first element, the Pre-Trial Chamber itself acknowledged that the *actus reus* allows for the perpetration of several

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[27] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Annex XIV, 22nd session, UN Doc. A/HRC/22/59, 5 February 2013.

[28] UNSC Res. 827, 25 May 1993, as amended by UNSC Res. 1877, 7 July 2009, art. 5(d) (hereinafter "ICTY Statute"); UNSC Res. 955, 8 November 1994, Annex (hereinafter "ICTR Statute").

[29] Rome Statute, above note 1, Art. 7(2)(e).

[30] Rome Statute, above note 1, Art. 7(1)(d).

different acts that amount to forcible expulsion or coercion.[31] These may typically include "deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting."[32] The "forcible" character of deportation need not involve the movement of people with force. It may be caused through physical or psychological force that causes "fear of violence, duress, detention, psychological oppression or abuse of power."[33]

In its decision of November 2019 the ICC Pre-Trial Chamber III of the Court noted that "a reasonable prosecutor could believe that coercive acts towards the Rohingya forced them to flee to Bangladesh, which may amount to the crime against humanity of deportation."[34] This conclusion was drawn based on material submitted during interviews of the Rohingya, 92% of whom expressed that they had suffered or witnessed a major incident prompting them to flee.[35]

In August of 2017, the Myanmar Army conducted "clearance operations" in northern Rakhine State. Hundreds of Rohingya people were brutally murdered, women and girls were raped and mutilated, children were thrown into rivers and victim's bodies were burned in piles.[36] Over 700,000 people fled the violence in what was the quickest mass exodus since the Rwandan genocide.[37] Human rights groups such as Fortify Rights have conducted significant research on the events that took place in 2017 in Myanmar providing compelling testimonies affirming that many of the acts listed above were committed, and showing the harrowing trauma and physical injuries resulting from the same.[38]

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[31] *Request under Regulation 46(3) of the Regulations of the Court,* above note 5, p. 35.

[32] ICC, *Prosecutor v Ruto and Sang*, Case No. ICC-01/09-01/11, Decision (Confirmation of Charges, Pre-Trial Chamber II, 4 February 2012.

[33] ICC, *Elements of Crimes*, The Hague, 2011, p. 5; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Radislav Krstic*, Trial Judgement, 2 August 2001.

[34] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, above note 14, p. 49.

[35] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, above note 14, 48.

[36] Fortify Rights, above note 24, p. 59.

[37] United Nations High Commissioner for Refugees (UNHCR), "Rohingya Emergency", *UNHCR Asia Pacific*, 31 July 2019, available at: https://www.unhcr.org/rohingya-emergency.html (accessed 1 August 2019).

[38] Fortify Rights, above note 24, p. 23.

For Syria, in more than eight years of conflict since the revolution, acts of concern to the international community include the targeting and unlawful killing of civilians, destruction and looting of property, rape, restriction of humanitarian assistance, arbitrary arrest, enforced disappearances, torture and ill-treatment.[39] United Nations reports as recent as March 2020 indicate that "hostilities show little sign of abating in several parts of the country… [rendering] distant the prospect of improving the immediate protection environment for civilians."[40] Amongst the various parties to the conflict, the Assad regime has been documented as playing a significant role in many, if not all of these crimes.[41]

The Assad regime is also responsible for the significant majority of deaths in Syria, which in total allegedly amount to over 190,000, although the numbers are disputed.[42] These deaths have predominantly been caused by "air attacks and shelling of civilian areas, blocking humanitarian aid to the opposition-controlled areas or killing the citizens of Syria in detention centers and prisons as a result of torture."[43] Furthermore, thousands of women and girls have fled Syria in fear of rape.[44]

The Human Rights Council of the United Nations has summarized the issue of displacement of the Syrian population as "directly induced by the failure of warring parties to take all feasible precautions as required by international humanitarian law or due to

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[39] Annika Jones, "Seeking International Criminal Justice in Syria," *International Law Studies*, Vol. 89, 2012, p. 803; Human Rights Council, "Without a trace: enforced disappearances in Syria," *Office of the United Nations High Commissioner for Human Rights*, 19 December 2013; UNHRC Res. S-25/1, 21 October 2016.

[40] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/43/57, 24 February-20 March 2020, p. 1.

[41] Seema Kassab, "Justice in Syria: Individual Criminal Liability for the Highest Officials in the Asses Regime," Vol. 9, *Michigan Journal of International Law*, 2018, pp. 283-287.

[42] Yavuz Gucturk, "War Crimes and Crimes Against Humanity in Syria," *Insight Turkey*, Vol. 7, 2015, p. 32.

[43] *Ibid*.

[44] Lisa Davis, "Syrian women refugees: out of the shadows," *CUNY School of Law Academic Works*, 2015, available at: https://academicworks.cuny.edu/cl_pubs/54/?utm_source=academicworks.cuny.edu%2Fcl_pubs%2F54&utm_medium=PDF&utm_campaign=PDFCoverPages (accessed 1 August 2019).

unlawful conduct by the parties, which carried out indiscriminate and deliberate attacks with little regard for civilian life."[45]

In *Krstic*, the Trial Chamber held that the Bosnian Muslims "were not exercising a genuine choice to go, but reacted reflexively to a certainty that their survival depended on their flight."[46] The involuntariness of the decision of the Rohingya and Syrian people to flee should be considered in this context. Given the high number of civilian deaths that have occurred during both the cleansing operations of the Myanmar military and the Syrian civil war, as well as their widespread and serious nature, these acts can easily be argued to create a fear of violence and would likely be classed as such by the ICC. The Court should view the displacement of both Rohingya and Syrian refugees not as a choice, but as an outcome of events that caused such extreme deprivation of human rights and left no practicable option but to flee the persecuting state.

(b) Lawful Presence

"Lawful presence" simply requires that the persons of concern either have nationality or some other legal basis to be present on the territory from which they have been forcibly displaced.[47] In the case of the Rohingya, domestic laws and policies have systemically excluded the minority from civic and economic participation. In fact, Myanmar excludes the Rohingya from full citizenship.[48] As a result, the Rohingya are considered a stateless population, and many individuals are not even issued birth certificates.[49]

However, the legality of a deportation cannot be assessed purely on domestic law and requires reference to international law, which disallows arbitrary and discriminatory deprivation of human rights.[50] In

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[45] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/39/65, 9 August 2018.

[46] *Prosecutor v. Radislav Krstic,* above note 33, para. 530.

[47] *Elements of Crimes*, above note 33, p. 6.

[48] Benjamin Zawacki, "Defining Myanmar's Rohingya Problem," *Human Rights Brief*, Vol. 20, 2012, p. 18.

[49] Joseph Powderly, William Schabas and N. Prud'homme, "Crimes against Humanity in Western Burma," *Irish Centre for Human Rights*, 2010, p. 112.

[50] *Ibid.;* Vincent Chetail, "Is there any blood on my hands? Deportation as a crime of international criminal law," *Leiden Journal of International Law*, Vol. 92, 2016, p. 925.

this case, arbitrary deprivation of nationality is protected against in international human rights law.[51] It is thus arguable that the deprivation of nationality the Rohingya have been subjected to since 1982 amounts to illegal conduct under international law. The illegality or lack of recognition under domestic law therefore does not deprive them of lawful presence.[52]

With the exception of refugee children born in exile, an overwhelming majority of Syrian refugees hold valid Syrian nationality.[53] In this way, the facts around the lawful presence element with regard to Syrians can be distinguished from the Rohingya as more clear and undisputed from a national perspective. However, from an international legal standpoint, both Rohingya and Syrian civilians have a legal basis to be present in their respective territories of origin and would thus be likely to be viewed by the ICC as such.

(c) The Perpetrator was Aware of the Factual Circumstances that Established the Lawfulness of Such Presence

The perpetrator need not have an understanding of the relevant provisions of international law that regulate the matter, it is sufficient that they be aware of the general factual circumstances that would give rise to unlawful deportation.[54] As such, a court would likely find that, as State actors, the Assad regime and the Myanmar military would be likely to have an understanding of the legal status of the victims of crimes perpetrated by the State. The case of Syria would present a clearer case for this element given that the Rohingya have been historically characterized as "illegal" inhabitants of Myanmar.

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[51] Human rights and arbitrary deprivation of nationality – Report of the Secretary-General, UN Doc. A/HRC/25/28, 19 December 2013.

[52] Md. Mahbubul Haque, "Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma," *Journal of Muslim Minority Affairs*, Vol. 37, 2017, p. 454.

[53] Zahra Albarazi and Laura van Waas, "Understanding statelessness in the Syria refugee context," *Norwegia Refugee Council*, 2016, p. 6.

[54] Guenael Mettraux, *International Crimes: Law and Practice*, Vol. II, Oxford University Press, Oxford, 2020, p. 481.

(d) Part of a Systematic or Widespread Attack against a Civilian Population

A systematic and widespread attack carried out against a civilian population is the final element to establish the *actus reus* of the crime against humanity of deportation and requires a "course of conduct involving the multiple commission of acts… pursuant to or in furtherance of a State or organizational policy to commit such an attack."[55] Such an attack need not be military in nature[56] although both factual situations discussed in this article would be likely to be classified as such.

The Pre-Trial Chamber has previously interpreted systematic or widespread to mean that the attack should be of large scale, with a high number of victims and of considerable seriousness.[57] "The relevant acts of deportation need not be widespread or systematic provided that they are part of a broader attack which meets this requirement."[58] The scale of impact of the conflict in Syria on civilian life has been significant, and likely to be viewed by the Court as sufficient within the meaning of this provision. Of a total population of more than twenty million prior to the commencement of the conflict, over five million have fled Syria, and an estimated thirteen million have been in urgent humanitarian need since.[59] These numbers suggest that the vast majority of people in Syria have been impacted by human rights violations or fear of violations so grave that they have been compelled to flee; the requirements are arguably met by the relevant acts committed in Myanmar and Syria.

The requirement of a State policy to commit the attack suggests that there has been preparation for the attack and a consistent pattern to the attacks.[60] This is shown by the clearance operations conducted by the Myanmar Military which involved the disarming of Rohingya civilians by confiscating any items that could be used as a weapon, the removal of

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[55] Elements of Crimes, above note 33, p. 5.

[56] *Ibid*.

[57] ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08-424, Decision (Pre-Trial Chamber II), 15 June 2009, para. 83.

[58] Vincent Chetail, "Is There any Blood on my Hands? Deportation as a Crime of International Law," *Leiden Journal of International Law*, Vol. 29, 2016, Section 3.2.2.

[59] UNHCR, "Syria Emergency", available at: https://www.unhcr.org/syria-emergency.html (accessed 9 June 2020).

[60] *Ibid*.

fences protecting Rohingya homes, the training and arming of non-Rohingya communities, the suspension of humanitarian aid and access, enforcement of a curfew, and the unusually large military presence in Rohingya communities.[61] These were all planned actions by the State that facilitated the subsequent mass atrocities committed in the latter half of 2017.

In the Syrian context, the Commission for International Justice and Accountability (CIJA) has collected and analysed hundreds of thousands of pages of evidence from the Syrian regime and drafted a 400-hundred page legal brief which "traces the systematic torture and murder of tens of thousands of Syrians to a written policy approved by President Bashar Al-Assad, coordinated among his security intelligence agencies, and implemented by regime operatives."[62] Evidence includes signed orders progressing down the chain of command, and reports describing exactly what was being done. Killings of at least 10,000 people can be documented to the highest levels. This final requirement for the *actus reus* of forced deportation as a crime against humanity is therefore likely satisfied in both situations and a court could be compelled to make the same finding.

(e) *Mens Rea*

The perpetrator of crimes against humanity must have knowledge of the attack and that their act comprises part of that attack, or an intention to commit the underlying offence.[63] The ICC tends to prosecute high-order officials as perpetrators of crimes against humanity as "large-scale and systematic commission of international crimes is usually planned and set in motion by senior political and military leaders"[64] and relies on the joint criminal enterprise doctrine to establish liability, given that the physical

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[61] Fortify Rights, above note 24, pp. 10-11.

[62] Ben Taub, "The Assad Files", *Pulitzer Center*, available at: https://pulitzercenter.org/projects/assad-files (accessed 1 August 2019); S. Kassab, above note 41, p. 287.

[63] *Elements of Crimes*, above note 33, p. 5; ICTY, *The Prosecutor v. Mitar Vasiljevic*, Judgement (Trial Chamber II), 29 November 2002, para. 37; ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Judgement (Appeals Chamber), 12 June 2002, para. 102.

[64] Hector Olasalo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, Hart Publishing, 2009, p. 13.

acts are often not carried out by the same high-level officials. The evidence analysed above with reference to a State policy goes towards showing knowledge and intention in both contexts on behalf of senior officials and leaders of either the Myanmar military forces or the Assad regime, to commit the acts of rape, murder, etc. which thereafter resulted in displacement. This element would need to be verified on a case-by-case basis to understand the specific intentions of the person indicted against the context of a more generalized policy intention.

A United Nations fact-finding mission in Myanmar confirmed that sufficient evidence exists to implicate senior officials in the military's chain of command, as well as possibly Aung San Suu Kyi.[65] Furthermore, American lawyer Stephen Rapp has also stated in the global media that evidence of international crimes in Syria is the strongest since Nazi war crimes in World War II and would also allow for the charging of cases "against the top level of the Syrian regime for murder, torture, crimes against humanity and war crimes."[66]

An intention to forcibly displace specifically is more difficult to establish. However, the Rome Statute requires only that "in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events."[67] As also established above in the analysis of the *actus reus* elements, the consequence of fleeing across international borders was a foreseeable if not certain consequence, and measure of survival, in light of the atrocities committed against the Rohingya and Syrian civilians. In the *Katanga* case, a consequence had to be a virtually certain result of an act.[68] Depending on how the Court interprets the facts, the existence of crimes against humanity may turn on this mental element.

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[65] "Myanmar: Tatmadaw leaders must be investigated for genocide, crimes against humanity, war crimes – UN report," *UNHRC*, available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23475 (accessed 1 August 2019).

[66] Eleanor Hall, "Syrian war crimes evidence strongest since Nurumberg trials, says prosecutor," *ABC News*, 3 December 2018, available at: https://www.abc.net.au/news/2018-12-03/syrian-war-crimes-evidence-strongest-since-nuremberg-trials/10577206 (accessed 1 August 2019).

[67] Rome Statute, above note 1, Art. 30.

[68] ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, Decision (Appeals Chamber), 25 September 2009.

An argument put forward by some scholars is that "[i]n Myanmar, it is beyond doubt that the junta intended to drive the Rohingya into Bangladesh. In Syria, by contrast, it is not evident that the Assad regime cared what happened to the civilians they forcibly displaced."[69]

This article argues that in both cases the deportation of civilians was caused by the coercive conduct of the perpetrator. To this effect, a tribunal would consider "the environment and context in which departures took place, the risks incurred by those who stayed, evidence of mistreatment of the population, the destruction of properties, the number of incidents of violence."[70]

Implications for Jurisdiction

Thus, due to analogous liabilities arising from crimes committed against the Rohingya and Syrian civilians, namely deportation, the ICC Pre-Trial Chamber finding should apply to Syrian refugees residing in Jordan as well as Rohingya refugees in Bangladesh. It relies on territorial jurisdiction of an objective nature, whereby an offence is commenced abroad, but completed in a State that is party to the ICC Statute or that has accepted its jurisdiction.[71]

This proposition relies on the use of precedence and how it applies to the statement of the Pre-Trial Chamber. Generally speaking, international courts and tribunals are not obliged to use *stare decisis*, the doctrine of precedent. Article 21(2) does specify however that among other key sources, "the Court may apply principles and rules of law as interpreted in its previous decisions." Indeed, quantitative studies of citation patterns have shown that the ICC relies most heavily on case law, including its own, compared to other sources of law in its decision-making.[72]

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[69] Kevin Jon Heller**, "**The ICC and the Deportation of Civilians from Syria to Jordan," *Opinio Juris*, 25 March 2019, available at: http://opiniojuris.org/2019/03/25/the-icc-and-the-deportation-of-civilians-from-syria-to-jordan/ (accessed 19 June 2020).

[70] G. Mettraux, above note 54, p. 479.

[71] HCA, *Ward v. The Queen*, 142 CLR 308.

[72] Steward Manley, "Referencing Patterns at the International Criminal Court," *European Journal of International Law,* Vol. 27, 2016, p. 121.

Despite not being bound by their own prior decisions, international courts and tribunals do give great weight to them.[73] Given that the elements, both physical and mental, are likely to have been met in that crimes against humanity of deportation have been committed against the Syrian population by the Assad regime, the ICC would be compelled to at least consider a similar line of reasoning with regard to jurisdiction, unless swayed by some other principle of law. In their submission, Guernica also argues that any departure from a ruling consistent with that formulated in relation to the Rohingya would be inconsistent and would represent a differing approach.[74]

Assuming that this approach to precedent is adopted by the ICC Pre-Trial Chamber, the question that follows is whether related crimes are also under the Court's jurisdiction and to what extent they must be related to acts of deportation. The Chamber considered that if at least an element of another crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party, the Court might assert jurisdiction pursuant to Article 12(2)(a) of the Statute.[75]

The decisions of the Court in relation to the Rohingya have also indicated an expansive approach to considering particular crimes as transboundary. Article 7(1)(h) of the Rome Statute includes within its jurisdiction, "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender… or other grounds… in connection with any act referred to in this paragraph." "In connection with any act referred to in this paragraph" was taken to mean by the ICC Pre-Trial Chamber as indicative of jurisdiction over other types of crimes including murder, deprivation of liberty, torture, rape, and particularly in the case of the Rohingya, extermination, provided that such acts are committed pursuant to Article 7(1)(h).[76] This thus opens up jurisdiction for crimes beyond forced deportation where they are still related. In the Prosecutor's Decision to authorize investigation in November 2019, persecution was considered as another possible transboundary crime, if deportation could be shown to have occurred on

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[73] Gilbert Guillaume, "The Use of Precedent by International Judges and Arbitrators," *Journal of International Dispute Settlement*, Vol. 2, 2011, p. 5.

[74] Guernica Centre for International Justice, above note 19.

[75] *Request under Regulation 46(3) of the Regulations of the Court,* above n 2, 42.

[76] *Ibid*.

discriminatory grounds.[77] This approach means that an intention to displace need not be established in order for the relevant conduct to be within scope of the Court's jurisdiction.

Risks and Challenges

The drafters of the Rome Statute were determined to put an end to impunity with the Preamble stating that the most serious crimes of concern to the international community as a whole must not go unpunished. Despite evidence suggesting that breaches of international criminal law have occurred in Syria, there have been no charges brought before the ICC to date.

In December 2017, the United Nations General Assembly established an independent mechanism to assist in the investigation and prosecution of international crimes in Syria.[78] This measure was taken in light of inaction on the part of the Security Council. A number of States objected to the establishment of the mechanism—some claiming a lack of legal authority of the General Assembly to do so, but mostly based on the objection that it would interfere in the domestic affairs of States.[79]

It would be safe to speculate that States are likely to object to the approach to jurisdiction discussed in this article based on similar concerns of sovereignty. Douglas Guilfoyle highlights the necessity of having the territorial cooperation of responsible governments for effective prosecution, as well as a number of examples where the ICC has failed.[80] Indeed, it was established in the *SS Lotus Case* that "restrictions upon the independence of States cannot…be presumed."[81] Myanmar has already expressed grievances with the proposed approach of the ICC Pre-Trial Chamber. On 13 April 2018, the Government of Myanmar stressed that "Myanmar is not a party to the Rome Statute" and "the proposed claim for extension of jurisdiction… exceed the well enshrined principle that the

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[77] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, above note 14, p. 49.

[78] UNGA Res. 71/248, 11 January 2017.

[79] *Ibid*.

[80] D. Guilfoyle, above note 23, p. 5.

[81] Permanent Court of International Justice, *The Case of the S.S. Lotus (France v. Turkey)*, 1927 PCIJ (ser. A) No. 10, Judgment, 7 September 1927, p. 18.

ICC is a body which operates on behalf of, and with the consent of States Parties"[82]

However, entitlement to State sovereignty is not absolute and this is an important but nuanced compromise that should surely be made in relation to crimes that are of the most serious concern to the international community. The ICC has what is termed "complementary jurisdiction." "Although a State continues to exercise jurisdiction over everyone within its country, it shares such jurisdiction with the ICC for the defined crimes of genocide, crimes against humanity and war crimes."[83] The sacrifice of sovereignty in this respect occurs only where States are "unable or unwilling" to prosecute domestically, putting the onus on the State to demonstrate that prosecution will occur. Arguably, where the crimes are carried out by the State and its agencies as a form of policy and with the requisite *mens rea*, which this article finds are met in both case studies, the unable and unwilling doctrine is satisfied. Since heads of State are unlikely to go before a national court[84], a solution at the international level is necessary and the creation of such new form of referral to the ICC should be supported.

Conclusion

This article has sought to provide a novel contribution to the literature on criminal justice in Syria and States not party to the Rome Statute, in general. Through an analysis of the facts that have taken place in Syria and Myanmar, it has shown that the displacement of the Rohingya and Syrian people is of an involuntary nature, due to a widespread and systematic attack, and with the requisite elements of *mens rea* on the part of the perpetrating States. It therefore amounts to deportation within the meaning of the Rome Statute.

Therefore, the ICC Pre-Trial Chamber statement of late 2018 and the affirmation of its reasoning in its 2019 authorization to investigate, that claims of crimes against humanity can be taken to the ICC where

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[82] *Request under Regulation 46(3) of the Regulations of the Court,* above note 5, Annex E to Prosecution Notice of Documents for Use in Status Conference.

[83] Ebru Coban-Ozturk, "The International Criminal Court, Jurisdiction and the Concept of Sovereignty," *European Scientific Journal*, Vol. 10, 2014, p. 151.

[84] *Ibid*.

forced deportation has been completed in the territory of States Parties, should hold true for any claims brought to the ICC. This argument could apply to other situations of deportation to countries not States Parties including those with ongoing protracted conflicts that have caused mass displacement to States Parties' territories due to coercive conduct, such as in Iraq, South Sudan or Yemen.

The criticism is often made that "international criminal institutions continue to lack independent legal power and remain largely dependent on political support to pursue their work."[85] Vesting this form of jurisdiction in the Court provides an avenue grounded in ICC case law to pursue criminal prosecution where other options have failed due to politicization, honoring the noble goal of the drafters of the Rome Statute to end impunity for the most serious crimes.

Establishing the novel approach to jurisdiction discussed in this article may also provide a much-needed means for Syrian state officials to be held accountable in a global public forum, with the impartiality of the ICC behind the investigations. Given that the conflict in Syria is ongoing, prosecution could entail not only a measure of justice for the Syrian population but also a possible means of stabilizing the conflict and preventing further atrocities.[86]

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[85] Alex Whitling, "An Investigation Mechanism for Syria," *Journal of International Criminal Justice*, Vol. 15, 2017, p. 235.

[86] Y. Gucturk, above note 42, p. 35.

Radio Silence: Autonomous Military Aircraft and the Importance of Communication for their Use in Peace Time and in Times of Armed Conflict under International Law

Dr. Eve Massingham[*]

ABSTRACT

Aerial systems with autonomous functionality are not new. However, their prevalence, sizes, manoeuvrability and the altitudes at which they fly today have not been fully contemplated by the international legal frameworks for aircraft developed in the 20th century. States are increasingly deploying these craft to undertake a range of tasks, and while these activities were once somewhat separated from the civilian airspace, this is no longer always the case. While most international civil aviation rules do not apply to military aircraft, military aircraft are not entirely exempt from compliance with key rules necessary to ensure the safety of civil aviation. This paper looks at how autonomous military aircraft are impacted by laws to protect international civil aviation, and indeed, civilians, and in particular identifies some of the communication requirements for the safe and lawful use of autonomous military aircraft alongside civil aviation, both in peace time and in times of armed conflict.

Keywords: International Law; Communication, Aircraft; State Aircraft; Military Aircraft; Autonomous Aircraft; Safety; Navigation; Belligerent Rights; International Humanitarian Law.

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I. Introduction

Militaries are keen to exploit autonomous technology. This is both to allow States to achieve their military objectives with potentially less risk to their people and expensive military hardware and assets than other methods, and to ensure that they are able to counter the technology deployed against them. Military systems with autonomous functionality are not new.[1] However, in recent years, autonomous technology has proliferated and advanced. There is a significant role that autonomy is increasingly playing for the military across a range of platforms. The potential development of more advanced autonomous weapons systems by the military has led to significant global discussion about the ability of autonomous weapons to comply with the core principles of international humanitarian law.[2] What receives less attention is the autonomous military platforms themselves. One of the clear advantages of autonomy is to allow the military to operate in communications-denied environments. Communication is central to military operations but is very susceptible to disruption and interception. Autonomous military aircraft are able to address this through "reduc[ing] the vulnerability of the communications link by severing it."[3] The technology can "render constant control and communication links obsolete" and therefore provide protection against hijacking or jamming.[4] However, to have clearance to fly, military aircraft must ensure that they can safely interact in the civilian environment. The inability of military aircraft to communicate in such a way as to "heed and care for the safety of the

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[1] For a more detailed look at the history of the use of autonomy by the military, *see further* Brendan Gogarty and Meredith Hagger, "The laws of man over vehicles unmanned: the legal response to robotic revolution on sea, land and air", *Journal of Law, Information and Science*, Vol. 19, 2013, pp. 76-82.

[2] Group of Government Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems established at the 2016 Fifth Convention on the Prohibitions or Restriction on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects Review Conference.

[3] Kenneth Anderson and Matthew C. Waxman, "Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can", *The Hoover Institution Jean Perkins Task Force on National Security & Law Essay Series*, 2013, available at: https://scholarship.law.columbia.edu/faculty_scholarship/1803 (all internet references were accessed on 18 June 2020).

[4] Jürgen Altmann and Frank Sauer, "Autonomous Weapon Systems and Strategic Stability", *Survival*, Vol. 59, No. 5, 2017, p. 119.

course and position of civil aircraft avoiding obstruction to the course of and collisions with civil aircraft"[5] means that the full benefits of the autonomous military aircraft advantage may not be exploited.

To examine these issues, this paper looks at how autonomous military aircraft are impacted by laws that aim to protect international civil aviation, as well as other relevant sources for the regulation of military aircraft. It shows the centrality of the role of communication in the safe and lawful use of autonomous military aircraft, in both peacetime and during times of armed conflict. In doing so, it considers:

- the obligation of State aircraft to have due regard for the safety of civil aviation;
- the restrictions on freedom of navigation attached to State aircraft; and
- the exercise of belligerent rights by autonomous military aircraft as they pertain to non-military persons and objects.

The paper will first discuss the nature of autonomous functionality and the different legal frameworks applicable to autonomous military aircraft before turning to look at these three topics.

II. Autonomous Functionality in Aircraft

There is no agreed definition of what amounts to "autonomous" aircraft. As the United Kingdom Department of Defence notes (in relation to weapons, though equally applicable across military platforms including aircraft), "there is inaccurate reporting and misleading debate about the meaning of automated and autonomous."[6] Ekelhof puts it nicely when she states that, "sometimes distinctions are made when there is no actual difference, but mostly the terms are used without difference when distinction is in fact necessary."[7] Autonomy clearly exists on a spectrum.

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[5] Michel Bourbonniere and Louis Haeck, "Military Aircraft and International Law: Chicago Opus 3", *Journal of Air Law and Commerce*, Vol. 66, No. 3, 2001, p. 916.

[6] United Kingdom Ministry of Defence, *Joint Doctrine Publication 0-30.2 Unmanned Aircraft Systems*, Development, Concepts and Doctrine Centre, Swindon, August 2017, p. 42.

[7] Merel Ekelhof, The Distributed Conduct of War: Reframing Debates on Autonomous Weapons, Human Control and Legal Compliance in Targeting, Vrije University, PhD Thesis, 2019, p. 74.

Aircraft have a range of different functions and the move has been towards automating some of these functions to different degrees. Indeed, of aviation more generally, the observation has been made that, "most flights can only be performed adequately with the aid of automation."[8] When parts of the functionality of an aircraft are able to be carried out autonomously, then that aircraft has a degree of autonomy. Experts looking at autonomy in different fields often use "levels of autonomy" to explain the different activities that autonomy can perform within the broader system.[9] This "levels of autonomy" approach has however been criticized for "deflect[ing] focus from the fact that *all autonomous systems are joint human-machine cognitive systems.*"[10] Militaries have tended to focus more on the distinction between:

- remotely piloted systems, where the system is still fully controlled by an operator;
- automated systems that, "in response to inputs from one or more sensors, is programmed to logically follow a predefined set of rules in order to provide an outcome"; and
- autonomous systems that are "capable of understanding higher-level intent and direction… to take appropriate action to bring about a desired state… deciding a course of action, from a number of

[8] Pablo Mendes de Leon, *Introduction to Air Law*, Wolters Kluwer, Alphen aan den Rijn, 2017, p. 302.

[9] *See for example* Dale Richards and Alex Stedmon, "To delegate or not to delegate: A review of control frameworks for autonomous cars", *Applied Ergonomics*, Vol. 53 B, March 2016, pp. 385-386; Guang-Zhong Yang et al., "Medical robotics—Regulatory, ethical, and legal considerations for increasing levels of autonomy", *Science Robotics*, 15 March 2017; Charles Hewitt et al., "Assessing Public Perception of Self-Driving Cars: the Autonomous Vehicle Acceptance Model", in 2*4th International Conference on Intelligent User Interfaces*, Marina del Ray, 17-20 March 2019.

[10] Department of Defence (United States) Defence Science Board, *The role of autonomy in DoD systems*, Office of the Undersecretary of Defence for Acquisition, Technology and Logistics, Washington, D.C., July 2012, p. 23, available at: https://fas.org/irp/agency/dod/dsb/autonomy.pdf.

> alternatives, without depending on human oversight and control."[11]

The line between the systems that help the pilot and an "autonomous" device is surprisingly hard to identify. Human control may still be significant in an aircraft with autonomous functionality. For example, in an aircraft with the pilot on board, or a remotely piloted aircraft, even when some functions are autonomous, the element of human control and ability to communicate means that there is a clear understanding of how the aircraft will respond to the environment. Initially, aerial navigation required pilots to use visual references on the ground in order to find the way and to keep clear of clouds,[12] limiting the conditions under which, and the altitude at which, they could fly. Today, aircraft fly higher, longer and further because they are supported by navigational technologies which rely extensively on a range of automated systems that communicate information using technologies such as the radionavigation system (for example, the global positioning system). This has made flying "faster, safer and more reliable than ever before."[13] The question is how far along the autonomy spectrum those developments can go without changing the fundamentals of being an aircraft and the ability of the craft to comply with international legal requirements, particularly regarding safety and communication.

There has clearly been an increase in the automation of several systems that previously required clear and meaningful communication between on-board pilots and pilots on board other planes, as well as ground crews. These include collision avoidance systems, low-visibility

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[11] United Kingdom Ministry of Defence, above note 7, p. 13; *see further* Ian Henderson and Bryan Cavanagh, "Unmanned Aerial Vehicles: Do They Pose Legal Challenges?", in Hitoshi Nasu and Rob McLaughlin (eds), *New Technologies and the Law of Armed Conflict*, Asser Press, The Hague, 2013; Scott Maloney, "Legal and Practical Challenges Associated with the use of Unmanned Aerial Vehicles in the Maritime Environment", *Soundings*, No. 11, May 2016, pp. 5-6.

[12] Australian Civil Aviation Safety Authority, *Visual Flight Rules Guide*, Version 6, 2018.

[13] Royal Australian Air Force, "Automated Aircraft Systems To Crew or Not To Crew: That is the question", *Pathfinder–Air Power Development Centre Bulletin*, No. 243, May 2005. See further the discussion of the early attempts at automated aircraft in the late 1980s.

guidance and satellite communications worldwide.[14] However, an autonomous military aircraft that is using covert tactics to achieve a military objective may have to balance the military advantage that can be obtained from being able to deactivate many of these automated communication systems, with the legal requirements to ensure the safety of civil aviation through proper communications with safety authorities. It is those aircraft which have their key communication functions operating with autonomy and without a link to human intervention and oversight that are the focus of this piece.

III. International Legal Frameworks for Military Aircraft with Autonomous Functions

There is no overarching international law defining and regulating military aircraft. As Milde observes, "the issue is not addressed in international law with any specificity… The practice of States that could form a basis for the development of customary law is… often shrouded in secrecy. The problem has been also mostly ignored in the legal research and literature."[15] The laws pertaining to military aircraft therefore require a consideration of the legal frameworks applicable in armed conflict (often referred to as international humanitarian law) as well as the laws of civil aviation.[16] In addition to the rules of international humanitarian law, to which this paper will return in Part VI, three instruments are particularly relevant:

- the 1923 Hague Rules of Aerial Warfare (Hague Rules);[17]

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[14] *See further* Charles E. Billings, *Aviation Automation: The Search for a Human-Centred Approach*, Lawrence Erlbaun Associated, New Jersey, 1997, Chapter 6; P. Mendes de Leon, above note 9, p. 305.

[15] Michael Milde, *International Air Law and ICAO*, 3rd ed., Eleven International Publishing, The Hague, 2016, p. 65.

[16] *See further* Heinz Hanke, "The 1923 Hague Rules of Air Warfare: A contribution to the development of international law protection civilians from air attack", *International Review of the Red Cross*, 1991, No. 3, pp. 139-172 (published in German with English translation used from CUP) for a description of the historical reasons why this area is so controversial and has made regulation difficult.

[17] Hague Rules of Aerial Warfare, 1923 (hereinafter "Hague Rules").

- the more recent 2013 Program on Humanitarian Policy and Conflict Research Manual on International Law Applicable to Air and Missile Warfare (HPCR Manual);[18] and
- the principal document of the international civil aviation legal framework, the 1944 *Convention on International Civil Aviation* (Chicago Convention),[19] as well as the documentation of the International Civil Aviation Organisation (ICAO).[20]

A collective reading of these three frameworks demonstrate that autonomous aircraft are included in the definition of aircraft and that as such, autonomous military aircraft will have to comply with the international legal rules which refer to State aircraft, military aircraft and the safety of civil aviation.

1. Hague Rules

The Hague Rules were inspired by the First World War and drafted in 1923 following a Commission of Jurists. The Hague Rules were never formally incorporated in a treaty by States and are therefore not binding international law in their own right. However, they are acknowledged as being highly persuasive, if not constituting customary international law.[21] The Hague Rules do not mention autonomous aircraft. This is arguably surprising given that an early version of autonomy in balloons (projectiles automatically deployed from uncrewed balloons) had already led to legal

[18] The Program on Humanitarian Policy and Conflict Research, *Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, Cambridge, 2013 (hereinafter "HPCR Manual").

[19] Convention on International Civil Aviation, 15 UNTS 295, 7 December 1944 (entered into force 4 April 1947) (hereinafter "Chicago Convention").

[20] Paul Stephen Dempsey, *Public International Air Law*, McGill University, Montreal, 2008, p. 30.

[21] Ian Henderson and Patrick Keane, "Air and missile warfare", in Rain Liivoja and Tim McCormack (eds), *Routledge handbook of the Law of Armed Conflict*, Routledge, Abingdon, 2016, p. 282.

concerns being raised.[22] Article 1 of the Hague Rules provides that "the rules of aerial warfare apply to all aircraft, whether lighter or heavier than air, irrespective of whether they are, or are not, capable of floating on water." The accompanying commentary to the Hague Rules (published by way of General Report in 1924) notes that:

> [n]o attempt has been made to formulate a definition of the term "aircraft", nor to enumerate the various categories of machines which are covered by the term. A statement of the broad principle that the rules adopted apply to all types of aircraft has been thought sufficient, and Article 1 has been framed for this purpose.[23]

As such, although autonomy is not mentioned, there is nothing in the Hague Rules definition of aircraft that would exclude autonomous aircraft.

The Hague Rules do however establish four requirements for "any aircraft operated by the armed forces of a State."[24] The aircraft shall: (i) bear an external mark indicating its nation and military character;[25] (ii) be under the command of a person duly commissioned or enlisted in the

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[22] Declaration (IV,1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, 29 July 1899 (entered into force 4 September 1900), applicable for 5 years and extended by Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, 18 October 1907 (entered into force 27 November 1909). The 1907 declaration was due to expire at the close of this projected Third Peace Conference. No Third Peace Conference has ever taken place. It is therefore technically still in application. That these projectiles "may just as easily hit inoffensive inhabitants as combatants, or destroy a church as easily as a battery" being the reason for their regulation: Division of the Law of Carnegie Endowment for International Peace, *The Proceedings of the Hague Peace Conferences: The Conference of 1899*, Oxford University Press, New York, 1920, p. 280 (comments by Captain Crozier, representing the United States in the First Commission, Third Meeting, June 22, 1899).

[23] "Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare", *The American Journal of International Law*, Vol. 32, No. 1, January 1938, p. 12.

[24] Hague Rules, above note 18; *see also* Louise Doswald-Beck (ed.), *San Remo Manual on international law applicable to armed conflicts at sea*, Cambridge University Press, New York, 1995, Art. 13(j).

[25] Hague Rules, above note 18, Art. III.

military service of the State;[26] (iii) be exclusively crewed by military[27]; (iv) and have the members of the crew wear a fixed distinctive emblem of such character as to be recognizable at a distance in case they become separated from their aircraft.[28] This will be discussed further below in Part 3.4.

2. HPCR Manual

The HPCR Manual, like the Hague Rules, is not binding on States. Rather, it is the product of a series of expert meetings which took place over a period of six years resulting in a "methodical and comprehensive reflection on international legal rules applicable to air and missile warfare, drawing from various sources of international law."[29] It is a "highly persuasive, but not authoritative, exposition of the relevant law."[30]

The HPCR Manual provides significant guidance around autonomous aircraft, adopting a definition of military aircraft that incorporates autonomous aircraft. Section A(1)(x) provides that military aircraft means aircraft:

> (i) operated by the armed forces of a State;
> (ii) bearing the military markings of that State;
> (iii) commanded by a member of the armed forces; and
> (iv) controlled, [crewed] or preprogrammed by a crew subject to regular armed forces discipline.

The commentary to the Manual demonstrates that the inclusion of remote and autonomous craft was clear in the minds of the drafters:

> Today, [uncrewed aerial vehicles] as well as [uncrewed combat aerial vehicles] also qualify as military aircraft, if the persons remotely controlling them are subject to regular armed forces discipline. The same holds true for

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[26] Hague Rules, above note 18, Art. XIV.
[27] Hague Rules, above note 18, Art. XIV.
[28] Hague Rules, above note 18, Art. XV; *see also* I. Henderson and B. Cavanagh, above note 12, p. 197.
[29] HPCR Manual, above note 19, p. vii.
[30] I. Henderson and P. Keane, above note 22, p. 283.

> autonomously operating [uncrewed aerial vehicles], provided that their programming has been executed by individuals subject to regular armed forces control.[31]

That said, there is no actual discussion in the commentary of what the inclusion of autonomous vehicles means for the exercise of the various rights and obligations of the aircraft. This will be also be discussed further below in Part 3.4.

3. Chicago Convention

Civil aviation has a broad definition of an aircraft, which covers "any machine that can derive support in the atmosphere from the reactions of the air other than the reaction of the air against the earth's surface."[32] This includes a range of both lighter and heavier than air devices such as balloons, airships, gliders, gyroplanes, helicopters, ornithopters and rotorcraft.[33] While there is no mention of autonomy in the Chicago Convention (although Article 8 does mention "aircraft capable of being flown without a pilot"), aircraft with autonomous functions are considered "aircraft" for the purposes of international law. The ICAO has noted that in fact "[e]ach category [e.g., helicopter, ornithopter, rotorcraft] of aircraft will potentially have un[crewed] versions in the future."[34] The ICAO has further clarified that the definition includes uncrewed aircraft that are programmed and autonomous:

> An [uncrewed] aerial vehicle is a pilotless aircraft… which is flown without a pilot-in-command on-board and is either remotely and fully controlled from another place

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[31] "Commentary to the HPCR Manual on International Law Applicable to Air and Missile Warfare", in HPCR Manual, above note 19, p. 38-39 (hereinafter "HPCR Manual Commentary").

[32] Chicago Convention, above note 20, Annex 7: Aircraft Nationality and Registration Marks, 5th ed., July 2003, section 1.

[33] *Ibid.; see also* P. Mendes de Leon, above note 9, p. 13.

[34] International Civil Aviation Organization (ICAO), *Unmanned Aircraft Systems*, ICAO, Montreal, 2011, para 2.5.

> (ground, another aircraft, space) or programmed and fully autonomous.[35]

The Chicago Convention, which distinguishes between civil and State aircraft, defines State aircraft as "aircraft used in military, customs and police services."[36] Article 3(a) of the Chicago Convention, like many other instruments of civil aviation law,[37] specifically provides that it "shall not be applicable to state aircraft." Some States have expressed strong opinions to the effect that the Chicago Convention, and therefore the ICAO, does not have any jurisdiction when it comes to State aircraft. During the drafting of the Chicago Convention, the view that "there was a clear border between civil and military aviation and that there was no need to regulate the latter internationally" was held.[38] However, the drafting also recognized the fact that all aircraft could potentially be navigating the same airspace and that consequences would flow from this.[39] As such, some rules of civil aviation are in fact applicable to State aircraft (see also below at Parts IV and V) and the aircraft definition in the civil aviation context is informative.

4. Military Aircraft with Autonomous Functions

The collective reading therefore of the Hague Rules, HPCR Manual, Chicago Convention and ICAO document on Unmanned Aircraft Systems demonstrates that autonomous aircraft are either included in, anticipated by or not excluded from the definitions of aircraft—whether civil or military.[40] In Parts IV-VI of the paper, the resulting obligations of

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[35] ICAO, above note 35, para. 2.1: referencing both the Global Air Traffic Management Operational Concept (Doc 9854) and the 35th Session of the ICAO.

[36] Chicago Convention, above note 20, Art. 3(b).

[37] *See for example* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 974 UNTS 177, 23 September 1971 (entered into force 26 January 1973), Art. 4.

[38] Jiri Hornik, "Article 3 of the Chicago Convention", *Annals of Air & Space Law*, Vol.26, June 2001, pp. 114-115.

[39] J. Hornik, above note 39, p. 115. Hornik's proposal is in fact for a new all-encompassing Convention "which would deal with navigation in airspace and its basic principles as a whole, in particular with those related to safety" (at p. 142).

[40] Chicago Convention, above note 20, section 1; ICAO, above note 35, para. 2.1; HPCR Manual, above note 19, Section A(1)(x).

these autonomous military aircraft are discussed. Two points, however, must be recalled when considering autonomous military aircraft and their legal obligations.

Firstly, the ICAO, despite grouping all potential levels of autonomous functionality together, has taken the view that autonomous aircraft will have some unique characteristics that may be problematic. This is evident from the observations that, although remotely piloted aircraft "will be able to integrate into the international civil aviation system in the foreseeable future" because the remote pilot can ensure "safe and predictable operation of the aircraft", "fully autonomous aircraft" may not be able to.[41] This is an acknowledgment that the level of autonomy may alter the fundamentals of the aircraft. In doing so, autonomy may challenge the ability of the aircraft to give effect to some of the legal obligations of an aircraft, such as those pertaining to communication, which arise by virtue of the legal frameworks for both civil and State aircraft discussed below.

Second, the criteria of military aircraft enshrined in the Hague Rules, HPCR Manual and customary law require that military aircraft: (i) bear an external mark indicating its nation and military character;[42] (ii) be under the command of a person duly commissioned or enlisted in the military service of the State;[43] (iii) be exclusively crewed by military[44]; and (iv) have the members of the crew wear a fixed distinctive emblem of such character as to be recognizable at a distance in case they become separated from their aircraft.[45] That is, the definition of a military aircraft is not concerned with technical aspects of aircraft. Indeed, an early attempt at a technical approach to a definition of military aircraft—as part of the post-Versailles Peace Treaty negotiations in 1922—was described as "ludicrous".[46] Rather, the definition is concerned with the aircraft's military nature—that it is being commanded and crewed (on-board or remotely) by military personnel. It is arguable that some of the criteria

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[41] ICAO, above note 35, para. 2.2.

[42] Hague Rules, above note 18, Art. III.

[43] Hague Rules, above note 18, Art. XIV.

[44] Hague Rules, above note 18, Art. XIV.

[45] Hague Rules, above note 18, Art. XV; *see also* I. Henderson and B. Cavanagh, above note 12, p. 197.

[46] *See further* M. Milde, above note 16, pp. 66-67.

used in the Hague Rules are, today, no longer strictly necessary and/or at least less important than they were. For example, Henderson has argued that the issue of aircraft markings "may" be "losing its legal significance"[47] given that the small size of some craft is rendering these markings not possible to identify.[48] Further, State practice does not demand that there be a crew on board the aircraft.[49] However, the inclusion of the requirement of command, by a person duly commissioned or enlisted in the military service of the State,[50] is less easy to dismiss, with command being such a central concept to military operations.

An open question remains as to the practical implications of the inclusion of autonomous aircraft as military aircraft for the exercise of the accompanying rights and obligations of military aircraft.[51] As was pointed out in discussing the HPCR Manual commentary above, there is a general lack of discussion about what the inclusion of autonomous vehicles means for the exercise of the various rights and obligations of an aircraft. The United Kingdom Joint Doctrine notes that the United Kingdom "does not possess *armed* autonomous aircraft systems and it has no intention to develop them" (emphasis added).[52] But what about non-weaponized military aircraft? For the Australian Defence Force "command is a *fundamentally human function* that cannot be conducted by machines" (emphasis added).[53] How does this sit with autonomy and the Australian

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[47] I. Henderson and B. Cavanagh, above note 12, p. 198.

[48] For a more detailed discussion of military aircraft markings see Ian Henderson, "International law concerning the status and marketing of remotely piloted aircraft", *Denver Journal of International Law and Policy*, Vol. 39, No. 4, 2011, pp. 615-628.

[49] I. Henderson and B. Cavanagh, above note 12, pp. 198-9; HPCR Manual Commentary, above note 32, p. 38.

[50] Hague Rules, above note 18, Art. XIV.

[51] *See further* Eve Massingham, Simon McKenzie and Rain Liivoja, "Command in the Age of Autonomy–Unanswered Questions for Military Operations", *Opinio Juris - AI and Machine Learning Symposium*, 1 May 2020, available at: https://opiniojuris.org/2020/05/01/ai-and-machine-learning-symposium-command-in-the-age-of-autonomy-unanswered-questions-for-military-operations/.

[52] United Kingdom Ministry of Defence, above note 7, p. 43.

[53] Australian Defence Force, *ADF Concept for Command and Control of the Future Force*, Commonwealth of Australia, 2018, p. 18, available at: https://theforge.defence.gov.au/sites/default/files/adf_concept_for_command_and_control_of_the_future_force_v.1_signed.pdf.

government plans for the development of "trusted autonomous systems"?[54] States need to turn some attention to this. If they do not, the practice of those States who are already deploying increasingly autonomous craft and who are including them in their doctrine will emerge as the default framework without due consideration by the broader international community as to whether the traditional criteria in the Hague Rules should be maintained or modified.

For completeness, it should be noted that airborne munitions—and in particular loitering munitions[55]—are not military aircraft. While many missiles and rockets would not meet the definition of an aircraft,[56] technology is increasingly allowing munitions to behave in ways more traditional to aircraft. Often, the design of an autonomous aircraft will mean it is expendable if necessary, but they are not designed to be destroyed. The intention is that they will return to base.[57] This is fundamentally different from a munition. As such, airborne munitions are excluded from the discussion of aircraft even if they would otherwise meet the definition of aircraft. Further, armament is not itself a factor that makes something a military aircraft.[58]

IV. Autonomous State Aircraft and the Safety of Civil Aviation

The Chicago Convention provisions require that States ensure civil aircraft are safe. For example, Article 3bis of the Chicago Convention provides that "every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered." Further, while the Chicago Convention does not purport to

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[54] Australian Government Department of Defence, *Defence Industry Policy Statement*, 2016, pp. 31-32, available at: https://www.defence.gov.au/WhitePaper/Docs/2016-Defence-Industry-Policy-Statement.pdf.

[55] *See further* Charlie Gao, "Why Loitering Munitions Are the Newest and Deadliest Threat", *The National Interest*, 17 September 2019, available at: https://nationalinterest.org/blog/buzz/why-loitering-munitions-are-newest-and-deadliest-threat-81241.

[56] *See further* P. Mendes de Leon, above note 9, p. 13.

[57] *See also* discussion regarding weapons at sea not meeting the definition of a vessel in Craig Allen, "Determining the Legal Status of Unmanned Maritime Vehicles: Formalism vs Functionalism", *Journal of Maritime Law and Commerce*, Vol. 49, No. 4, 2018, p. 495.

[58] HPCR Manual Commentary, above note 32, p. 38 (*see for example* ftn 63); *see also* C. Allen, above note 58, p. 495.

regulate State aircraft directly, it specifically requires that States ensure that State aircraft have "due regard" for the safety of civilian aircraft. Article 3(d) provides that "when issuing regulations for their state aircraft … [States] will have due regard for the safety of navigation of civil aircraft." The Chicago Convention codified the due regard principle as it relates to State aircraft.[59] Bourbonniere and Haeck describe this provision in the following way. Due regard "creates an obligation on States to regulate State aircraft in order to ensure that State aircraft exercise appropriate attention, as well as, heed and care for the safety of the course and position of civil aircraft avoiding obstruction to the course of and collisions with civil aircraft."[60] Ells is even more specific in noting that "[a]t the risk of vast oversimplification, having or exercising due regard means assuming responsibility for the safety of other aircraft in the immediate vicinity without reliance on an air traffic control system."[61] The question therefore is: whether in automating some of the functions of aircraft, State aircraft systems can still have "due regard for the safety of navigation of civil aircraft" and thus meet the legal requirements?

Autonomy can clearly enhance safety.[62] However, that autonomous aircraft have potential to cause significant safety concerns is acknowledged by the ICAO. To date the issue has been left as one for States to deal with. Milde cites the ICAO observation that "there is no apparent need to amend… the Convention" noting that "[n]ational legislations gradually" are addressing this.[63] That said, the understanding of potential challenges in the legal framework is acknowledged. A working paper of the ICAO in 2015 noted that given the:

> efforts of the international aviation community to address the myriad technical and operational issues arising from

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[59] M. Bourbonniere and L. Haeck, above note 6, p. 912.

[60] M. Bourbonniere and L. Haeck, above note 6, p. 916.

[61] Mark Ells, "Unmanned state aircraft and the exercise of due regard", *Issues in Aviation Law and Policy*, Vol. 13, No. 2, 2014, p. 323.

[62] Christoph Torens, Johann Dauer, Florian Adolf, "Towards Autonomy and Safety for Unmanned Aircraft Systems" in Umut Durak et al. (eds), *Advances in Aeronautical Informatics,* Springer, Cham, 2018, p. 105.

[63] M. Milde, above note 16, p. 46. As Dempsey points out, domestic laws predated international laws. For example, in 1784, for example, a directive was issued by the Paris police prohibiting unauthorised balloon flights: P. Dempsey, above note 21, p. 11.

> the removal of the pilot from the aircraft, a re-examination of specific aspects of international air law is warranted to ascertain the adequacy and efficacy of the existing legal framework.[64]

There are therefore questions across the civil aviation space about the need for further regulation and for understanding the distinctions between aircraft employing these new technologies and more traditional aircraft.[65] These are not settled questions, and as more and more State aircraft employ greater levels of autonomy, States need to consider, in relation to different levels of autonomy, whether the technology does in fact allow for "due regard" of the safety of civil aviation. The acceptable standard will also need to be considered. Is this to be the standard of crewed aircraft? That is, should autonomous aircraft be required to pose no greater risk than that which would be posed by a crewed aircraft?[66] Or should the autonomous technology be held to a higher standard?

A costly example of the importance of the military balancing military capability demands with the ability to comply with civil aviation safety regulations is the German Euro Hawk project. This project was cancelled, after more than USD790 million had been spent, because it would not be cleared to fly by European civil aviation.[67] "The Euro Hawk lacked an on board 'sense and avoid system' to avoid collisions, a prerequisite to obtain flight permission in the [European Union]."[68] The "sense" component on the "sense and avoid system" requires the aircraft to use a range of communication methods to both broadcast and receive

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[64] Study of Legal Issues Relating to Remotely Piloted Aircraft, ICAO Doc. LC/36-WP/2-4, 30 November – 3 December 2105, Appendix A-1, available at: https://www.icao.int/Meetings/LC36/Working%20Papers/LC%2036%20-%20WP%202-4.en.pdf.

[65] *See further* Ridha Aditya Nugraha, Deepika Jeyakodi and Thitipon Mahem, "Urgency for legal framework on drones: Lessons for Indonesia, India, and Thailand", *Indonesia Law Review*, Vol. 6, No. 2, 2016, p. 153.

[66] *See further* M. Ells, above note 62, p. 343.

[67] Stephen Ceccoli and Matthew Crosston, "Diffusion and policy transfer in armed UAV proliferation: the cases of Italy and Germany", *Policy Studies*, Vol. 40, No. 2, 2019, p. 122.

[68] Deanne Corbett, "Germany Seeks to Revive Euro Hawk Program", *Defence News*, 16 January 2015, available at: https://www.defensenews.com/air/2015/01/16/germany-seeks-to-revive-euro-hawk-program/.

information.[69] This inability of the craft to meet the basic communication requirements to allow safe interactions with civilian aircraft ultimately contributed to it being unable to serve its military purpose.

Having due regard for the safety of navigation of civil aircraft necessarily requires an aircraft to be able to signal and communicate in a manner consistent with international protocols in order to avoid hazards and to avoid being a hazard. As has been earlier flagged, the value of an autonomous military aircraft may well be linked to its ability to operate in a communications-denied environment. Legal exemptions for military devices might mean that a device deliberately designed with a limited capacity for communication may not have any difficulties operating in some domestic contexts. For example, in Australia, where the radio spectrum is regulated by the *Radiocommunications Act 1992* (Cth), Article 24 provides that the Act does not apply to acts or omissions by Defence members "the purpose of which relates to… research for purposes connected with defence" or "intelligence". However, where these criteria are not met, the Act imposes penalties on persons using radio-communications which defence personnel may have to comply with. Further, Hornik observes that in fact many States' "national air laws contain a provision that to various extents subjects State aircraft to the same regulations applicable to civil aircraft" and that this is "undeniably an important aspect of promoting the safety of navigation."[70] If the result is that the aircraft cannot comply with the communication requirements of domestic legal frameworks this will be a breach of the domestic law, but may also mean that the craft cannot have due regard for the safety of civil aviation and is therefore also violating international civil aviation law. Depending on the nature of the mission, States may need to ensure that autonomous military aircraft are able to comply with civilian communication protocols designed for the safety of civil aviation while completing their flight.

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[69] *See for example* Giancarmine Fasano et al., "Sense and Avoid for Unmanned Aircraft Systems", *IEEE Aerospace and Electronic Systems Magazine.* Vol. 31, No. 11, 2016, p. 82.

[70] J Hornik, above note 39, p. 109.

V. Autonomous State Aircraft and Navigation Rights

State aircraft have to comply with restrictions on their navigational rights. These rules are significantly more stringent than the requirements for any civil flight that enters the sovereign territory of another State (as detailed in the Chicago Convention[71]), and being able to communicate with other aircraft and with air traffic control is key.

According to treaties and customary international law, State aircraft are able to fly over the:

1. land areas and territorial waters adjacent thereto under their State's sovereignty;[72]
2. land areas and territorial waters adjacent thereto of any State that has given express prior permission;[73]
3. high seas;[74]
4. straits which are used for international navigation between one part of the high seas or an exclusive economic zone;[75]
5. archipelagic sea lanes;[76]
6. "other parts of the earth's surface not subject to any State's jurisdiction, [which] is free to the aircraft of all States";[77] and
7. areas of "undetermined sovereignty".[78]

The freedom of overflight of aircraft applies the same principles of the freedom of the high seas—namely, that there is a right of "unimpeded

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[71] *See for example* Chicago Convention, above note 20, Arts. 5 and 6.

[72] Chicago Convention, above note 20, Art. 2.

[73] Chicago Convention, above note 20, Art. 3(c).

[74] United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994), Art. 87(1)(b) (hereinafter "UNCLOS").

[75] UNCLOS, above note 75, Arts. 37 and 38.

[76] UNCLOS, above note 75, Art. 54. Archipelagic waters are determined by drawing straight baselines connecting the outer edges of qualifying islands in an archipelago. Archipelagic sea lanes passage allows an archipelagic State to set aside sea lanes and air routes through its archipelagic waters.

[77] P. Dempsey, above note 21, p. 13; *see also* Hague Rules, above note 18, Art. XII.

[78] M. Bourbonniere and L. Haeck, above note 6, p. 895. Note particularly, footnote 38 regarding Antarctica.

passage" but that this passage is subject to limitations including the duties to protect life and the environment and to prevent illicit activities such as piracy, slavery, trafficking and unauthorized broadcasting.[79]

While the paper's focus is on military air assets there is clearly an overlap between naval warfare and land warfare rules.[80] Further, the United Nations Convention on the Law of the Sea (UNCLOS), which governs the use of the seas and oceans, provides for the regulation of overflight in the different zones recognized by the law of sea. There are communications requirements for aircraft as part of UNCLOS as well. For example, it is a requirement on aircraft exercising overflight rights to "at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority."[81] States must be sure that the technology of the autonomous State aircraft does not interfere with this communication obligation.

A State aircraft that enters prohibited airspace without permission risks being shot down. "The trespassing aircraft could be intercepted and identified, directed to leave, forced to land at a designated airfield, or ultimately have a warning shot fired, and, if necessary, have its flight terminated."[82] While the "disposable" nature of autonomous aircraft means that the implications of downing the craft is much less serious than the downing of crewed craft, in many cases, there will not necessarily be any significant consequence from a short duration of an autonomous aircraft entering the airspace of another State.

That said, the consequences of any State aircraft, crewed or otherwise, straying into foreign territory could also be more far-reaching in terms of starting a military engagement. State aircraft straying into the airspace of another State without permission could be seen as contravening Article 2(4) of the UN Charter which prohibits the "threat or use of force against the territorial integrity or political independence of any state." Given that there may be non-hostile reasons for State aircraft to fly into foreign airspace—for example, bad weather, accident or other

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[79] Douglas Guilfoyle, "Article 87" in Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary*, Beck, Hart and Nomos, Germany, 2017, pp. 681-2.

[80] *See further* Franciso Javier Guisández Gómez, "The Law of Air Warfare", *IRRC*, Vol. 323, 1998; *see also*, I. Henderson and B. Cavanagh, above note 12, p. 198.

[81] UNCLOS, above note 75, Art. 39 (3)(b).

[82] M. Bourbonniere and L. Haeck, above note 6, p. 946.

force majeure[83]—during peacetime, State practice has seen alignment with the customary law principles for civil aircraft that prohibit their downing in these cases.[84] However, there is always the possibility of the aircraft being attacked in circumstances where there was no hostile intent. It is also perhaps increasingly likely that these aircraft will be used to push the boundaries of sovereignty for military (in particular surveillance) purposes which may result in States being less inclined to treat State aircraft in the way civil aircraft have been treated in the past.

There are measures in place in order to protect sovereignty which may require aircraft to communicate. For example, some States have implemented a "reporting and identifying regime for aircraft bound for coastal and island states" which seeks communication from the aircraft while still in international airspace as to its future intention to enter that airspace.[85] Although aircraft not entering the relevant States' airspace do not have to identify themselves, this is an example of a recognized custom of States where communication plays a significant role.

It is therefore important that the autonomous functionality on any autonomous aircraft allows for compliance with these navigational principles in order to prevent international incidents—including the possible downing of aircraft when no hostile intent was present. Again, as it is with the safety of civil aviation, communication is vital here. Autonomous aircraft must be programmed in such a way as to ensure that they can comply with the relevant communications protocols. In the case of a communications-denied environment or other communications challenge, the aircraft must be appropriately programmed to ensure that it does not fly into foreign airspace unintentionally. In the event that this does occur, "actions on" making this transgression must also include an ability to comply with civil aviation communications protocols to alert the relevant authorities to the situation.

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[83] M. Bourbonniere and L. Haeck, above note 6, pp. 946-8.

[84] *Ibid.*

[85] Lt Col Andrew S. Williams, "Aerial Reconnaissance by Military Aircraft in the Exclusive Economic Zone", in Peter Dutton (ed.), *Military Activities in the Exclusive Economic Zone,* Naval War College China Maritime Studies Institute, Unites States of America, December 2010, p. 51.

VI. Military Aircraft Rights and Obligations under International Humanitarian Law and Communication in Aid of Civilian Safety

The final point addressed in this paper are the communications functions that allow an autonomous aircraft to exercise the rights and obligations of a *military* aircraft without the safety of civilians and civilian aircraft being compromised. In Parts IV and V, the discussion has looked at the obligations of State aircraft. Military aircraft are a particular subset of State aircraft.[86] However, there is necessarily a difference between State aircraft—which have certain navigational and other rights—and military aircraft, which not only have these same navigational rights (and limitations), but also have belligerent rights. Belligerent rights are those rights that attach to belligerency, or "the condition of being in fact engaged in war."[87] They allow "actions in wartime that would not be permitted under the law of peace."[88] Belligerent military aircraft have the right to engage in hostilities (including specific communication rights such as the "transmission during flight of military intelligence"[89]) in compliance with international law and, more specifically, international humanitarian law. In order to exercise belligerent rights and obligations, an autonomous aircraft must not only have the status of a "State aircraft" but specifically be a "military aircraft".

If an autonomous aircraft is a military aircraft, then it will have belligerent *rights*. It should be noted that because belligerent rights are just that—rights—not obligations, not all military aircraft need to be able to exercise them, and so being able to do so is not a requirement of being a military aircraft. However, having these rights can be hugely significant. Military aircraft have potential impacts on civilians and civilian aircraft in the exercise of their rights and obligations. In times of war, States may regulate aircraft movement within their jurisdiction.[90] This allows States to require aircraft (including belligerent non-military aircraft and neutral

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[86] Chicago Convention, above note 20, Art. 3(b).

[87] Encyclopedia Britannica, "Belligerency", available at: https://www.britannica.com/topic/belligerency.

[88] Lawrence Hill-Cawthorne, "Rights under International Humanitarian Law", *European Journal of International Law*, Vol. 28, No. 4, 2017, pp. 1188.

[89] Hague Rules, above note 18, Art. XVI.

[90] Hague Rules, above note 18, Art. XII.

aircraft) to "make the nearest available landing."[91] Belligerent commanders can also "prohibit the passing of neutral aircraft in the immediate vicinity of the force or may oblige them to follow a particular route."[92] Non-compliant aircraft "may be fired upon."[93] Further, pursuant to the authorization of a no-fly zone,[94] a "delinquent aircraft—which has been subject to the full range of non-lethal warning and escalation of force measures", there may be some situations when the use of force may be allowed.[95]

As such, should an autonomous military aircraft seek to exercise these rights, it would need to ensure the legal requirements were appropriately complied with. Communicating warnings appropriately is therefore absolutely essential to a military aircraft's activities. This raises a number of questions. Can an autonomous military aircraft effectively give warnings, effectively receive warnings, and effectively receive and act on communications in response to warnings issued? These are legal questions the developers of these aircraft must consider. Autonomous military aircraft communications have to be able to be executed in accordance with global protocols such that miscommunication is not the source of civilian aircraft being destroyed.

In addition, autonomous military aircraft must be able to comply with the *obligations* of military aircraft. A key obligation of military medical aircraft is that they shall also "obey every summons to land."[96] This is articulated in Article 36 of the First Geneva Convention and Article 30 of the Second Geneva Convention. The Updated Commentary to the Geneva Conventions acknowledges the broad nature of the term "aircraft" and that indeed, in the future, military medical aircraft that are

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[91] Hague Rules, above note 18, Arts. XXXIII, XXXV.

[92] Hague Rules, above note 18, Art. XXX.

[93] Hague Rules, above note 18, Arts. XXX, XXXIII, XXXIV, XXXV.

[94] *See further* Rob McLaughlin, "United Nations Security Council Practice in Relation to Use of Force in No- Fly Zones and Maritime Exclusion Zones" in Mark Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, Oxford, p. 205.

[95] R. McLaughlin, above note 95, p. 6.

[96] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Art. 36; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 30.

uncrewed may be a reality and may fall within the scope of Article 36.[97] The Commentary specifically notes:

> [I]t is increasingly likely that States will develop and employ [uncrewed] ground and/or air medical evacuation vehicles that are either remotely controlled or autonomous to collect and transport wounded and sick personnel. As long as they meet the requirement for protection set forth in Article 35 (i.e. being assigned exclusively to medical transportation), there is no reason to exclude such transports from the scope of Article 35. Their protection can only contribute to the humanitarian objectives of the Convention.[98]

There is no set way in which the summons to land must be communicated.[99] Ideally, the parties will have a predetermined method for this—for example, "broadcasting the summons on a pre-approved frequency."[100] However, "the Party issuing the summons to land must take all reasonable measures to ensure that the summons actually reaches the persons in control of the aircraft."[101] Article 14 of the Regulations concerning identification annexed to Additional Protocol I notes that the "standard visual and radio interception procedures prescribed by Annex 2 to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, should be used by the intercepting and the medical aircraft."[102] Autonomous aircraft developers will therefore have to ensure that their aircraft are capable of responding to directions given in accordance with these methods. If they cannot be programmed to respond appropriately, then while they may (arguably)

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[97] ICRC, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd ed., ICRC, Geneva, 2016, para. 2440 (hereinafter "Commentary to GCI").

[98] Commentary to GCI, above note 98, para. 2373.

[99] Commentary to GCI, above note 98, para. 2473.

[100] Commentary to GCI, above note 98, para. 2474.

[101] *Ibid.*

[102] Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Annex I, Art. 13.

meet the technical definition of a military aircraft or at least of a State aircraft, they will not be able to comply with the legal requirements of being a military medical aircraft and thus lose the protections afforded by international humanitarian law, putting the sick and wounded at risk.

VII. Conclusion

There is still a lack of clarity about what is going to be feasible in terms of autonomy from a technological perspective. There is also a lack of understanding about what States are willing to pursue in terms of autonomy. An increasing number of armed actors are deploying uncrewed technologies, particularly for tasks such as surveillance and reconnaissance. Many of those developing these technologies have been cautious. Some believe there is some underlying agreement that "until the machine processors equal or surpass humans at making abstract decisions, there's always going to be mission command."[103] That said, many States (and some non-State actors) are developing their capabilities using autonomous technologies, and there is an increasingly vast range of military aircraft with different degrees of autonomous functions currently in the skies, and in civilian airspace, challenging the legal frameworks.

Aircraft with autonomous functions that are employed by the military are already automatically considered military aircraft by many States. Further, in the civilian landscape of the ICAO, aircraft include autonomous aerial vehicles. As aircraft have existed since the beginning of air travel (e.g., balloons), definitions of "aircraft" in the regulatory frameworks were designed to address craft both with pilots on-board and remote to the craft. Although autonomous systems are recognized as having features different to remotely piloted ones, and their full integration into aviation is still developing, the determination of their status as aircraft seems settled.

But regardless of status, exercising both the rights and obligations of State and military aircraft will require autonomous military aircraft to have certain abilities and, importantly, the communication functions to give effect to these rights and obligations. While the very point of

[103] Paul Scharre, *Army of None*, WW Norton and Company, New York, 2018, p. 81, quoting Bradford Tousley of the United States Defence Advanced Research Projects Agency.

autonomous military aircraft in some cases will be to allow for operations in communications-denied environments, their functionalities (and therefore their tasks) must not prevent them from complying with legal frameworks pertaining to the safety of civil aviation and civilians.

Compliance with the civilian aviation regulations requires not only the capacity to communicate consistently with international protocols where necessary, but also having a system to deal with the situation when communications systems fail. Communication challenges of course can also apply to crewed and remotely piloted aircraft without autonomous functionality where problems result in pilots being unable to reach either military or civilian air-traffic control. The communications channels between the operator and the device may be accidentally lost or may be deliberately jammed or hacked. As such, some of these challenges may not be unique to autonomous aircraft. However, given that autonomous military aircraft are often specifically designed with the objective of operating in communications-denied environments, States need to give consideration to ensuring that autonomous military aircraft are able to comply with civilian communication protocols designed for the safety of civil aviation while completing their military missions.

There is a very real question about whether some autonomous military aircraft can appropriately communicate in order to exercise the relevant rights and obligations. Autonomous military aircraft have many possible positive uses, but some certainty is required in the legal sphere. States need to consider whether the autonomous military aircraft they operate obviate danger to civil aircraft, comply with the sovereign rights of aircraft and can give effect to belligerent obligations (as well as exercise belligerent rights where necessary). To not do so would mean further costly undertakings which result in a failure to deliver, but also would put at risk civil aviation and civilians in both peace time and in times of armed conflict.

Grey Zone Conflict in the South China Sea and Challenges Facing the Legal Framework for the Use of Force at Sea

Trang T. Ngo[*]

ABSTRACT

The pursuit of maritime resources, especially in disputed maritime zones, has encouraged various States to engage in grey zone conflict to assert control over such areas on the one hand, and to obtain marine resources for economic benefit on the other hand. These operations have posed threats to the neighbouring States as well as challenges to international law on the use of force since the force used is often below the threshold of conventional military operations to which the current international law on the use of force applies. This article introduces the concept of grey zone conflict and analyses tactics common to such conflicts in the context of the South China Sea. Based on these, the author revisits the legal framework for the use of force at sea, including the prohibition thereof under the United Nations Charter (UN Charter) and the United Nations Convention on the Law of the Sea (UNCLOS), explores its treatment under International Humanitarian Law (IHL) and International Human Rights Law (focusing on maritime law enforcement) to identify key challenges to international law in addressing this phenomena in the South China Sea, and gives relevant recommendations on the subject.

Keywords: Use of Force at Sea, Grey Zone Conflict, South China Sea.

Introduction

In March 2009, while conducting routine operations in international waters in the South China Sea, the surveillance ship USNS *Impeccable* was harassed by five Chinese vessels which allegedly attempted to impede the

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US vessel's activities in the area, although the location was beyond the territorial sea of any coastal State.[1] In April 2012, two Chinese maritime surveillance ships approached and prevented a Philippine warship from arresting Chinese fishermen who were illegally fishing near the disputed Scarborough Shoal in the South China Sea.[2] From May to August 2014, State-owned China National Offshore Oil Corporation moved its HD-981 oil platform to the disputed waters near the Paracel Islands in the South China Sea, resulting in tension between China and Vietnam. Chinese vessels not only rammed and sank Vietnamese fishing boats, but also fired water cannons at a Vietnamese ocean inspection ship while it was operating in the territorial waters of Vietnam.[3] These incidents have become increasingly common in the South China Sea, escalating tensions among States and affecting regional peace and stability. Nevertheless, these activities fall within the concept of "gray zone" conflicts, thus, challenging the application of international law on the use of force.

The abovementioned incidents are examples of gray zone conflicts, in which operations of forces may not merely be actions by regular armed forces and do not clearly reach the threshold of war. Gray zone conflict has been a subject of numerous research projects, which often focus on aspects of international relations and security.[4] The legal framework for the use of force remains a traditional topic in international law; however, the discussion around use of force within grey zone conflict is an area that can be further explored.

Patricia Jimenez Kwast successfully addresses key aspects of the distinction between maritime law enforcement and the use of force at sea

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[1] Yuli Yang, "Pentagon says Chinese vessels harassed U.S Ship", *CNN*, 9 March 2009, available at: http://edition.cnn.com/2009/POLITICS/03/09/us.navy.china/index.html (all internet references were accessed on June 2020).

[2] Associated Press in Manila, "Philippine warship in standoff with Chinese vessels", *The Guardian,* 10 April 2012, available at: https://www.theguardian.com/world/2012/apr/11/philippines-china-stand-off-south-china-sea.

[3] Ankit Panda, "Chinese Ship rams and sinks Vietnamese fishing boat in South China Sea", *The Diplomat,* 28 May 2014, available at: https://thediplomat.com/2014/05/chinese-ship-rams-and-sinks-vietnamese-fishing-boat-in-south-china-sea/.

[4] Michael Mazarr, *Mastering Gray zone: Understanding a changing era of conflict*, U.S Army War College Press, Carlisle, 2015; Nathan Freier et al., *Outplayed: Regaining Strategic Initiative in the Gray Zone*, U.S Army War College Press, Carlisle 2016; Nadia Schadlow, "Peace and War: The Space between", *War on the Rocks*, 18 August 2014, available at: https://warontherocks.com/2014/08/peace-and-war-the-space-between/.

in her paper on the Guyana/Suriname Award,[5] without, however, delving into other forms of use of force or other branches of international law governing the use of force. Johnathan G. Odom has also comprehensively analysed legal aspects of the operation of grey zone strategy under different international law frameworks,[6] though his research is limited to the operation of maritime militia, a common form of grey zone strategies. Most recently, Aurel Sari distinguished lawfare, hybrid warfare and grey zone conflicts with the recommendation to treat international law as a special instrument to pursue strategic and operational objectives,[7] but without scrutinizing any specific international law framework regulating these three situations.

In this context, it is essential to revisit the international law on use of force at sea to identify the most feasible framework for the grey zone. Within its scope, the paper would briefly recap understanding of grey zone conflicts among international scholars before describing specific patterns of grey zone conflicts being used in the South China Sea. Afterwards, the legality of this phenomenon would be considered by answering two questions: (i) whether the use of force is prohibited under the United Nations (UN) Charter and United Nations Convention on the Law of the Sea (UNCLOS) framework; and (ii) how force is used under the international humanitarian law and maritime law enforcement framework. It should be noted that whether each body of international law scrutinized in this paper is applicable or not depends on pieces of factual evidence of an incident and the context in which the said incident arises. Thus, the analysis in this paper is based on the assumption that all information found and referred to is accurate. If any information is found inaccurate, a different legal analysis may be more applicable.

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[5] Patricia Jimenez Kwast, "Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award", *Journal of Conflict & Security Law*, Vol. 13, No. 1, (2008), pp. 49-92.

[6] Johnathan G. Odom, "Guerrillas in the sea mist – China's maritime militia and international law", *Asia-Pacific Journal of Ocean Law and Policy,* No. 3, 2018, pp. 31-94.

[7] Aurel Sari, "Legal resilience in an era of grey zone conflicts and hybrid threats", *Cambridge Review of International Affairs*, 20 May 2020, available at: https://www.tandfonline.com/doi/full/10.1080/09557571.2020.1752147.

The Use of Force in Grey Zone Conflict

Understanding the Grey Zone Conflict

Grey zone is neither a legal term nor a brand-new strategy, but simply a new terminology to replace a long-standing concept in international relations.[8] Grey zone conflict is a metaphorical state of being between war and peace, where one country may aim to win either political or territorial advantages associated with overt aggression, using military or paramilitary forces, without crossing the threshold of open warfare with its rivals. Grey zone conflict moves gradually towards its objective rather than seeking conclusive results in a specific period of time.[9]

In recent years, the concept of the grey zone has attracted the attention of policymakers and has been the subject of debates among international scholars. Nadia Shadlow defines grey zone as "the space between war and peace [...] a landscape churning with political, economic, and security competitions that requires constant attention".[10] Denny Roy describes it as a situation "where a State attempts to make gains at the expense of a strategic competitor by using tactics that, while aggressive, remain below the level that usually triggers conventional military retaliation".[11] Meanwhile, Nathan Freier et al. propose that "gray zone challenges lie between 'classic' war and peace, legitimate and illegitimate motives and methods, universal and conditional norms, order and anarchy, and traditional and irregular (or unconventional) means."[12] Despite differing descriptions, most scholars are similar in setting conventional warfare as a ceiling for grey zone operation and recognize grey zone strategy as having three major characteristics: (i) an objective to

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[8] Adam Elkus, "50 shades of gray: Why the gray wars concept lacks strategic sense, Commentary", *War on the Rocks,* 15 December 2015, available at: https://warontherocks.com/2015/12/50-shades-of-gray-why-the-gray-wars-concept-lacks-strategic-sense/.

[9] M. Mazarr, above note 4.

[10] N. Schadlow, above note 4.

[11] Deny Roy, "China Wins the Gray Zone by Default", *ETH Zurich Center for Security Studies*, 1 October 2015, available at https://css.ethz.ch/en/services/digital-library/articles/article.html/193819/pdf.

[12] N. Freier et al., above note 4.

change the *status quo*; (ii) the gradual or incremental operation; and (iii) the involvement of "unconventional" elements of State Powers.[13]

There is a range of tools and techniques that can be used to assemble grey zone campaigns. Grey zone strategy can be exercised in the areas of economics, military, information, politics and other fields, with different purposes. With specific regard to the military field, grey zone tools and techniques could include nuclear posturing, movement of troops, threats, creation of *fait accompli* situations, large-scale covert actions to weaken regime, discrete acts of violence at key moments, use of unconventional warfare forces (special operation forces, covert operators) in direct action with deniability and sponsoring large scale proxy violence, among others.[14]

Grey Zone Conflict in South China Sea

Assessments of the situation in the South China Sea have shown that the grey zone strategy is being used in the South China Sea, making the regional situation unstable and unpredictable.[15] This hypothesis comes from the assumption that there is a "grey zone" in waters, particularly in the South China Sea, a disputed area with numerous overlapping country claims. For instance, some States have conducted unilateral activities to gradually alter the *status quo* and control the sea by involving "unconventional" elements such as law enforcement or civilian forces.[16] This strategy aims to control the waters without the use of military force or creating reason for military intervention.

There have been a number of grey zone tools and techniques used as part of the grey zone strategy in the South China Sea. However, within the scope of this article, the author will focus on the analysis of two major patterns: (i) military activities; and (ii) paramilitary activities.

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[13] Dmitry Filipoff, "Andrew S. Erickson and Ryan D. Martinson Discuss China's Maritime Gray Zone Operations", *Center for International Maritime Security (CIMSEC)*, 11 March 2019, available at: http://cimsec.org/andrew-s-erickson-and-ryan-d-martinson-discuss-chinas-maritime-gray-zone-operations/39839.

[14] M. Mazarr, above note 4.

[15] To Anh Tuan et al., "China's gray zone strategy in the East Sea (South China Sea)", East Sea Institute, November 2018, p. 15.

[16] *See* Introduction.

Military Activities

Military activities in the grey zone implies the use of military power to spread a message of readiness to use said military power or otherwise escalate militarily.[17] Though these may appear to be closest in form to use of force,[18] these activities are still within the grey zone since they only manifest force in the form of deterrence, and information about these events, if any, comes from unofficial sources only.

In the South China Sea, military activities in the grey zone often take different forms. It could be a threat to invade, for instance, as when China moved the HD-981 oil rig to Vietnam's EEZ, which some media sources revealed the Chinese military had gathered along the border between the two countries.[19] However, no official source has confirmed the news. Nevertheless, the threat to invade creates a psychological advantage for the country that uses grey zone tools, and threatens and discourages neighbouring countries. Military activities in the grey zone could also be applied in large-scale military exercises—for example, in 2018, China for the first time sent a bomber (H-6K) to land on an island in the South China Sea (Paracel Islands), the purpose of which was to deter and show its (possibly illegal) control over the islands and normalize its military presence there.[20]

The situation should be more complicated when "low level" coercion and nonmilitary capabilities such as the employment of paramilitary forces are applied in the maritime context. Commonly, a State would use military vessels to support sea action in the grey zone, a strategy referred to as salami/cabbage slicing.[21] In this strategy, there is a combination of use of coast guard forces with fishermen, militia, and naval forces to assert a maritime claim. Particularly, capabilities would be used in concert, with fishermen and maritime militia acting as the first line

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[17] T. Tuan, above note 15, p. 16.

[18] *Ibid.*

[19] Joshua Philipp, "Chinese Military said to be massing near the Vietnam border", *The Epoch Times,* 18 May 2014, available at: https://www.theepochtimes.com/chinese-military-said-to-be-massing-near-the-vietnam-border_682973.html.

[20] Bethlehem Feleke, "China tests bombers on South China Sea island", *CNN*, 21 May 2018, available at: https://edition.cnn.com/2018/05/20/asia/south-china-sea-bombers-islands-intl/index.html.

[21] T. Tuan, above note 15, p. 18.

of defence, the coast guard as the second line, and the military as a force of last resort, which is always ready to use force when necessary.[22] This strategy is well-illustrated in various incidents in the South China Sea such as those involving the Impeccable (2009), the 2013 incident at Second Thomas Shoal in the Spratly Islands (2013), and HD-981 (2014), among others.

Paramilitary Activities

Paramilitary activities include using measures, whose characteristics, subjects and strategy blur the line between military and paramilitary activities.[23] Within the scope of this paper, the author will focus on paramilitary activities implemented by three main subjects: (i) maritime law enforcement forces; (ii) maritime militia; and (iii) State-owned or semi-State-owned enterprises. These subjects can operate separately or in harmony with each other depending on the nature and scale of the activities.

Maritime law enforcement forces, such as coast guard, maritime surveillance forces, etc., aim to enforce administrative controls over disputed waters.[24] Accordingly, these forces not only perform traditional

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[22] Michael Green et al., "Countering Coercion in Maritime Asia: The Theory and Practice of Gray Zone Deterrence", *Center for Strategic & International Studies*, Washington, D.C., 2017, p. 12.

[23] Lyle Morris, *Gray Zone Challenges of East and Southeast Asia* (presented at 9th South China Sea International Conference, Ho Chi Minh City, Vietnam), November 2017.

[24] Depending on countries, the organization of maritime law enforcement force may vary. However, the obvious link between government and these forces is a thing in common. For example, under the State Council Institutional Reform and Functional Transformation Plan (2013), China Coast Guard (CCG) was restructured on the basis of merging departments as China Maritime Surveillance Forces (CMS), Fisheries Law Enforcement (FLEC), Maritime Safety (MSA), etc. From 2018, CCG was put under the command of the military-administered People Armed Police (PAP) of China. Vietnam coast guard is a people's armed and specialized force of the State playing the key role in law enforcement and protection of national security and order and safety at sea (Article 3, Vietnam Law on Coast Guard 2018). Similarly, Indonesia Sea and Coast Guard (KPLP) is tasked to safeguard and carry out law enforcement functions at sea and coast in terms of safety inspection, maritime traffic and safety of shipping lane (Law of the Republic of Indonesia Number 17 of 2008 on Shipping Law, Chapter XVII, Article 277). The Indonesian Maritime Security Board/The Indonesia Coast Guard (BAKAMLA) is tasked to carry out and organize joint safety patrols, safety early warning system

maritime missions such as ensuring security, order, safety, as well as observance of domestic law of the sea, but could also take actions such as collisions or using water cannons to attack foreign military or civil vessels in disputed waters. In May 2013, after accusing the Philippines of building a new structure on the vessel BRP Sierra Madre, Chinese Coast Guard vessels appeared near the Second Thomas Shoal and attempted to block food supplies for this vessel.[25]

Maritime militia, on the other hand, employ civilian vessels controlled by fishermen that are in fact trained in the military, and can be armed to perform duties in disputed waters, including patrolling, monitoring and attacking foreign fishing vessels.[26] The main objective of these activities is to maintain superiority over the disputed waters while keeping the dispute below the level of conflict and ensuring effective maritime claims. A maritime militia is neither a State agency nor officially established by governments. Instead, they are fishing enterprises and are often comprised of individuals that do not wear military uniform but engage in economic production activities (i.e., fishing). Though the use of maritime militia has never been affirmed as a formal activity,[27] its formal nature is clearly suggested by four characteristics, i.e., that they are: (i) conducted by State organizations;[28] (ii) conducted by authorized personnel;[29] (iii) conducted at government instruction, direction or control;[30] and (iv) acknowledged or adopted by a State.[31] Maritime militias are believed to have been involved in major incidents in the South China

(Presidential Regulation of the Republic of Indonesia Number 178 of 2014 on Maritime Security Agency, Chapter I, Article 3).

[25] M. Green et al., above note 23.

[26] T. Tuan, above note 15, p. 22.

[27] Zhang Hongzhou, "Beijing has a maritime militia in the South China Sea. Sound fishy?", *South China Morning Post*, 3 March 2019, available at: https://www.scmp.com/week-asia/geopolitics/article/2188193/beijing-has-maritime-militia-south-china-sea-sound-fishy.

[28] UNGA Res. 56/83, 12 December 2001, Art. 4 (hereinafter "ROSFIWA").

[29] ROSFIWA, above note 28, Art. 5.

[30] ROSFIWA, above note 28, Art. 8.

[31] ROSFIWA, above note 28, Art. 11.

Sea, such as the Impeccable (2009),[32] Scarborough (2012),[33] and HD-981 (2014).[34]

Paramilitary activities in the grey zone can also be implemented by State-owned or semi-State-owned enterprises. These are strategic tools to gain benefits in disputed waters and to erase the boundary between military and civilian activities. It is challenging to identify the exact status of this kind of subject. Specifically, in practice, the national oil and gas enterprises are often owned by States and led by high-ranking officials.[35] Some may even be of a higher rank than the authorities of local governments where they operate, making it difficult for local government authorities to control or order them.[36] This often creates vague boundaries between commercial and national interests. For instance, in the HD-981 incident (2014), the role of energy companies of China was confirmed.[37] However, it is not easy to identify whether these companies are operating for commercial or national interests.

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[32] During the incident, the South China Sea Bureau of the Chinese Fisheries Bureau ordered Chinese maritime militia to obstruct the operation of the Impeccable. *See* Andrew S. Erickson and Connor M. Kennedy, "China's Daring Vanguard: Introducing Sanya City's Maritime Militia"*, Andrew S. Erickson*, 5 November 2015, available at: https://www.andrewerickson.com/2015/11/chinas-daring-vanguard-introducing-sanya-citys-maritime-militia/.

[33] During the incident, Chinese maritime militia attacked twenty-five fishing boats in four groups to the shoal in response to the need for higher-level State authorities. *See* Connor M. Kennedy and Andrew S. Erickson, "Model Maritime Militia: Tanmen's leading role in the April 2012 Scarborough Shoal Incident", *Andrew S. Erickson*, 21 April 2016, available at: http://www.andrewerickson.com/2016/04/model-maritime-militia-tanmens-leading-role-in-the-april-2012-scarborough-shoal-incident/.

[34] In the incident of HD-981 oil rig, Dam Mon maritime militia of China was ordered to participate in a barrier around the oil platform. *See* Connor M. Kennedy and Andrew S. Erickson, "From Frontier to Frontline: Tanmen's Leading Role Pt. 2", *Andrew S. Erickson*, 17 May 2016, available at: http://cimsec.org/frontier-frontline-tanmen-maritime-militias-leading-role-pt-2/25260.

[35] For instance, Wang Yilin, former chairman of the board of the China National Petroleum Corporation (CNPC) from 2015 to 2020, was a member of the 18th Central Commission for Discipline Inspection, a high-ranking position in the Communist Party of China.

[36] Kenneth Lieberthal, *Managing the China Challenge: How to Achieve Corporate Success in the People's Republic*, Brookings Institution Press, Washington, D.C., 2011, p. 51.

[37] A. Panda, above note 3. HD-981 oil rig operates under the China National Offshore Oil Company (CNOCC).

Challenges Facing the International Law on Use of Force at Sea

The emergence of grey zone threats has posed challenges to the traditional understanding of international law on use of force, making it necessary to reconsider the legality of the prohibition on the use of force as well as the manner in which use of force is exercised under various legal frameworks.

Legalities Regarding the Prohibition on the Use of Force

UN Charter

The principle of non-use of force, stipulated under Article 2(4) of the UN Charter, is one of the most important principles in international law to prevent States from resorting to the use of force or threat to use force as a method of resolving international disputes. This is a *jus cogens* principle or a peremptory norm of international law from which no derogation is allowed.[38] In the *Nicaragua* case, the International Court of Justice (ICJ) also confirmed the status of the prohibition of the use of force in Article 2(4) of the Charter as a customary norm with binding character towards all subjects of international law.[39]

However, the interpretation of this article remains ambiguous. Generally, the concept of use of force refers to an armed attack by organized military, naval or air forces of States. However, unofficial agents, volunteers, armed bands and groups of insurgents could also be involved in practice[40] which makes it challenging to identify whether agencies concerned could be categorized as military or other forces under government control.

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[38] Oliver Dörr and Albrecht Randelzhofer, "Chapter I: Purposes and Principles, Article 2(4)" in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary*, Oxford University Press, Oxford, 1995, para. 61.

[39] International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgement (Jurisdiction and Admissibility of the Application), *ICJ Reports 1984*, para. 73 (hereinafter "*Military and Paramilitary Activities (Jurisdiction)*").

[40] Ian Brownlie, *International Law and the Use of Force by States*, Clarendon Press, Oxford, 1981, p. 361.

In grey zone operations, determination of whether a threat to use force or use of force has been exercised by a State is rather problematic for a number of reasons.

First, it is challenging to determine whether force has been used. Article 2(4) of the UN Charter does not limit said force to the armed forces, but could also include political, economic or any other form of coercion aimed against States.[41] Nevertheless, the Preamble of the UN Charter does refer to the need to ensure that "armed force" should not be used except in the common interest while Article 51 of the UN Charter deals with the right to self-defence.[42] In grey zone operations, armed forces might be deployed in the form of military or paramilitary activities. However, grey zone operations are frequently kept under the threshold of an open warfare so as not to infringe on non-use of force *jus cogens*. Rather, grey zone operators only manifest armed forces in the form of deterrence and information to discourage neighbouring countries.[43] Thus, even though the armed forces are employed, it is may not be immediately evident that a State has illegally used force as part of its grey zone strategies.

Second, the prohibition of the threat to use force hardly prevents a State from pursuing a grey zone strategy. A threat to use force can be a "signaled intention to use of force if certain events occur"[44] or consist "in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government".[45] The use of grey zone tools in the form of large scale military exercises near a shared border without any express or implied message from the operators may hardly be categorized as a threat to use force. In the case of a message such as a threat to invade, since it often comes from an unofficial source, a solid link with a government's intention cannot be easily drawn. Additionally, mere possession of weapons cannot by itself

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[41] UNGA Res. 2625(XXV), 24 October 1970.

[42] Malcolm Shaw, *International Law*, Cambridge University Press, Cambridge, 2008, p. 1124.

[43] T. Tuan, above note 15, p. 16.

[44] ICJ, *Legality of the threat or use of nuclear weapons,* Advisory Opinion, *ICJ Reports 1996*, para. 47 (hereinafter "Nuclear Weapons Advisory Opinion").

[45] I. Brownlie, above note 40, p. 364.

constitute a threat to use force,[46] thus, military parades for instance cannot be prohibited under the non-use of force principle.

Third, even in case of the confirmation of the use of force, whether the force has been used in an illegal manner by States and thus entail State responsibility under international law still requires more concrete evidence. Though there is no single treaty or convention that specifically covers State responsibility, customary rules on State responsibility have been reflected in judicial decisions and in the Articles on Responsibility of States for Internationally Wrongful Acts (ROSFIWA).[47] Accordingly, actions or omissions can be attributed to a State only if they are: (i) conducted by State organizations;[48] (ii) conducted by authorized personnel;[49] (iii) conducted at government instruction, direction or control;[50] and (iv) acknowledged or adopted by a State.[51]

While the link between maritime law enforcement forces and the government may be obvious,[52] the conduct of maritime militia in grey zone conflicts is not easily attributable to the concerned State. Maritime militia are not State organs—instead, they are created by fishing companies and use civilian vessels.[53] Furthermore, little evidence supports that maritime militia are empowered by law to patrol, monitor or even attack foreign fishing vessels since they are mainly fishermen whose functions are fishing. It is argued that China's maritime militia is empowered by the China Emergency Response Law of 2007, which

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[46] Nuclear Weapons Advisory Opinion, above note 44, paras. 48-50.

[47] ROSFIWA, above note 28.

[48] ROSFIWA, above note 28, Art. 4.

[49] ROSFIWA, above note 28, Art. 5.

[50] ROSFIWA, above note 28, Art. 8.

[51] ROSFIWA, above note 28, Art. 11.

[52] Above note 24.

[53] It is believed that the People's Liberation Army (PLA) Navy employed the South China Fisheries Company's maritime militia during the 1974 contest between China and Vietnam over the Paracels (Andrew S. Erickson and Connor M. Kennedy, "Trailblazers in Warfighting: The Maritime Militia of Danzhou", *CIMSEC*, 1 February 2016, available at: http://cimsec.org/trailblazers-warfighting-maritime-militia-danzhou/21475). Similarly, the Sansha City Fisheries Development Company is explicitly meant so serve as a maritime militia organization to develop maritime rights protection capabilities for Sansha City of China (Connor M. Kennedy and Andrew S. Erickson, "Riding a New Wave of Professionalization and militarization: Sansha City's maritime militia", *CIMSEC*, 1 September 2016, available at: http://cimsec.org/riding-new-wave-profession alization-militarization-sansha-citys-maritime-militia/27689).

requires members of said militia to participate in rescue and relief efforts.[54] However, such empowerment by law remains uncertain unless there is a law that specifies that certain missions involving the protection of maritime interests fall within the scope of its emergency response activities. Arguably, maritime militia can be armed to perform duties, including attacking foreign vessels in disputed waters,[55] thus, there are reasons to believe that they are trained in military combat and can be instructed or controlled by the government. Nevertheless, this attribution to State is, once again, not easy to be legally formulated under the international law of State responsibility. There must be a "real link"[56] between the maritime militia and State machinery to demonstrate the instruction, direction or control, such as a regulation under domestic law on the establishment of maritime militia or a decision to organize maritime militia by an authorized State's body, etc. However, maritime militia often do not wear uniform and mainly conduct economic production activities (i.e., fishing).[57] The threat or use of force by maritime militia, if any, thus, cannot establish the "real link" with the State as governments would never affirm that maritime militia are demonstrating their positions. Similarly, it is groundless to affirm that there is an acknowledgement or adoption of State under ROSFIWA for the threat or use of force by maritime militia.

Nevertheless, force can be lawfully exercised if States use force at sea as a means of self-defence against armed attacks on their territory, ships or aircrafts.[58] Under Article 51 of the UN Charter, States enjoy the

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[54] China Emergency Response Law, Art. 14.

[55] Examples of Impeccable (2009), Scarborough (2012) and HD-981 (2014).

[56] International Law Commission, "IV.E.2. Responsibility of States for Internationally Wrongful Acts: General Commentary", in Report of the International Law Commission on the Work of its Fifty-Third Session, UN Doc. A/56/10, 10 August 2001, Art. 8, para. 1.

[57] Uniform-wearing individuals cannot be considered as State agent in the strict sense. However, their infringement of international obligations can be still attributable to State for the purpose of State responsibility because foreign States cannot be expected to know, or to figure out, which acts do or do not fall within the actual competence of a domestic official. *See Caire Claim (France v. Mexico)*, Arbitral Award, *5 R.I.A.A. 516*, 13 June 1929, p. 530.

[58] Jinxing Ma and Shiyan Sun, "Restriction on the use of force at sea: an environmental protection perspective", *International Review of the Red Cross*, Vol. 98, No. 902, 2016. It is further noted that States may also lawfully use force with the authorization of the UNSC

right of use of force in case of self-defence in response to an armed attack. The ICJ in the *Nicaragua case* opined the nature of the acts, which can be treated as an armed attack, including those which are:

> [N]ot merely actions by regular armed forces across an international border, but also the sending by or on behalf of a state of armed bands, groups irregulars or mercenaries which carry out acts of armed force against another state of such gravity as to among to an actual armed attack concluded by regular forces or its substantial involvement therein.[59]

Additionally, to distinguish between use of force and an armed attack, the Court further emphasized that the resort to force constitutes an "armed attack" depending on the scale and effect of an operation rather than the nature of personnel conducting the operation.[60] In the latter case of *Oil Platforms*, the ICJ likewise addressed the distinction between the use of force and an armed attack. The United States, in this case, argued that its use of force against several of Iran's offshore oil platforms was an act of self-defence in response to a number of Iran's actions. However, taking consideration the facts of the case and compared to its decision in the *Nicaragua case*, the Court decided that Iran's actions did not qualify as the most grave form[61] of use of force to constitute an armed attack and repeated the gravity distinction from the *Nicaragua case*.[62]

Based on these legal grounds, whether a grey zone operation constitutes an "armed attack" and triggers the individual right of self-

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in form of resolutions under Chapter VII to address certain threats to international peace and security recognized by the UNSC. However, there are not many cases in which force was used at sea within the framework of UN's actions. Thus, the author does not discuss this exception in this paper.

[59] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgement (Merits), *ICJ Reports 1986*, para. 195.

[60] *Ibid*. "The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces."

[61] *Military and Paramilitary Activities (Jurisdiction)*, above note 39, para. 19.

[62] ICJ, *Oil Platforms (Iran v. United States)*, Judgement (Merits), *ICJ Reports 2003*, para. 64.

defence for another State requires an examination not only of the nature of personnel involved but also the scale, gravity and effect of the operation. On the one hand, for military activities in grey zone operations, though they involve military personnel in large scale exercises, the gravity and effect are limited to spreading the threat and discouraging neighbouring countries from maintaining maritime claims in the disputed waters. In the unlikely case of a significant effect, it is not easy to establish the causal link between military activities and the alleged effect. On the other hand, as earlier mentioned, the use of State personnel to conduct paramilitary activities in grey zone operations needs more evidence. The scale of paramilitary activities is confined in disputed waters or low level coercion among two or more fishing vessels. Thus, the effect of these activities is relatively small compared to that of an armed attack. For these reasons, the possible use of force in grey zone conflicts could hardly be categorized as an armed attack that could trigger other countries to act in self-defence.

United Nations Convention on the Law of the Sea (UNCLOS)

In the context of the oceans, the principle of non-use of force is further emphasized in the constitution of the law of the sea, the 1982 UNCLOS.[63] In its preamble, the UNCLOS refers to the UN Charter in that the codification and development of the law of the sea would be in accordance with the purposes and principles of the Charter.[64] Article 301 of the UNCLOS states that:

> In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

Except for small differences in the wordings, Article 301 refers to a similar prohibition against the threat to, or use of, force as well as the same

[63] United Nations Convention on the Law of the Sea, 1833 UNTS 397 (entered into force 16 November 1994) (hereinafter "UNCLOS").

[64] UNCLOS, above note 63, Preamble, para. 8.

indication of the protection territorial integrity and political independence under Article 2(4). Nevertheless, the nature of the use of force in the oceans must be determined by the background, basis, and forms of the use of force.[65] Usually, the users of force at sea are either State forces, law enforcement forces, armed agencies, organized armed groups, pirates or other private entities.

The use of force at sea has commonly been exercised to either protect the sovereignty rights of a coastal State or in the course of law enforcement. The legitimation of the use of force for protection of sovereignty rights of coastal States depends on the locations of exercises where coastal States have different rights and obligations.

(a) Internal Waters and Territorial Seas

Internal waters are treated similarly to the land territory of a State under the UNCLOS.[66] Thus, there is no rule allowing foreign military forces to enter internal waters without the permission of the coastal State. Military activities within this zone are *a fortiori* impermissible. Besides UN Security Council enforcement under Chapter VII and situations of self-defence as set out under Article 51 of the UN Charter, the occasions under which an act of force arises in the territorial sea fall into two typical circumstances.

The first circumstance is when a coastal State resorts to the use of force as a countermeasure against a foreign State's illegal acts, usually during its exercise of innocent passage. Under Article 25 of the UNCLOS, a coastal State can "take the necessary steps in its territorial sea to prevent passage which is not innocent".[67] Usually, use of force under this article arises during a conflict between States, thus raising the question of

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[65] Permanent Court of Arbitration (PCA), *Maritime Boundary Delimitation (Guyana v. Suriname)*, Award, *PCA Report 2007*, para. 442-443.

[66] UNCLOS, above note 63, Art. 2.

[67] In the Pueblo incident of 1968, the North Korean naval military resorted to armed force to capture the US intelligence ship Pueblo. After the seizure, North Korea imprisoned the personnel of Pueblo, until an agreement for the release of the crew members in exchange for the US acknowledgement of its espionage activities. (Francesco Francioni, "The Gulf of Sirte Incident and International Law", *Italian Yearbook of International Law 1985*, Vol. 5, pp. 1980-1981) Similarly, the Gulf of Sirte incident of August 1981 illustrates the parties' use of force to protect coastal rights and to defend the freedom of navigation of their fleet.

whether a resulting force is admissible and if so, what degree of force is acceptable. Obviously, Article 25 recognizes the right of a coastal State to use force in the course of negating the aggressive acts of foreign navies. Regarding the acceptable degree of the use of force, one must rely on the general rule of necessity and proportionality.[68]

The second circumstance is when a foreign State resorts to the use of force to assert navigational claims. In the *Corfu Channel case,* the British navy used force to assert freedom of transit through the Channel and the ICJ agreed that the assertion of navigational rights, even when involving use of force, does not constitute an illegal threat or use of force.[69] On the contrary, other military activities such as carrying out maneuvers along the coast, assembling combat formation or issuing an ultimatum would still constitute a violation of international law.

Apparently, admissible use of force in internal waters and territorial seas must be in the form of self-defence which takes place under strict conditions—i.e., either aggressive acts of foreign navies during innocent passage or assertion of navigational claims in territorial seas by forces. These two circumstances, however, have not been witnessed in practice for two reasons. First, the sovereignty and sovereign rights of coastal States in these maritime areas are obvious and firmly stipulated by UNCLOS with little "grey area" for any grey zone operations. Thus, States have little reason to put themselves in a legal risk by directing grey zone operations in these maritime areas. Second, in the unlikely case that there is a grey zone operation in these maritime areas, it is likely a paramilitary activity. However, it has been previously demonstrated that the existence of an armed attack in this situation can hardly be legally formulated.

(b) Exclusive Economic Zone (EEZ)

According to Article 56 of the UNCLOS, within the EEZ, a coastal State has sovereign rights and jurisdiction over the economic exploitation and exploration of all resources, artificial islands and installations, marine scientific research and the protection and preservation of the marine

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[68] International Tribunal for the Law of the Sea (ITLOS), *The M/V "Saiga" (No.2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgement, *ITLOS Reports 1999*, para. 155.

[69] ICJ, *Corfu Channel (UK v. Albania)*, Judgement (Merits), *ICJ Reports 1949*.

environment. Article 58, on the other hand, allows other States to enjoy the same freedoms as in the high seas but with "due regard" to the rights and duties of coastal States. These articles did not contemplate the issue of whether military activities, such as military maneuvers, weapons tests, the gathering of strategic information, military practices, etc. are lawful in the EEZ or not. Many scholars hold the belief that regulations concerning the military uses of the seas should be applied in the EEZ as they are applied in the high seas[70] as the UNCLOS did not grant coastal States any power to regulate military activities within the EEZ and coastal States are only able to exercise very limited rights and jurisdiction over certain subjects.[71] Therefore, it is safe to conclude that the UNCLOS does not prohibit lawful military activities within the EEZ. However, these activities must be performed with "due regard"[72] for the rights of coastal States.

Additionally, it is worth noting that there is no specific provision regulating the permissible use of force to counter unlawful activities within the EEZ. Though it is acceptable that a coastal State could invoke the use of force in law enforcement operations as an act of its domestic powers under Articles 73 and 216 of the UNCLOS, the use of force in these circumstances is exercised for the main purpose of safeguarding the resources of the EEZ and its marine environment only. Other than that, when the matters are clearly not within the limited jurisdiction of the coastal State in the EEZ, the strict approach of the use of force under Article 2(4) UN Charter and the Article 301 UNCLOS must be applied.

Unlike the previously discussed maritime areas, an EEZ could commonly be disputed waters with overlapping claims as a result of unfinished delimitation efforts among States. Thus, grey zone operations could take place within the EEZ more frequently. Nevertheless, whether

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[70] H. Labrousse, "Les Problèmes Militaires Du Nouveau Droit de la Mer", *The Management of Humanity's Resources: The Law of the Sea,* The Hague Academy of International Law Workshop, The Hague, 29-31 October 1981, p. 307- 313.

[71] UNCLOS, above note 63, Art. 56.

[72] As there is no definition of the phrase "due regard" in the UNCLOS, there are many interpretations. "Due regard" will depend on the particular circumstances, military practices or weapon tests, for example, need to take measures to ensure the safety of maritime navigation in the zone. See Jing Geng, "The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS", *Merkourios,* Vol. 28, No. 74, pp. 22-30; 27.

the legal framework of the use of force within the EEZ could cover this operation remains unclear. Grey zone operations within the EEZ will only infringe international law if it amounts to an "internationally wrongful" act or omission which is attributable to States and which constitutes a breach of an international obligation of the State.[73] This assumption could be true if it can be legally demonstrated that a State has failed to conduct grey zone operation with "due regard" under Article 58 of the UNCLOS. The obligation to act with "due regard" is characterized as a "balancing exercise"[74] between the rights and duties of coastal and other States.[75] During the HD-981 incident (2014), China moved its oil rig to waters where Vietnam enjoys sovereignty rights (in the EEZ and continental shelf) under the UNCLOS. The oil rig was escorted by coast guard vessels, transport ships and tugboats, fishing vessels and even naval ships. These grey zone operations of China aim to prevent Vietnam's fishing vessels from fishing in their traditional fishing grounds within Vietnam's EEZ by using non-military forces against non-military forces.[76] Apparently, these similar actions of grey zone operations, though kept under the threshold of an armed attack, impaired or interfered with the lawful use of the seas enjoyed by Vietnam, and thus, violates the obligation of due regard under Article 58. Nevertheless, obstacles to attribute a grey zone operation to a State mentioned earlier still make it difficult to challenge the legal basis of grey zone operations in the EEZ under UNCLOS.

(c) High Seas

All States enjoy the freedom of navigation, overflight and of laying submarine cables and pipelines in the high seas.[77] Therefore, it is permissible for all States to perform lawful military activities in the high seas.

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[73] ROSFIWA, above note 28, Art. 2.

[74] PCA, *The Chagos Marine Protected Area Arbitration (Mauritius v. U.K.)*, Award, *PCA 2015*, para. 534.

[75] Myron H. Nordquist et al. (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2, Kluwer Academic Publishers, Dordrecht, 1993, p. 556.

[76] *Military and Paramilitary Activities (Jurisdiction)*, above note 39.

[77] UNCLOS, above note 63, Art. 87.

Although UNCLOS does not mention the use of force in the high seas, one can easily find such regulation governing the use of force in law enforcement operations in the high seas within general public international law. Accordingly, all States are entitled to exercise the right of visit on the high seas in the case of rendering assistance, piracy, slave trade, unauthorized broadcasting, statelessness and hot pursuit. However, before force is resorted to, law enforcement officials must exhaust all other means. The use of force "must be avoided as far as possible and where […] unavoidable, it must not go beyond what is reasonable and necessary in the circumstances".[78] Additionally, in all circumstances, the freedom of the high seas must be exercised with "due regard" for the interests of other States' freedom of the high seas.[79]

As grey zone operations often take place in disputed areas where the rights and obligations of the coastal State and other States are "grey", the use of force in the high seas would not share the characteristics of a grey zone conflict. The use of force in a grey zone conflict in high seas, if any, could be dealt with by general principles of international law of non-use of force as illustrated above. The only obligation that would need further consideration is the obligation to exercise the freedom of the high seas with due regard for the interests of other States in the high seas. However, similar to circumstances in the EEZ, even in the unlikely case that a violation of the due regard obligation is found in the course of a grey zone operation in the high seas, such action could hardly be attributable to States giving rise to State responsibility under international law.

Legality Regarding Manner of the Use of Force

In this part, the kinds and legitimate degrees of force used at sea will be assessed. Depending on the prevailing situation, notably the existence or non-existence of an armed conflict, international humanitarian law or international human rights law is applicable.

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[78] *Saiga*, above note 68, p. 10, para. 155

[79] UNCLOS, above note 63, Art. 87.

International Humanitarian Law

The rules of international humanitarian law (IHL) regulate the manner in which use of force is exercised by principles of distinction, proportionality and precautions. These principles are applicable in the case of armed conflict, whether international or non-international.[80] The operation of grey zone conflicts usually concerns the use of force between States. Thus, it might constitute an international armed conflict.

Without defining it, the notion of an international armed conflict is used in Common Article 2 of the Geneva Conventions of 1949:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

In the jurisprudence, an armed conflict of an international character is generally considered to exist "whenever there is a resort to armed force between States".[81] Accordingly, an international armed conflict would occur if one or more States resort to armed forces against another State,

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[80] Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Arts. 51, 52 and 57 (hereinafter "Additional Protocol I"); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I, Cambridge University Press, Cambridge, 2005, Rules 1, 7, 14.

[81] ICTY, *The Prosecutor v. Dusko Tadic*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; Philip Spoerri et al. (eds), Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 2nd Edition, International Committee of the Red Cross (ICRC), Geneva, 2017, Art. 2, para. 240 (hereinafter "ICRC Commentary on the Second Geneva Convention").

regardless of the reasons or the intensity or the absence of a formal declaration or recognition of war. The existence of an international armed conflict, however, depends on what actually happens on the ground.[82]

Thus, under what circumstances will an operation during grey zone conflict amount to an international armed conflict under IHL? As mentioned earlier, armed forces in grey zone operations only manifest through either deterrence or large-scale exercises without crossing another State's borders. Thus, the existence of an international armed conflict under IHL cannot be easily proven. Nonetheless, the 2017 ICRC Commentary on the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea[83] reveals some circumstances under which grey zone operations could qualify as an international armed conflict.

According to the Commentary, a lawful use of force of a State against a vessel of another State being suspected to violate fisheries legislation does not constitute an international armed conflict.[84] However, depending on the circumstances, the use of force at sea motivated by other reasons than the enforcement of maritime law may qualify as an international armed conflict.[85] The Commentary does not explain further about the exact circumstance when a use of force at sea could amount to an international armed conflict. Nevertheless, it could generally be interpreted as any use of force at sea by a State disguised as maritime law enforcement which could possibly amount to an international armed conflict. This coincidently is the mechanism of how a grey zone strategy is commonly developed in practice.

In the salami/cabbage slicing strategy of China, coast guard forces who are tasked by the Government to enforce maritime law are actually escorted by naval forces and ready to use force to illegally assert maritime claims in disputed areas. The underlying motivation of this grey zone operation is rather to assert maritime claims and alter the *status quo* of the region. Thus, any actions of these forces, not except for the use of force, could also be attributable to China as a State. Therefore, it could be

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[82] ICRC, *How is the term "armed conflict" defined in International Humanitarian Law*, Geneva, March 2008, p. 1.

[83] ICRC Commentary on the Second Geneva Convention, above note 81.

[84] ICRC Commentary on the Second Geneva Convention, above note 81, para. 249.

[85] *Ibid*.

argued that this strategy of use of force in grey zone conflict has amounted to an international armed conflict under Common Article 2 of Geneva Conventions and triggers the application of IHL. Yet, this argument is admittedly weak since grey zone operators would never affirm any motivation but maintenance of maritime order, while deploying such forces.

Another point worth noting from the Commentary is that regardless of who is involved, a situation may qualify as an international armed conflict as long as a State resorts to means and methods of warfare against another State.[86] In other words, whether the grey zone operation is conducted by maritime militia or military forces is immaterial for the determination of an international armed conflict under IHL. As long as the State's organs or other entities acting on behalf of a State use force, it would matter if such forces use the means and methods of warfare. Nevertheless, in the context of grey zone conflict, there is little information on which means have been used by States. Generally, in sea incidents which are allegedly grey zone strategies, a State often refrains from using military weapons. Alternatively, water cannons are commonly reported to be used by States in many incidents to gain advantages.[87] To what extent then can water cannons be categorized as "means of warfare" under IHL? A means of warfare generally refers to weapons, weapons systems or platforms employed for the purpose of attack in an armed conflict.[88] IHL does not provide an exhaustive list of means of warfare. Nonetheless, weapons of a nature that can cause superfluous injury or unnecessary suffering or widespread, long-term and severe damage to the natural environment are prohibited.[89] Accordingly, it is really complicated

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[86] ICRC Commentary on the Second Geneva Convention, above note 81, para. 250.

[87] Water cannons are reported to be used in HD-981 incidents. *See* Ernest Bower and Gregory Poling, "China-Vietnam Tensions High Over Drilling Rig in disputed waters", *CSIS,* 7 May 2014, available at: https://www.csis.org/analysis/china-vietnam-tensions-high-over-drilling-rig-disputed-waters; *see also* Manny Mogato, "Philippines accuses China of turning water cannon on its fishing boats," *Reuters*, 21 April 2015, available at: https://www.reuters.com/article/us-southchinasea-philippines-usa/philippines-accuses-china-of-turning-water-cannon-on-its-fishing-boats-idUSKBN0NC0MN20150421.

[88] ICRC, "Means of warfare", *ICRC Glossary*, available at: https://casebook.icrc.org/glossary/means-warfare.

[89] Additional Protocol I, above note 80, Article 35(2)(3).

to decide whether the use of water cannons in grey zone operations is a means for warfare. The existence of an international armed conflict is unknown, as it is unclear what exact injuries and consequences are caused by water cannons in a grey zone situation when both sides reveal opposite observations of the incidents.

In the unlikely case that the existence of armed conflict is legally formulated in grey zone operations, the use of force must comply with principles of IHL such as distinction, proportionality and precautions. Generally, the principle of distinction requires a separation between non-combatants and combatants.[90] The use of force must also be controlled to ensure that it targets only military objects.[91] Under the principle of precautions, attacking parties are obligated to take measures to ensure that non-targets are evacuated or are at least aware of the incoming attack.[92] The principle of proportionality is also a criterion for the lawfulness of the use of force under general international law.[93] Under IHL, the principle of proportionality prohibits 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.[94]

There is little information on factual details of sea incidents in the context of a grey zone conflict, thus, an investigation on compliance with IHL principles can only be based on the prime features of the recent grey zone operations illustrated above. Accordingly, it is argued that none of those principles have been complied with. As illustrated above, incidents at sea in a grey zone conflict often aim at fishing vessels, which are civilian in nature and do not at any time take part directly in hostilities, thus

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[90] Additional Protocol I, above note 80, Article 48; J. Henckaerts and L. Doswald-Beck, above note 80, Rules 1 and 7; Waldemar A. Solf, "The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice", *American University Law Review*, Vol. 33, 1983, p. 58.

[91] Additional Protocol I, above note 80, Art. 52.

[92] J. Henckaerts and L. Doswald-Beck, above note 80, Rules 15 and 22.

[93] Nuclear Weapons Advisory Opinion, above note 44, para. 42. "A use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law."

[94] J. Henckaerts and L. Doswald-Beck, above note 80, Rule 14; Additional Protocol I, above note 80, above note 89, Art. 51(5)(b) and Art. 57.

violating the principle of distinction provided that IHL is applicable. There is no evidence that fishing vessels have been notified of possible collisions at sea, thus, they are not aware of incoming attacks as required under the principle of precautions of IHL. Operations in grey zone conflict are mainly based on the asymmetric condition between opponents[95] to gain psychological advantages. Thus, the principle of proportionality is not always complied with. Even in the case that the use of force is proportionate, grey zone operations could still cause incidental loss of life and injury to fishermen and damage to fishing vessels, thus violating principle of proportionality under IHL.

Maritime Law Enforcement as Required under International Human Rights Law (IHRL)

Enforcement is an act to compel observance of or compliance with the law.[96] Law enforcement operations at sea, thus, can be perceived as activities of law enforcement or military vessels flying the flag of a State with a view to stopping crimes and violations of the applicable law in specific waters. Law enforcement action against foreign-flagged vessels may be operated for fiscal, immigration, sanitary and customs violations in the coastal States' contiguous zone, for all natural resource law violations in the EEZ and for seabed resource violation in the continental shelf. Law enforcement may also be carried out against a foreign-flagged vessel even without the permission of the flag State within the zones of internal waters, archipelagic waters and territorial seas when law enforcement officials determine that there exist reasonable grounds of violation of coastal States' law applicable in those waters, including the illicit traffic of drugs. [97]

It is worth noting that maritime law enforcement will only be applicable if a State can legally establish its sovereign rights and jurisdiction over the subject waters. Nevertheless, grey zone operations

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[95] David Carment and Dani Belo, "Wars Future: the risks and rewards of grey zone conflict and hybrid warfare", *Canadian Global Affairs Institute*, October 2018, available at: https://www.cgai.ca/wars_future_the_risks_and_rewards_of_grey_zone_conflict_and_hybrid_warfare.

[96] Bryan A. Garner, *Black's Law Dictionary*, 8th ed., Thomson West, Toronto, 2004, p. 569.

[97] UNCLOS, above note 63, Art. 108.

are often deployed in the disputed waters where the exact boundary of sovereign rights and jurisdiction have not been delineated by States. Therefore, maritime law enforcement cannot be applied.

In the unlikely case that maritime law enforcement is found applicable in a specific grey zone operation, it is argued that such use of force is not consistent with the manner required under the legal framework of law enforcement.

UNCLOS does not have any specific provision regarding the use of force for law enforcement. The international legal regulation of the exercise of "police" force at sea has principally developed in customary international law.[98] As noted in the arbitration between Guyana and Suriname concerning the delimitation of maritime boundary and the alleged infringements of international law by Suriname in disputed maritime territory, "force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary."[99] Before the use of force can be exercised during the course of law enforcement operations, all other measures must have been exhausted. Such use of force must comply with the principles of unavoidability, proportionality and necessity[100] as required under international human rights law.

International Human Rights Law (IHRL) governs the use of force in maritime law enforcement operations the most and is applicable at all times.[101] Accordingly, the use of force in maritime law enforcement operations cannot infringe on the right to life recognized under the International Covenant on Civil and Political Rights.[102] Regardless of their non-binding character, the UN Code of Conduct for Law Enforcement Officials (CCLEO)[103] and the UN Basic Principles on the

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[98] I.A. Shearer, "Problems of Jurisdiction and Law Enforcement against Delinquent Vessels", *The International Comparative Law Quarterly*, Vol. 35, No. 2, 1986, p. 341.

[99] *Maritime Boundary Delimitation,* above note 65, para. 445.

[100] Gerald Gray Fitzmaurice, "The Case of the I'm Alone", *British Yearbook of International Law*, Vol. 17, 1936, p. 99.

[101] ICRC, "The Use of Force in Law Enforcement Operations", 14 June 2019, available at: https://www.icrc.org/en/document/use-force-law-enforcement-operations-0.

[102] International Covenant on Civil and Political Rights, 999 UNTS 171 (entered into force 23 March 1976), Art. 6.

[103] UNGA Res. 34/169, 5 February 1980 (hereinafter "CCLEO").

Use of Force and Firearms by Law Enforcement Officials (BPUFF)[104] provide further guidance on the use of force in law enforcement operations.[105]

According to the BPUFF, the use of force is considered unavoidable when "other means remain ineffective or without any promise of achieving the intended result."[106] The other means may include issuing verbal warnings to stop, use of radio communication, etc. Only when law enforcement officials have exhausted those measures without achieving results can they resort to the use of force.

With respect to the principle of necessity, under the CCLEO, law enforcement officials may use force only in "strictly necessary" situations and to the extent required for the performance of their duty.[107] According to BPUFF, it is only acceptable for law enforcement officials to exercise the use of force in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such danger and resisting their authority or to prevent their escape, and only when less extreme means are insufficient to achieve these objectives.[108]

The principle of proportionality "sets a maximum on the force that might be used to achieve a specific legitimate objective".[109] When resorting to the use of force, "law enforcement officials shall act in proportion to the seriousness of the offence and legitimate objective to be achieved."[110] Article 225 of the UNCLOS prohibits any law enforcement action which endangers the safety of navigation or otherwise creates any hazard to a vessel, or brings it to an unsafe port or anchorage, or exposes the marine environment to an unreasonable risk". It indicates that the

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[104] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials", *UN Human Rights Office of the Commissioner*, 27 August-7 September 1990 (hereinafter "BPUFF").

[105] The Use of Force in Law Enforcement Operations, above note 101.

[106] BPUFF, above note 104, Art. 4.

[107] CCLEO, above note 103, Art. 2.

[108] BPUFF, above note 104, Art. 9.

[109] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, A/HRC/26/36, 1 April 2014, §66.

[110] BPUFF, above note 104.

safety of the crew and the protection of the marine environment prevail over the State's right to enforce its laws.[111]

In the context of the South China Sea disputes, regardless of differences in the interpretation of the principles of necessity and proportionality compared to the IHL framework, operations of grey zone conflict are not consistent with principles of maritime law enforcement as required under IHRL.

Conclusion

The scrutiny of all applicable international law on the use of force at sea reveals that grey zone operations hardly fit in any legal framework due to its distinctive features. The operation of grey zone strategy would not amount to use of force or a threat to use force under the UN Charter. Even when it is the case, the attribution of such operation to States faces many legal challenges due to the involvement of diverse types of force and their unclear link with governments under the principle of State responsibility. Activities within grey zone conflicts are designed to assert and establish territorial claims in disputed waters and gradually alter the *status quo,* thus, preventing the use of principle of non-use of force under the UNCLOS which apply in different maritime zones. For similar reasons, maritime law enforcement as required under IHRL cannot cover operations in grey zone strategy. In the unlikely case that force could legally be exercised, principles of IHL and maritime law enforcement can prevent any effort to legitimize the use of force in grey zone conflict under international law.

In the author's viewpoint, while the application of UNCLOS, IHL and maritime law enforcement as required under IHRL face challenges, as when the location of grey zone operation is in disputed waters, the traditional principle of non-use of force within the UN Charter framework is the most feasible framework in considering the legality of grey zone operations. The biggest challenge remains the attribution of grey zone activities to States, and accordingly, attributing State responsibility. In the absence of an effective framework applicable to grey zone operations, there are a number of recommendations that affected States

[111] UNCLOS, above note 63, Art. 225.

should consider undertaking to address concerns arising from grey zone operations.

On the one hand, States should publicize concerns of grey zone activities to other nations, explaining the ramifications of the expansion of grey zone operations in the long run, such as increasing suspicion among neighbouring States, and affecting peace and stability in the region and the rest of the world. Additionally, affected States should stimulate a global attempt to clarify as well as condemn the exercise of grey zone activities. On the other hand, affected States should furnish themselves with a comprehensive understanding of all forms and varieties of grey zone activities to develop appropriate plans to deal with each situation. At the same time, they should also communicate with States operating grey zone activities through various diplomatic and military channels to signal their concerns, call upon goodwill in conducting sea activities and minimize consequences and possible damage caused by these activities. Most importantly, the lack of accurate and sufficient factual information on what happens in a grey zone operation has prevented States from applying international law. Therefore, it is essential to increase transparency through regular information exchange among States regarding the exercises of grey zone operations. It is particularly relevant as transparency is also a legal obligation under domestic, regional and international legal frameworks.[112] Nevertheless, from an international law perspective, to effectively cope with this phenomenon, the adherence of States to international law in general and to its fundamental principles, especially those of non-use of force and the peaceful settlement of international disputes, still plays the most significant role.

[112] General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187 (entered into force 1 January 1995), Art. 10; Treaty on European Union (Consolidated Version), Official Journal of the European Communities C 325/5 (entered into force 1 November 1993), Art. 11; Constitution of the Federative Republic of Brazil of 1988, Art. 5.

Malaysia and the Rome Statute: Panel Discussion during the Margins of the IHL Moot Court Competition at the International Islamic University Malaysia on 12 October 2019

Dr. Jan Römer[*]

I. Introduction

For over ten years, Malaysia—including governmental officials—had been steeped in discussions on the ratification of the Rome Statute. Eventually, on 4 March 2019, the Malaysian government notified the United Nations of its accession to the Rome Statute indicating that the decision would enter into force six months later. This caused a highly controversial debate in Malaysia among many stakeholders, particularly in view of the Rulers' role as supreme commander of the armed forces and their immunity, and resulted in Malaysia's withdrawal on 29 April 2019. The International Humanitarian Law (IHL) Moot Court[1], co-organized by the International Islamic University Malaysia and the International Committee of the Red Cross (ICRC) and held on 12-13 October 2019, offered a great opportunity to reassess Malaysia's position on the Rome

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[*] Joined the ICRC in 2001. His last assignment (2018-2020) was in East Asia as ICRC's Regional Legal Adviser. Previously, he was legal adviser to the operations in Ukraine (2014-2017) and at the headquarters in Geneva with a responsibility for Europe, Central Asia and Latin America (2010-2014). Jan also worked as an ICRC delegate in various countries such as Iraq, Georgia, Colombia, Zambia, Russia and Afghanistan; mainly in the field of protection. Before joining the ICRC, Jan was trained and worked as a lawyer in his native Germany (1997-2001). He studied law at Ruprecht Karls Universität (Heidelberg) and Université de Genève (1991-1997) and received his doctoral law degree from Europa Universität Viadriana (Frankfurt Oder) in 2009. From 2018 to 2020, he was one of the two Managing Editors of the Asia-Pacific Journal of IHL. He published, among others, the book 'Killing in a Gray Area between Humanitarian Law and Human Rights' in 2010 (Springer, Heidelberg).

[1] This was the 16th edition of the IHL Moot Court in Malaysia that is organized annually.

Statute and to draw a roadmap. Dr Mohd Hisham Mohd Kamal and Dr Fareed Mohd Hassan accepted the invitation to a panel chaired by Dr Jan Römer, ICRC Regional Legal Adviser for East Asia.

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DR. FAREED MOHD HASSAN, LL.B. (Sha. & Civ.) Hons (USIM), MCL (IIUM) and Ph.D. (Aberdeen) is a Senior Lecturer at the Faculty of Shariah and Law, Universiti Sains Islam Malaysia (USIM). He completed his Ph.D. thesis entitled "National Prosecution Against Heads of State of Non-State Parties to the Rome Statute in Southeast Asia: Challenges and Prospects Under the Complementarity Principle" in May 2018. His research areas include international criminal law and international criminal justice system.

II. The History of War Crimes and Crimes Against Humanity and How It is Implemented in Malaysia by Dr Hisham

Dr Hisham began by describing the threshold for the commission of war crimes, and then explained that the criminalization of war crimes began in the nineteenth century. In the beginning, international law left to national courts the task of prosecuting and punishing perpetrators. Following the end of World War II, the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo were established, in 1945 and 1946 respectively, to punish war criminals. He recalled that a lot of progress happened in the

1990s when the Security Council established the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), in 1993 and 1994 respectively. The permanent International Criminal Court (ICC) was established by the ICC Rome Statute in 1998. There are also other special criminal courts and tribunals for Sierra Leone, Lebanon and Cambodia.

Dr Hisham then described the threshold of crimes against humanity and explained that such crimes were criminalized for the first time by the Statutes of the IMT and of the IMTFE. He also explained that before 1945, only low-ranking servicemen were tried. Since 1945, high-ranking officers have also been tried by virtue of command or superior responsibility.

Dr Hisham then turned to the legal situation in Malaysia. With regard to the issue surrounding the withdrawal of Malaysia's consent to the Rome Statute which criminalizes war crimes, crimes against humanity and genocide, he was of the opinion that it would still be good for Malaysia to enact a law making the commission of such crimes anywhere in the world as crimes punishable in Malaysian courts.

He explained that Malaysia is a party to the Geneva Conventions and has enacted the Geneva Conventions Act in 1962, which sets forth war crimes committed during an international armed conflict. However, the Act does not cover violations of IHL during non-international armed conflicts. Even though Malaysia is not yet a party to Additional Protocol II to the Geneva Conventions, it is good practice to enact a statute to punish such violations.

Dr Hisham gave another example for the need to enact further penal provisions under domestic law: Malaysia has been a party to the Convention on Genocide since 1994 but has not criminalized acts of genocide. In the event that genocide is committed in Malaysia, for example, the perpetrator cannot be tried for genocide, but only for multiple murder. The classification of the crime as an ordinary crime demonstrates a tendency to misrepresent the very nature, hence, to belittle the seriousness of, the crime of genocide.

Dr Hisham concluded his lecture by underscoring how important it is for Malaysia to enact legislation criminalizing and punishing such heinous crimes for purposes of complying with its international obligations.

III. The Role of the Rulers of Malaysia as Supreme Military Commanders by Dr Fareed

Dr Fareed started by explaining that usually it should be uncontroversial to support the ICC and its founding treaty: the Rome Statute. He then explained the legal difficulties that Malaysia is currently facing.

He then clarified the role of the Malaysian rulers and what this means under the Rome Statute. Dr Fareed explained that Article 28 of the Rome Statute provides for the criminal responsibility of both a military commander and a civilian superior. For the discussion, he however only focuses on the criminal responsibility of a military commander, with special reference to the position of the Malaysian monarch as supreme commander of the Malaysian Armed Forces, as provided under Article 41 of the Malaysian Federal Constitution.[2]

Noting that Article 28(a) of the Rome Statute states that "a" military commander will be criminally liable for the alleged crimes committed by his/her subordinates, Dr Fareed explained that this means that *any* person who holds a position within the military will be held responsible for crimes committed by his or her subordinates. For Malaysia, the Yang di-Pertuan Agong (YDPA) or the monarch, being the supreme head of the Federation, holds a military position. Thus, he argued that, not only is the YDPA "a" military commander, His Majesty the YDPA is "the" military commander since he holds a position as "the" supreme commander of the Malaysian Armed Forces as provided under Article 41 of the Federal Constitution.

Dr Fareed further explained issues relating to the immunity of a head of State under Article 27 of the Rome Statute, a provision which sets aside any immunity that prevents the head of State from being held liable. He argued that this provision is not in line with the provision of the Malaysian Federal Constitution whereby the YDPA and other rulers are accorded with official immunity (*rationae materiae*). He also noted that in 1993, the Parliament has amended the Constitution to remove the YDPA and other rulers their Highnesses' personal immunity (*rationae personae*). As such, their Highnesses can be sued or tried before the Special Court

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[2] Malaysian Federal Constitution, Art. 41. **"**The Yang di-Pertuan Agong shall be the Supreme Commander of the armed forces of the Federation."

established under Article 182 of the Constitution. However, their Highnesses can only be sued or tried based on their personal capacity, but not under their Highnesses' official capacity—neither as the Head of State nor as the Supreme Commander of the Armed Forces as stipulated under Articles 181 to 183 of the Constitution.[3]

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[3] Malaysian Federal Constitution, Art. 181 "(1) Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the Rulers and the prerogatives, powers and jurisdiction of the Ruling Chiefs of Negeri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.

(2) No proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity except in the Special Court established under Part XV";

Art. 182. "(1) There shall be a court which shall be known as the Special Court and shall consist of the Chief Justice of the Federal Court, who shall be the Chairman, the Chief Judges of the High Courts, and two other persons who hold or have held office as judge of the Federal Court or a High Court appointed by the Conference of Rulers.

(2) Any proceedings by or against the Yang di-Pertuan Agong or the Ruler of a State in his personal capacity shall be brought in a Special Court established under Clause (1).

(3) The Special Court shall have exclusive jurisdiction to try all offences committed in the Federation by the Yang di-Pertuan Agong or the Ruler of a State and all civil cases by or against the Yang di-Pertuan Agong or the Ruler of a State notwithstanding where the cause of action arose.

(4) The Special Court shall have the same jurisdiction and powers as are vested in the inferior courts, the High Court and the Federal Court by this Constitution or any federal law and shall have its registry in Kuala Lumpur.

(5) Until Parliament by law makes special provision to the contrary in respect of procedure (including the hearing of proceedings *in camera*) in civil or criminal cases and the law regulating evidence and proof in civil and criminal proceedings, the practice and procedure applicable in any proceedings in any inferior court, any High Court and the Federal Court shall apply in any proceedings in the Special Court.

(6) The proceedings in the Special Court shall be decided in accordance with the opinion of the majority of the members and its decision shall be final and conclusive and shall not be challenged or called in question in any court on any ground.

(7) The Yang di-Pertuan Agong may, on the advice of the Chief Justice, make such rules as he may deem necessary or expedient to provide for the removal of any difficulty or anomaly whatsoever in any written law or in the carrying out of any function, the exercise of any power, the discharge of any duty, or the doing of any act, under any written law, that may be occasioned by this Article; and for that purpose such rules may make any modification, adaptation, alteration, change or amendment whatsoever to any written law";

He then discussed that since Malaysia subscribes to a dualist theory of international law, treaties are not automatically applied in the domestic legal system but must instead be incorporated into legislation by Parliament. Should Malaysia join and become a State party to the Rome Statute, the Parliament must pass legislation which can be called "the Rome Statute Act", or amend existing legislation to incorporate all the provisions of the Rome Statute. This is pertinent since Article 120 of the Statute prohibits reservation from any of its provisions since the Rome Statute is a "take it all" or "not at all" treaty. However, such legislation must be in accordance with the Federal Constitution being the supreme law of the Federation as provided under Article 4(1) of its Constitution.

Upon inquiry by the chair on whether the rulers referred to have a rather "symbolic role" as supreme commander or if they indeed have "effective command and control, or effective authority and control" as required under Article 28 Rome Statute, Dr Fareed concluded that the role of the rulers is not just symbolic. In fact, it is clearly set forth in the legal system based on the Reid Commission—the drafters of the Malaysian Federal Constitution—which intended the YDPA to exercise powers militarily. This has been upheld by the Court of Appeal, though it was in the dissenting judgment in the case of *Armed Forces Council, Malaysia & Anor v Major Fadzil Bin Arshad* in 2012. Therefore, the YDPA and the rulers do have "effective command and control".

Dr Hisham added that the government should have consulted all the Malay rulers who ascend to the position of Yang di-Pertuan Agong by rotation. A consultation with the Sultan of Johor would have been of special importance since he is the commandant of the Johor Military Forces. Further research is needed to better understand the implication of the involvement of these forces and the Sultan's role as their commander, in view of the Rome Statute obligations, but it has been said that the Johore Military Forces, established in 1915, were involved in the Great War and the World War II.

Art. 183. "No action, civil or criminal, shall be instituted against the Yang di-Pertuan Agong or the Ruler of a State in respect of anything done or omitted to be done by him in his personal capacity except with the consent of the Attorney General personally".

IV. Discussion

The chair noted that crimes against humanity can be committed in all times, whether at peacetime or during war, while war crimes can only be committed in the event of an armed conflict. As Malaysia presently enjoys a peaceful state of affairs, many may believe that the incorporation of war crimes in Malaysian legislation is less relevant. He asked Dr. Hisham to explain how it may be relevant for Malaysia to amend the existing Geneva Conventions Act 1962.

Dr Hisham mentioned a few reasons. First, Malaysia should be able to prosecute and punish war crimes wherever, and by whom, they are committed. This is an important message to the international community that Malaysia will never be a safe haven for perpetrators of war crimes and crimes against humanity.

Secondly, even though Malaysia is not a warmongering country, there is no guarantee that it will be safe from external aggression. War crimes may be committed by aggressors and even by the aggressed. Sometimes, in order to repel aggression, the aggressed may resort to desperate measures, including the commission of war crimes. Nevertheless, this should not go unpunished.

Upon a further question from the chair, Dr Hisham noted that Malaysia deploys peacekeeping troops, including to countries at war. The peacekeeping forces do not take side in the armed conflicts, and therefore have the status of civilians. This means that if they are attacked, the perpetrator commits a war crime. Thus, a better legal framework would increase the protection of Malaysia's peacekeeping forces.

Dr Hisham further explored the point that crimes against humanity can be committed during war and peacetime. This thus means that the absence of war does not make the crimes irrelevant. In fact, incidents that can be categorized as crimes against humanity have happened in Malaysia before, but the perpetrators have gone unpunished. The civilian population must be protected from such crimes, hence the need for the penal legislation.

The chair noted one case from Germany of a woman having gone to Northern Syria where she got married to a fighter, and with whom she held Kurdish slaves. One of them was tortured to death. In this case, even though she was not physically involved in fighting, she committed crimes

that have a nexus to the armed conflict in Syria and is now being tried for the commission of war crimes in Germany. Malaysia should also keep in mind that there are Malaysian nationals that are so-called Jihadis going to these places to fight, where they possibly commit war crimes.

The chair then asked Dr Fareed how, in his opinion, a thorough consultation process among all relevant stakeholders–including academics–could unfold, and how a roadmap should look like for Malaysia to eventually become a party to the Rome Statute. As for the process for Malaysia to accede to the Rome Statute, Dr Fareed noted that all relevant stakeholders must first be consulted—particularly the rulers, the military, and most importantly, the people. Views from these stakeholders must be taken into consideration before Malaysia accedes to the Rome Statute. Academics can play an important role in providing opinions and views in this process. Once these stakeholders have been thoroughly clarified and well-informed, and views from academics voiced out and considered, the responsible agencies, including the Parliament, may have the chance to table a bill to pass legislation for the Rome Statute to have force within Malaysia, and in accordance with its Constitution, following its accession to the same.

V. Conclusion

The chair found that the expectations for this panel were met. It set a new and constructive tone and clearly showed a roadmap that he summarized as follows:

- There is a need, owing to several reasons, for Malaysia to incorporate into its legal system the punishment of all war crimes, crimes against humanity and genocide;
- The process can be set in motion even before accession to the Rome Statute;
- Having a debate within Malaysian society on the role of the Rulers is of utmost importance, including on the scope of the latter's immunity; and
- Malaysia may eventually adhere to the Rome Statute, though the process requires significant amounts of time and effort.