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2021 Edition

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FOREWORD

In accordance with our mission to spotlight voices from the Asia Pacific region and to encourage debate among young scholars, academia, and practitioners alike, the University of the Philippines Law Centre Institute of International Legal Studies (UP-IILS) and the International Committee of the Red Cross (ICRC) are delighted to have published the second edition of the Asia Pacific Journal of International Humanitarian Law (APJIHL). This edition is a result of the devotion and dedication of the entire team and scholars across the region amidst a global pandemic, for which I am sincerely grateful.

Since its creation, promoting respect and dissemination of international humanitarian law (IHL) is central to ICRC's mandate and mission and continues to be just as relevant today during the COVID19 pandemic where needs of people and populations affected by protracted armed conflicts are further aggravated. It reminds us of the critical need of respecting the laws of war and remembering that humanity must prevail.

Continuing our tradition of encouraging scholarship and providing a platform from debate and discussion, the first part of this year's edition features voices of practitioners, academics, and humanitarians from the Asia Pacific region. This edition's second part focuses on endeavors related to generating respect for and fostering understanding of international humanitarian law (IHL) among various audiences.

The opening piece where Judge O-Gon Kwon, a permanent judge at the ICTY till 2016 and former President of the Assembly of State Parties at the ICC, shares insights into his illustrious career in IHL and international criminal law, sets the tone for the rest of the edition. A career that spans over four decades, Judge Kwon, is an inspirational voice in the region. In discussion with the Journal team led by then-ICRC interns Romina Medina and Ann Clarice Opinion, he speaks about the effects of the Covid19 pandemic, challenges facing international criminal law and the significance of academic journals providing further motivation to many individuals involved in such endeavors, including myself.

In the next article, Dr. Ali Masoudi Lamraski highlights the challenges posed by lethal autonomous weapon systems to compliance with IHL rules. Through in-depth analysis, the author calls for limitations on autonomy and the need for humans to maintain "meaningful control" over the various functions of these weapon systems.

Following this cutting-edge piece is another article that also tackles an area of much interest in recent years, that is the need of humanitarian exemption clauses

in domestic counter-terrorism legislation. With a particular focus on the Philippines, Leandro Anton Castro delves into the interaction and inter-relationship between IHL and counter-terrorism laws.

The next article by Dr. Bingling Wei focuses on the rich history of the Red Cross Society in China. It traces a tumultuous period for the national society where it sought to maintain its identity as a neutral and impartial humanitarian organization during the Beiyang Government period from 1912 to 1928 while the government was interested in exerting more control over this auxiliary organization.

Using the 2011 East Japan earthquake as a case study, Yoshinori Kodama's contribution examines the challenges and possible prescriptions of operations by foreign military and civil rescue and relief assistance teams. It concludes by providing a framework for inter-State military and civil operation in civil rescue and relief assistance that would expedite such operations to the benefit of those most in need.

Authors Lucas Alcici and Saba Papia, in their article then present the differences and similarities in the two proceedings instituted at the International Court of Justice and the International Criminal Court on the situation in Myanmar and the treatment of the Rohingya population.

The final piece in part A of this edition is authored by Mary Flanagan, exploring the experience of Australia in prosecuting war crimes, with particular emphasis on the prospects of participation of victims and their families in investigations and criminal proceedings using the victim participation framework of the International Criminal Court.

Trained as a lawyer myself, and since then engaging in dialogue with and involved in disseminating the law to a wide array of audiences which mostly include non-lawyers, I firmly believe that law is not only for the lawyers. For adequate, comprehensive, and effective implementation of the law, it must be understood and respected by all segments of society.

As the ICRC, this multidisciplinary engagement is part and parcel of our dissemination activities and support to domestic implementation work. This is where Part B of this year's edition sheds some light, on some of the ways that the ICRC engages with all the different actors in the numerous contexts where we are present. These include, *inter alia*, the judiciary, the civil society, academia, members of armed forces, and national authorities.

The two reports featured in this section, the first authored by Christian Donny Putranto and the second by Azhari Setiawan and Dhani Akbar, present the objectives of the two activities, the format, and structure as well as the discussions that ensued. Ranging from the protection of cultural property in armed conflicts, to the protection of civilians, of medical personnel and healthcare, and the rules of war that apply during both international and non-international armed conflicts, the two

activities highlighted several pertinent topics that remain relevant to Asia and the Pacific region.

All of our work and all of these voices are aimed at advocating for strengthening respect for the law, to upholding humanity in war and respecting human dignity at all times. It is our hope that you will enjoy reading these articles that capture some of the most pressing issues of our time and that they will add to the existing scholarship and understanding of IHL.

In closing, my sincere gratitude to the Board of Experts for their continuous guidance, to the entire team at the UPIILS for their tireless efforts in producing this edition especially my co-Managing Editor Prof. Rommel J. Casis, and to Georgia Hinds for her invaluable support.

SAHAR HAROON

ICRC Regional Legal Adviser in Southeast Asia

PREFACE

The Institute of International Legal Studies (IILS) of the Universities of the Philippines (UP) Law Center, under Philippine law, is mandated to undertake research, training and extension services in various fields of international law, including international humanitarian law (IHL). Since its establishment, IILS has conducted research, publication, and training in the field of IHL, including hosting the National Moot Court on International Humanitarian Law in partnership with the International Committee of the Red Cross (ICRC). This partnership eventually led to the publication of the Asia-Pacific Yearbook of International Humanitarian Law (APYIHL). With five volumes published between 2005 and 2017, the APYIHL featuring peer-reviewed articles and book reviews on significant developments in IHL and related fields.

In 2018, ICRC and IILS took a step forward by reformatting the APYIHL from a yearbook into a journal, with a Board of Experts representing countries in the Asia-Pacific Region. With the goal of providing a platform for scholars from the region and building on the gains of APYIHL, the Asia-Pacific Journal of International Humanitarian Law (APJIHL) took off in May 2019, through a new memorandum of understanding signed between the UP and ICRC. The Journal, as an annual publication, is a platform for peer-reviewed scholarly articles, book reviews, and commentaries on significant developments in IHL, with special emphasis on the Asia-Pacific region.

After months of planning, meeting, and peer review, and amid the challenges posed by an ongoing global health emergency, the UP-IILS and ICRC proudly launched the first edition of the APJIHL in November 2020, available in print and online.

The APJIHL is critical addition to the UP Law Center's roster of research and publications that further advance legal scholarship and pathways for important legal reform, especially in the areas of civil rights protection, international relations, and law enforcement. The APJIHL's special emphasis on IHL issues that relate to the Asia-Pacific region, written by scholars who are from or are based in the region, is also critical as the region takes on new challenges and opportunities for collaboration on the humanitarian and security front.

Building on the successful launch of inaugural edition last year, the 2021 Edition continues to explore thematic areas of IHL articles that have undergone a rigorous peer review process, written by voices from the Asia-Pacific, under an interdisciplinary lens. At a time where the challenges posed by COVID-19 persist, the revamped APJIHL website serves as a platform not just for the free and public

distribution of all APJIHL Editions, but also the production of new media for online distribution such as podcasts and blog posts on the topics covered by the contributed articles.

UP IILS would like to thank the research and administrative staff of the UP Law Center who generously 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, Research Assistant Jasmin Althea Siscar, and Mr. Mario Dela Cruz who prepared the lay-out. We would also like to thank the ICRC, particularly Ms. Sahar Haroon and Ms. Georgia Hinds whose dedication made this volume possible.

ROMMEL J. CASIS

Managing Editor

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ASIA-PACIFIC JOURNAL OF INTERNATIONAL HUMANITARIAN LAW **PART I**

VOICES FROM THE REGION

Interview with Judge O-Gon Kwon

Judge O-Gon Kwon was a permanent judge at the International Criminal Tribunal for the former Yugoslavia from November 2001 to March 2016. He was also Vice President of the tribunal from 2008 to 2011. At the ICTY, he presided over the trial of former Bosnian Serb leader, Radovan Karadžić. He also sat on the trials of Slobodan Milošević, former President of the Republic of Serbia and the Federal Republic of Yugoslavia, and of Popovic and others, which dealt with the events of Srebrenica. Following his tenure at the ICTY, Judge Kwon was elected President of the Assembly of States Parties of the International Criminal Court in December 2017. He served in that capacity until February 2021. Prior to his international career, Judge Kwon served as a judge in the Republic of Korea for 22 years. He also served in various senior positions in the government of the Republic of Korea. He holds an LL.B degree from Seoul National University College of Law and of two LL.M degrees, from the Graduate School of Seoul National University and from Harvard Law School.

What led you to specialize in international humanitarian law and to serve as a judge for the International Criminal Tribunal for the Former Yugoslavia (ICTY)? How did your experiences as a member of the judiciary in your home country of the Republic of Korea shape your approach to the work of the ICTY?

To be frank I didn't intend to specialize in IHL as such. However, having served as a judge in South Korea for 22 years, I became curious about the idea of becoming a judge at an international tribunal. I thought that it would be intriguing, albeit challenging, to adjudicate on behalf of the international community as a whole. I had sufficient expertise in criminal law and criminal procedure, so it was not a big problem for me to catch up and familiarize myself with IHL and the criminal procedure at the ICTY. Further, when I joined the ICTY, its procedural rules had already converted to a hybrid system, combining both the common law and the civil law features. This made it easier for me, coming from the Republic of Korea which has also adopted such a hybrid system, to quickly adapt to the new system and to contribute to its development to a certain extent. For example, if you follow the jurisprudence, I offered some momentum to import some civil law features such as the admission of written statements within or under certain conditions.

Turning to specific cases during your time on the ICTY, such as the trial of former Bosnian Serb leader Radovan Karadžić, of the former President of the Republic of Serbia and the Federal Republic of Yugoslavia Slobodan Milošević, and the trial of Popović and others, what were some of the key things that stood out to you?

I worked at the ICTY from 2001 to 2016. During that period, I was involved in many cases: trials, appeals, pre-trials, sentencing, contempt, referrals and so on. At one point in time, I think I had the highest caseload of any of the judges in the tribunal. However, the main high-profile cases that I was involved in were the three trials that you mentioned: Milošević, the Popović, et. al., and finally the Karadžić case, and each of these took five years, totaling fifteen years.

My first matter, the Milošević case, drew extraordinary worldwide attention in that he was the first head of State to be indicted for acts that had allegedly been committed during his term in office. Unfortunately, as you know, Milošević died in prison due to his health problem when the trial was in its final stages, so of course the proceedings were terminated. It was a great disappointment, but I believe that the case itself still sent an important message that the international community would not tolerate criminal impunity for heads of State.

What is of note is that all the three cases I was involved in included the Srebrenica component, and therefore I may be one of the judges who looked at the Srebrenica massacre in the most comprehensive way. In particular, my second case, the Popović et al. case was exclusively related to Srebrenica event and included seven accused from various echelons of the military and the police. And so what had happened in Srebrenica was analyzed in the most comprehensive way. Further, Karadžić was the individual at the highest echelon, as the President of the Serbian Republic for Bosnian Serbs.

I would say that the case has stood out the most for me is the Karadžić case, as I was the presiding judge. It was a challenging and yet rewarding experience. Karadžić was charged for two counts of genocide – one for Srebrenica component and the other for the municipalities component, or in other words “ethnic cleansing”. As you know, the Chamber concluded that what happened in Srebrenica in the summer of 1995 amounted to a genocide and found Karadžić to be individually responsible for this. In terms of jurisprudence of international criminal law, the Srebrenica case was the first case in which the “intent” to destroy a “part of a group” was held to amount to *dolus specialis* or special intent for genocide. To put it simply, the intent was not to destroy the whole Muslim group but the groups who were in the part of Eastern Bosnia; the Muslims who stayed in

the Srebrenica area. So that's the first case in which the part of the group was targeted.

However, as regards the municipalities component, the Chamber held that what happened there did not amount to genocide. There, the Chamber was not satisfied beyond reasonable doubt that there had been such "special intent" to destroy a part of the whole of a group, as part of ethnic cleansing. So in the one case, there were two different charges of genocide and the Chamber had to distinguish one from the other. That was a very difficult task for us.

Turning to current issues, how do you think the COVID 19 pandemic has affected work in international criminal law?

As I left the ICTY before the outbreak of the COVID 19 pandemic, I am not in a position to comment on how work in that kind of tribunal has been affected by the pandemic. But I can certainly imagine that there are various difficulties in terms of investigation, and logistical problems related to the trial such as bringing witnesses to The Hague.

However, while I served as the President of the ASP¹ of the ICC² from December 2017 to February 2021, the last part of my mandate was severely affected by the pandemic so much so that I could not travel at all and all the meetings had to be held virtually including the interviews of candidates for judges and the prosecutor. At the same time, however, I think there was also merit in having these kinds of virtual meetings. One of the problems with the ASP of the ICC has been the issue of the working method between the New York delegates and The Hague delegates. However, when we had virtual meetings, the delegates in The Hague and in New York were able to participate in meetings at the same time, which would be impossible if you have to hold all meetings in person.

Do you see the Asia Pacific region as having contributed to the development of international humanitarian law?

Yes and no.

Asia is said to be the place where the idea of international humanitarian law originated. Sun Tzu's Art of War, a Chinese classic on military strategy written around 500 BC and the Indian Code of Manu developed between 200 BC and 400 AD are good examples. And it is also true that the Asia Pacific region

¹ Assembly of States Parties to the Rome Statute.

² International Criminal Court.

provided a lot of competent judges, including Judge Pangalangan from the Philippines, to various international tribunals and courts, thereby contributing to the development of ICL and IHL.

However, whilst the Asia-Pacific is the most populous and economically dynamic region in the world, Asian States are the least likely of any regional grouping to be party to most international organisations. There is no regional framework here comparable to the African Union, or the Organization of American States or the European Union. And Asian States have by the far the lowest rate of acceptance of compulsory jurisdiction of the International Court of Justice. The membership of the International Criminal Court is a very good example. Almost two-thirds of the countries of the world have ratified the Rome Statute. But only one-third of Asia Pacific States have done so, or 19 out of 53 countries.

It is noteworthy that we did see the establishment of the Association of Asian Constitutional Courts in 2012. In the same vein, I sincerely hope that our shared efforts for implementing justice and rule of law in the region will bring about the realization of our dream of having a common regional judicial body, such as an Asian Pacific Court of Human Rights, in the near future.

Further, I mention that there have been a number of judges that came from the Asia Pacific Region. Now, I would like to see many staff members from the Asia Pacific Region at the ICC and other institutional organs. In this regard, while I served as the President of the ASP, I used every opportunity to emphasize the importance of geographical representation in staffing issues and I look forward to seeing some positive results.

Looking at academic journals, such as the Asia Pacific Journal of IHL, how impactful have these journals been in the development of international humanitarian law and related fields?

The role of academic journals and blogs is of critical importance for the development of jurisprudence of criminal law and criminal procedure law. Practitioners are so busy dealing with their everyday routine and workload, so they need to receive some kind of input and guidance on a regular basis, to look back at their practice and allow them to think about a way forward. This also applies to the administration of the ASP, where I think the role of journals is somewhat similar to that of civil society. I am a strong advocate for this, serving myself as a member of the Board of Editors of one such academic journal.

To be successful, these journals must of course be able to publish good articles. It is also important that they are able to motivate scholars, in particular

young scholars, to contribute to the development of IHL and ICL. Organizing interesting seminars and symposiums on important topics or giving some opportunities like scholarships or awards to young scholars may be some ways to do that.

What do you see as some of the challenges facing international criminal law and what might be some of the ways the international community can address these?

The message that I'm always trying to send is that the international justice system is in its infancy stage, so we can only expect it to progress slowly. I see international criminal justice as a living or growing organism – very much a project in progress. We have to admit it is far from being perfect. We have to develop it bit by bit. And it is a great and intriguing experience to be able to contribute to it.

In terms of challenges, first of all there are so many parts of the world that are out of reach of the rules-based international order. So much so that these States as well as non-State actors push the boundaries of humanity with acts of violence conducted with disregard for human rights and internationally accepted norms.

Currently there are 123 States Parties to the ICC. This means one-third of countries of the world are not under the umbrella of the Rome Statute, not to mention some big powers such as the United States, China and Russia. When I was elected as President of the Assembly of States Parties to the ICC, I made a pledge to do my best to increase the number of countries that ratified the Rome Statute, in particular in my region Asia-Pacific. I have to admit, I only had limited success. During that time, the Philippines withdrew from the ICC and Malaysia, which had reached the final stage of ratification, withdrew its intention at the last minute. However, we were so pleased to be able to welcome one country from the Pacific at the last minute: the Republic of Kiribati. This meant we at least maintained the total number of States Parties from the Asia Pacific region.

As for other challenges for the ICC, I think the lack of cooperation from States Parties and the international community, including the United Nations Security Council, also raises serious problems. The case of Omar al-Bashir may be a good example. Although the UNSC referred the case to the ICC almost 20 years ago and the arrest warrant was issued more than a decade ago, he is still at large. So without cooperation from the international community, the ICC, or any other international court or tribunal, is just a giant without limbs. And here I would also point out the critical role of the principle of complementarity, in that the primary responsibility to prosecute the heinous crimes lies with the States or the domestic jurisdiction. In other words, the ICC steps in only when domestic jurisdictions are

unable or unwilling to carry out effective investigations and prosecutions. In other words, the ICC is intended to complement, not to replace the domestic jurisdiction. However, I'm afraid that this principle of complementarity does not seem to be widely or properly understood by many States and there still exists a lot of misunderstanding.

Talking about the ICC, what are your views on the prospect of involving the crime of ecocide as an international crime?

For me, it was not until I attended the Pacific Islands Roundtable on the Ratification and Implementation of the Rome Statute of the ICC held in Port Vila, Vanuatu³, one of the Pacific Island countries, that I was able to feel in my bones the seriousness of the issue of ecocide. At that conference, I heard the serious arguments from delegates from the Pacific Island countries for the inclusion of ecocide as an international crime. I responded to them that such argument might be another reason for them to ratify the Rome Statute to become a part of the family of the Rome Statute, because by doing so they can have a stronger voice for criminalizing ecocide at the international level as well.

However, practically, I think it will be difficult to get consensus from the international community to include the crime of ecocide as an international crime at this juncture. Also, there is an argument that it may be best for the ICC to focus right now on enhancing the effectiveness of the performance of its traditional mandate. Therefore, I would propose that the process of criminalizing ecocide at the international level should start with domestic restriction and should proceed to the regional movement by way of alliances, and finally aiming at becoming a global movement.

What is your forecast for the ICC in the coming years especially given the new Prosecutor?

Well, the new Prosecutor is incredibly competent and experienced, and will no doubt provide very good momentum for a renewed way forward for the court. At the same time, the Independent Expert Review or IER also offers a golden opportunity to enhance the performance of the ICC and strengthen the Rome Statute system.

³ Pacific Islands Roundtable on the ratification and implementation of the Rome Statute of the International Criminal Court, held on 31 May 2019. See <https://www.icc-cpi.int/news/Pages/event.aspx?event=20190531-seminar-port-vila>.

As you know, during my mandate as the ASP President, the ASP commissioned eminent well qualified experts for this exercise. And the group of independent experts, under the leadership of its chair Mr Richard Goldstone, issued its final report last year. Now, the ASP is working hard to assess and to implement the recommendations of the experts contained in that report. I believe this IER report and its implementation will be remembered as a legacy for the international criminal justice system in the future. I have no doubt States Parties and all the other stakeholders will spare no effort in their support for the ICC. As a young institution, a “project in progress”, the ICC and the Rome Statute system will continue to progress and be perfected bit by bit with such support.

What qualities do you think are important in a position such as the prosecutor or a judge of an international court?

For any judge, any criminal judge, it is imperative to be equipped with a sense of justice and the ability to empathize with the victims. That said, the judges at the international tribunal are supposed to work with individuals from various parts of the world with diverse legal and cultural backgrounds. Therefore, you need to have an open mind and you should avoid the habit of sticking to familiar practices or theory in the country where you come from. An open mind is very important. Finally, of course, you should work hard. The case load is just enormous because the size and scope of the cases are truly immense and not comparable to the ones in the domestic jurisdiction, so if you don’t work hard, the case could be prolonged forever.

Do you have any specific advice for aspiring legal practitioners especially those who are thinking of specializing in IHL or ICL?

For certain contexts in Asia, like Philippines, English will not be an issue. But even for others, for example Korean students, I say don’t be too concerned about language. What matters is the content and what you like to do so focus on what you like to do. If you are interested in ICL or IHL, continue and keep on going and keep studying and developing yourself. I recommend doing some internships at international tribunals or international organizations. Having real experience gives you something else.

Preliminary Remarks on Lethal Autonomous Weapon Systems from an IHL Perspective

*Dr. Ali Masoudi Lamraski**

ABSTRACT

During the past decades, developments for lethal autonomous weapons systems continued unabated and various States have dedicated significant resources to research and development on these systems. While there is no standard, universally-accepted definition of some of the key terms related to them, in their broadest sense, lethal autonomous weapon systems can operate outside direct human control and independently dispense lethal force in the battlespace based on internal programming. While these weapons, like all others, must comply with the law of armed conflict, there seems something troubling about this prospect. On one hand, there is growing advocacy asserting that these weapons can adhere to the law and even deliver more humanitarian outcomes in their dispensation of violence. Such advocacy assumes much about the normativity of the law. On the other hand, there exist grave concerns as to these weapons' level of autonomy. The fundamentals of IHL, best exemplified by the principles of distinction, proportionality, precaution and humanity require qualitative, context-dependent cognitive reasoning and judgment. These are the qualities that cannot be encoded into a weapon control system and machines are inherently incapable of. That is the reason humanitarians, roboticists and States have been struggling to define the extent to which weapons may be developed to conduct military operations without human control. This paper seeks to canvass the legal challenges posed by using autonomous weapons systems from an IHL perspective and interrogate how developments of the legal framework should be made on this matter.

Keywords: Lethal Autonomous Robots, Autonomous Weapons Systems, Human Control, New Technologies, Contemporary Challenges to IHL

1. Introduction

Physically removing weapons users or controllers from the battlefield has been the primary driving factor for advancements in military weapons technology: the greater the distance between the users and the battlefield, the safer the party is who is in possession of the technology.¹ This tendency reflects the so-called “third revolution

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¹ The American biologist Paul Bingham goes a good deal further, presenting the ability to kill or injure other human beings from a distance as the main force driving the evolution of the human species towards “cooperative social adaptation” to the extent that, as he puts it, the ability to kill remotely

of warfare” following gunpowder and nuclear weapons, namely autonomous weapons.² Lethal Autonomous Weapon Systems (LAWS) are no longer just something conjured up by Hollywood for their entertainment value; instead, they are increasingly used in today’s armed conflicts. For instance, during the 2020 conflict over Nagorno-Karabakh, Azerbaijani forces used different loitering munitions, also known as suicide/kamikaze drones against Armenian armored and logistical forces.³ Similarly, as reported by the United Nations Security Council, fighters in Libya “were subsequently hunted down and remotely engaged” by the same weaponry.⁴

On the other hand, LAWS have been the subject of much research and investment. While up-to-date open source information concerning national military research and development expenditure is often very scarce, studies show that the projected resources dedicated by States on the research and development of autonomous weapons systems to date is substantial. This is best exemplified by the United States’ spending of \$17.5 billion, China’s \$4.5, Russia’s \$3.9, South Korea’s \$1.9 and the members of the European Union’s cumulative spending of \$8 billion on drones only.⁵ In the midst of all this, humanitarians, roboticists and States have been struggling to define the extent to which weapons may be developed to conduct military operations without human control.

Simply put, humans exercise control over weapons at different phases: in their development, deployment and operation, including the application of its “Critical Functions” which are authoritatively defined by the International Committee of the Red Cross (ICRC) as the “acquiring, tracking, selecting and attacking targets”.⁶ For LAWS or any other weapon for that matter, it is evident that

dramatically reduces “the individual cost of punishing non-cooperative behaviour by allowing these costs to be distributed among multiple co-operators”; See P.M. Bingham, “Human Uniqueness: A General Theory”, *Quarterly Review of Biology*, Vol. 74, No. 2, June 1999, pp. 133–169.

² *Autonomous Weapons: An Open Letter from AI & Robotics Researchers*, 28 July 2015; This open letter was announced at the opening of International Joint Conferences on Artificial Intelligence of 2015, seeking a ban on LAWS. To date, it has been signed by 30,717 individuals, including 4,502 AI/Robotics researchers. The letter is available and open to sign at: <https://futureoflife.org/open-letter-autonomous-weapons/> (all internet references were last accessed in May 2021).

³ See Seth J. Frantzman, “Israeli drones in Azerbaijan raise questions on use in the battlefield”, *The Jerusalem Post*, 1 October 2020, available at: <https://www.jpost.com/middle-east/israeli-drones-in-azerbaijan-raise-questions-on-use-in-the-battlefield-644161>.

⁴ See Final Report of the Panel of Experts on Libya established pursuant to Security Council resolution 1973 (2011), UN Doc. S/2021/229, 8 March 2021, para. 63.

⁵ Justin Haner and Denisa Garcia, “The Artificial Intelligence Arms Race: Trends and World Leaders in Autonomous Weapons Development”, *Global Policy*, Vol. 10, Issue 3, September 2019, pp. 331-337; see for more e.g., Vincent Boulanin and Maaïke Verbruggen, *Mapping the Development Autonomy in Weapon Systems*, Stockholm International Peace Research Institute (SIPRI), 2017, pp. 94-105.

⁶ See ICRC, *Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects*, Report of Expert Meeting, Geneva, 26-28 March 2014, p. 1.

control at the first two stages cannot be relinquished. However, the technology is headed in such a direction that human interference may be excluded entirely from the critical functions stage. This is where grave concerns and imperative questions arise regarding the level of these weapons' autonomy. Having been the focus of an intergovernmental discussion under the framework of the Convention on Certain Conventional Weapons⁷ since 2014, these concerns may be addressed under various bodies of law—including, primarily, International Human Rights Law (IHRL), the law on the use of force or “*jus ad bellum*” and International Humanitarian Law (IHL). The discussion in this paper, however, is limited to the use of LAWS as a means of warfare governed by the rules of IHL on the conduct of hostilities.

The legal concerns that arise during the said third stage of undertaking “critical functions” are manifold. Foremost among these is a machine's capability to make qualitative, context-dependent cognitive reasoning, in view of the fundamental rules of IHL (the principles of distinction, proportionality and precaution) which require analysis and application of the mind to each situation as and when they arise. In addition, there may be unpredictable situations on the battlefield which would require context-specific judgment to proceed further, rather than quantitative and technical indicators. A machine is inherently incompetent to tackle such situations no matter how high the degree of automation.⁸ Such machines remain subject to their programming,⁹ which is devoid of the ability to make any of these types of judgments and carries with it certain degrees of unpredictability and unreliability. These challenges have been best categorized in one of ICRC's collaborative works as the “numbers”, “context” and “predictability” challenges.¹⁰

In comparison, a human counterpart is capable of analysing situations on the spot and, armed with prior knowledge of the law, can be able to apply the same in unforeseen scenarios. Moreover, humans have the critical ability to judge for themselves the legitimacy of orders, keeping in mind that not only are they not bound to follow unlawful orders, but that they are also bound not to carry out manifestly unlawful orders.¹¹ At the same time, a machine would be limited by its code and

⁷ 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, 1342 UNTS 137, 10 October 1980 (entered into force 2 December 1983) [hereinafter CCW].

⁸ See Tyler D. Evans, “At War with the Robots: Autonomous Weapon Systems and the Martens Clause”, *Hofstra Law Review*, Vol. 41, No. 13-17, 2014, p. 704.

⁹ Christopher P. Toscano, “Friends of Humans: An Argument for Developing Autonomous Weapons Systems”, *Journal of National Security, Law and Policy*, Vol. 8, No. 1, 2015, p. 14.

¹⁰ See Vincent Boulanin *et al.*, *Limits on Autonomy in Weapon Systems - Identifying Practical Elements of Human Control*, SIPRI & ICRC, June 2020, pp. 4-7.

¹¹ See for e.g., Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rules 154, 155

execute orders as it is programmed without any cognitive understanding of their lawfulness. Therefore, a robot's adaptability cannot be compared to a human being's free will.¹²

In Section Two, this paper classifies autonomous weapon systems while describing their true capabilities. It further illustrates the extent of current technology and where it may be headed in the near future. Section Three analyses the compatibility of this new means of warfare with IHL and highlight primary legal complexities. Section Four concludes that different measures must be taken by various stakeholders, ranging from States to international humanitarian lawyers and NGOs, to develop and re-interpret the legal framework currently applicable to armed robots, in light of the fundamentals of humanitarian law, namely, the principles of military necessity, distinction, proportionality, precaution and humanity.

2. LAWS: What they really are

2.1. Often misunderstood notions of autonomy

"The term 'autonomy' can be very confusing for those not working in robotics",¹³ or those who have not studied robots' characteristics as they really are, which is one of the main reasons why there is no standard, universally-accepted definition of some of the key terms related to LAWS.¹⁴ In popular culture, autonomous robots have been influenced and mythicized by science fiction, and are thus assigned human-like attributes, such as thinking for themselves,¹⁵ consciousness, guilt functions, and so

[hereinafter ICRC Customary IHL Study]; See also Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002), Art. 33 [hereinafter the Rome Statute].

¹² Christopher P. Toscano, above note 9, p. 9.

¹³ Noel E. Sharkey, "Automating Warfare: Lessons Learned from the Drones", *Journal of Law, Information and Science*, Vol. 21, Issue 2, 2011, p. 141.

¹⁴ Amitia Etzioni and Oren Etzioni, "Pros and Cons of Autonomous Weapons Systems", *Military Review*, May-June 2017, p. 77, available at: <http://www.armyupress.army.mil/Journals/Military-Review/English-Edition-Archives/May-June-2017/Pros-and-Cons-of-Autonomous-Weapons-Systems>;" *contra* Maya Brehm, *Defending the Boundary: Constraints and Requirements on the Use of Autonomous Weapon Systems under International Humanitarian Law and International Human Rights Law*, Geneva Academy of International Humanitarian Law and Human Rights, May 2017, pp. 13-16, who believes "the lack of a common understanding is not simply due to a failure to agree on the correct nomenclature. Rather, participants in multilateral policy discussions frame issues of autonomy, agency and weapons in different ways."

¹⁵ See Patrick Lin, George Bekey and Keith Abney, "Autonomous Military Robotics: Risk, Ethics and Design", *California Polytechnic State University*, 20 December 2008, p. 4, available at: http://ethics.calpoly.edu/ONR_report.pdf; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/HRC/23/47, 9 April 2013, para. 39. [hereinafter Report of the Special Rapporteur].

forth.¹⁶ Among various stakeholders, varying uses of the term “autonomous”¹⁷ reflect uncertainty on the true nature of these new technologies.¹⁸ In this respect, perceptions on both autonomy and artificial intelligence (AI) are constantly shifting, and with advances in technology certain systems once considered “autonomous” and “intelligent” are now deemed merely “automated”.¹⁹ For instance, mines have been considered by some States as “rudimentary autonomous weapon systems”.²⁰

It must be noted that the use of “autonomy” in the field of robotics should not be confused with how it is used in philosophy, politics, individual freedom or common parlance. “Autonomy in robotics is more related to the term ‘automatic’ than it is to individual freedom.”²¹ An automatic robot is controlled by an “IF/THEN statement” and carries out a pre-programmed sequence of operations or moves in a structured environment.²² An autonomous robot is similar to an automatic machine, except that it operates in open or unstructured, or even “real-world”²³ environments. The robot is still controlled by an IF/THEN-based program; however, it now receives information from its sensors that enable it to adjust the speed and direction of its motors (and actuators) as specified by the program. Simply speaking, however, the bottom line for decision-making by machines, regardless of complexity, and “whether is it using mathematical decision spaces or [AI] programs, is the humble IF/THEN statement”.²⁴

ICRC has also acknowledged this confusion by taking the position that “there is no clear technical distinction between automated and autonomous systems, nor is there universal agreement on the meaning of these terms”. In the eyes of the

¹⁶ See Ronald C. Arkin, *Governing Lethal Behavior in Autonomous Robots*, CRC Press, Boca Raton, Florida, 2009, p. 91.

¹⁷ See for further reading United Nations Institute for Disarmament Research (UNIDIR), *The Weaponization of Increasingly Autonomous Technologies: Concerns, Characteristics and Definitional Approaches - A Primer*, 2017, pp 19-22, which discusses the three main approaches taken in the context of CCW talks to define autonomous systems, namely “Technology-centric”, “Human-centered” and “Task/Functions” approaches.

¹⁸ See Tim McFarland, *Autonomous Weapon Systems and the Law of Armed Conflict - Compatibility with International Humanitarian Law*, Cambridge University Press, Cambridge, 2020, pp. 41-42.

¹⁹ ICRC, *Autonomy, Artificial Intelligence and Robotics: Technical Aspects of Human Control*, Geneva, August 2019, p. 7.

²⁰ See United States Department of Defence (US DoD), *DoD Law of War Manual*, Section 6.5.9.1, “Description and Examples of the Use of Autonomy in Weapon Systems”, Washington, D.C. 2015, p. 328.

²¹ See Noel E. Sharkey, above note 13, p. 141; see also Gregory P. Noone and Diana C. Noone, “The Debate over Autonomous Weapons System”, *Case Western Reserve Journal of International Law*, Vol. 47, 2015, p. 27.

²² A good example is a robot arm painting a car.

²³ Patrick Lin, George Bekey and Keith Abney, above note 15, p. 4.

²⁴ For more elaboration on this issue see Noel E. Sharkey, above note 13, pp. 140-42.

ICRC, “autonomous” represents “systems that interact with their environment”.²⁵ Accordingly, anthropomorphizing LAWS and ascribing them characteristics similar to those of human beings, such as judgment, understanding of values, anticipation of the directions in which events are unfolding,²⁶ understanding people’s intention²⁷ and situational awareness,²⁸ if not being used metaphorically, stems from nothing except a “weak analogy”.²⁹ The importance of this issue will be borne in upon debates about robots making life and death decisions.

2.2. *Different types of LAWS and the continuum loop*

With no common understanding of what autonomy and LAWS are, the latter are categorized by different commentators on the basis of different criteria.³⁰ The mainstream trend, however, is to define and categorize LAWS based on human control, supervision, involvement or intervention³¹ or their “level of autonomy”.³² In this regard, by taking a “functional approach”,³³ the ICRC has authoritatively defined LAWS as “any weapon system with autonomy in its critical functions. That is, a weapon system that can select (i.e., search for or detect, identify, track, select) and

²⁵ See ICRC, above note 19.

²⁶ See M. L. Cummings, “The Human Role in Autonomous Weapon Design and Deployment”, *University of Pennsylvania Carey Law School*, [undated], p. 6, available at: <https://www.law.upenn.edu/live/files/3884-cummings-the-human-role-in-autonomous-weapons>.

²⁷ See United Kingdom Ministry of Defence, *Joint Doctrine Note 2/11: The UK Approach to Unmanned Aircraft Systems*, 30 March 2011, p. 2-3; which states “an autonomous system is capable of understanding higher level of intent and direction. From this understanding and...”

²⁸ Dan Saxon, “International Humanitarian Law and the Changing Technology of War”, in Dan Saxon (ed.), *International Humanitarian Law and the Changing Technology of War*, Martinus Nijhoff Publishers, Leiden, 2013, p. 4; “Situational Awareness” corresponds to the ability to perceive the elements in the environment within a volume of time and space, to comprehend their meaning, and to project their status in the future. “In generic terms the three levels of situational awareness are level 1-perception, level 2-comprehension and level 3-projection. There is both individual and group or team situational awareness”. See US DoD, *Unmanned Systems Safety Guide for DoD Acquisition*, Washington, D.C., 27 June 2007, p. 16.

²⁹ See Noel E. Sharkey, above note 13, p. 141.

³⁰ See for e.g., Yoram Dinstein, “Autonomous Weapons and International Humanitarian Law”, in Wolff Heintschel von Heinegg et. al. (eds.), *Dehumanization of Warfare - Legal Implications of New Weapon Technologies*, Springer, Cham, 2017, pp. 17-19.

³¹ See Human Rights Watch, *Losing Humanity: The Case against Killer Robots*, 19 November 2012, p. 2; US DoD, *Directive No. 3000.09; Autonomy in Weapon Systems*, 21 November 2012, p. 13.

³² See Markus Wagner, “The Dehumanization of International Humanitarian Law: Legal, Ethical and Political Implications of Autonomous Weapon Systems”, *Vanderbilt Journal of Transnational Law*, Vol. 47, 2014, pp. 1379-1384.

³³ See UNIDIR, above note 17, p. 21.

attack (i.e., use force against, neutralize, damage or destroy) targets without human intervention.”³⁴

Consequently, attention must be paid to the control exercised by humans at different stages of the life cycle of LAWS. As enunciated by the ICRC, this control may be exercised by human beings during the machines’ development (including programming), deployment, and operation.³⁵ The last two stages have been the starting point for categorization of LAWS. Meanwhile, based on human involvement in each, robotic weapons are often divided into the following three categories:

First are “Human-in-the-Loop Weapons”, robots that can select targets and deliver force only with a human command. These include remote-controlled, or as put by some authors, “semi-autonomous” weapon systems;³⁶

Second, “Human-on-the-Loop Weapons”, also called semi-autonomous or human-supervised weapon systems, are systems subject to human intervention for specific functions, from target-selection to engagement.³⁷ Human operators exercise control in a way that they may monitor the machines’ operations³⁸ or override the system’s capabilities to launch lethal force.³⁹ Depending on the scale of intervention, these weapons may range from “humans in the loop” to “humans on the loop”.⁴⁰ Classic examples of these weapons include air defence systems like the Iron Dome and the Phalanx Close-In Weapon System (CIWS).⁴¹

Third are “Human-out-of-the-Loop Weapons”, or fully autonomous weapon systems, which are capable of selecting targets and

³⁴ ICRC, *Views of International Committee of the Red Cross on Autonomous Weapon System*, Geneva, 11 April 2016, p. 1.

³⁵ *Ibid.*, p. 3.

³⁶ See Tim McFarland, above note 18.

³⁷ William H. Boothby, “Highly Automated and Autonomous Technologies”, in William H. Boothby (ed.), *New Technologies and the Law in War and Peace*, Cambridge University Press, Cambridge, 2019, p. 138.

³⁸ Aaron Saenz, *War 2.0 – Rise of the Robots*, 1 June 2009, available at: <http://www.singularityhub.com/2009/06/01/war-20-rise-of-the-robots>.

³⁹ Tyler D. Evans, above note 8, p. 702.

⁴⁰ Christopher P. Toscano, above note 9, pp. 12-13.

⁴¹ See for more examples and further references Daniele Amoroso and Guglielmo Tamburrini, “In Search of the ‘Human Element’: International Debates on Regulating Autonomous Weapons Systems”, *The International Spectator*, Vol. 56, No. 1, 2021, p. 22

delivering force without any human input or interaction.⁴² Fully autonomous robots are those weapons that keep humans entirely “out of the loop”.⁴³ They are “robots that are capable of selecting targets and delivering force without any human input or intervention.”⁴⁴ This suggests that machines would be capable of adapting to the situation at hand and respond accordingly.⁴⁵

It must be noted that “autonomy” is not a binary conception. In other words, “a system does not have to be exclusively autonomous or exclusively remote operated. There is a continuum from fully controlled to fully autonomous.”⁴⁶ For the present purposes, however, the phrase “remote-controlled weapon systems” means weapons which keep a human-in-the-loop, such as Unmanned Combat Aerial Vehicles (UCAVs or drones), which are not categorically under discussion here. The remaining two classes are semi-autonomous/human-supervised and fully autonomous weapon systems.

Moreover, having the above-mentioned definition and categorization of LAWS in mind, and based on the comprehensive studies conducted by the ICRC and other international institutions, it must be noted that all existing LAWS operate under some form of human control and intervention.⁴⁷ This has also been indicated by States leading technological developments in weaponry. For example, the United States Department of Defense (DoD) has made clear its policy that “autonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force”.⁴⁸ In the same vein, proponents of LAWS have also suggested that “fully” and “truly” autonomous weapon systems are still at the research stage and have not yet appeared, let alone deployed in armed conflicts. They have considered the study and discussions of LAWS to be based on possibilities and assumptions.⁴⁹ Regardless of the accuracy of such statements in the current state of technology, the fact that fully

⁴² See Human Rights Watch, above note 31, p. 2; Gregory P. Noone and Diana C. Noone, above note 21, p. 28.

⁴³ Tyler D. Evans, above note 8, p. 703.

⁴⁴ Human Rights Watch, above note 31, p. 2.

⁴⁵ Christopher P. Toscano, above note 9, p. 13.

⁴⁶ Noel E. Sharkey, above note 13, p. 142; see also Report of the Special Rapporteur, paras. 39-43.

⁴⁷ See for references Vincent Boulanin *et. al.*, above note 10, pp. 17-18; see also Report of the Special Rapporteur, paras. 43-45; Michael N. Schmitt, “Autonomous Weapon Systems and International Humanitarian Law: A Reply to Critics”, *Harvard National Security Journal Features*, 2013, p. 3

⁴⁸ US DoD, above note 31, 4.a.

⁴⁹ Zhang Xinli, “Legal Issues concerning Autonomous Weapon Systems” in ICRC, *Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons*, Versoix, 15–16 March 2016, p. 41.

autonomous machines might not yet be a reality, does not preclude such an eventuality in the future.⁵⁰

2.3. *Robots in the real world: remote-controlled or autonomous?*

Official statements from States capable of producing LAWS appear to indicate that “their use during armed conflict or elsewhere is not currently envisioned”.⁵¹ Some have even suggested that no designer, engineer, academic or practitioner believes we will see a deployable Fully Autonomous Weapon System within ten or twenty years at the least.⁵² However, as has been previously pointed out, there exist systems with unsupervised autonomy that “possess automatic target-recognition software, enabling them to find a target on their own, match that target to a target-identification library or database, and then fire on the target.”⁵³ In addition, there exists growing belief that soon, Unmanned Systems (UMS) “will operate without human input; in other words, a single platform will search for, identify, and destroy targets autonomously.”⁵⁴

In addition, States have been spending massively in the last two decades for research to take humans out of the loop, and plans are well underway so that robots can operate autonomously to locate targets and destroy them without human intervention⁵⁵ in the air, on the ground,⁵⁶ and in the maritime environment, whether on the high seas or underwater.⁵⁷ Moreover, as will be discussed later, even human-

⁵⁰ See Human Rights Watch, above note 31, pp. 7-9.

⁵¹ See US DoD, *Unmanned Systems Integrated Road Map FY2011-2036*, p. 50, available from <http://publicintelligence.net/dod-unmanned-systems-integrated-roadmap-fy2011-2036>, cited in Report of the Special Rapporteur, para. 29.

⁵² Gregory P. Noone and Diana C. Noone, above note 21, p. 30.

⁵³ Heather Roff, “Sensor-Fused Munitions, Missiles and Loitering Munitions” in ICRC, *Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons*, Versoix, 15–16 March 2016, p. 33.

⁵⁴ Michael N. Schmitt, “War, Technology and the Law of Armed Conflict”, in Anthony M. Helm (ed.), *The Law of War in the 21st Century: Weaponry and the Use of Force*, International Law Studies, Vol. 52, Naval War College, New Port, Rhode Island, 2006, p. 143; See also Ronald C. Arkin, above note 16, pp. 7-10.

⁵⁵ See Noel E. Sharkey, “Cassandra of False Prophet of Doom: AI robot and war”, *IEEE Intelligent Systems*, Vol. 23, No. 4, 2008, pp. 14-17.

⁵⁶ For e.g., United States Congress had mandated in 2001 that by 2010, one-third of the aircraft in the operational deep strike force should be unmanned, and by 2015, one-third of the army’s Future Combat Systems’ operational ground combat vehicles should be unmanned. See *United States National Defence Authorization Act*, Fiscal Year 2001, Public Law No. 106-398, 114 Stat. 1654, Section 220(a).

⁵⁷ See generally UNIDIR, *The Weaponization of Increasingly Autonomous Technologies in the Maritime Environment: Testing the Waters*, 2017.

in/on-the-loop LAWS, if used as force multipliers, or in “swarms”, would be indistinguishable from fully autonomous weapons.

The United States Department of Defence’s Unmanned Air Vehicles (UAVs) inventory, for instance, has rapidly grown from 167 in 2002 to over 7,000 in 2010. In 2009 alone, the United States Air Force trained more drone operators than aircraft pilots.⁵⁸ These UMS are playing an increasingly significant role in the military operations of more and more States including Georgia, Israel⁵⁹ and Iran.⁶⁰ All these systems can navigate across the battlefield or the designated area and search for targets, but it is a remote operator who makes the final decision about when to apply lethal force.⁶¹

States are rapidly increasing their use of Unmanned Ground Vehicles (UGVs) too, for tasks such as defending borders and reconnaissance to bomb disposals.⁶² From 2004 to 2006, UGVs/robots have increased from 160 to 4,000 in Iraq and Afghanistan, which performed nearly 30,000 explosive ordnance disposal missions and neutralized more than 11,000 improvised explosive devices in 2006 alone.⁶³ In 2008, between 4,000 to 6,000 United States UGVs were operating in Iraq and Afghanistan, more than the number of British soldiers on the battlefield.⁶⁴

Current UGVs enjoy limited autonomy and are capable of conducting long-term surveillance tasks and collaboration with other UGVs, such as the United States government’s Defence Advanced Research Projects Agency’s (DARPA) “Crusher”; a six-wheeled robot that rolls through ditches, walls, streams, other vehicles and almost anything else that gets in its way.⁶⁵

The same is true with regard to UAVs. In 2009, the United States released “Unmanned Aircraft Systems Flight Plan 2009-2047”, a “plan to achieve the United

⁵⁸ United States House of Representatives, *Rise of the Drones: Unmanned Systems and the Future of War*, Hearing before the Subcommittee on National Security and Foreign Affairs of the Committee on Oversight and Government Reform, 111th Congress, 2nd Session, 23 March 2010, p. 2.

⁵⁹ See Larry Dickenson, “New Respect for UAVs”, *Aviation Week and Space Technology*, Vol. 170, Issue 4, 2009, p. 94, cited in Jack M. Beard, “Law and War in the Virtual Era”, *American Journal of International Law*, Vol. 103, 2009, p. 413.

⁶⁰ See Ned Parker, “U.S. Says It Downed Iran Drone over Iraq”, *Los Angeles Times*, 17 March 2009, p. A23.

⁶¹ Noel E. Sharkey, “Grounds for Discrimination: Autonomous Robot Weapons”, *RUSI Defence System*, Vol. 11, No. 2, 31 October 2008, p. 87.

⁶² Dan Saxon, above note 28.

⁶³ Ramon Lopez, “Foiling Bombs and Bad Guys”, *Defense Technology International*, 1 December 2007, p. 30.

⁶⁴ Noel E. Sharkey, above note 55, p. 14.

⁶⁵ See “Pentagon’s ‘Crusher’ Robot Vehicle Nearly Ready to Go”, *Fox News*, 27 February 2009, available at: <http://www.foxnews.com/story/2008/02/27/pentagon-crusher-robot-vehicle-nearly-ready-to-go.html>.

States Air Force vision for the future of Unmanned Air Systems”.⁶⁶ According to this plan, humans will remain “in the loop” and will still fly airplanes, but in a multitude. For example, since 2020, human operators are supposed to control four aircrafts each, thousands of miles away. This means that upon the human operator’s issuing of the flight plan, the aircraft itself will complete many critical aspects of the mission, such as taking off, flying to the target, and avoiding detection by adversaries, unassisted.⁶⁷ The United States Air Force has also predicted that “by 2030 machine capabilities will have increased to the point that humans will have become the weakest component in a wide array of systems and processes.”⁶⁸

This has been high on the military agenda of all United States forces,⁶⁹ as well as the armies of other States.⁷⁰ In fact, due to UMS’ ability to improve surveillance and minimize risks to combatants,⁷¹ States have aimed to use UMS as a force multiplier in swarms, “so that one human on the battlefield can be a nexus for initiating a large-scale robot attack from the ground and the air.”⁷²

This progression, however, makes unclear how human control could be significantly—or as some have accurately pointed out, “meaningfully”⁷³—maintained over the force.⁷⁴ It is obviously going towards something that, if nothing else, looks like autonomy. In ICRC’s view, this trend dramatically exacerbates the humanitarian legal challenges posed by LAWS.⁷⁵ This is mainly due to the chaotic, time-critical nature of armed conflicts in which human beings’ supervisory actions cannot be relied upon by UMS. There exists an “inherent” neuromuscular lag in humans, which means a half-second delay in a single hitting of a fire/stop button when needed, even when paying full attention.⁷⁶ This is while “the decision-making

⁶⁶ United States Air Force, *United States Air Force Unmanned Aircraft Systems Flight Plan 2009-2047*, Washington, D.C., 18 May 2009, p. 14.

⁶⁷ See Joe Pappalardo, “The Future for UAVs in the U.S. Air Force”, *Popular Mechanics*, 25 February 2010, available at: <http://www.popularmechanics.com/military/a5383/4347306/>.

⁶⁸ See the United States Chief Scientist, *Report on Technology Horizons: A Vision for Airforce Science & Technology During 2010-2030*, Vol. 1, AF/ST-TR-10-01-PR, 15 May 2010, p. 106.

⁶⁹ See Noel E. Sharkey, above note 61.

⁷⁰ See generally United Kingdom Ministry of Defence, above note 27.

⁷¹ See Andy Nativi Genoa, “Automation Army: UGVs Meet a Growing Range of Battlefield Needs”, *Defense Technology International*, December 2007, pp. 26-28.

⁷² Noel E. Sharkey, above note 61.

⁷³ The term “Meaningful Human Control” has gained prominence in the international talks addressing the quality of required human control over the use of LAWS. See for definition and further references Human Rights Watch and International Human Rights Clinic, “Killer Robots and the Concept of Meaningful Human Control”, *Human Rights Watch*, April 2016, available at: https://www.hrw.org/sites/default/files/supporting_resources/robots_meaningful_human_control_final.pdf.

⁷⁴ See Merel Ekelhof and Giacomo Persi Paoli, *Swarm Robotics - Technical and Operational Overview of the Next Generation of Autonomous Systems*, UNIDIR, 2020, pp. 1-2.

⁷⁵ ICRC, *ICRC Position and Background Paper on Autonomous Weapon Systems*, Geneva, 12 May 2021, p. 6.

⁷⁶ See M. L. Cummings, above note 26, p. 2.

processes of robots are often measured in nano-seconds, and the informational basis of those decisions may not be practically accessible to the supervisor.”⁷⁷ This is well demonstrated by the following example: an operator with undivided attention and full situational awareness “on the loop” of a single drone is confident enough to cast doubt on the accuracy of the robot’s decision-making process. Nonetheless, due to the aforesaid, they will not be able to override the drone’s decision, when the robot and a wounded child soldier confront, and the first decides to shoot, while the latter is to drop the weapon and surrender. Given this, one would be constrained to expand the English language as much as imagination allows, to say that one human, who controls a swarm of UAVs teamed with UGVs,⁷⁸ a fleet of drones or land robots to attack multiple targets,⁷⁹ is still “in the loop”, “on the loop” or clinging to it. The operator is *de facto* out of the loop,⁸⁰ as this is warfare conducted by machines largely unassisted by humans.⁸¹

3. LAWS and the Laws of War: Is using robots in compliance with the principles of IHL?

IHL applies to all weapons, including LAWS. This has been acknowledged as the first of 11 guiding principles affirmed by the 2019 report of the Group of Governmental Experts (GGE) related to emerging technologies in the area of LAWS in the context of the CCW, and adopted by consensus by the parties to Convention.⁸² From an IHL perspective, it is first important to differentiate between a particular type of weapon being lawful, and the lawfulness of the way in which it is being used. It is evident that every weapon can be used in an unlawful manner, nevertheless, inherent attributes of certain weapons cause their use, in some or all circumstances, to be unlawful *per se*.

Generally speaking, weapons are considered inherently unlawful if: they have been specifically prohibited by treaty or customary law;⁸³ they are of a nature to

⁷⁷ Report of the Special Rapporteur, para. 41.

⁷⁸ See United States Air Force, above note 66, p. 2; United States Army, *Eyes of the Army: U. S. Army Roadmap for Unmanned Aircraft Systems 2010-2035*, UAS Centre of Excellence, Fort Rucker, Alabama, 2010, p. 2.

⁷⁹ See Peter W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century*, Penguin Publishing, New York, 2009, p. 126.

⁸⁰ Report of the Special Rapporteur, para. 41.

⁸¹ See Shane Harris, “Autonomous Weapons and International Humanitarian Law or Killer Robots Are Here. Get Used to It.”, *Temple International and Comparative Law Journal*, Vol. 30, 2016, p. 79.

⁸² See Guiding Principles affirmed by the GGE on Emerging Technologies in the Area of Lethal Autonomous Weapons System, *CCW/MSP/2019/9, Annex III*, 13 December 2019.

⁸³ See for e.g., Convention on the Prohibition of Anti-Personnel Mines, 2056 UNTS 211, 3 December 1997 (entered into force 1 March 1999); Protocol on Blinding Laser Weapons (Protocol IV) to the CCW, 1380 UNTS 370, 13 October 1995 (entered into force 30 July 1998); and Convention on the

cause superfluous injury or unnecessary suffering; they are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment;⁸⁴ or they are indiscriminate by nature because they cannot be aimed at a lawful target or their effects cannot be restricted as required by IHL.⁸⁵ Proponents of LAWS, consisting of major military powers, have repeatedly argued that since fully autonomous robots have not yet emerged, their complex nature is hard to determine, thus it is premature to come to any conclusion regarding the legality of the use of LAWS in armed conflicts and their compatibility with principles of IHL. Furthermore, no specific international instrument exists for their prohibition. In this regard, some have suggested that, subject to conducting a legal review of new weapons, it is safe to say that autonomous weapon systems are not “inherently illegal”; instead, their use may range from lawful to unlawful.⁸⁶ Nevertheless, having in mind the characteristics of LAWS, this issue seems to be not so undemanding. For instance, as stated by the ICRC, certain LAWS would be inherently indiscriminate and thus prohibited under IHL, since “their effects, in their normal or expected circumstances of use, could not be sufficiently understood, predicted and explained”.⁸⁷

Another important consideration for any discussion on LAWS is the prohibition on indiscriminate weapons. In order for LAWS to not be considered inherently unlawful, it must be ensured that their operation will not result in unlawful outcomes with respect to the principle of distinction and other IHL principles emanating therefrom. In fact, by using LAWS for the purpose of attack, parties to an armed conflict must still be able to first, distinguish between military objectives and civilians or civilian objects, and in case of doubt, presume civilian status (distinction); second, evaluate whether the incidental harm likely to be inflicted on the civilian population or civilian objects would be excessive in relation to the concrete and direct military advantage anticipated from that particular attack (proportionality and military necessity);⁸⁸ and third, take all feasible precautions to avoid, and in any event minimize, incidental harm to civilians and damage to civilian objects, as well as

Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1974 UNTS 45, 13 September 1992 (entered into force 29 April 1997)

⁸⁴ See 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. 35-36 [hereinafter AP I].

⁸⁵ See ICRC Customary IHL Study, Rules 71, 11, 12; See for a thorough discussion regarding these four categories William H. Boothby, “Regulating New Weapon Technologies”, in William H. Boothby (ed.), *New Technologies and the Law in War and Peace*, Cambridge University Press, Cambridge, 2019, pp. 16-42.

⁸⁶ Zhang Xinli, above note 49.

⁸⁷ See ICRC, above note 75, p. 7.

⁸⁸ ICRC Customary IHL Study, Rules 14

cancel or suspend the attack if it becomes apparent that the target is not a military objective, or that the attack may be expected to result in excessive (disproportionate) incidental harm (precaution).⁸⁹

This section addresses the compatibility of LAWS with the above-mentioned principles of IHL to explore if and under what circumstances they can be used lawfully under the laws of war.

3.1. *Military Necessity*

Military operations under the laws of war derive their legitimacy from the principle of military necessity, the codification of a customary obligation. This customary duty was first enshrined in the Lieber Code,⁹⁰ according to Article 14 of which, “military necessity, as understood by modern civilized nations consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.” The obligation further arises from the St. Petersburg Declaration, which states that “...the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.”⁹¹ It allows for military operations that offer a “definite military advantage”⁹² and prohibits the “infliction of suffering for the sake of suffering.”⁹³ Clearly, the use of any weapon, whether autonomous or otherwise, against an adversary would fulfil the criterion of offering a definite military advantage.⁹⁴ Based on this, some authors have interpreted military necessity not as a distinct rule of IHL, but as “a foundational principle that undergirds” this “entire body of law”. They are thus of the opinion that as long as other principles of IHL, particularly precaution, are applied, LAWS do not pose a challenge to the application of this rule.⁹⁵

It must be borne in mind, however, that military necessity requires more of a qualitative assessment, restricted by other principles of IHL, as IHL requires that a

⁸⁹ ICRC Customary IHL Study, Rules 15, 18, 19

⁹⁰ The United States Department of War, *General Order No. 100: Instructions for the Government of Armies of the United States in the Field*, 24 April 1863 [hereinafter the Lieber Code]

⁹¹ St. Petersburg Declaration Renouncing the Use, In Time of War, of Explosive Projectiles Under 400 Grammes Weight, 138 CTS 297, 11 December 1868 (entered into force 11 December 1868), Preamble.

⁹² AP I, Art. 52(2); Military advantage has been defined as “those benefits of a military nature that result from an attack. They relate to the attack considered as whole and not merely to isolated and or particular parts of the attack.” See Program on Humanitarian Policy and Conflict Research at Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, Cambridge, 2013, p. xxv.

⁹³ The Lieber Code, Art. 16.

⁹⁴ Benjamin N. Kastan, “Autonomous Weapons Systems: A Coming Legal ‘Singularity’?”, *Journal of Law, Technology and Policy*, Vol. 2013, No. 1, 2013, p. 58.

⁹⁵ Michael N. Schmitt, above note 47, p. 22.

balance be struck between military necessity and considerations of humanity. In other words, “an equilibrium between military necessity and humanitarian considerations underlies every norm of the law of international armed conflict, whether customary in nature or drawn up in treaty form”.⁹⁶ It is for this purpose that the law incorporates several other principles to the military necessity equation, such as distinction, proportionality and precaution, to define the boundaries of legal advancement of military objectives during the conduct of hostilities. The determination of whether the use of LAWS would comply with the principle of military necessity and overall, IHL, must therefore be dependent on and be interpreted in light of the application of these other principles and legal constraints. For instance, if LAWS cannot distinguish between military or civilian targets, such as between a military or a civilian medical facility, they cannot determine whether the target’s destruction would be militarily necessary.⁹⁷ The same argument applies to principles of proportionality and precaution, as discussed hereinafter. In sum, military necessity itself requires a cognitive analysis of the situation, or as put by some, “a context-dependent, value-based judgment of a commander”.⁹⁸ These are functions that LAWS are inherently incapable of, and require strict human supervision.

3.2. *Distinction*

The fundamental principle of distinction has been held by the International Court of Justice as a “cardinal” principle of IHL, which together with the prohibition of causing unnecessary suffering, constitutes “the fabric of humanitarian law”.⁹⁹ This principle lies at the heart of IHL and is applicable in every nature of armed conflict.¹⁰⁰ Embodied in Article 48 of Additional Protocol I to the 1949 Geneva Conventions (AP I), the principle of distinction obligates parties to a conflict to always distinguish between the civilian population and combatants and between civilian objects and military objectives and to only direct attacks against the latter.¹⁰¹ The negative wording of Article 50 of AP I defining “civilians” protects them against direct attacks.

⁹⁶ See Yoram Dinstein, “Military Necessity”, *Max Planck Encyclopedia of International Law*, para. 7, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e333?rskey=7OmlD3&result=1&prd=EPIL>.

⁹⁷ Benjamin N. Kastan, above note 94.

⁹⁸ *Ibid.*

⁹⁹ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, para.78.

¹⁰⁰ Cadet Allyson Hauptman, “Autonomous Weapons and the Law of Armed Conflict”, *Military Law Review*, Vol. 218, 2013, p. 174.

¹⁰¹ ICRC Customary IHL Study, Rules 1, 7, 10.

It provides that in case of doubt on status, an individual must be considered civilian unless determined otherwise, and that combatants act with caution in such attacks.¹⁰² Civilian individuals only lose their protection from direct attacks if and “for such time as they take a direct part in hostilities”.¹⁰³

These characterizations by their nature require qualitative or evaluative judgments which are made on the basis of values and interpretation of a particular situation rather than numbers or technical indicators.¹⁰⁴ LAWS having autonomy in their “critical functions” means selecting targets and directing attacks are taken out of the hands of a human operator and encoded into the weapon control system.¹⁰⁵ They may be programmed to generate outputs corresponding to who humans would identify as fellow humans; however, that will be the extent of their existing capability, in the opinion of some prominent roboticists, for at least the next four decades.¹⁰⁶

Secondly, it is not possible to program robots to ascertain the distinguishing features between civilians and *hors de combat* or combatants.¹⁰⁷ This is because the calculation of an individual as a civilian is not based on any fixed criteria. A computer can compute any given procedure that can be written down in a programming language. Instead, the law provides an ambiguous definition of civilians, which is insufficiently determinate to encode in LAWS. It is evident from AP I,¹⁰⁸ which defines a civilian as someone who is not a combatant, and also the Geneva Conventions of 1949¹⁰⁹ which require the use of common sense to identify.¹¹⁰ These criteria are at times extremely hard to judge even for combatants,¹¹¹ particularly in today’s combat situations, which increasingly involve fighting in the midst of urban areas and dynamic and congested places, so that programming them into a machine may not prove to be a possible task.

¹⁰² Cadet Allyson Hauptman, above note 100, p. 175.

¹⁰³ AP I, Art. 51(3); ICRC Customary IHL Study, Rule 6.

¹⁰⁴ See Vincent Boulanin *et al.*, above note 10, p. 5.

¹⁰⁵ See generally for the legal implications of this matter on IHL rules governing the nature and design of LAWS, Tim McFarland, above note 18, pp. 90-99.

¹⁰⁶ Noel E. Sharkey, “The Evitability of Autonomous Robot Warfare”, *International Review of the Red Cross*, Vol. 994, No. 886, 2012, pp. 788-789.

¹⁰⁷ Hin-Yan Liu, “Categorization and Legality of Autonomous and Remote Weapons Systems”, *International Review of the Red Cross*, Vol. 94, No. 886, 2012, p. 642-643.

¹⁰⁸ AP I, Art. 50(1); Art. 43.

¹⁰⁹ See Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135, 12 August 1949 (entered into force 21 October 1950), Art. 4 [hereinafter GC III]

¹¹⁰ Noel E. Sharkey, above note 106, p. 789.

¹¹¹ “It is extremely difficult to correctly identify targets on the battlefield. One study found that up to 70% of all civilian casualties caused by U.S. forces were cases of mistaken identity.” Benjamin N. Kastan, above note 94, p. 60; See also Gregory S. McNeal, “Are Targeted Killings Unlawful?: A Case Study in Empirical Claims Without Empirical Evidence”, in Claire Finkelstein, Jens David Ohlin & Andrew Altman (eds.), *Targeted Killings: Law and Morality in an Asymmetrical World*, Oxford University Press, Oxford, 2012, p. 331.

Thirdly, even if such advanced programming was possible and machines are made to distinguish between these categories of individuals, this determination remains more of a cognitive and highly contextual, conduct-, intent- and causality-related legal assessment, a deduction intrinsically better done by humans than machines,¹¹² or as ICRC puts it, shall be made by humans in the context of a specific attack. In ICRC's view, it is difficult to envisage realistic combat situations where the use of AWS against persons would not pose a significant risk of IHL violations.¹¹³

The same is true with regard to distinction between civilian objects and military objectives. Adherence to the rule requiring attacks to be directed against "objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a military advantage",¹¹⁴ requires an assessment based on knowledge of the context and the ability to adapt to changing circumstances. This is so long as LAWS do not see like humans, nor have any understanding of meaning or context, meaning that they can make mistakes that a human never would.¹¹⁵

This necessitates constant and significant levels of human control over the operations of LAWS, before and after attacks and negates, to a large extent, the compatibility of LAWS with IHL principles, particularly the principle of distinction. In this regard, the potential and actual incidents leading to civilian and/or friendly fire ("fratricide") casualties due to using human-in-the-loop, or human-on-the-loop autonomous systems¹¹⁶ shows, unlike what LAWS proponents argue, that a greater autonomy in weapon systems neither decreases the risk of poor distinction between legal and illegal targets of attacks,¹¹⁷ nor that there is any guarantee that robots would be capable of distinguishing more reliably.¹¹⁸

¹¹² Noel E. Sharkey, above note 61, pp. 86–89.

¹¹³ ICRC, above note 75, p. 9.

¹¹⁴ AP I, Art 52(2), ICRC Customary IHL Study, Rule 8.

¹¹⁵ ICRC, above note 19, p. 3.

¹¹⁶ See generally Paul Scharre, *Army of None - Autonomous Weapons and the Future of War*, New York, W. W. Norton & Company, 2019, pp. 137-160; Paul Scharre, *Autonomous Weapons and Operational Risk*, Center for a New American Security, Washington, D.C., 2016; see also Luke Swartz, *Overwhelmed by Technology: How Did User Interface Failures on Board the USS Vincennes Lead to 290 Dead?*, available at: <http://xenon.stanford.edu/~lswartz/vincennes.pdf>; Neil Tweedie, "US Fighter Shot Down by Patriot Missile", *Telegraph*, 4 April 2003, available at: <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1426631/US-fighter-shot-down-by-Patriot-missile.html>; Wade Boese, "Army Report Details Patriot Record in Iraq War", *Arms Control Association*, 1 November 2003, available at: https://www.armscontrol.org/act/2003_11/Patriotmissile.

¹¹⁷ Hin-Yan Liu, above note 107, p. 641.

¹¹⁸ Human Rights Watch and International Human Rights Clinic, *Fully Autonomous Weapons: Questions and Answers*, 21 October 2013, pp. 3-4.

3.3. Proportionality

The principle of proportionality reflective of customary law¹¹⁹ and enshrined in Article 51(5)(b) and Article 57 of AP I, provides that “incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.”

Where a military operation poses risks to civilians, civilian life and objects, this principle evidently requires logic and reasoning in multiple aspects.¹²⁰ For such an assessment, “excessive incidental loss” and “anticipated military advantage”, which must also be “direct and concrete”, are crucial elements.¹²¹ These determinations require application of evaluative decisions and value judgments, which are context-dependent and time-bound, and would differ in each case,¹²² with the calculation of military advantage dependent on a military commander’s constantly changing plans or development of operations.¹²³ Therefore, there is no set standard that can be effectively incorporated in a machine, and on top of that, it is not humanly possible to predict all scenarios in every situation to pre-program these machines to respond accordingly and proportionately. Even if such is possible, as argued by some authors¹²⁴ and as confirmed by the ICRC, the laws of war require parties to exercise unfettered discretion over the course of conflict. In fact, proportionality assessments which form part of planning assumptions, constantly vary over the course of attack. Hence, the continuing validity of the parties’ assumptions about the context of target and its environment until the execution of the attack, is fundamental to its lawfulness.¹²⁵

¹¹⁹ICRC Customary IHL Study, Rule 14.

¹²⁰Benjamin N. Kastan, above note 94, p. 62.

¹²¹Noel E. Sharkey, above note 106, pp. 789-790.

¹²²Christopher P. Toscano, above note 9, p. 32-33; Michael N. Schmitt and Jeffrey S. Thurnher, “‘Out of the Loop’: Autonomous Weapon Systems and the Law of Armed Conflict”, *Harvard National Security Journal*, Vol. 4, 2013, p. 255-256.

¹²³Marco Sassoli, ‘Can Autonomous Weapon Systems Respect the Principles of Distinction, Proportionality and Precaution?’, in ICRC, *Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects*, Report of Expert Meeting, Geneva, 26-28 March 2014, pp. 41-42.

¹²⁴See Eliav Lieblich and Eyal Benvenisti, “The Obligation to Exercise Discretion in Warfare: Why Autonomous Weapons Systems are Unlawful”, in Nehal Bhuta et al. (eds.), *Autonomous Weapons Systems: Law, Ethics, Policy*, Cambridge University Press, Cambridge, 2006, p. 250, who by applying a global administrative law approach argue that LAWS embody pre-bound discretion of their programmers and deploying commanders, and this makes them unlawful *per se*.

¹²⁵Vincent Boulanin *et. al.*, above note 10, p. 7; Schmitt has argued in favour of LAWS that in theory they could be pre-programmed with military advantage algorithms and a base maximum collateral damage level for a military target, which a human would make the determination that generally comports with the proportionality as well. However, he notes, as ICRC also marked down in its commentary to AP I that proportionality is a “subjective” evaluation allowing for a “fairly broad

These are decisions that a robot is incapable of making on its own. They require more than a balancing of quantitative data, and LAWS cannot be programmed “to duplicate the psychological processes in human judgment that are necessary to assess proportionality”.¹²⁶ This necessitates a human operator’s involvement during the whole course of attack by LAWS, at the very least, as far as proportionality is concerned.¹²⁷

3.4. *Precautionary Measures*

The customary obligation¹²⁸ to take all feasible precautions is enshrined in AP I as requiring “constant care to spare the civilian population, civilians and civilian objects.”¹²⁹ The “constant care” standard has been the point of much debate and is understood as a duty applicable not just at the planning stage of a military operation, rather, it is one that continues throughout its execution as well.¹³⁰ This interpretation is in accordance with the requirements of the provision, as under Article 57 of AP I, the precautionary principle further involves military commanders to verify targets, to carefully choose lawful means and methods of warfare, and to refrain from launching attacks that would be disproportionate.¹³¹ Moreover, it also provides for the cancellation or suspension of attacks, when an objective is identified as civilian or under special protection, or when launching lethal force would be considered disproportionate.¹³²

As with the preceding principles, feasible precautions also require context-specific qualitative judgments and complex evaluative assessments based on the circumstances prevailing at the time of the decision to attack, but also during the attacks, as and when they arise. In fact, “if an autonomous system is to minimize harm, it must also be ‘cognizant’ of possible harmful consequences of its actions, and it must select its actions in light of the ‘knowledge’ even if such terms are only

margin of judgment” and “must above all be a question of common sense and good faith for military commanders”, proportionality has to be adjustable by human operators based on “the military situation at a particular phase in the conflict”. See Michael N. Schmitt, above note 47, pp. 20-21.

¹²⁶ Human Rights Watch, above note 31, p. 33

¹²⁷ John J. Klein, “The Problematic Nexus: Where Unmanned Combat Air Vehicles and the Law of Armed Conflict Meet”, *Chronicles Journal Online*, 2003, p. 6, available at: <http://www.sevenhorizons.org/docs/Kleintheproblematicnexus.pdf>.

¹²⁸ ICRC Customary IHL Study, Rules 15-21.

¹²⁹ AP I, Art. 57(1).

¹³⁰ Michael N. Schmitt, *The Tallinn Manual on the International Law applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013, p. 166, paras. 4-5.

¹³¹ Michael N. Schmitt and Jeffrey S. Thurnher, above note 122, p. 259.

¹³² AP I, Art. 57(2)(b).

metaphorically applied to machines.”¹³³ This criterion cannot be “handed over” to machines and requires LAWS design and use to enable combatants to make these judgments.¹³⁴ It mandates human involvement at every juncture of a military attack; otherwise, a subsequent change in circumstances would make an attack unlawful.

In this regard, one may argue that attacks by many weapons, such as certain types of missiles, may not be suspended once they are launched, and that thus LAWS are no different. It must be borne in mind, however, that what make LAWS different in a way that necessitate the involvement of a person during its operation, are concerns regarding their “reliability”, i.e. a measure of how often they fail, and “predictability”, a measure of how the system will perform in a particular circumstance.¹³⁵ In order to be able to take precaution during an attack, combatants must be capable of limiting the effects of the weapons they use by reasonably foreseeing how it will function in any given circumstance and the effects that will result therefrom. Using LAWS carries a risk that determinations made by a user on the launching of an attack are invalidated by a change of circumstances. Not only can LAWS apply force at a specific time and place unknown to the user after activation, the consequences of them applying force will vary depending on the circumstances in the environment at the time of attack. This risk is increased as the environment in which LAWS operate varies over time. Considerations include rapid changes to the legal characterisation of military objectives, prolonged AWS attacks, expanded areas over which AWS may need to operate, the need for it to conduct a higher number of strikes and the introduction of a more dynamic, congested or complex operating environment.¹³⁶

4. Conclusions and Suggestions

With LAWS posing serious challenges for compliance with fundamental rules of IHL for protection of civilians, action must be taken to prohibit the use of fully autonomous weapons and regulations must be adopted so that humans can exert “meaningful control” and judgment over the use of LAWS. Increased autonomy, whether as a result of the development and use of more advanced and complex weapon systems or the deployment of swarms of remote-controlled robots, exacerbates concerns with respect to these weapons’ compliance with IHL. The

¹³³ See Wendell Wallach and Colin Allen, *Moral Machines - Teaching Robots Right from Wrong*, Oxford University Press, New York, 2009, p. 17.

¹³⁴ See ICRC, “Artificial Intelligence and Machine Learning in Armed Conflict: A Human-Centered Approach”, *International Review of the Red Cross*, Vol. 102, Issue 913, 2020, p. 472.

¹³⁵ These concerns and their legal implications have been extensively addressed by the ICRC, including in ICRC, above note 19, pp. 2-4

¹³⁶ See ICRC, above note 72, p. 9; Vincent Boulanin *et al.*, above note 10, p. 7

question of how to respond to these concerns has steadily climbed the international agenda since the issue was first discussed at the United Nations Human Rights Council in 2013. In this regard, the number of States, international and domestic organisations, policy makers, roboticists, and AI experts discussing LAWS and seeking a ban on their use is growing. Since then, ninety-seven States have publicly elaborated their views on LAWS, the vast majority of which consider human control and decision-making as critical to the acceptability and legality of LAWS. Among these, thirty States have called explicitly for a ban on LAWS,¹³⁷ including China¹³⁸ and Pakistan¹³⁹ in the Asia-Pacific region.

During the same time, the Campaign to Stop Killer Robots, a coalition of 165 non-governmental organisations in sixty-five countries, including Human Rights Watch, has been working to ban fully autonomous weapons and thereby retain a regime of requiring meaningful human control weapons.¹⁴⁰ In addition, since 2018, the UN Secretary-General has repeatedly called upon States to ban LAWS, considering them to be “politically unacceptable and morally repugnant”.¹⁴¹ Even the ICRC, as of May 2021, has endorsed a ban on fully autonomous weapons.¹⁴²

Be that as it may, it was in December 2019 that international talks under the auspices of the CCW lead to the official adoption of a set of eleven Guiding Principles in the area of LAWS. These principles affirm the application of international law, particularly IHL, to LAWS, their development, review and deployment, the need for human control at various stages of their life cycle, the prohibition of anthropomorphizing LAWS, and the fact that the CCW is the appropriate framework to address LAWS.¹⁴³ Nonetheless, while of much value, these principles are merely intended to guide the CCW deliberations and do not seem to be an adequate or appropriate response, on their own, to the multiple concerns raised by increasing autonomy in weapons systems. Moreover, since decisions at the CCW are taken by consensus, a single State can block an agreement sought by the majority. So

¹³⁷ See for States' Position Human Rights Watch, *Stopping Killer Robots - Country Positions on Banning Fully Autonomous Weapons and Retaining Human Control*, August 2020.

¹³⁸ See Government of China, *Working Paper Submitted to the CCW GGE on LAWS*, CCW/GGE.1/2018/WP.7, 11 April 2018.

¹³⁹ See Government of Pakistan, *Statement to the CCW Informal Meeting of Experts on LAWS*, 16 May 2014, available at https://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2014/statements/13May_Pakistan.pdf.

¹⁴⁰ See for a full listing, the Campaign to Stop Killer Robots website: <https://www.stopkillerrobots.org/endorsers>.

¹⁴¹ See UN Secretary-General's Address to the Paris Peace Forum, 11 November 2018, available at <https://www.un.org/sg/en/content/sg/statement/2018-11-11/allocution-du-secrétaire-général-au-forum-de-paris-sur-la-paix>.

¹⁴² See ICRC, above note 75, p. 2.

¹⁴³ See above note 81.

far, several States such as the United States, Russia, Australia, and South Korea have rejected proposals to negotiate a new CCW protocol or standalone international treaty on LAWS, considering them to be “premature”.¹⁴⁴ Given these developments, CCW does not appear to be the appropriate forum to create the necessary legal framework to deal with IHL challenges posed by LAWS.¹⁴⁵ It is for this reason that the call for new legally binding rules that specifically regulate LAWS is gaining prominence.¹⁴⁶ Nonetheless, as acknowledged by the ICRC, the negotiation of new legally binding rules and [other] efforts to develop aspects of an operational and normative framework under consideration in CCW GGE, can be “complementary and mutually reinforcing”.¹⁴⁷

Whatever the form and framework of these new rules may be, it is imperative that IHL be seen by stakeholders as an evolving and dynamic system, the re-interpretation and evolution of the rules of which are shaped by moral considerations, principles of humanity and the dictates of public conscience. In this regard, the very fundamental goal of IHL, namely the protection of the civilians from the effects of war, must at all times be given priority over other considerations, and any interpretation in the field should be made in a way which guarantees fulfilment of this goal.

In sum, and to achieve the compliance with IHL by LAWS, the following prohibitions and regulations constraining their use seem to be necessary:

- LAWS which by their nature select and engage targets without meaningful human control, should be prohibited. These are systems that are designed or used in a manner that makes it difficult to understand, predict and explain their effects and how they will perform in a particular circumstance. They are thus unpredictable, and eventually indiscriminate;
- Due to LAWS being incapable of making qualitative, context-dependent value judgments of situations, as and when they arise, or other IHL requirements that are primarily addressed to humans, use of LAWS to target human beings should be prohibited;

¹⁴⁴ See for further references Human Rights Watch, above note 137, pp. 5, 9, 47, 53.

¹⁴⁵ See for further reasons and references Bonnie Docherty, “The Need for and Elements of a New Treaty on Fully Autonomous Weapons”, in *Rio Seminar on Autuonomous Weapons Systesm*, Fundação Alexandre de Gusmão, Brasília, 2020, pp. 227-228.

¹⁴⁶ See Human Rights Watch, *New Weapons, Proven Precedent - Elements of and Models for a Treaty on Killer Robots*, October 2020.

¹⁴⁷ See ICRC, above note 75, p. 4; see also Michael Biontino, “Challenges Towards a Regulatory Framework”, in *Rio Seminar on Autonomous Weapons System*, Fundação Alexandre de Gusmão, Brasília, 2020, pp. 211-221.

- Meaningful Human Control¹⁴⁸ is required at all times, particularly during the operation of LAWS in the battlefield with the option of deactivation and fail-safe mechanisms. Some believe that this will be achieved by means of controls in weapon system parameters, on the environment, and through human-machine interaction.¹⁴⁹ These controls have also been categorized as “decision-making”, “technological”, and “operational” components of Meaningful Human Control.¹⁵⁰ Regardless of the terminology used, these measures should be used to regulate the design and use of LAWS that are not prohibited, and as the ICRC has precisely indicated, through a combination of legally binding limits on:
 - The types of targets, such as constraining LAWS to objects that are military objectives by nature;
 - The duration, geographical scope and scale of use, including to enable human judgement and control in relation to a specific attack; and
 - Situations of use, such as constraining them to situations where civilians or civilian objects are not present.¹⁵¹

¹⁴⁸ See for reasons why using this term has benefits over other terms used by stakeholders Human Rights Watch, above note 146, pp. 21-23.

¹⁴⁹ Vincent Boulanin, *et al.*, above note 10, pp. 36-37.

¹⁵⁰ See Human Rights Watch, *The Need for and Elements of a New Treaty on Fully Autonomous Weapons*, June 2020, available at: https://www.hrw.org/sites/default/files/media_2020/06/202006arms_rio_autonomous_weapons_systems_2.pdf, p. 7.

¹⁵¹ ICRC, above note 75, p. 10.

The Humanitarian Exemption Challenge: Securing the Philippine Humanitarian Space in the Anti-Terrorism Act of 2020

*Leandro Anton M. Castro**

ABSTRACT

The interaction between counter-terrorism law and international humanitarian law has long been the subject of extensive legal discourse. Concomitant issues include whether international humanitarian law applies in the context of terrorism, the determination of which legal regime applies and how to reconcile them in particular contexts, among others. One of the most contentious topics in the area is the prohibition of the provision of material support to terrorist individuals or organizations and its conflict with rights and obligations provided by international humanitarian law. The most common remedy to such conflict is the integration of humanitarian exemptions in counter-terrorism legislation. The Philippines is no stranger to these issues having included both a prohibition against the provision of material support to terrorists and a humanitarian exemption the Anti-Terrorism Act of 2020, its latest counter-terrorism measure.

This Article analyses the material support provision and the humanitarian exemption in the Anti-Terrorism Act of 2020. More particularly, the Article tackles how the material support provision puts humanitarian organisations at risk of criminal prosecution and the inadequacy of the humanitarian exemption in the law. A problematic aspect of the Philippine exemption is the requirement of state-recognition which appears stricter than the standards provided by international humanitarian law .

The Article also endeavours to confront the challenge of balancing the demands of combatting terrorism and the needs of the humanitarian sector and their beneficiaries. The Article provides a comparative analysis of humanitarian exemptions in various jurisdictions and goes on to recommend the improvement of the Philippine exemption through the adoption of commendable practices by other States and the avoidance of potential pitfalls and threats. Ultimately, the Article aims to contribute to the wide discussion on counter-terrorism and international humanitarian law in hopes of improving the protection of the Philippine humanitarian space as the country simultaneously shores up its legal armaments to combat terrorism.

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Keywords: Humanitarian Exemption, Anti-Terrorism Act of 2020, Counter-terrorism laws, International Humanitarian Law

I. Introduction

On 3 July 2020, President Rodrigo Duterte signed into law Republic Act No. 11479,¹ the Anti-Terrorism Act of 2020 (ATA).² It is the Philippines' latest counter-terrorism law, which took effect on 18 July 2020. According to Duterte, the statute was enacted as an affirmation of the government's commitment to eliminate terrorism³ and is pursuant to the Philippines' commitments to the objectives of the United Nations (UN).⁴ The ATA repealed the earlier Human Security Act of 2007,⁵ which according to proponents was replete with gaps, lapses and inadequacies⁶ in the face of terrorist threats and acts that have become "more serious, violent and undertaken in a complicated and systematic manner."⁷

At present, however, the ATA faces strong opposition. Thirty-seven petitions assailing its constitutionality are before the Philippine Supreme Court.⁸ Aside from the constitutional issues, one aspect of the ATA that concerns petitioners is the impact of the ATA on the humanitarian sector.⁹ Particular provisions of concern include Sections 12 and 13 thereof; Section 12 punishes the provision of material support to terrorist organisations, while Section 13 exempts humanitarian organisations from criminal prosecution under Section 12. These are the provisions of the ATA that this Article aims to engage. It will consider the impact of the ATA on international humanitarian law (IHL) and on the humanitarian sector. It will also

¹ Hereinafter referred to as RA 11479.

² Hereinafter referred to as ATA.

³ Office of the Presidential Spokesperson, *On Republic Act No. 11479*, available at: <https://pcoo.gov.ph/OPS-content/on-republic-act-no-11479/>.

⁴ Darryl John Esguerra, "Duterte defends anti-terrorism law in debut speech before UN General Assembly", *Inquirer.net*, 23 September 2020, available at: <https://newsinfo.inquirer.net/1338790/duterte-defends-anti-terror-law-in-un-general-assembly-debut>.

⁵ Rep. Act No. 9372.

⁶ H. No. 2082, 18th Cong., 1st Sess., Explanatory Note (2019).

⁷ H. No. 551, 18th Cong., 1st Sess., Explanatory Note (2019).

⁸ Rey Panaligan, "37 petitions filed with SC against Anti-Terrorism Act", *Manila Bulletin*, 8 October 2020, available at: <https://mb.com.ph/2020/10/08/37-petitions-filed-with-sc-against-anti-terrorism-act/>.

⁹ See Coordinating Council for Development and Governance, Inc. (CPDG), et al. v. Duterte, et al. Petition for Certiorari and Prohibition under Rule 65 with Prayer for Status Quo Ante Orde or Temporary Restraining Order/Writ of Preliminary Injunction, 2020, para. 151-163.

discuss concepts relating to material support and humanitarian exemptions, the interaction between them and suggestions for the development of an adequate humanitarian exemption.

Part II also provides a substantive discussion on the interaction between the regime of IHL and counter-terrorism, while also looking at the material support provision of the ATA. Part III discusses the State practice of adopting humanitarian exemptions, which are well-integrated in counter-terrorism laws as a protective measure for workers in the humanitarian sector. However, several provisions for humanitarian exemption, including that of the ATA's, suffer from defects which end up endangering humanitarian work rather than protect it. Part III provides a conceptual discussion on humanitarian exemptions, and a discussion on the ATA exemption *vis-à-vis* the relevant provisions of the Geneva Conventions, of customary IHL, and of laws of other jurisdictions. Part IV engages the humanitarian exemption challenge, in particular, that of crafting an adequate humanitarian exemption in domestic counter-terrorism measures. It also provides good practices that may be emulated and discusses gaps to be addressed in the present ATA. Finally, Part V concludes the Article with the following submissions: that material support provision of the ATA and its adjunct exemption are replete with gaps and loopholes; that although it is still subject to extensive debate, humanitarian exemptions are necessary; that from a comparative examination of humanitarian exemptions in other jurisdictions, here are good practices that may be emulated and adopted.

II. International Humanitarian Law and Counter-Terrorism

The interaction and tension between IHL and counter-terrorism laws have long been the subject of extensive discussion. It has in fact been argued that the two are not merely in tension but are actually in conflict with each other, because applying either IHL or counter-terrorism measures to the same set of facts would yield different outcomes.¹⁰ According to Debarre, theoretically, IHL and counter-terrorism are not contradictory legal regimes. Both are geared towards the protection of civilians. Their difference lies in their respective “underlying rationales and assumptions.”¹¹ IHL is the set of rules applied during an armed conflict and its object is to limit the effects of

¹⁰ See David McKeever, “International Humanitarian Law and Counter-Terrorism: Fundamental Values, Conflicting Obligations”, *International and Comparative Law Quarterly*, Vol. 69, 2019, pp. 68-71, available at: <https://doi.org/10.1017/S0020589319000472>.

¹¹ Alice S. Debarre, “Countering Terrorism and Violent Extremism: The Risks of Humanitarian Action”, *International Peace Institute*, 22 May 2019, p. 203, available at: https://www.ipinst.org/wp-content/uploads/2019M/07/Extremism_Risks_-Humanitarian_-Action.pdf.

an armed conflict.¹² On the other hand, counter-terrorism law has been developed to prevent and prohibit terrorist acts, association with and support to terrorist organizations as well as to ensure the prosecution and punishment of those who commit terrorist acts.¹³

The tension between IHL and counter-terrorism can be understood in four aspects: the lack of a globally accepted definition of terrorism; the lack of a definition as to what constitutes a terrorist act; the conflicting duties and prohibitions under IHL and counter-terrorism laws respectively on the treatment of designated terrorists; and the issue of what constitutes support to terrorism.¹⁴ This part of the Article covers the third aspect—particularly the conundrum between punishing material support and allowing humanitarian assistance. A conundrum exists because the concept of punishable material support often overlaps with that of humanitarian activity, which is protected under international law.

A. The Conundrum: Punishing Material Support and Allowing Humanitarian Assistance

Provisions which penalize the provision of material support and related acts such as terrorist financing are common in counter-terrorism statutes. The United States,¹⁵ Australia¹⁶ and New Zealand,¹⁷ among others, have such provisions. In the Philippines, the provision of material support is criminalized under the ATA as follows:

Sec. 12. *Providing Material Support to Terrorists.* – Any person who provides material support to any terrorist individual or terrorist organization, association or group of persons committing any of the acts punishable under Section 4 hereof, knowing that such individual or organization, association, or group of persons is committing or planning to commit such acts, shall be liable as principal to any and all terrorist activities committed by said individuals or organizations,

¹² International Committee of the Red Cross, “What is International Humanitarian Law”, July 2004, available at: https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf.

¹³ Alice S. Debarre, “Safeguarding Medical Care and Humanitarian Action in the UN Counterterrorism Framework”, *International Peace Institute*, September 2018, p. 5, available at: <https://www.ipinst.org/2018/09/safeguarding-humanitarian-action-in-un-counterterrorism-framework>.

¹⁴ *Ibid.*, pp. 5-8.

¹⁵ 18 U.S. Code § 2339A(b)(1).

¹⁶ Aust. Criminal Code Act (1995) 102.2 - 102.8.

¹⁷ Public Act 2002 No. 34, §10.

in addition to other criminal liabilities he/she or they may have incurred in relation thereto.¹⁸

Further, the statute defines material support as:

Sec. 3(e) – *Material Support* shall refer to any property, tangible or intangible, or service, including currency or monetary instruments or financial security, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation¹⁹

As currently drafted, the ATA’s material support provision puts many humanitarian workers in a precarious situation. Humanitarian organizations are easily exposed to criminal liability under the ATA and other counter-terrorism legislation because the nature of their work can easily fall within the concept of material support.²⁰ Section 12 in relation to Section 3(e), by its broad and loose drafting, encroaches upon the humanitarian space because humanitarian acts can easily be construed as material support.

Retired Supreme Court Associate Justice Carpio and his co-petitioners against the ATA argued that Section 12 “enlarges discretion”.²¹ As presently defined under the ATA, the concept of material support encompasses properties, services and personnel, among others. As argued by Justice Carpio, lawful activities such as seminars on peaceful negotiations and the provision of legal assistance may be considered as providing material support.²² Furthermore, the Coordinating Council for People’s Development and Governance (CPDG) and their co-petitioners also argued that Section 12 legitimizes the threat against humanitarian and development workers. Humanitarian programs can be tagged as providing “material support”.²³

¹⁸ Rep. Act No. 11479 (2020), § 12.

¹⁹ Rep. Act No. 11479 (2020), § 3(e).

²⁰ Abdel Jamal Disangcopan, “Re: Humanitarian Work and Sec. 12, 13 and other provisions of the Anti-Terrorism Act of 2020”, 2020, pp. 2-6.

²¹ Antonio T. Carpio, et al. v. Anti-Terrorism Council, et al. Petition for Certiorari and Prohibition under Rule 65 of the Rules of Court with: 1) Urgent Application for Status Quo Ante Order and/or Temporary Restraining Order and/or Writ of Preliminary Injunction and 2) Motion for Special Raffle and Oral Arguments, 2020, paras. 117, available at: <https://law.upd.edu.ph/wp-content/uploads/2020/07/ATB-Petition-for-Certiorari-and-Prohibition.pdf>.

²² *Ibid.*, para. 119.

²³ CPDG v. Duterte, above note 9, paras. 151-163.

From a constitutional standpoint, Section 12 also violates the due process clause,²⁴ as it ambiguously defines the act it proscribes. The provision suffers from vagueness because it fails to set standards by which it would be implemented.²⁵ It sends a chilling effect to humanitarian organisations because humanitarian work can easily fall within the provision. What is necessary is a penal provision that clearly defines the offense, and a humanitarian exemption that is comprehensive and wide so as to allow humanitarian organizations to operate without fear of prosecution.

It is important to consider that IHL uses general terms in providing for “protected acts”. Generally, IHL guarantees humane treatment and care for combatants and non-combatants in an armed conflict. Common Article 3 provides that an impartial humanitarian body may offer its services to Parties to a conflict.²⁶ According to the International Committee of the Red Cross (ICRC), “services” is meant to be broadly construed so as to include all activities that address the needs of all persons affected by an armed conflict.²⁷ An observation similar to the construction of Common Article 3 can be made on Article 17(1) of the First Additional Protocol which uses the word “care” instead of “medical assistance” so as not to be restrictive.²⁸ The provision reads:

The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them. The civilian population and aid societies, such as national Red Cross [...] Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas.

²⁴ See *Carpio v. Anti-Terrorism Council*, above note 21, paras. 117-125.

²⁵ A. Disangcopan, above note 20, p. 4.

²⁶ 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), Art. 3; 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), Art. 3; Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 3; 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 1950), Art. 3; see Debarre, above note 13, p. 6; D. McKeever, above note 10, pp. 49-50.

²⁷ International Committee of the Red Cross, *Commentary on the Third Geneva Convention*, 2020, para. 846.

²⁸ D. McKeever, above note 10, p. 57.

No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts.²⁹

Per the commentaries of the ICRC, humanitarian activities “are all activities that ‘prevent and alleviate human suffering wherever it may be found’, and the purpose of which is to ‘protect life and health and to ensure respect for the human being.’”³⁰ In an armed conflict, “humanitarian activities are those that seek to preserve the life, security, dignity and physical and mental well-being of persons affected by the conflict, or that seek to restore that well-being if it has been infringed upon.”³¹ Humanitarian activities can be further classified as humanitarian protection activities or humanitarian relief or assistance. Humanitarian protection activities in the context of IHL “refer to all activities that seek to ensure that the authorities and other relevant actors fulfill their obligations to uphold the rights of individuals. Protection activities include those that seek to put an end to or prevent the (re)occurrence of violations of humanitarian law (for example by making representations to the authorities or by making the law better known), and those which seek to ensure that the authorities cease or put a stop to any violations of the norms applicable to them.”³² Humanitarian relief or assistance “refers to all activities, services and the delivery of goods carried out primarily in the fields of health, water, habitat (the creation of a sustainable living environment) and economic security (defined by the ICRC as ‘the condition of an individual, household or community that is able to cover its essential needs and unavoidable expenditures in a sustainable manner, according to its cultural standards’), which seek to ensure that persons caught up in an armed conflict can survive and live in dignity.”³³ Humanitarian relief encompasses both medical and non-medical assistance. Non-medical forms include visits and material assistance to detainees and IHL dissemination, among others.³⁴

The discussion above shows the wide range of humanitarian activities protected under IHL: from protection activities to relief and assistance activities. These activities are performed not only by the ICRC, but also by other humanitarian organizations.

²⁹ 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. 17(1).

³⁰ International Committee of the Red Cross, *Commentary on the Third Geneva Convention*, above note 27, para. 848.

³¹ *Ibid*, para. 849.

³² *Ibid*, para. 853.

³³ *Ibid*, para. 859.

³⁴ D. McKeever, above note 10, p. 56.

There is tension between the IHL and material support provisions in counter-terrorism laws because provisions which prohibit support, services, assistance to and even association with designated terrorists are often worded without qualification and drafted with overbreadth such that they threaten the activities of humanitarian organizations.³⁵ The application of overbroad provisions which prohibit support is aggravated by the fact that the humanitarian activities that IHL protects are by themselves difficult to encapsulate, as demonstrated through the ICRC commentaries above. Prohibited support may include forms of IHL-protected acts. There is a threat against impartial humanitarian organisations to either completely cease operations, risk criminal prosecution³⁶ or to simply perform their work inconsistently with the humanitarian principles of impartiality and neutrality. As explained by Debarre:

[...] IHL also protects (inter alia) all those in armed conflict who are wounded or sick, whether combatants or civilians. Designating persons as “terrorist” does not weaken this protection. However, under some counterterrorism laws, medically treating a designated terrorist may be criminally prohibited as a form of support to terrorism. Such approaches go against both the principle of impartiality in humanitarian action, which requires assistance to be given solely on the basis of need, and the entitlement of all wounded and sick, including fighters, to medical care, which are among the foundational safeguards laid down in IHL. Indeed, the growing trend to treat all individuals and groups designated as “terrorist” as criminals, without regard for internationally accepted legal protections and the code of medical ethics, threatens to erode fundamental normative commitments in IHL.³⁷

The UN has noted that material support provisions have restricted humanitarian workers’ access to conflict areas. Humanitarian organizations have faced incidents of harassment, arrest, and prosecution under material support prohibitions. Furthermore, these incidents occur not only against humanitarian workers but also towards civil society actors. What enables these incidents are not only “overly broad” definitions of terrorism under counter-terrorism legislation³⁸, but

³⁵ A. Debarre, above note 13, pp. 7-8.

³⁶ A. Debarre, above note 13, p. 5.

³⁷ A. Debarre, above note 13, pp. 7-8.

³⁸ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the role of measures to address terrorism and violent

also poorly and loosely drafted provisions which penalize related acts that come under the notion of “material support”.

It is also worth noting that similar to IHL, “humanitarian assistance” is defined broadly under Philippine law. The Special Protection of Children in Situations of Armed Conflict Act defines humanitarian assistance as:

any aid that seeks to save lives and alleviate suffering of a crisis-affected population. Humanitarian assistance must be provided in accordance with the basic humanitarian principles of humanity, impartiality, independence and neutrality. Assistance may be divided into three (3) categories: direct assistance, indirect assistance, and infrastructure support, which have diminishing degrees of contact with the affected population.³⁹

This broad definition of humanitarian assistance favours humanitarian workers as it provides their work a larger blanket of protection. Similar to the ICRC commentaries on the Geneva Conventions, the use of the phrase “any aid” arguably manifests the legislative intent to not confine humanitarian assistance to mere food or medical aid.⁴⁰ This is to enlarge the scope of protection and to avoid restriction of what may fall under humanitarian acts. The only caveat to the definition above is that it may be construed to only cover humanitarian relief activities and not humanitarian protection activities.

Lastly, it is significant to note that the definition of material support in the ATA is a verbatim lifting from the US definition,⁴¹ the only difference being that the latter expressly exempted “medicine and religious materials”. Decisions of United States courts on material support must be taken to account in light of the verbatim reproduction and because United States cases are often cited in Philippine jurisdiction especially in instances where there is no jurisprudential precedent.⁴²

The landmark decision in the United States is *Holder v. Humanitarian Law Project*⁴³ where the Court held that activities such as IHL trainings and legal services,

extremism on closing civic space and violating the rights of civil society actors and human rights defender, U.N. Doc., A/HRC/40/52, 18 February 2019, para. 34.

³⁹ Rep. Act No. 11188 (2019), § 5.

⁴⁰ A. Disangcopan, above note 20, p. 5.

⁴¹ 18 U.S. Code § 2339A(b)(1).

⁴² Dante Gatmaytan, *Legal Method Essentials 2.0*, University of the Philippines College of Law, 2014, p.184, citing *Southern Cross Cement Corporation v. Cement Manufacturers Association of the Philippines*, G.R. No. 158540, August 3, 2005.

⁴³ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

when provided with knowledge that the recipient are designated terrorists, fall within the material support provision. The Court held that the law prohibits “knowingly” providing material support. To violate the provision, what is merely required is knowledge that the receiving organization is either a designated terrorist organization, or is an organization engaged or is engaging in terrorist activity, or that the organization has engaged or engages in terrorism. Intent is immaterial. One may be held liable so long as he had knowledge that the receiving party has or is engaged in terrorism.

III. Securing the Humanitarian Space

Part II of the Article demonstrated the tension between counter-terrorism legislation and IHL particularly in the aspect of prohibiting the provision of material support and allowing humanitarian activities. In Part III, the Article discusses the common route taken by States in addressing the tension: the integration of humanitarian exemptions in their counter-terrorism statutes. This Part takes off with a discussion of the concept of a humanitarian exemption, the common arguments concerning it and ends with a discussion on the humanitarian exemption in the Philippines found in Section 13 of the ATA.

A. Humanitarian Exemptions: Concept and Common Arguments

Humanitarian exemptions are measures that secure the humanitarian space within counter-terrorism frameworks. They exempt humanitarian activities of impartial humanitarian organizations from counter-terrorism measures.⁴⁴ Humanitarian exemptions may be in favour of individuals or of a sector.⁴⁵ Exemptions granted to individuals are those extended to designated terrorist individuals. Exemptions of this nature allow designated individuals to receive humanitarian assistance based on specific needs and on a case-by-case basis.⁴⁶ Sectoral humanitarian exemptions are for humanitarian organisations and workers. These exemptions allow them to provide principled aid without the risk of violating counter-terrorism laws or UN

⁴⁴ International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2019, p. 60 available at: <https://www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts>.

⁴⁵ Katie King, Naz K. Modirzadeh, and Dustin A. Lewis, “Understanding Humanitarian Exemptions: U.N. Security Council Sanctions and Principled Humanitarian Action – Working Brief Memorandum”, *Harvard Law School Program on International Law and Armed Conflict Counterterrorism and Humanitarian Engagement Project*, April 2016, pp. 7-8, available at: https://dash.harvard.edu/bitstream/handle/1/29998395/Understanding_Humanitarian_Exemptions_April_2016.pdf?sequence=1.

⁴⁶ *Ibid.*

sanctions.⁴⁷ Sectoral exemptions can be decision-specific exemptions⁴⁸ or standing ones. Decision-specific sectoral exemptions are those which require prior authorization before a humanitarian organization can operate. They are likened to licensing which readily implies government regulation. Exemptions of this nature are in effect partial sectoral exemptions.⁴⁹ Decision-specific exemptions are common in UN Sanction Regimes such as those decreed for Somalia, Eritrea and Libya.⁵⁰

In contrast, prior authorization is not necessary for a standing humanitarian exemption.⁵¹ An exemption of this kind affords humanitarian organisations efficiency.⁵² As to why standing sectoral exemptions are preferred, Gillard’s comparison is insightful:

First, they make it clear from the outset that humanitarian activities do not fall within the scope of the sanctions, and that operations can be conducted wherever there are needs, in accordance with the humanitarian principle of impartiality. Second, obtaining licences is time-consuming and expensive – even licensing authorities recognize this. Third, separate licences are necessary from every state that has a connection with a relief operation, including the state of nationality of the humanitarian organization and those through which the relief goods must transit and where the operations will be conducted. Fourth, and paradoxically, as far as the banking sector is concerned, licences have proved counterproductive.⁵³

However, Gillard also adds that “omnibus” or “self-standing” exemptions, while theoretically ideal, may be difficult to attain in the level of the UN Security Council (UNSC) because the Council still prefers addressing situations on a case-to-case basis.⁵⁴ Gillard’s analysis is applicable in the Philippine context. Considering the current socio-political climate in the Philippines, it seems that the Government is bent to implement the ATA with little regard for groups such as the humanitarian sector.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, pp. 10-11.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, citing UNSC Res. 2009, 16 September 2009 and UNSC Resolution 1916, 19 March 2010.

⁵¹ *Ibid.*

⁵² *Ibid.*, p. 8.

⁵³ Emanuela-Chiara Gillard, “Recommendations for Reducing Tensions in the Interplay Between Sanctions, Counterterrorism Measures and Humanitarian Action”, *Chatham House*, August 2017, pp. 5-6, available at: https://www.chathamhouse.org/sites/default/files/publications/research/CHHJ5596_NSAG_iv_research_paper_1708_WEB.pdf.

⁵⁴ *Ibid.*, pp. 9-10.

It is with this context that Congress may not be ready to integrate an omnibus exemption. However, as Gillard also wrote, “confidence in exemptions for humanitarian action needs to be built gradually.”⁵⁵ The humanitarian sector must continue to engage and lobby government for a more comprehensive exemption. Ultimately, a standing humanitarian exemption allows for the efficient provision of humanitarian aid as organizations are spared from additional administrative requirements.

Are Humanitarian Exemptions Necessary?

There are opposing views as to whether humanitarian exemptions are necessary.

Those who advocate for express humanitarian exemptions argue that they are necessary for legal clarity.⁵⁶ The Norwegian Refugee Council considers humanitarian exemptions as “one of the most efficient methods” of protecting the humanitarian sector from counter-terrorism laws.⁵⁷ On the other hand, those who object to having humanitarian exemptions argue that first, humanitarian exemptions will hamper humanitarian assistance. Some argue that humanitarian exemptions will ultimately limit humanitarian work “either by prohibiting particular activities or by implying that exemptions are always necessary.”⁵⁸ There is the fear that humanitarian exemptions may be used to proscribe activities or limit humanitarian assistance to certain activities. There is also the fear that all humanitarian work may end up depending on the existence of a humanitarian exemption. If there is no express exemption, then there is no humanitarian work. Furthermore, there is also the apprehension that States would require prior recognition through humanitarian exemptions which may restrict the aid and affect the principled work of humanitarian organizations.⁵⁹

The second argument against humanitarian exemptions is State security. It is argued that exemptions may become loopholes in counter-terrorism laws.⁶⁰ Among the fears is that terrorist organisations may exploit exemptions by posing as humanitarian organizations to be able to assist terrorist groups. In the case of the

⁵⁵ E. Gillard, above note 53, p. 10.

⁵⁶ K. King, N. Modirzadeh, and D. Lewis, above note 45, p. 8.

⁵⁷ Norwegian Refugee Council, *Principles Under Pressure: Impact of Counterterrorism Measures and Preventing/Countering Extremism on Principled Humanitarian Action*, 2018, p. 29, available at: https://www.nrc.no/globalassets/pdf/reports/principles-under-pressure/1nrc-principles_under_pressure-report-screen.pdf.

⁵⁸ *Ibid.*

⁵⁹ K. King, N. Modirzadeh, and D. Lewis, above note 45, p. 9.

⁶⁰ *Ibid.*

Somalia Exemptions, the UN Monitoring Group observed several instances of aid diversion in favour of terrorist militia and businessmen, but ultimately, these instances turned out to be mere allegations with little evidentiary support.⁶¹

Amidst these debates, it is significant to note that the UNSC has manifested the importance of making domestic counter-terrorism legislation sensitive to a State's international law obligations, particularly those under IHL, International Human Rights Law and International Refugee law, among others. In Resolution 2462, the UNSC made the following pronouncements:

5. *Decides* that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense the willful provision or collection of funds, financial assets or economic resources or financial or other related services, directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used for the benefit of terrorist organizations or individual terrorists for any purpose, including but not limited to recruitment, training, or travel, even in the absence of a link to a specific terrorist act;⁶²

6. *Demands* that Member States ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism as provided for in this resolution, comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law;⁶³

24. *Urges* States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including

⁶¹ National Model United Nations – New York, “Humanitarian Exemptions in Sanction Regimes”, *Montana Model United Nations*, p. 19, available at: http://hs.umt.edu/mun/documents/topic-Guides/NY2018_BGG_SC-Sec2-Sanction_Reg_Exc.pdf.

⁶² UNSC Res. 2462, 28 March 2019, para. 5.

⁶³ *Ibid.*, para. 6.

medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law.⁶⁴

In relation to the foregoing, it is submitted that humanitarian exemptions are necessary because they provide legal clarity.⁶⁵ Poorly drafted counter-terrorism legislation blurs the line between what one can and cannot do. The common argument against the ATA is that it creates a chilling effect.⁶⁶ This chilling effect would extend to humanitarian workers because the nature of their work inevitably exposes them to potential liabilities under the material support provision.⁶⁷ Humanitarian exemptions, especially if drafted adequately, protect and secure humanitarian workers. Furthermore, humanitarian exemptions clear the first hurdle of resolving whether humanitarian assistance is criminal or not under counter-terrorism laws. The only issue left is the determination of whether a particular act is humanitarian in nature and falls within the exemption.

As to the fear of humanitarian exemption provisions becoming loopholes, it is submitted that it must not be the sole reason for rejecting exemptions. Leaving the subject of humanitarian assistance in legal grey area will be prejudicial to communities and conflict areas where aid spells the difference between life and death.⁶⁸ The fear of humanitarian exemption being exploited by terrorist organisations is one clearly outweighed by the obligations of States to allow the conduct of humanitarian activities. Governments must balance the provision of humanitarian aid while ensuring that exemptions are not exploited.

B. Humanitarian Exemption in the Anti-Terrorism Act

Section 13, which contains the humanitarian exemption in the ATA, reads:

Humanitarian activities undertaken by the International Committee of the Red Cross (ICRC), the Philippine Red Cross (PRC), and other state-recognized impartial humanitarian partners or organizations in

⁶⁴ *Ibid.*, para. 24.

⁶⁵ K. King, N. Modirzadeh, and D. Lewis, above note 45, p. 8.

⁶⁶ See *Kabataang Tagapagtanggol ng Karapatan, et. al. v. Executive Secretary, Petition for Certiorari and Prohibition with Prayer for Issuance of a Temporary Restraining Order and Writ of Preliminary Injunction*, 2020; *Doyo, et al v. Medialdea, Petition for Writs of Certiorari and Prohibition under Article VIII, Sec. 1 of the 1987 Constitution with Application for Temporary Restraining Order and Preliminary Injunction*, 2020; *Carpio v. Anti-Terrorism Council*, above note 21.

⁶⁷ A. Disangcopan, above note 20, pp. 2-6.

⁶⁸ *Ibid.*

conformity with International Humanitarian Law, do not fall within the scope of Section 12 of this Act.⁶⁹

Section 13 of ATA is a partial sectoral humanitarian exemption. It is a sectoral humanitarian exemption because it generally exempts the ICRC and PRC from Section 12. It is also a decision-specific or partial exemption because aside from the standing exemption in favour of the ICRC and PRC, the statute requires State recognition for other organisations. It is submitted that Section 13 of the ATA is an inadequate exemption that puts the Philippines in a position to potentially violate its IHL obligations. The Philippines is a State Party to the Geneva Conventions and its Additional Protocols.⁷⁰ Common Article 3 of the Geneva Conventions guarantees the right of impartial humanitarian bodies to offer services to parties in an armed conflict.⁷¹ As discussed in Part II.A, what is contemplated by Common Article 3 is the provision and protection of a wide range of humanitarian activities in the form of humanitarian protection activities, and humanitarian relief activities.⁷² Common Article 9 of the Geneva Conventions (Article 10 of the Fourth Geneva Convention) also provide that the Conventions shall “constitute no obstacle” to the activities of the ICRC and of impartial humanitarian organizations.⁷³ Article 17, Part I of Additional Protocol I states the humanitarian imperative: the principle that all citizens of all countries have the right to receive and offer humanitarian assistance.⁷⁴

Laws have also been enacted in support of the Philippines’ IHL obligations. The PRC Charter provides that the State shall at all times act in conformity with the Geneva Conventions and the Additional Protocols, and the Statutes of the International Red Cross and Red Crescent Movement.⁷⁵ Furthermore, the PRC charter adopted the humanitarian principles of humanity, neutrality, impartiality and

⁶⁹ Rep. Act No. 11479 (2020), § 13.

⁷⁰ International Committee of the Red Cross, *Treaties, State Parties and Commentaries: Philippines*, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=PH.

⁷¹ Common Art. 3 to the GC, above note 26.

⁷² See International Committee of the Red Cross, *Commentary on the Third Geneva Convention*, above note 27, paras. 844-850

⁷³ Geneva Convention (I), above note 26, Art. 9; Geneva Convention (II), above note 26, Art. 9; Geneva Convention (III), above note 26, Art. 9; Geneva Convention (IV), above note 26, Art. 10.

⁷⁴ Protocol Additional (I) to the Geneva Conventions, above note 29, Art. 17(1); International Committee of the Red Cross, “Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief”, available at: <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-1067.pdf>.

⁷⁵ Rep. Act No. 10072 (2010), § 2.

independence, as well as voluntary service, unity and universality.⁷⁶ The definition of humanitarian assistance in the Special Protection of Children in Situations of Armed Conflict Act likewise includes the humanitarian principles.⁷⁷ The Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity also provides that the Philippines adopts as part of its legal system “the generally accepted principles of international law, including the Hague Conventions of 1907, the Geneva Conventions on the protection of victims of war and international humanitarian law, as part of the law of our nation.”⁷⁸ Customary IHL also guarantees the unimpeded passage of humanitarian relief.⁷⁹ Parties to a conflict “must refrain from deliberately impeding the delivery of relief supplies,”⁸⁰ otherwise they would violate international law.⁸¹

Based on the foregoing, it can be concluded that the Philippines is obliged to ensure that humanitarian aid reaches those in need without unnecessary impediment. In an attempt to uphold its obligations and guarantee humanitarian assistance yet ensure security from terror threats, the Philippine Congress included Section 13 in the ATA. However, Section 13 is an inadequate exemption. It “creates a false sense of protection,” and is in conflict with Philippine laws and the country’s international obligations.⁸² Instead of securing the humanitarian space, Section 13 poses a potential hurdle for humanitarian organizations with the prior State recognition requirement for humanitarian organizations other than the ICRC and the PRC. Prior State recognition is arguably a more stringent standard than what IHL provides. Common Article 3 merely requires that the organisation providing support is both impartial and humanitarian in nature. Common Article 3 does not expressly require prior State recognition.⁸³ The same can be observed in Common Article 9 (Article 10 of the

⁷⁶ Rep. Act No. 10072 (2010), § 2.

⁷⁷ Rep. Act No. 11188 (2019), § 5(u) Humanitarian assistance refers to any aid that seeks to save lives and alleviate suffering of a crisis-affected population. Humanitarian assistance must be provided in accordance with the basic humanitarian principles of humanity, impartiality, independence and neutrality. Assistance may be divided into three (3) categories: direct assistance, indirect assistance, and infrastructure support, which have diminishing degrees of contact with the affected population.

⁷⁸ Rep. Act No. 9851 (2009), § 2(d).

⁷⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol.1: Rules* 193-200 (2005), Rule 55, available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, citing Protocol Additional (I) to the Geneva Conventions, above note 29, Art. 70(1) and Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 18(2).

⁸² A. Disangcopan, above note 20, p. 6.

⁸³ Common Art. 3 to the GC, above note 26.

Fourth Geneva Convention) of the Geneva Conventions, which grants impartial humanitarian organisations the right to offer humanitarian activities to parties to an international armed conflict. It reads:

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.⁸⁴

For non-international armed conflicts, a similar right is granted by Article 18 of the Second Additional Protocol. The provision reads:

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.
2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.⁸⁵

Substantively, the only standards required to be met in order to fall within the protection of IHL is that the acts to be performed are humanitarian and impartial in nature. For international armed conflicts, consent of the Parties to the conflict concerned is necessary. For non-international armed conflicts, consent is necessary “if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.”⁸⁶

⁸⁴ Common Art. 9 to the GC, above note 26.

⁸⁵ Protocol Additional (II) to the Geneva Conventions, above note 81, Art. 18.

⁸⁶ Protocol Additional (II) to the Geneva Conventions, above note 81, Art. 18(2).

As to the standards of being humanitarian and impartial, activities are said to be humanitarian when the object of the activities is to “prevent and alleviate human suffering wherever it may be found,”⁸⁷ and the purpose of which is to “protect life and health and to ensure respect for the human being.”⁸⁸ Impartiality refers to the requirement that assistance be provided without “any ‘discrimination as to nationality, race, religious beliefs, class or political opinions’ or, for that matter, any other similar criteria.”⁸⁹

However, the prior State recognition requirement in the ATA may alternatively be justified as an exercise of the State’s consent in accepting humanitarian assistance which IHL allows. The ICRC has explained that humanitarian aid may be declined if it is unnecessary, not humanitarian in nature or is offered by an impartial body.⁹⁰ Likewise, IHL still recognizes the Parties’ entitlement to verify the nature of aid and to even limit or restrict activities when necessary.⁹¹ As stated by the ICRC:

Under IHL, the obligation to allow and facilitate relief schemes is without prejudice to the entitlement of the relevant actors to control them through measures such as: verifying the humanitarian and impartial nature of the assistance provided, prescribing technical arrangements for its delivery or, as mentioned above, limiting/restricting activities of relief personnel in case of imperative military necessity.⁹²

It may be argued then that the State recognition requirement in Section 13 is only an exercise of the State’s consent, and it is in the State’s best interest to verify the humanitarian and impartial nature of offered assistance in the name of national security. However, this justification may be rebutted in two fronts: first, that IHL allows the provision of humanitarian service on the own initiative of the civilian population organisations; and second, that States may not arbitrarily withhold consent. On the first point, with no mention of State consent, IHL allows the civilian

⁸⁷ International Committee of the Red Cross, *Commentary on the Third Geneva Convention*, above note 27, para. 1321.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, para. 1343.

⁹⁰ D. McKeever, above note 10, p. 56 citing International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, 32IC/15/11, 2015.

⁹¹ International Committee of the Red Cross, “International Humanitarian law and the Challenges of Contemporary Armed Conflict in 2015”, 2015, para. 149, available at: <https://casebook.icrc.org/case-study/icrc-international-humanitarian-law-and-challenges-contemporary-armed-conflicts-2015>.

⁹² *Ibid.*

population, in both international and non-international armed conflicts to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas.⁹³ The necessary implication is that even without the consent of States, civilians, in their individual capacity, may provide humanitarian aid to those in need, and that such is a right granted under IHL. Furthermore, in some instances, the act of individuals providing humanitarian aid warrant the protection of the parties to the conflict.⁹⁴ Secondly, and in relation to Section 13, IHL prohibits States from arbitrarily withholding consent to the provision of humanitarian aid⁹⁵ and unfortunately, Section 13 of the ATA provides a leeway for such. Under IHL, consent to receive humanitarian assistance becomes imperative when the Parties concerned cannot satisfy the humanitarian needs on the ground. To do otherwise would be tantamount to an arbitrary withholding of consent. This is why IHL requires that Parties assess in good faith, with consideration of their international law obligations and with the necessity for assistance, offers of humanitarian assistance.⁹⁶

What is “arbitrary” in international law is not only confined to “unrestrained decisions made purely by discretion or on a whim.”⁹⁷ Whether the withholding of consent is arbitrary or not may be determined by resolving three tests: first, whether or not the act of withholding consent violates the State’s obligations under international law; second, whether there is failure to comply with the principles of necessity and proportionality; or third, whether the conduct is unreasonable in all circumstances such that it is not in accordance with the principles of IHL or of International Human Rights Law, or that the act would lead to injustice or lack of predictability.⁹⁸ Section 13 of the ATA fails to hurdle the third issue.

Under the third test, denial of humanitarian assistance is considered arbitrary when to do so would cause “inappropriateness, injustice and lack of predictability.”⁹⁹ Withholding of consent to humanitarian assistance without stating the reasons for such or when the basis of the withholding is erroneous is arbitrary.¹⁰⁰ The requirement to provide the reason for withholding consent is a procedural obligation

⁹³ See Protocol Additional (I) to the Geneva Conventions, above note 29, Art. 17; Protocol Additional (II) to the Geneva Conventions, above note 81, Art. 18.

⁹⁴ See Protocol Additional (I) to the Geneva Conventions, above note 29, Art. 17(2).

⁹⁵ See International Committee of the Red Cross, *Commentary on the Third Geneva Convention*, above note 27, para. 1304.

⁹⁶ *Ibid.*

⁹⁷ Dapo Akande and Emanuela-Chira Gillard, “Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict”, *International Law Studies*, Vol. 92, 2016, p. 493, available at: <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1696&context=ils>.

⁹⁸ *Ibid.*, p. 494

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, p. 501.

that must be performed.¹⁰¹ A blanket withholding of consent is also considered arbitrary as it would lead to a lack of predictability. Furthermore, the withholding of consent to humanitarian assistance when the conditions for acceptance have been met is also considered arbitrary.¹⁰²

Section 13 fails to hurdle the third test because the provision could be a precursor to acts that would lead to injustice or lack of predictability. Neither the statute nor its implementing rules provide for the nature or actual process of State recognition. The effect is that humanitarian organisations may be refused recognition based on capriciousness, or that because the intended beneficiaries would be groups identified or designated as terrorists by the State. The problematic wording and the lack of safeguards of the humanitarian exemption exposes it to multiple possibilities and permits the exercise of Government's unchecked and unbridled discretion. The possibilities are limitless and there is no predictability as to how the State would act in relation to humanitarian organisations.

These imperfections set dangerous implications. First, perception of humanitarian organizations as neutral and independent parties may be compromised if prior State recognition is required. State-recognized organizations may be seen as government partners rather than as impartial entities.¹⁰³ According to Debarre:

aligning with in-state or donor counterterrorism frameworks may require organizations to operate in ways that are at variance with the humanitarian principles of impartiality and neutrality and may also have an impact on the perception of a humanitarian organization's neutrality.¹⁰⁴

Second, State recognition entails additional administrative and bureaucratic hurdles which may result in inefficiencies¹⁰⁵ as well as redirection of supplies and services.¹⁰⁶ The ICRC, commenting on Common Article 9, also stated that "an offer of services and its implementation may not be prohibited or criminalized by virtue of

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Sara Pantuliano, et al., "Counter-terrorism and humanitarian action: Tensions, impact and ways forward", *Humanitarian Policy Group Policy Brief*, No. 43, October 2011, p. 8, citing *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 93 (7th Cir. 2008), available at: <https://cdn.odi.org/media/documents/7347.pdf>.

¹⁰⁴ A. Debarre, above note 13, p. 5.

¹⁰⁵ *Ibid.*

¹⁰⁶ Reinna Bermudez, "The humanitarian imperative and the threat of the Anti-Terror Bill", *Rappler*, 14 June 2020, available at: <https://rappler.com/voices/ispeak/opinion-humanitarian-imperative-threat-anti-terror-bill>.

legislative or other regulatory acts.”¹⁰⁷ Arguably, Section 13 permits these evils which IHL aims to prevent.

According to Bermudez, Section 13 “gives broad powers to the implementers of the law to determine which groups can provide aid without incurring penal liability, and which ones will be under potential pain of penalty under Section 12 [...]”¹⁰⁸ She further writes that Section 13 may create a chilling effect that could impair the conduct of humanitarian work.¹⁰⁹ Compliance with recognition requirements “could be as mundane as filing paperwork to actually choosing which side to provide aid to.”¹¹⁰ Ultimately, this will be prejudicial to vulnerable communities where humanitarian assistance is needed. Lastly, as stated by the CPDG:

These provisions of the law [Section 12 and 13] constitute a direct intervention and intrusion into internationally accepted development and humanitarian law that is being upheld and protected under IHL. The law will jeopardize impartial humanitarian assistance to communities by placing state recognition and state arbitration as the basis for the provision of humanitarian services.¹¹¹

C. A Sober Perspective: Situating the Philippine Exemption Among Various Jurisdictions

While the previous section has demonstrated the weaknesses and inadequacies of the humanitarian exemption in the ATA, this section aims to situate the Philippine exemption as among other examples from foreign jurisdictions, through a comparative analysis that will provide a more balanced perspective in identifying the strengths, loopholes and opportunities to develop the Philippine exemption. Off the bat, it is submitted that the Philippines is better situated in terms of legislating humanitarian exemptions than other States. Although certain aspects of the ATA in relation to IHL remain to be strengthened, the Philippines fares better than States like Nigeria, Iraq and Syria, which have no humanitarian or medical exemptions in their

¹⁰⁷ International Committee of the Red Cross, *Commentary on the Third Geneva Convention*, above note 27, para. 1317.

¹⁰⁸ R. Bermudez, above note 106.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ CPDG v. Duterte, above note 9, para. 162-163.

counter-terrorism statutes.¹¹² As will further be shown, the Philippine exemption likewise appears to have a wider scope than those provided in countries which have their own exemptions such as the United States, Australia, United Kingdom and the Netherlands.

Humanitarian exemptions in the United States stems from its material support law¹¹³ and the International Emergency Economic Powers Act (IEEPA).¹¹⁴ In this jurisdiction, the provision of, the attempt or the conspiracy to provide material support or resources to a foreign terrorist organization, is prohibited and punishable if committed with knowledge that the receiving party is a designated terrorist organization or one that has engaged or is engaging in terrorism.¹¹⁵ The law exempts medicine and religious materials. The definition of material support reads:

the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, *except medicine or religious materials*,¹¹⁶

As previously discussed in Part II.A, the material support provision in the ATA is a verbatim lifting from the US statute quoted above, sans the humanitarian exemption in the latter which only exempts medicine or religious materials. Thus, insofar as the exemption from the offense of providing material support is concerned, the Philippine exemption has a wider scope than that of the United States as the latter covers only medicine and religious materials unlike the former which makes no classification. The coverage of the exemption was an issue in *United States v. Farhane*¹¹⁷ which affirmed *United States v. Shah*.¹¹⁸ In *Farhane*, the United States Court of Appeals held that only substances which qualify as medicines fall within the exemption. Other activities such as volunteering to be a doctor for a terrorist organization is prohibited. Fortunately, the Philippine exemption suffers from no

¹¹² See A. Debarre, above note 13.

¹¹³ 18 U.S. Code § 2339A(b)(1).

¹¹⁴ U.S. 50 U.S.C. 1701 (1977).

¹¹⁵ 18 U.S. Code § 2339B(A)(1).

¹¹⁶ 18 U.S. Code § 2339A(b)(1), (Emphasis supplied.).

¹¹⁷ *United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011).

¹¹⁸ *United States v. Shah*, 474 F. Supp 2d 492 (S.D.N.Y. 2007).

stringent qualification that limits the exemption to medicinal supplies and religious materials.

Under the International Emergency Economic Powers Act or the IEEPA,¹¹⁹ the United States President is authorized to freeze assets of “specially designated terrorists”.¹²⁰ The law exempts donations such as food, clothing and medicine intended to be used to relieve human suffering.¹²¹ However, the exemption may be subjected to the President’s override powers if he determines that the donations would seriously impair his ability to deal with any national emergency; or that the donations are in response to coercion against the proposed recipient or donor; or that they would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances.¹²² In 2001, United States President George W. Bush exercised his override authority through Executive Order 13224. The Order authorized the United States government to designate and freeze the assets of individuals who commit or pose the risk of committing terrorist acts.¹²³ In 2019, United States President Trump issued Executive Order 13886 which expanded Executive Order 13224.¹²⁴ The override powers given to the President in IEEPA and its exercise through Executive Order 13224 have been widely criticized. According to the Charity and Security Network, Executive Order 13224 is effectively a cancellation and repeal of the humanitarian exemption in the IEEPA.¹²⁵ Furthermore, it has been argued that the IEEPA authorizes a breach of IHL.¹²⁶ According to White, while both the Geneva Conventions and the IEEPA prohibit terrorist funding, the latter “goes beyond what is necessary and limits legitimate and

¹¹⁹ U.S. 50 U.S.C. 1701 (1977).

¹²⁰ K. King, N. Modirzadeh, and D. Lewis, above note 45, p. 12.

¹²¹ U.S. 50 U.S.C. 1701 (1977), § 1702(b)(2).

¹²² U.S. 50 U.S.C. 1701 (1977), § 1702(b)(2).

¹²³ U.S. Department of State, *Executive Order 13224*, available at: <https://www.state.gov/executive-order-13224/>.

¹²⁴ See Daniel Andreef and Terence Gilroy, “Trump Administration Expands Counter Terrorism Sanctions Authority and Designates 28 Persons as Specially Designated Global Terrorists”, *Baker McKenzie*, 23 September 2019, available at: <https://sanctions.news.bakermckenzie.com/trump-administration-expands-counter-terrorism-sanctions-authority-and-designates-28-persons-as-specially-designated-global-terrorists/>.

¹²⁵ Kay Guinane, “19 Years Later, EO13224 Continues to Block Humanitarian Aid. It’s Time for An Update”, *Charity and Security Network*, 24 September 2020, available at: <https://charityandsecurity.org/blog/19-years-later-eo-13224-continues-to-block-humanitarian-aid-its-time-for-an-update/>.

¹²⁶ Jennifer R. White, “IEEPA’s Override Authority: Potential for a Violation of the Geneva Conventions’ Right to Access for Humanitarian Organizations?”, *Michigan Law Review*, Vol. 104, Issue 8, 2006, pp. 2026-2035.

necessary aid”.¹²⁷ Under IHL, the standard is only that organizations be humanitarian and impartial.¹²⁸ However, in the IEEPA, being impartial and humanitarian in nature are not sufficient to guarantee protection because the exemption in the statute is subject to presidential override.¹²⁹ According to White, the IEEPA allows unchecked “sweeping prohibitions” and the disregard of IHL and international law.¹³⁰ The IEEPA “creates an environment in which the President can eviscerate these [IHL] protections for non-combatants, placing the United States in violation of international law.”¹³¹

In comparison, the ATA suffers from a similar defect. Essentially, the State recognition requirement in Section 13 vests the Government with the same executive discretion in the IEEPA. The only difference is that the IEEPA grants override powers which necessarily means that override follows the allowance of aid. In contrast, the State recognition requirement may prevent the provision of humanitarian assistance altogether in the event that an organization fails to obtain recognition. Still, the overall effect would be the same. As demonstrated in the previous section, prior State recognition and override measures require more stringent measures than what IHL provides and can adversely affect the work of humanitarian organisations.

Another class of exemptions which are arguably more stringent and limited than the Philippine exemption are those found in Australia, the United Kingdom and in the proposed amendments in the Netherlands. All three States integrated their exemptions only in particular offenses. In Australia, association with terrorists¹³² has an exemption for the provision of aid which is “humanitarian in nature”.¹³³ However, in other acts such as the provision of training and funding¹³⁴ and travelling to “declared areas”¹³⁵ there is no humanitarian exemption. In the United Kingdom, the Counter-Terrorism and Border Act of 2019 provides for a humanitarian exemption

¹²⁷ *Ibid.*, p. 2028.

¹²⁸ See Common Art. 3 to the GC, above note 26; Common Art. 9 to the GC, above note 26.

¹²⁹ J. White, above note 126, pp. 2028-2029.

¹³⁰ *Ibid.*, p. 2031.

¹³¹ *Ibid.*

¹³² Austl. Criminal Code Act (1995) Div. 102.8; see Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi, “Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation”, *International Review of the Red Cross*, Vol. 97, 2015, available at https://international-review.icrc.org/sites/default/files/irc_97_1-2-10.pdf

¹³³ Aust. Criminal Code Act (1995) 102.8(4); see P. Wynn-Pope, Y. Zegenhagen and F. Kurnadi, above note 132.

¹³⁴ P. Wynn-Pope, Y. Zegenhagen and F. Kurnadi, above note 132, p. 245-247; Australian Criminal Code Division 101.2, 102.5, 102.6.

¹³⁵ *Ibid.*; see Austl. Criminal Code Act (1995) Div. 119.2.

only on the offense of entering or remaining in a designated area.¹³⁶ The Netherlands is similarly situated as only the offense of entering or remaining in a designated area incorporates a proposed exemption.¹³⁷

Arguably, the Philippine exemption provides for a wider protection as it covers a class of offenses which may fall under the definition of providing material support so long as the acts are compliant with Section 13, as opposed to specific acts in the Australian, United Kingdom and Dutch laws. As previously discussed in Part III.A, the practice of only incorporating exemptions in particular provisions and omitting them in others manifests one of the apprehensions of the humanitarian sector: that exemptions imply that they are always necessary and must be expressly provided. The inevitable interpretation is that there is no exemption for acts where there is no express exemption. *Casus omisus pro omisso habendus est* – “a person, object or thing omitted from an enumeration must be held to have been omitted intentionally.”¹³⁸ This is despite the fact that these acts may be performed by impartial humanitarian organizations.

Even though the Philippine exemption appears to provide a wider exemption than those found under other States’ laws, there are still gaps and weaknesses which may be addressed by emulating the good practices of other States. For example, New Zealand’s Terrorism Suppression Act 2002 prohibits making available property, or financial, or related services to designated terrorists, but it exempts those made available with “legal justification” or with “reasonable excuse”. An example of a reasonable excuse is the provision of items such as food, clothing or medicine which “does no more than satisfy essential human needs” of a designated individual. The statute also grants the Prime Minister the power to authorize the provision of property and services to designated individuals and groups.¹³⁹ According to Mackintosh and Duplat, “New Zealand criminal law incorporates the full principle”¹⁴⁰ as it provides for “a specific exemption from the crime of material support.”¹⁴¹ Furthermore, it is submitted that the particular strength of the exemption in New Zealand is the use of the terms “legal justification” and “reasonable excuse”,

¹³⁶ U.K. Counter-Terrorism and Border Security Act (2019), § 4(58B).

¹³⁷ Neth. Amendments to the Criminal Code and the Code of Criminal Procedure to criminalize of staying in one by a terrorist organization controlled area (criminalization of staying in one by one terrorist organization controlled area) (2019-2020), art. 134(B).

¹³⁸ D. Gatmaytan, above note 42, p. 251 citing COA of Province of Cebu v. Province of Cebu, G.R. No. 141386, Nov. 29, 2001.

¹³⁹ Public Act 2002 No. 34, §10.

¹⁴⁰ Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, Norwegian Refugee Council and United Nation Office for the Coordination of Humanitarian Affairs, July 2013, p. 118.

¹⁴¹ *Ibid.*

as well as the express provision of an example of a reasonable excuse which is the provision of food or medical aid. The effect of these clauses in the exemption is a larger blanket of protection because of the general terms used. Further, acts which can be interpreted to be within food and medical aid can easily be protected. In contrast, what Section 13 of the ATA provides is a reference to IHL which, as will be discussed in the next section, is not sufficient.

Other good practices that may be considered are the recently adopted humanitarian exemptions in the counter-terrorism laws of Switzerland and Chad. The Swiss statute exempts humanitarian services provided by an impartial humanitarian body in accordance with Common Article 3 from criminal prosecution.¹⁴² According to Bouchet-Saulnier of *Medecins Sans Frontieres*, the reference to Common Article 3 is important because it provides more space for humanitarian organizations in providing assistance and even entering into agreements with all Parties to a conflict—agreements which may well be criminally proscribed by sole application of domestic law.¹⁴³ The humanitarian exemption in Chad, on the other hand, exempts “activities of an exclusively humanitarian and impartial character carried out by neutral and impartial organizations”¹⁴⁴ from criminal prosecution of terrorist acts. The strength of both the Swiss and the Chadian exemptions is that the only standard to be met to be protected is that the activities be impartial and humanitarian in character. This is among the effects of expressly mentioning Common Article 3 in the Swiss provision, and by expressly providing for the humanitarian and impartial standards in the Chadian exemption. In contrast, the humanitarian exemption in the ATA additionally requires State recognition as a prerequisite to be exempted. It deviates from the minimum standards set by IHL and adopted by Chad and Switzerland.

Lastly, non-binding instruments such as the European Parliament and Council’s Directive 2017/541 and the Humanitarian Assistance and Peacebuilding Protection Act (HAPPA),¹⁴⁵ a proposed amendment to the IEEPA in the United States are also worth noting with regard to crafting exemptions. European Parliament

¹⁴² Federal Decree, art. 260.

¹⁴³ Geneva Academy of International Humanitarian Law and Human Rights, “Swiss Counter-Terrorism Laws: What are the Legal and Policy Challenges?”, 2020, available at: <https://www.youtube.com/watch?v=oYKIHyzNges&t=1757s>.

¹⁴⁴ Law No. 003/PR/2020 concerning the repression of acts of terrorism in the Republic of Chad.

Art 1(4) Activities of exclusively humanitarian and impartial character carried out by neutral and impartial humanitarian organizations are excluded from the scope of application of the present law.

¹⁴⁵ U.S. Humanitarian Assistance and Peacebuilding Protection Act, 114th Cong., 1st Sess. (2015).

and Council's Directive 2017/541 is one of the considered good humanitarian exemptions.¹⁴⁶ Recital 38 of the Directive states:

The provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive, while taking into account the case-law of the Court of Justice of the European Union.¹⁴⁷

Gillard notes that the mental threshold for the offense under the Directive is high.¹⁴⁸ Knowledge of the receiving party's intent to use the support to further terrorism is an element of the offense of providing material information or resources¹⁴⁹ or terrorist financing.¹⁵⁰ This is a higher standard than what United States law provides where mere knowledge is the measure.¹⁵¹ Again, the construction of the United States material support law may find application in Philippine jurisdiction. Aside from the higher mental threshold, the Directive is good practice because it adopts a standing sectoral exemption with less stringent recognition requirements. Furthermore, Recital 37¹⁵² of the Directive expressly reaffirms the obligations of Member States under IHL. On the other hand, the HAPPA is an attempt to amend the IEEPA. It expands the exemption in the IEEPA by exempting transactions of humanitarian organizations with foreign persons who are subject to sanctions so long as the transactions are performed "in good faith and without intent to further the aims or objectives of the foreign person and has used its best efforts to minimize any such transactions."¹⁵³

D. Note on the Implementing Rules and Regulations

Section 54 of the Anti-Terrorism Act of 2020 mandated the Anti-Terrorism Council and Department of Justice to promulgate the implementing rules and regulations (IRR) of the statute.¹⁵⁴ In Philippine jurisdiction, administrative rules may be in the

¹⁴⁶ D. McKeever, above note 10, p. 74.

¹⁴⁷ EU Directive 2017/541 (2017), Recital 38.

¹⁴⁸ E. Gillard, above note 53, p. 18.

¹⁴⁹ EU Directive 2017/541 (2017), art. 4.

¹⁵⁰ EU Directive 2017/541 (2017), art. 11.

¹⁵¹ See *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

¹⁵² EU Directive 2017/541 (2017), Recital 37.

¹⁵³ U.S. Humanitarian Assistance and Peacebuilding Protection Act, 114th Cong., 1st Sess. (2015), § 5(b).

¹⁵⁴ Rep. Act No. 11479 (2020), § 14.

nature of legislative rules, interpretative rules or contingent rules. Legislative rules implement a statute and provide details on the implementation. Interpretative rules interpret, clarify or explain the operation of an administrative body. Contingent rules are those issued to address particular factual circumstances which affect the implementation of a statute.¹⁵⁵ The IRR, more particularly Rule 4.14 thereof which implements Sections 12 and 13, are arguably legislative rules aimed at providing details on the implementation of the counter-terrorism measure. Rule 4.14 provide:

Rule 4.14. *Providing material support to terrorists* – It shall be unlawful for any person to provide material support to any terrorist individual or terrorist organization, association, or group of persons committing terrorism as defined under Section 4 of the Act, knowing that such individual or organization, association, or group of persons is committing or planning to commit such acts.

“Material support” shall refer to any property, whether tangible or intangible, or service, including:

- a. Currency or monetary instruments or financial securities;
- b. Financial services;
- c. Lodging
- d. Training;
- e. Expert advice or assistance, including information related to movement and activities of government forces or to the situation in surrounding areas that are possible targets and basis for terroristic attack;
- f. Safe houses
- g. False documentation or identification
- h. Communications equipment
- i. Facilities
- j. Weapons
- k. Lethal substances
- l. Explosives;
- m. Personnel (one or more individuals who may be or include oneself); and
- n. Transportation

¹⁵⁵ Republic v. Drugmaker's Laboratories, Inc., G.R. No. 190837, March 5, 2014.

Humanitarian activities undertaken by the International Committee of the Red Cross, the Philippine Red Cross, and other state-recognized impartial humanitarian partners or organizations in conformity with International Humanitarian Law, as determined by the ATC, do not fall within the scope of the crime providing material support to terrorists under Section 12 of the Act.

The ATC may adopt a mechanism involving relevant government agencies and/or private entities for the purpose of assisting the ATC and submitting recommendations on whether or not an organization is a state-recognized impartial humanitarian partner or organization as referred to in this Rule.

Any such person found guilty therefor shall be liable as a principal to any and all terrorist activities committed by said individuals or organizations, in addition to other criminal liability he/she or they may have incurred in relation thereto.¹⁵⁶

The rule cited above however fails to fill in the details needed for the implementation of Sections 12 and 13. Both provisions were merely substantially reproduced in the IRR. As a legislative rule, Rule 4.14 should have filled in the details on what constitutes the provision of material support and on what the State-recognition procedure will be. The Rule failed on both fronts. The provision which criminalizes the provision of material support remains susceptible to interpretation which may be prejudicial to humanitarian organizations; and the process of State-recognition remains to be a question mark. The rule only provides that the Anti-Terrorism Council (ATC), with the help of other agencies, will be the body to formulate and adopt the mechanism for State recognition.¹⁵⁷ The actual process remains to be absent and the vulnerability to State intrusion remains imminent. Even assuming that the IRR and Rule 4.14 specifically are interpretative rules, they still fail to satisfy the necessity of clarifying what State recognition entails. As stated above, Rule 4.14 was merely a substantial reproduction of Sections 12 and 13. The IRR failed to address what it needed to address.

¹⁵⁶ Department of Justice (DOJ) and Anti-Terrorism Council (ATC), The 2020 Implementing Rules and Regulations of Republic Act No. 11479, otherwise known as The Anti-Terrorism Act of 2020 (2020), Rule 4.14.

¹⁵⁷ Department of Justice (DOJ) and Anti-Terrorism Council (ATC), The 2020 Implementing Rules and Regulations of Republic Act No. 11479, otherwise known as The Anti-Terrorism Act of 2020 (2020), Rule 4.14.

VI. Crafting the Humanitarian Exemption Provision in Philippine Counter-Terrorism Measures

This Part tackles the challenge of crafting a humanitarian exemption, and attempts to resolve the following inquiries: whether a humanitarian exemption provision is necessary for the Philippines' domestic counter-terrorism framework; if in the affirmative, what model should the humanitarian exemption emulate; and what should be the features of the humanitarian exemption and/or the counter-terrorism law.

A. Defining Humanitarian Assistance

As a preliminary and fundamental matter, the term “humanitarian activities” must be defined in any counter-terrorism measure, especially in those which include a humanitarian exemption. The ATA does not define “humanitarian activities” despite reference to the term in Section 13. A statute containing a humanitarian exemption must clearly provide what it exempts in view of the fact that humanitarian activities of humanitarian workers can be easily construed as material support. Defining humanitarian activities or humanitarian assistance should be treated as an “indispensable element”¹⁵⁸ in counter-terrorism laws. The concepts of material support and humanitarian activities exist in a grey area which the law must delineate. “Humanitarian assistance” is already defined in the Special Protection of Children in Situations of Armed Conflict Act as cited. The same definition may be adopted in the ATA.

However, it is ideal for humanitarian assistance to be defined in a way that encompasses all humanitarian activities—humanitarian protection activities and humanitarian aid and relief, as contemplated under IHL and as discussed above. As the definition in the Special Protection of Children in Situations of Armed Conflict Act only covers humanitarian relief activities, a definition that would include humanitarian protection activities must be seriously considered. A comprehensive definition of what constitutes humanitarian activities in Section 13 would serve as a backbone for a more adequate humanitarian exemption. It likewise goes without saying that to adopt such a comprehensive definition would make the ATA more sensitive to the country's IHL obligations.

¹⁵⁸ Abdel Jamal Disangcopan, “Submission of Position Paper of the Philippine International NGO Network (PINGON) To the Technical Working Group – Development of the Proposed Implementing Rules and Regulations of The Anti-Terrorism Act Of 2020”, 2020, p. 8.

B. Necessity for a Standing Sectoral Humanitarian Exemption

As previously discussed in Part III.A, an express humanitarian exemption is preferred because it clarifies the bounds of the humanitarian space in the counter-terrorism framework. It dispenses with the issue of determining whether humanitarian assistance is punishable. What only needs to be addressed is the issue of whether an act is humanitarian or not.

Furthermore, an adequate exemption not only protects humanitarian workers but also ensures that aid reaches the most vulnerable communities. Humanitarian assistance is invaluable in the Philippines being among the most disaster-prone countries in the world and in which territory numerous non-international armed conflicts are currently ongoing.¹⁵⁹ From 2008 to 2019, around 3.6 million Filipinos were internally displaced annually due to natural disasters. There were 183,000 new displacements due to armed conflict in 2019 alone.¹⁶⁰ As of May 2020, there have been 374,130 displaced individuals in Mindanao, the hotbed of armed conflict in the Philippines. UN data further shows that as of July 2020, there have been 300,000 Filipinos in need of humanitarian assistance in the country.¹⁶¹ If humanitarian organizations will be left to second-guess whether or not their work is criminal, then humanitarian aid may not reach those who need it. This is why an express humanitarian exemption provision is necessary, as it will prevent humanitarian organizations from hesitating to provide aid. An express exemption allows for legal clarity which will ultimately benefit the communities in need. However, as earlier argued, Section 13 is inadequate as it appears to be a partial humanitarian exemption. It is thus submitted that a standing sectoral exemption should be considered. A standing exemption provides humanitarian organizations more space to conduct their work with little intervention from the State. While arguably State intervention cannot be totally discarded, it should only be the exception rather than the rule. Section 13 provides for a blanket exemption for the ICRC and the PRC but leaves to the State whether to exempt other organizations. Aside from potential IHL violations, consequences may span from the erosion of the impartial and independent perception towards humanitarian organizations to ultimately, State intrusion and aid redirection.

¹⁵⁹United Nations Population Fund, *Philippines Humanitarian Emergency*, available at <https://www.unfpa.org/data/emergencies/philippines-humanitarian-emergency>.

¹⁶⁰Internal Displacement Monitoring Centre, *Philippines*, available at <https://www.internal-displacement.org/countries/philippines>.

¹⁶¹ United Nations Population Fund, above note 159.

C. Essential Features of a Counter-Terrorism Law in Relation to a Humanitarian Exemption

As cited in Part III.A, the UN Security Council in Resolution 2462 manifested that counter-terrorism endeavours must be made sensitive to and compliant with the States' obligations under international law, including IHL, international human rights law and international refugee law.¹⁶² Several legal scholars hold a similar position as the Security Council: domestic counter-terrorism legislation must reflect the State's obligations under international law. Pantuliano, et al., Gillard and McKeever wrote that domestic counter-terrorism legislation must reflect a State's IHL obligations¹⁶³ "even if this may result in differing standards for humanitarian agencies that work across multiple states."¹⁶⁴ McKeever also submitted that counter-terrorism legislation must be sensitive to its nuances with IHL: first, the different treatment IHL affords to medical and non-medical humanitarian aid¹⁶⁵; second, the implementation of due diligence measures for non-medical assistance to ensure their impartial nature; third, the endeavour of humanitarian sector to initiate their own due diligence measures, otherwise, it is the State who would be imposing;¹⁶⁶ fourth, the making of a distinction between humanitarian organizations who travel to conflict zones to provide humanitarian assistance impartially and those who travel to conflict zones with the knowledge and intent of exclusively aiding terrorists.¹⁶⁷ McKeever writes that "simple references to IHL or to 'impartial humanitarian organisations'" is insufficient.¹⁶⁸

Customary IHL and the Philippines' ratification of the Geneva Conventions and its Additional Protocols; its enactment of domestic laws implementing its IHL obligations all ensure that humanitarian assistance is protected. However, the ATA's reference to IHL can be further expanded in a manner where the ATA and any other counter-terrorism measures that the Philippines will adopt in the future will reaffirm the country's IHL obligations. The Swiss exemption in particular may be emulated on this front as it made an express reference to Common Article 3—a notable feature according to experts. The Chadian exemption is also worth noting on this end as although there is no express reference to IHL, the exemption expressly adopted the

¹⁶² See UNSC Res. 2462, 28 March 2019, paras. 5-6, 24.

¹⁶³ S. Pantuliano et al., above note 103, pp. 11-12; E. Gillard, above note 53, p. 15; D. McKeever, above note 10, p. 74.

¹⁶⁴ D. McKeever, above note 10, p. 76.

¹⁶⁵ *Ibid.*, p. 74

¹⁶⁶ *Ibid.*, citing E. Gillard, above note 53.

¹⁶⁷ *Ibid.*, p. 75.

¹⁶⁸ *Ibid.*, p. 76.

standards of impartiality and being in humanitarian nature as standards for exemption. This is consistent with IHL.

Although not binding, the drafting of the exemption in the European Union 2017 Directive is also worth considering. Compared to the ATA, this Directive is more lenient because it does not require prior State recognition for humanitarian organizations. The safeguard of the directive is that so long as international law recognizes the humanitarian activities of an organization, they are exempt.¹⁶⁹ Again, IHL only requires that the services provided are impartial and humanitarian in nature.

The foregoing is in contrast with Section 13 which requires prior state-recognition to be covered by the exemption. It adds another burden to humanitarian organizations which only have to satisfy less stringent standards under IHL. Furthermore, the only safeguard is the mere inclusion of the phrase “in conformity with International Humanitarian Law”, which appears to be mere lip service without the express provision of the process to be implemented. Arguably, what Section 13 sets is that aside from the ICRC and PRC, State recognition, intervention or even intrusion is the rule rather than the exception.

Aside from the points made above, the mental threshold for providing material support must also be reconsidered. At present, the material support provision adopts knowledge that the party receiving support is a terrorist organization as the threshold for liability. This bar is too low and may clash with the humanitarian principles of impartiality and independence. As pointed out by McKeever, humanitarian workers extend aid on the basis of need alone, regardless of their knowledge of the recipient’s designation as terrorists or not.¹⁷⁰ To expand the exemption and to limit the detrimental effects of the material support provision, a higher mental threshold must be adopted. This higher mental threshold is either knowledge of the intent of the recipient to use the support to further terrorist activities, or actual intent to support and further terrorism. The European Union Directive may again be used as reference. The Directive requires knowledge of the receiving party’s intent to use the support given to further terrorism.¹⁷¹ As an alternative, the HAPPA¹⁷² may also be emulated. The HAPPA exempts transactions of humanitarian organizations with foreign persons subject to sanctions provided that the transactions are performed “in good faith and without intent to further the aims or objectives of the foreign person and has used its best efforts to minimize any such

¹⁶⁹ EU Directive 2017/541 (2017), Recital 38.

¹⁷⁰ D. McKeever, above note 10, p. 66.

¹⁷¹ EU Directive 2017/541 (2017), para. 15.

¹⁷² U.S. Humanitarian Assistance and Peacebuilding Protection Act, 114th Cong., 1st Sess. (2015).

transactions.”¹⁷³ Similar to the EU Directive, the HAPPA adopts a higher mental threshold. Furthermore, HAPPA requires “robust due diligence” measures for transactions with designated organizations,¹⁷⁴ similar to McKeever’s recommendation. Due diligence measures may be a good balancing scheme to reconcile security concerns with the necessity to provide humanitarian assistance. Nonetheless, scholars also posit that cooperation between the State and humanitarian organizations is vital in crafting exemptions.¹⁷⁵

However, despite these possible adjustments to Sections 12 and 13, it is also significant to note that adopting a definition of terrorism that expressly excludes the whole range of humanitarian activities protected by IHL is a possible and viable route to take. Section 4 of the ATA which defines terrorism under the statute has been assailed to be unconstitutional on grounds that it “denies due process for lack of notice, deters free speech, and grants law enforcers unbridled discretion to define criminal conduct.”¹⁷⁶ An amended definition of Section 4 may soon be in order, and although tackling the definition of terrorism is another matter altogether, it is a fundamental consideration in defining material support offences and humanitarian exemptions. In defining terrorism, it is submitted that a definition that is compliant with both international law and constitution be adopted.

In sum, Congress must consider making the humanitarian exemption more comprehensive and more sensitive to the Philippines’ international obligations. As a starting point, Congress must define humanitarian assistance in the country’s counter-terrorism measures. Philippine laws already provide for a definition. For legal clarity, it would be wise to either adopt the same in counter-terrorism laws or to adopt a more comprehensive definition which covers the different species of humanitarian activities. Further, Congress may also consider redefining the concept of terrorism to exclude activities which are humanitarian and impartial in nature. Third, the obligations of the Philippines under IHL must be affirmed. This eases not only the tension among IHL, domestic legislation, and domestic counter-terrorism legislation, but it also clarifies grey areas. Fourth, Congress should consider adopting a higher mental threshold in punishing the provision of material support. Intent is more appropriate, or at least knowledge that the receiving party intends to use the support provided in furtherance of terrorism. Adopting mere knowledge that the receiving party is a designated terrorist organization as a threshold clashes with humanitarian principles as humanitarian workers are often already knowledgeable that designated terrorists receive their aid.

¹⁷³ U.S. Humanitarian Assistance and Peacebuilding Protection Act, 114th Cong., 1st Sess. (2015), § 5(b).

¹⁷⁴ U.S. Humanitarian Assistance and Peacebuilding Protection Act, 114th Cong., 1st Sess. (2015), § 5(b).

¹⁷⁵ Norwegian Refugee Council, above note 57; E. Gillard, above note 53.

¹⁷⁶ *Carpio v. Anti-Terrorism Council*, above note 21, para. 2(d).

V. Conclusion

The ATA leaves much to be desired especially for the humanitarian sector and its beneficiaries. The material support provision and its adjunct exemption are replete with gaps and loopholes. Humanitarian workers face the risk of criminal liability under Section 12 because of the nature of their work. Section 13, the supposed exemption, provides little protection as it requires either that the humanitarian worker is with the ICRC or the PRC, or is from a State-recognized humanitarian organisation. The required State recognition for humanitarian organisations puts the Philippines in a position to potentially violate its IHL obligations. Further, a State recognition requirement places an additional requisite than what IHL requires. To reiterate, IHL only requires impartiality and that the act is humanitarian in nature. Furthermore, while what constitutes State recognition remains to be an unresolved issue, legal scholars have already cited potential threats to the humanitarian sector because of added administrative regulations.

Although it is still hotly debated whether humanitarian exemptions are necessary or not, it is submitted that they are, and that they must allow the humanitarian sector to accomplish their job with minimal State intervention. The Article demonstrated that there are practices that may be emulated in crafting a humanitarian exemption. Among aspects to be considered are: first, a definition of terrorism which expressly excludes humanitarian activities; second, a higher mental threshold for the provision of material support; third, a definition of humanitarian assistance which covers both relief and protection activities; fourth, a reaffirmation of the Philippines IHL obligations; and fifth, the consideration of adopting due diligence measures.

Ultimately, the fight against terrorism is a valid and urgent undertaking. Counter-terrorism laws are necessary to equip States with legal means to combat terrorism. However, they must be sensitive to the operations and needs of humanitarian organisations and their beneficiaries. The tension between IHL and counter-terrorism has been well-documented and extensively discussed. The challenge faced by the Philippine legislature, albeit difficult, is not novel. Thus, Congress ought to take note of the nuances of counter-terrorism legislation *vis-à-vis* the State's equally important duty to uphold its international law obligations.

The Red Cross Society of China in the Beiyang Government Period (1912-1928): A Civil Society Organisation Amidst Political Unrest

Dr. Bingling Wei*

ABSTRACT

The background of the Red Cross Society of China (RCSC) reveals the rich history of humanitarian efforts in the twentieth century in China, particularly during the Beiyang Government period (1912-1928). Against the backdrop of the First World War, the RCSC established strategic collaborations with external partners, including the United States. However, it also faced considerable challenges, many driven by a Chinese government whose vested interests often opposed the RCSC's goals. The Beiyang Government thus engaged in both constitutional and in strong-arm tactics to exert its control over key facets of the RCSC, which was then a well-established and globally reputable organisation. These circumstances make the organisation an effective test case of developing a humanitarian organisation in a country with an unstable governmental system. This paper argues that the ideological conflict between the RCSC and the Beiyang Government was a sign that civil society still lacked penetration and depth in China.

Keywords: RCSC, Constitutional Republic, Civil Society, Beiyang Government, Government Interference

Introduction

This paper will examine the development of the Red Cross Society of China (RCSC) during the Beiyang Government period, between 1912 and 1928. During this period, the Central Government was very weak, since the emergent Republic's Administration was in its infancy and several warlords threatened its stability. It was one of the most chaotic political periods in Chinese history, yet the Central Government still managed to control the RCSC. As discussed below, State intervention in the affairs of the RCSC ran unchecked under the Beiyang

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Government. It could thus be argued that the RCSC became a State apparatus during this period, for two main reasons: first, civil society organisations were heavily reliant on the government for financial support, and second, the culture of Confucianism hindered the formation of a public sphere where citizens could interact with each other without government interference.¹ Accordingly, this paper will explore RCSC operations between 1912 and 1928, to investigate the development of the Red Cross in China in this Republican period. It will finally be argued that the ideological conflict between the RCSC and the Government was a sign that civil society still lacked penetration and depth in China during the Beiyang Government period.

Background

During the 1910s, 1920s and 1930s, China was characterized by a surge of peacetime activities, as the country attempted to recover from the Boxer Crisis and the ensuing revolution that took place at the turn of the century. These changes were especially evident in China's government system, as it made its first major strides toward instituting a system of democracy, breaking from its previous monarchy. In 1912, widely regarded to be the beginning of a new era for China, the Provisional Government² was established, as well as the National Assembly tasked with the election of a president and vice-president every five years. The first president appointed by the National Assembly was Yuan Shikai, a former military general. China also became a founding member of the League of Nations during this time, demonstrating its willingness to work with other countries on a global level.³

However, troubles were far from over for the people of China. Yuan Shikai (袁世凯) died before completing a full term, and what would follow was the period often referred to as the Warlord Era. A national army was also established, a controversial decision that involved forced recruitment and a grand display of power against the threat of uprising. The political tensions associated with World War I escalated these disruptions even further, with the fledgling government's second presidential election in 1918, which is widely regarded to have been rigged. After this time, various groups battled for control of China, chiefly competing factions based out of Beijing and Shanghai. The country's governmental system was fully rewritten several times as different entities took control, culminating in an expansionist,

¹ Karla W Simon, *Civil Society in China: the Legal Framework from Ancient Times to the "New Reform Era"*, Oxford University Press, Oxford, 2013, p. 86.

² The Provisional Government of the Republic of China was established on 1 January 1912, marking the end of China's feudal monarchy.

³ Julia C Strauss, *Strong institutions in weak polities: state building in Republican China, 1927-1940*, Oxford University Press, Oxford, 1998.

military rule that lasted from 1926 to 1928.⁴ Throughout this time, the country's people faced widespread famines exacerbated by natural disasters, frequently unfair government practices, and many casualties stemming from a series of military conflicts.

The RCSC sought to alleviate these difficulties to whatever degree possible, and to achieve validation and successes similar to those it had during the Russo-Japanese War.⁵ The Society opened up a number of hospitals in cities such as Beijing and Shanghai. The popularity of the outfit let it establish many local branches, expanding its network and operational ground in China. More Chinese people were able to access services and aid through these local chapters.⁶ The local chapters were popular with many civilians due to their modernity, international connections and diversified humanitarian activities. In 1906, under the watch of Shen Dunhe (沈敦和),⁷ the society sent its first workers to a foreign region, the United States, in response to an earthquake in San Francisco.⁸ The earthquake was devastating, injuring and killing people from all over the world then based in the metropolis.

The successes of the RCSC were largely linked to the Beiyang Government period (1912-1928), when major milestones were achieved in its move towards a fairer and more stable society.⁹ It is during this period, against the backdrop of the First World War that the entity attained international status, with many strategic collaborations with external partners, such as the United States. However, the

⁴ John R Watt, *Saving lives in wartime China: how medical reformers built modern healthcare systems amid war and epidemics, 1928-1945*, Brill, Leiden, 2013.

⁵ Randall Peerenboom, *China's long march toward rule of law*, Cambridge University Press, Cambridge, 2002.

⁶ May-ling Soong Chiang, *China shall rise again*, Harper & Brothers Publishers, New York, 1941.

⁷ Shen Dunhe (沈敦和), Zi (字) was Zhong Li (仲礼), a Renxian (鄞县) County, Zhejiang Province, social activist and philanthropist. He studied at Cambridge University in England in the early years and specialized in politics and law. After returning to China, he served as a teacher at Jinling Tongwen Hall (金陵同文), Jiangnan Navy Teacher School (江南水师学堂 *Jiangnan shuishi xuetang*), and Wusong Self-Strengthening Military Operation Division Office (吴淞自强军营机处总办 *wusong ziqiang junying jichu zongban*), as well as the director of Shanghai Siming Corporation (上海四明公所 *Shanghai Siming Gongsuo*), the first president of Ningbo Traveler in Shanghai Association (宁波旅沪同乡会 *Ningbo lvhu tongxianghui*), and the director of Shanghai General Chamber of Commerce (上海总商会董事 *Shanghai zongshanghui dongshi*).

⁸ Rajeswary Ampalavanar Brown, and Justin Pierce (eds), *Charities in the non-Western world: The development and regulation of indigenous and Islamic charities*, Vol. 1, Routledge, London, 2013.

⁹ Chinese Red Cross Society, *National Red Cross Society of China: Medical relief commission*, Connaught Printing Press, Hong Kong, 1900.

Beiyang Government period also involved many challenges for the RCSC, ranging from government interference to internal strife within the humanitarian outfit.¹⁰

The RCSC during the Beiyang Government Period: 1912-1928

The Provisional Government of the Republic of China was established on 1 January 1912, marking the end of China's feudal monarchy. Sun Yat-sen (孙中山)¹¹ became the provisional president of the Republic of China in Nanjing.¹² After the establishment of the Republic of China, the president of the International Committee of the Red Cross (ICRC) in Geneva, Switzerland, sent a letter to Shen Dunhe, the Director of the RCSC Board, confirming that "China had officially joined the ICRC as a member."¹³ The Statutes of the International Red Cross and Red Crescent Movement clearly required that each member organisation "[b]e duly recognized by the legal government of its country on the basis of the Geneva Conventions and of the national legislation as a voluntary aid society, auxiliary to the public authorities in the humanitarian field."¹⁴ This was the first time an independently founded Chinese organisation gained official recognition by the ICRC.

After the formal registration of the RCSC as a non-governmental organisation, two competing factions emerged, originating in Beijing and Shanghai respectively. The two factions battled for representation and control of the organisation. The Shanghai faction believed that the RCSC was established to provide relief during times of calamity and war, and hence should be managed by merchants without government interference. In contrast, the Beijing faction believed that the RCSC should be an extension of the government,¹⁵ which would prevent the creation of a parallel power and any possible conflict with government policies. This view originated from the RCSC's constant need of government support to facilitate relief to injured soldiers. While the RCSC during this period was focused on providing aid to soldiers and others in need who often lacked access to care, it was

¹⁰ Jean-Philippe Lavoyer, "Implementation of international humanitarian law and the role of the International Committee of the Red Cross", in *International Humanitarian Law: Challenges*, Brill Nijhoff, Leiden, 2006, pp. 579-591.

¹¹ Sun Yat-sen was the provisional President of the Republic of China in Nanjing from 1 January 1912 to 1 April 1912.

¹² School of Sociology in Suzhou University 苏州大学社会学院 and Suzhou Red Cross Society 苏州市红十字会, *Zhongguo hongshizi lishi biannian (1904-2004) 中国红十字历史编年 (1904-2004) [Chronicles of the Red Cross Society of China (1904-2004)]*, Anhui Renmin Chubanshe, Hefei, 2005, p.19.

¹³ *Ibid.*, p.19.

¹⁴ *Statutes of the International Red Cross and Red Crescent Movement*, adopted by the 25th International Conference of the Red Cross and Red Crescent at Geneva in 1986, ammended in 1995 and 2006, p.9.

¹⁵ *Chronicles of the Red Cross Society of China (1904-2004)*, above note 12, p. 15.

consistently viewed with suspicion by the various parties involved in the battle for control of the country. They viewed the RCSC as either an institution of power presenting competition for political power, and thus an enemy, or as a tool that could be leveraged for some kind of gain. This presented many challenges for the RCSC, which continually faced actions from both the faction currently in power and from other factions aiming to seize control.

There was also an existing relationship between the American Red Cross and the RCSC since both had made mutual donations in a major disaster, so relations between the two countries were harmonious. This relationship was maintained until 1918 when the American Red Cross wished to establish a branch in China, to increase donations and publicity as well as recruit members for the American Red Cross. However, Shen Dunhe and other members of the RCSC opposed the American Red Cross having a branch in China, thus resulting into a series of disputes. The conflict was not only personal, but also affected the RCSC and other branches of the Red Cross. The Chinese government and the American Red Cross in Washington, the United States Embassy Minister, and the Consul in Shanghai all paid close attention to the conflict, which had a profound impact on the RCSC.

The American Red Cross asked the Consul-General of the United States in Shanghai to discuss with Shen Dunhe how the United States could set up the branch of the American Red Cross in China. Specifically, the United States intended to establish a Red Cross branch in Shanghai to facilitate the transport of medical supplies for the French war relief and for fundraising in China. In Shen Dunhe's view, Britain, France and other countries had already established Red Cross branches in Shanghai, so it was illogical to prevent the American Red Cross from also doing so. In addition, the branch of the American Red Cross in China was mainly for fundraising. Therefore, the RCSC was also in favour of an American Red Cross branch in Shanghai.

Shen Dunhe had also established the Huayang Charity (华洋义赈 Huayang yizhen), which gained the appreciation of the American Red Cross. When the American Red Cross asked to establish a branch in China with a charity focus, Shen Dunhe agreed.¹⁶ At the time, the United States had received no formal agreement documents from China. However, Sa Moji (萨门司) had called Shen Dun and said:

There is no opposition to the American Red Cross setting up a branch in China, and the vice president of the RCSC, Shen, agrees to that. We welcome the American Red Cross undertaking

¹⁶ “Shen Dunhe zhi Xia Yingtang han 沈敦和致夏应堂函 [Letter of Shen Dunhe to Xia Yingtang]”, *Shun Pao*, 7 May 1918.

worthwhile activities in China, so the RCSC will give strong support to the American Red Cross.¹⁷

When Sa Moji sent this letter, the society understood that the American Red Cross was to set up a branch in China, and that Wang Zhengting (王正廷) would be the president for the branch. The Chinese government, Shen Dunhe, and local chapters had put forward their views. The debate between the RCSC and the American Red Cross regarding the proposed branch continued for more than a year. The conflict affected the normal development of the RCSC: as Shen had agreed to set up the branch of the American Red Cross, he was forced to resign.

In January 1918, the Chinese government, Shen Dunhe and the RCSC agreed that the American Red Cross could come to China for fundraising activities. However, the United States wanted to establish a branch of the American Red Cross in China; the Chinese government and RCSC opposed this idea. In April 1918, a document produced by the Army of China explicitly forbade the establishment of an American Red Cross branch in China because the American Red Cross had only negotiated with, and gained permission from, Shen Dunhe. However, the American Red Cross had already publicly announced that it would be allowed to establish a branch in China. This situation was embarrassing for the American Red Cross, which resulted in Shen Dunhe being censured by other members of the RCSC.¹⁸ In Shen's account:

If the American Red Cross is only to set up transit agencies primarily responsible for transport of relief goods, it can be considered. If the American Red Cross sets up a branch in China, which is half the national nature of the Red Cross, it cannot be allowed in my own opinion. So, I cannot give feedback about it.¹⁹

Thereafter, Shen shifted to a neutral attitude and no longer expressed any opinion. Due to the attitude of the RCSC, the American Red Cross sought another way to secure consent from China. Meanwhile, the American Red Cross declared that it was not going to establish a branch in China after all. Wang Zhengting, as the president of the American Red Cross in China, was misinformed.

Subsequently, Anrid, the representative of the American Red Cross in China and the United States Embassy commercial counsellor, clarified the misunderstanding. Anrid stated that:

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

[t]he United States was to establish a temporary agency to collect donations in China, such as clothes, hand-made bandages, and other items to send to the European battlefield for the wounded. This activity was not seen as the American Red Cross acting independently but had unanimous treaty approval. Although the name “American Red Cross in China” literally translated into Chinese as “the branch of the American Red Cross in China”, the nature of its activity was different from that of the RCSC, so the institution would not infringe on the RCSC.²⁰

The conflict between the RCSC and the American Red Cross was a misunderstanding caused by English translation. Shen Dunhe, the president of Shanghai Commerce Association, along with a representative of the American Red Cross and the Vice-Consul of the United States in Shanghai (who was proficient in Chinese), jointly decided to translate “the American Red Cross” as “the preparatory ambulance material department of the United States”.²¹ When asked by the Ministry of Interior, the Ministry of Foreign Affairs and the Department of the Army, Shen Dunhe said: “the branch is incompatibly involved.”²² Subsequently, Shen Dunhe sent the announcement to the European battlefield that the American Red Cross relationship was purely charitable in nature and did not interfere with the sovereignty of the national Red Cross, but instead gave it support. Local branches of the Red Cross were informed about the preparatory ambulance material department of the United States going to various regional areas to raise funds, and were told that they should provide hospitality and assistance.²³

Parallel with this internal conflict, the government also attempted to control the RCSC.²⁴ For example, soon after the creation of the RCSC the American Red Cross attempted to establish an office in China, but the request was denied by the government since it was suspicious of possible interference by foreigners in internal

²⁰ “Guanyu Meihonghui zai hua mukuan xiaoxi 关于美红会在华募款消息 [Reports on the Fund Raising of the American Red Cross in China]”, *Shun Pao*, 4 May 1918.

²¹ “Meihonghui yizheng zai hua mujuan mingcheng zhi baogao 美红会译正在华募捐名称之报告 [Report on Fundraising Activities in China Translated by the American Red Cross]”, *Shun Pao*, 21 May 1918.

²² *Ibid.*

²³ *Ibid.*

²⁴ Zihua Chi 池子华, *Compilation of Historical Materials of Red Cross Movements in China (Volume I)*, Hefei University of Technology Publishing House, Hefei, 2014.

affairs.²⁵ The government enhanced its pressure on the General Assembly of the RCSC to clarify several issues, such as the location of the head office and the nature of the organisation.²⁶ As a result, the RCSC became a non-governmental charity organisation with its headquarters in Shanghai.

Under the Beiyang Government, there were several drastic changes in government involvement with the evolution of civil society. During the Qing government, the appointments of presidents of the RCSC were subject to approval by the imperial crown.²⁷ However, from 1914 onwards the Government could make direct appointments without need of approval by the Congress. Under the RCSC Statutes, the supervision of the RCSC was placed under the Department of the Army and the Department of the Navy.²⁸

The Red Crescent Movement and the International Red Cross' Statutes state that a Red Cross society should be recognized in its host country through national legislation.²⁹ Accordingly, Shen Dunhe successfully negotiated the recognition of the RCSC by the Ministry of Interior in 1912.³⁰ The conflict between Beijing and Shanghai escalated due to events at the International Conference of the Red Cross in Washington. In 1912, the Ministry of Foreign Affairs received notice from the International Conference of the Red Cross. It first informed Shen Dunhe of the Shanghai Committee of the Red Cross and expected him to participate in the Conference on his own. Shen was not concerned about this matter, however, so he passed the notice to the Head Office of the Red Cross in Beijing. Subsequently, Beijing reported to President Yuan Shikai that Rong Kui (容揆), a Chinese Counsellor in the United States, would attend the Conference on behalf of the RCSC. Beijing, however, sent John Calvin Ferguson to accompany Rong Kui as a consultant, as Rong Kui had little knowledge on the RCSC.³¹ As a result, Beijing announced a conference to discuss combining all the Red Cross Societies, whereas Shanghai announced a first general meeting for the election of directors, president,

²⁵ Carolyn L. Hsu, *Social entrepreneurship and citizenship in China: The rise of NGOs in the PRC*, Taylor & Francis, Oxfordshire, 2017.

²⁶ Jianqiu Zhang 张建隼, *Zhongguo hongshizihui chuqi fazhan zhi yanjiu 中国红十字会初期发展之研究 [Research on the beginnings of the Red Cross Society of China]*, Zhonghua Shuju, Beijing, 2007, pp. 3-4.

²⁷ Qiuguang Zhou 周秋光, *Hongshizihui Zai Zhongguo (1904-1927) 红十字会在中国 (1904-1927) [The Red Cross Society in China (1904-1927)]*, Renmin chubanshe, Beijing, 2008.

²⁸ David P. Forsythe, *The humanitarians: The international committee of the Red Cross*, Cambridge University Press, Cambridge, 2005.

²⁹ J. Zhang, above note 26.

³⁰ *Chronicles of the Red Cross Society of China (1904-2004)*, above note 12, p.15.

³¹ *Ibid.*, p. 21.

and members.³² At that point, the Beijing branch enjoyed government support but lacked functional capability in medical care, relief and fundraising, while the Shanghai faction had support from merchants but lacked the government acknowledgment critical for cooperation and international recognition.³³ This situation demonstrates the compounding struggles of humanitarian organisations operating out of countries in turmoil, as the restrictions set by their governments may come into conflict with international policies.

On 29 September 1912, the first General Assembly of the RCSC was held in Shanghai. The Assembly adopted a Constitution that authorized the merging of Beijing, the location for the head office and the president, and Shanghai, the location of the affairs office and vice-president.³⁴ The new RCSC Constitution marked the end of the conflict between the two cities.³⁵ Its aim was to ensure that the organisation could operate without government interference. The International Red Cross also required a congressional structure to be implemented in all Red Cross societies through a secret ballot. Thus, the RCSC converted its board system into a congress that attracted more than 1,000 delegates from across China. This conference attained a standardized management system that eliminated controversies between officials and merchants.

On 6 October 1912, the congress of the RCSC was officially established. Based on the charter of the East-West countries, the congress established the Charter of the RCSC, electing the president and vice president of the Republic of China as the honorary president and vice-president, respectively. On 18 October 1912, the Government of China acknowledged the decision and announced it in the presence of representatives from the Navy and the War Department, the Ministry of Internal Affairs and the Ministry of Foreign Affairs,³⁶ but it was not satisfied with the Charter restricting the relevance of Beijing. For this reason, the Commission of Legislative Affairs of the Senate did not approve the draft Charter.³⁷ The Government later issued Regulations of the RCSC that allowed the former to appoint senior officials and enabled the Ministry of Internal Affairs, the Department of Navy and the

³² “Zhongguo hongshizihui di yi ci huiyuan dahui guanggao 中国红十字会第一次会员大会广告 [Advertisement of the First General Meeting of the Red Cross Society of China]”, *Shun Pao*, 7 August 1912.

³³ “Zhongguo hongshizihui dahui gaiqi guanggao 中国红十字会大会改期广告 [Advertisement on the Date Change of Conference of the Red Cross Society of China]”, *Shun Pao*, 12 September 1912.

³⁴ *Chronicles of the Red Cross Society of China (1904-2004)*, above note 12, p.21.

³⁵ *Ibid.*

³⁶ “Hongshizihui kaihui mang 红十字会开会忙 [Tight Meeting Schedule of the Red Cross]”, *Shun Pao*, 16 October 1912.

³⁷ *Ibid.*

Department of Army to control the Red Cross. The new orders meant that the Affairs Office in Shanghai was reduced to a Branch Office.³⁸

After the conflict between the Red Cross Societies in China and the United States, a series of actions by the Beiyang Government led to “people from civil society misunderstanding that the government was going to take the Red Cross back to being a government-run organization.”³⁹ Until 1919, the Department of the Army, together with the Department of the Navy and the Department of Internal Affairs, regularly sent representatives to Shanghai in response to criticism by the American Red Cross Society of the RCSC, to investigate the accounts of the General Affairs Office. The Head Office of the RCSC in Beijing proposed to actively release the regulations and implementation rules issued by the Government; however, such a release was still opposed by Shen Dunhe. Shen Dunhe even attempted to draft a revision of the foregoing regulations for review by the General Assembly and final approval at the National Conference of the General Assembly, based on which he would plead with the Government to make the revision.⁴⁰ This attempt illustrated continued opposition to the intent of the Government to exert greater control over the General Affairs Office. This was obviously unacceptable to the Beiyang Government, which then decided to take drastic action.⁴¹

The Beiyang Government was dissatisfied with the current work of the Red Cross and attempted to select new officers. Shen Dunhe noted that “the government’s intention to replace employees was designed to rectify and expand the scope”⁴² of the RCSC. On 29 April 1919, the Beiyang Government directly announced that Cai Tinggan (蔡廷干)⁴³ would be dispatched to undertake the position of vice-president

³⁸ “Paiding hongshizihui huizhang yaodian 派定红十字会会长要电 [Telegraph of the president of Red Cross]”, *Shun Pao*, 20 October 1912.

³⁹ “Zhongguo hongshizihui quanguo dahui ji (xu) 中国红十字会全国大会纪 (续) [Minutes of General Meeting of the Red Cross (continued)]”, *Shun Pao*, 27 June 1922.

⁴⁰ The Second Historical Archives of China, “Zonghui fa Shen fu huizhang han 总会发沈副会长函 [Letter from the Head Office to Vice President Shen]”, in *Hongshizihui dang'an 红十字会档案 [Archives of the Red Cross Society]*, 19 February 1919, pp. 476-3241.

⁴¹ The Second Historical Archives of China, “Zonghui fa Wu jingzhong han 总会发吴敬仲函 [Letter from the Head Office to Wu Jingzhong]”, in *Hongshizihui dang'an 红十字会档案 [Archives of the Red Cross Society]* (16 April 1919), pp. 476-3239.

⁴² “Shen Zhongli laidian 沈仲礼来电 [Telegram from Shen Zhongli]”, *Shun Pao*, 18 July 1919.

⁴³ Cai Tinggan, called Yaotang (耀堂) as a courtesy name, was a native of Xiangshan (香山, Guangdong). He was sent to America for study in the 12th year of Emperor Tongzhi in the Qing Dynasty (同治十二年 A.D. 1873), when he was still a child. Later, he came back and served at Dagu Torpedo School. During the First Sino-Japanese War, he even led a torpedo boat in combat. In the 3rd year of Emperor Xuantong (宣统三年 A.D. 1911), he was assigned as the Chief of the Navy

of the RCSC, which meant removing the former Vice-President, Shen Dunhe, from the position.⁴⁴ This act embarrassed Shen, who issued a letter to the General Assembly the same day issuing his resignation.⁴⁵

In 1921, Tang Yuanzhan (唐元湛), who had been appointed General Director of the General Affairs Office by Vice President Cai Tinggan, died from a stroke, so he was succeeded by Zhuang Lu (庄篆), who was elected by the General Assembly.⁴⁶ The succession orders were issued by the President and completely bypassed the election of the RCSC. The Government's behaviour allowed the private sector to reframe the RCSC as a government-run organisation. Therefore, Cai Tinggan declared that "all these positions were taken over in accordance with the regulations."⁴⁷

To resist pressure from the Government and satisfy the grassroots public's desire for non-government organisations, the General Assembly convened the Second National Conference in 1922, as the expiration of the standing members' office term had brought about the abovementioned conflict. On 29 June, the 3rd Session of the National Conference was held for the election of standing members. The National Conference was a victory for the gentry and merchants in Shanghai.

Inspection Division under the Department of the Navy. During the 1911 Revolution, he went to Wuchang, following the orders of Yuan Shih-kai, to negotiate with Li Yuanhong (黎元洪). In 1912, he was promoted to be a senior military staff officer, ranked as a vice admiral; in 1913, he was made the Superintendent of the Department of Revenue, and latter additionally made the protocol officer of the President's Office, or the English secretary of Yuan Shih-kai according to another source. In 1918, he became a member of the Customs Revision Committee. Cai Tinggan had been serving in Beijing since the late Qing Dynasty, and had been placed in important positions by successive presidents in the Beijing Government since the reign of Shih-kai Yuan, due to his specialty in foreign languages. This was probably one of the reasons why he was selected by the Beiyang Government as the Vice President of the Red Cross Society of China. Youchun Xu徐有春, *Minguo renwu da cidian 民国人物大辞典* [The Great Dictionary of Figures in the Republic of China], Hebei renmin chubanshe, Shijiazhuang, 1991, p. 1363.

⁴⁴ "Da zongtong ling 大总统令 [Presidential Order]", *Zhengfu gongbao 政府公报* (Nanjing), 30 April 1919.

⁴⁵ The Second Historical Archives of China, "Zonghui Feng Enkun fa Lv huizhang han 总会冯恩昆发吕会长函 [Letter from Feng Enkun of the Head Office to President Lv]", in *Hongshizihui dang'an 红十字会档案* [Archives of the Red Cross Society], 1 May 1919, pp. 476-3239.

⁴⁶ "Zhongguo hongshizihui ershinian dashi gangmu 中国红十字会二十年大事纲目 [List of Major Events for Red Cross Society of China in 20 Years]", in *Zhongguo hongshizihui yundong shiliao xuanbian 中国红十字会运动史料选编* [Selected Historical Materials of the Chinese Red Cross Movement], Hefei gongye daxue chubanshe, Hefei, 2014, pp.30-37.

⁴⁷ "Hongshizihui changyiyuan hui jishi 红十字会常议委员会纪事 [Meeting Minutes of the General Assembly of the Red Cross Society]", *Shun Pao*, 13 August 1919.

The Conference passed the revised Constitution and ensured that the General Assembly was the central authority of the RCSC; the President was appointed by the Government but now occupied an honorary position and was subject to election by the General Assembly. Adding a vice-president position in Shanghai meant that the General Affairs Office dominated governance via the vice-president in Beijing. Meanwhile, the newly elected members of the General Assembly were more representatives of the Shanghai side. Finally, the president and vice-presidents were elected by the General Assembly and only passively acknowledged by the Beiyang Government. As mentioned above, Shen Dunhe hoped to adhere the Red Cross to the private sector and successfully achieved his goal, while the Beiyang Government's attempt to make the Red Cross a government-run organisation was defeated. Therefore, during the subsequent reign of the Beiyang Government or even during the reign of the Government of the Republic of China, the RCSC constantly maintained its status as a civilian-run organisation, while the General Assembly, dominated by partial gentry and merchants in Shanghai, remained in a leadership position.

The office terms of the president and the vice-presidents expired in 1924, so the General Assembly held a meeting on 23 March. There, Yan Huiqing (颜惠庆) was elected as the president and Cai Tinggan and Yang Sheng (杨晟) were elected as the vice-presidents; on 29 April, the Beiyang Government approved the appointments as usual.⁴⁸ In 1928, Yan Huiqing was re-elected before the restructuring of the Head Office. During his tenure, however, the General Assembly, consisting of partial gentry and merchants in Shanghai, remained the central authority of the RCSC. After the founding of the Republic of China, the controversy about having a government-run or civilian-run Red Cross Society also came to an end.

The Rationale Behind the Beiyang Government's Interference in the RCSC

The Beiyang Government's interference into the RCSC can only be understood through the incorporation of civil society management theories and by considering the dictatorial tendencies of the Beiyang Government. The "Constitutional Republic" established in 1912 was supposed to be a democracy. It incorporated an

⁴⁸ "Hongshizihui gaixuan zheng fu huizhang 红十字会改选正副会长 [Reelection of the President and Vice Presidents of the Red Cross Society]", *Shun Pao*, 17 April 1924. "Zhongguo hongshizihui ershinian dashi gangmu 中国红十字会二十年大事纲目 [List of Major Events for Red Cross Society of China in 20 Years]", in *Zhongguo hongshizihui yundong shiliao xuanbian 中国红十字会运动史料选编 [Selected Historical Materials of the Chinese Red Cross Movement]*, Hefei gongye daxue chubanshe, Hefei, 2014, pp. 30-37.

elected parliament, which was keen on coordinating with the government under President Yuan Shikai. However, Yuan was against sharing power with the parliament as it was dominated by Sun Yat-sen's party. This was captured in how often he ignored any decisions emanating from the National Assembly. The dissolution of the parliament in January 1914 was a major step by Yuan in consolidating his power as a dictator. The dissolution provided him wide powers over the next ten years, which he used to safeguard his personal interests. This transition significantly strained governmental relations with the RCSC.

As a non-governmental organisation, the RCSC enjoyed much legitimacy from the public. Its aid during the Russo-Japan disaster was critical in rallying support across China. It is prudent to note that the humanitarian mandate was critical in ensuring that the Shen Dunhe-led entity acquired material and financial support from the Shanghai elite. The RCSC was also seen to be much attuned to the public's concerns and to the needs of several maligned groups that could have easily escaped the government's net due to religious standing or political inclination.⁴⁹ With chapters across China, the RCSC network was also much different from the Beiyang Government, which was founded on traditional monarchical structures. This could have been one of the reasons why the Beiyang Government was keen on exerting its control over the organisation but not to the extent of fully crippling it. The network structures were complementary to many governmental functions—hence the calculated control of the RCSC under Yuan's tenure.

The Yuan dictatorship sought to contain the RCSC, the only civil society organisation at the time, through different strategies. Many governments make it impossible or difficult for NGOs to get registered.⁵⁰ However, in the Beiyang Government's case, the registration of the RCSC was a matter beyond its control due to the RCSC's international standing and links. The only viable approach for the Yuan administration was to contain or usurp the organisation's power by shrinking the legal and administrative space that it could work with. Through purported constitutional changes, the Government showed its true intentions of curtailing the organisation's independence.

Smear campaigns are one of the tactics used by governments in fighting non-governmental organisations. These campaigns may be levelled against the organisation's leaders, sponsorship or mandate. The linkage of the RCSC to the

⁴⁹ David C. Korten and Antonio B. Quizon, "Government, NGO and International Agency Cooperation: Whose Agenda?" in *Government-NGO relations in Asia*, Palgrave Macmillan, London, 1995, pp. 131-164.

⁵⁰ Grace Chikoto, "Steering international NGOs through time: The influence of temporal structuring in government accountability requirements", *Nonprofit Policy Forum*, vol. 6, no. 1, De Gruyter, Berlin, 2015, pp. 59-90.

International Red Cross Society was one of the premises for the smear campaigns launched by the Yuan Administration. The leakage of a news piece regarding the conflict between Beijing and Shanghai on the Red Cross delegation to the United States was aimed at highlighting the disarray in the organisation. Since the newspapers were the popular information media, leaking the conflict can be said to have been government-engineered. News of the conflict would have augured negatively with the Chinese population, whose cultural values were non-confrontational, honest and inclined towards wisdom. A smear campaign strategy may also have been used against Shen Dunhe, who was the strongest personality at the time standing up to the Yuan Administration in its quest to control the RCSC. By targeting its topmost official, the Yuan Administration tried to delegitimize the RCSC as it was then constituted, in order to justify its need to take more control over the RCSC activities in China.

The countermoves of the Beiyang Government also exhibit its desire to install its puppets in major offices. A good example is the mooted of the Cai Tinggan candidacy in April 1919 to replace the influential Shen Dunhe. The decision was made with the goal of humiliating Shen and flexing its muscle, in accordance with the new constitutional changes dubbed “Regulations of the Red Cross Society” that had been ratified by the legislature.⁵¹ The puppeteering of the top leadership by the Government can be explained by the intentional skipping of pertinent meetings by Cai Tinggan, particularly those that sought to mount attacks on the government’s interference.

Intimidation was one of the other tools adopted by the Beiyang Government. This was observed through the deliberate push by Beijing to have new regulations introduced to restrict the RCSC’s Head Office. This led to the announcement of the Regulations of the RCSC (Article 11). The decision by the government to ignore the Affairs Office and Executive Council amounted to strong-arm tactics that could only be equated to intimidation.

Left-Wing Perceptions of Civil Society

According to the framer of the concept of civil society, Georg Wilhelm Friedrich Hegel, He identifies family, religion, morality, legislation, education, class relations, laws and relationships between citizens as the basic components of civil society.⁵² Under this theoretical framework, the State plays the pivotal role of balancing interest

⁵¹ R. Gallopin, H. Beer, and O. Stroh, “International Assistance of the Red Cross in Indo-China”, *International Review of the Red Cross*, Archive 14, no. 157, 1974, pp.194-195.

⁵² Peter G. Stillman, “Hegel, Civil Society, and Globalization,” in Andrew Buchwalter (ed.), *Hegel and Global Justice*, Springer Dordrecht Heidelberg, New York, London, 2012, pp.112-13.

groups' influence and ensuring that civil society is developed for the public good. Building on this theory, Karl Marx stated that the civil society under capitalism would be eager to advance individual interests, which in the end would evolve into the focus of the society in context. Thus, in a capitalistic society the capitalist class would use the civil society to advance its agenda.

In light of this theory, it is worth noting that the RCSC was initially founded and funded by the elite class in China under the leadership of Shen Dunhe. Before legal ratification of the RCSC by the Government, the body's agenda could have been influenced by the interests of its major stakeholders: the elite class. As such, Shen Dunhe emerged as the leader of a civil society organisation which had the potential to deviate from its core mandates, in order to advance the individual interests of its top financiers. However, with the Government's interference, under this theory, the potentiality of such an action was contained. This may be used to highlight the positive implications of the Government's involvement in the RCSC operations in China.

Reviewing the constitution of the body from a leftist perspective suggests that the Yuan Administration might have been serving the greater good for the Chinese public. As a provisional government, the Yuan Administration had the legal mandate of protecting the public's interests. This was achieved through the establishment of special internal coordination in the entity via government representatives. Officials drawn from the Ministry of Foreign Affairs, the Department of the Navy, and the Department of the Army were incorporated into the Red Cross Society in order to provide governmental oversight, which otherwise would not have been possible with the government participating in the periphery.

The actions of the Government could also be argued as ensuring that the body was rooted in its core mandate of providing humanitarian assistance.⁵³ With the First World War taking place, the Government had to take an active role in the affairs of the Red Cross Society with the intent of creating the much-needed synergy between the two parties, as envisioned in the Geneva Conventions. This is observed in the long-term relationships between the Government and the Red Cross. The Red Cross provided the logistical support which was critical in aiding victims on the battlefield. The Government, on the other hand, focused on providing the material aid to enhance the Society's capacity to perform its functions. Under the Left-Wing Theory, the Government acted as the chief public watchdog against an entity that could have easily been used to advance vested interests by its local and foreign financiers.

⁵³ David C. Korten, and Antonio B. Quizon, "Government, NGO and International Agency Cooperation: Whose Agenda?", *Government-NGO relations in Asia*, Palgrave Macmillan, London, 1995, pp. 131-164.

The Liberal School of Civil Society

According to the framers of the civil society management theory, the civil society acts as the middle ground between the ruling class and its subjects.⁵⁴ It is the only institution which can effectively ensure that society is just or upholds justice. In the Beiyang Government period, the RCSC was the only formidable non-governmental organisation and civil society entity that was legitimate in the eyes of the public. Thus, it was the only body that could effectively intervene to provide universal aid, which in any democracy is the responsibility of the government of the day. In light of these, the liberal nature of this entity—as assumed in its recognition by the International Red Cross and Red Crescent Movement—was pivotal. It was this independence that allowed the Red Cross leaders such as Shen Dunhe to assemble and set up functional structures in Shanghai that made the Red Cross very efficient in its operations.

Governmental interference, under this theory, stemmed from the Yuan Administration's desire to enforce its authority on all facets of national life, including civil society. By instituting constitutional changes and forcing the Red Cross leadership to incorporate government officials in the running of the organisation, the Government was able to dilute the entity's independence. The desire to exert control over the body was also observed with the fronting of puppet leaders in the Red Cross. It is through these leaders that the government could advance its agenda within the humanitarian outfit, without much difficulty. The fresh leaders could easily be manipulated to serve the Yuan Administration, especially when compared to leaders drawn from the Red Cross Society membership.

Alternatively, this school of thought can explain the future resurgence of the Red Cross Society in reclaiming some lost control. In 1920, the Red Cross membership reversed some of the former constitutional changes that had been initiated by the Government. Many of the changes were initiated by the Shanghai side, which flexed its political muscle in the General Assembly. Compared with the old Constitution, the new changes were seen as critical in fighting the Beiyang Government's interference. The new changes were aimed at empowering the various offices while at the same time providing a clear definition of roles.

Implications of the Government Interference

The Yuan regime did more harm than good in overstepping its mandate by seeking to control the RCSC. The machinations from the start were driven from an inherent

⁵⁴ Peter G. Stillman, "Hegel, Civil Society, and Globalization", in Andrew Buchwalter (ed.), *Hegel and Global Justice*, Springer Dordrecht Heidelberg, New York, London, 2012, pp.112-13.

fear that can only be explained as imagined threats by the government.⁵⁵ With a political history associated with coups, destabilisation and violent power takeovers, the Yuan Administration did not comprehend the role of the RCSC in line with its humanitarian mandate. The biased onslaught on Shen Dunhe must have been based on the strong network and support that he enjoyed, particularly in Shanghai. Shen Dunhe was also the face of the Society, and thus all the milestones attained by the RCSC could be seen as due to his efforts. With such a standing in a newly formed republic, Shen Dunhe was a strong individual outside the political circle. He was perceived as a potential threat to the leadership of President Yuan, which itself was transitioning from the totalitarianism associated with monarchical rule to a near-democratic structure that incorporated various checks and balances.

The insistence by the government through the Act of Administrative Rules and Procedures of the RCSC that the “President and Vice-President of the RCSC ought to be designated by the President of the Government” was one of the controlling ploys observed.⁵⁶ This stipulation was clearly articulated by the Government with the goal or intention of exerting control over the RCSC.

Conclusion

The RCSC can be said to have been a by-the-people organisation in support of Chinese merchants and political elites, who were keen on alleviating the suffering of poor civilians caught up in the Russo-Japanese war. The noble intentions of the outfit were noted and led to the RCSC being ratified in the Beiyang period. All these efforts can be linked to Shen Dunhe, who sought to establish an independent entity that had its objectives set out. However, these efforts were greatly impaired by government interference.

The Central Government may have been acting out of a sheer need to meet the RCSC’s mandate, as enshrined in Article III of the Statutes of the International Red Cross and Red Crescent Movement. However, the Yuan Administration overstepped its own mandate by frustrating efforts by officials such as Shen Dunhe. The efforts, for instance, to introduce new constitutional changes that sought to incorporate the Departments of the Navy, the Army and Internal Affairs have frequently been described as extreme. Based on historical analysis, these departments were not above arm-twisting the Red Cross officials to advance the Government’s agenda. The Beiyang period can thus be said to have been a transitional period, where

⁵⁵ Julia C Strauss, *Strong institutions in weak polities: state building in Republican China, 1927-1940*, Oxford University Press, Oxford, 1998.

⁵⁶ R. Gallopin, H. Beer, and O. Stroh, “International Assistance of the Red Cross in Indo-China”, *International Review of the Red Cross*, Archive 14, no. 157, 1974, pp.194-195.

political leaders were still sticking to old monarchical leadership tactics detested by majority of the Chinese, and which motivated the change of rule in the first place.

Through the incorporation of civil society management theories, several elements can be established. The Left-Wing Perspectives seeks to defend the Yuan Administration's interference in the Red Cross Society, as part of its mandate as custodian of public interest. Additionally, under this perspective the government is depicted as a good entity that seeks to protect the citizenry from exploitation by civil society organisations like the Red Cross which could have easily advanced the interests of the elites in China. The Government, through a series of constitutional changes, was keen on cementing its position as the chief watchdog. The liberal perspective, however, captured the role of the independent Red Cross as the balance between injustice and justice in China. With public and external support, the Red Cross Society could have easily sufficed as the justice watchdog in China, keeping the Beiyang Government on its toes when it came to delivering services to the public.

The Use of Military Units and Personnel for International Rescue and Relief Operations: Pertinent Issues Related to the 2011 East Japan Earthquake

Dr. Yoshi Kodama *

ABSTRACT

This article attempts to examine the challenges and possible prescriptions of operations by foreign military and civil rescue and relief assistance teams, using the 2011 East Japan earthquake as a case study. The article then presents a framework for inter-State military and civil operations in civil rescue and relief assistance. The article particularly examines how military units and personnel have advantages in ground operations, though its use has been under-evaluated in existing inter-State frameworks, including the 2006 Oslo Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, UN-authorized guidelines for military and civil rescue / relief operations. The article then explores possible inter-State and domestic statutory frameworks, covering civil and military operations as prescriptive proposals, on such issues as the entry into and transport of equipment and personnel within the territory, swift duty-free introduction of emergency materials, access to affected areas via airports and seaports, domestic transport, as well as medical qualifications. It also addresses the rules on immunities from the receiving State's domestic laws and regulations.

Introduction

This article examines the challenges and possible prescriptions of operations by foreign military and civil rescue and relief assistance teams, using the 2011 East Japan

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earthquake as a case study. This article then presents a framework for inter-State military and civil operations in civil rescue and relief assistance.

On 11 March 2011, the east coast of the northeast region of Japan was hit by an unprecedented large-scale earthquake. The epicenter was under the seabed off the coast of the Tohoku Region in Northeast Japan.¹ The earthquake brought about a significant number of casualties as well as physical damage to buildings and infrastructure, leading to a total or partial eradication of towns and villages as well as paralysis of lifelines.² This damage further caused protracted difficulties in the recovery of agricultural and industrial supply sources.

For rescue operations, the first seventy-two hours is crucial for saving people's lives. To that end, prompt and well-organized operations are a prerequisite and pre-arranged international agreement is important. Immediately after the earthquakes, rescue operations were commenced by Japan's domestic fire and police agencies, supported by the Japan Self-Defense Forces.³ The initial rescue operations faced difficulties caused by delay in collecting and compiling information on casualties and damage. This was exacerbated by the disruption of electricity, gas, telecommunications, as well as transport links. Rescue and relief operations by domestic agencies encountered obstacles at their initial search and life-saving activities.

The rescue and initial relief operations were supported by the United States forces stationed in Japan, which are settled in Japan's territory under the 1960 Japan-US Status of Forces Agreement.⁴ The situation presents a unique example of post-disaster emergency assistance operations by foreign forces stationed in the host State's territory.

The East Japan earthquake demonstrated that in the case of disasters of such scale, military units, both institutionally and practically, can fulfill the need for self-sufficiency and self-containment, without requiring support and resources from local authorities and communities. Rescue teams were required to be equipped with their own transport means as well as fuel and basic living needs, including water, food and sanitary tools. They needed their shelter and camps in affected areas. However, even

¹ Joint Editorial Committee for the Report on the Great East Japan Earthquake Disaster, *Report on the Great East Japan Earthquake Disasters*, Tokyo, 2014 (Japanese language. Citations are the author's translation.) part 3; Japanese Fire and Disaster Management Agency, *Compiled Records on the East Japan Great Earthquake*, Tokyo, 2013 (Japanese language. The author's translation) Ch. 2, 12.

² Japanese Agency *ibid*, Ch. 3.

³ *Ibid*, Ch. 4.

⁴ Agreement under Article VI of the Treaty for Mutual Cooperation and Security between Japan and the United States of America regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 1009 UNTS 365, 19 January 1960 (entered into force 23 June 1960).

military units had difficulties in coordinating and communicating with local agencies. There were cases when foreign military rescue teams sought fuel from local authorities.⁵

Earthquakes of this scale demand self-sufficiency and cost-owning under United Nations General Assembly Resolution 57/150 (2002), as well as the Guidelines for Urban Rescue and Recovery Operations (2004) by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) as an inter-governmental basis for guidance and reference.⁶ In applying such guidelines, military units have advantages with their ability to engage in autonomous deployment in affected areas.

There have been debates in judicial cases and academic treatises on the scope and conditions for immunities applied to military troops in foreign territories.⁷ Based on judicial decisions and State practice, international law provides at least a certain scope of immunities enjoyed by troops operating in a foreign territory, with the receiving State's consent to the troops' presence therein.⁸ The scope has been generally narrowed to non-commercial official duties under current international law.⁹

In most cases, military personnel's permanent or mission-specific stationing in a foreign country is regulated by inter-State legal instruments, such as status-of-forces agreements, which contribute to the clarity of the status and treatment of forces in station.¹⁰ As a recent trend, the clarity of foreign forces' treatment in a foreign territory are also established by bilateral defense cooperation agreements and

⁵ Japanese Agency, above note 1, Ch. 4.

⁶ UNGA Res. 57/150, 2012; United Nations, Office for the Coordination of Humanitarian Affairs (OCHA), Field Coordination Support Section, Preparedness-Response, International Search and Rescue Advisory Group, *Guidelines and Methodology*, Geneva, 2012. On disaster relief in general, recent basic documents and reports are UNGA Res. A/RES/69/283, Sendai Framework for Disaster Risk Reduction 2015-2030, New York, 2015; United Nations Office for Disaster Risk Reduction, *Disaster Risk Reduction and Resilience in the 2030 Agenda for Sustainable Development*, New York, 2015; United Nations Economic and Social Council (ECOSOC) Integration Segment, *United Nations International Strategy for Disaster Reduction*, New York, 2014; Tom Mitchell, *Options for including disaster resilience in post-2015 development goals*, Background Note, London, 2012.

⁷ See, e.g., John Woodliffe, *The Peacetime Use of Foreign Military Installations under Modern International Law*, Nijhoff, The Hague, 1992; Serge Lazareff, *Status of Military Forces under Current International Law*, Nijhoff, The Hague, 1971.

⁸ Supreme Court of the United States, *The Exchange v McFaddon*, 7 Cranch 116, 1812; *Coleman v Tennessee*, 97 US 509, 1878.

⁹ Woodliffe *ibid*, Ch. 8.

¹⁰ Lazareff, above note 7, Ch. IV.

domestic visiting forces legislation.¹¹ Such instruments typically provide for the principle of respecting domestic law and regulations; exemption or facilitation of military personnel's entry into the receiving State; special treatment in customs and procedures for goods employed for official duties; the facilitation of movement within a territory; as well as special status and arrangement in the application of criminal and civil procedures to military personnel.¹²

When rescue teams are part of military forces, the challenge will be in screening and selecting immunity rules that apply during natural disaster emergency operations. The emergency nature of deployment will reduce the need for long-term immunities which conventionally presuppose permanent or semi-permanent stationing of forces. Immunities for dependents, as traditionally provided for under the relevant treaties including status-of-forces agreements, may also not be at issue, and the use of domestic facilities and equipment may be less required for emergency rescue units. On the other hand, their emergency operations necessitate exceptional modalities, such as in the entry into and transport of equipment and personnel within the territory, swift duty-free introduction of emergency materials, and access to affected areas via airports and seaports.

With this initial issue-setting, this article examines how military units and personnel have advantages in ground operations, though its use has been under-evaluated in existing inter-State frameworks, including the 2006 Oslo Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, UN-authorized guidelines for military and civil rescue/relief operations.¹³ The article will then explore possible inter-State and domestic statutory frameworks, covering civil and military operations as prescriptive proposals, with special attention to the rules on immunities from the receiving State's domestic laws and regulations.

The Practical Use of Military Units and Personnel in Disaster Emergencies

Current Trends

There is an increasing trend of using military units and personnel for humanitarian assistance and disaster relief operations, particularly for rescue and relief activities in

¹¹ E.g., Agreement between the Government of Australia and the Government of the French Republic regarding Defence Cooperation and Status of Forces, 14 December 2006, Australian Treaty Series 2009 ATD 18.

¹² *Ibid*, Annex I.

¹³ OCHA, *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief* ("Oslo Guidelines") (updated November 2006, Revision 1.1, November 2007).

large-scale disasters.¹⁴ This reflects the capacity and technical abilities of military teams suitably catering to initial rescue activities. Military units in particular have capabilities for tackling dangerous work, including the treatment of hazardous materials accidentally spread in disasters. Such units also have advantages with speed and mobility capacities that are suitable for immediate response to emergencies and life-saving operations.¹⁵ In most cases, particularly when the affected State or regions are located in remote or geographically segregated areas, or have archipelagic features, military rescue teams are the first to arrive in affected areas. This is enabled by military transport capacities, including cargo aircraft for transporting personnel and aid materials, as well as helicopters for rescue and aid material transport operations.¹⁶

It has been reported that in fragile States, military units are the main, if not initial, responders before civilian units for rescue and relief activities. During the 2010 Haiti earthquake, for instance, peacekeeping operation units were particularly mandated to engage in humanitarian convoy protection and airspace management.¹⁷ In the Pacific region, where islands and reefs widely disperse, military transport and rescue/relief operations are distinctively crucial.¹⁸ In an island country covered by tropical plants, it has been observed that rescue/relief teams are first engaged in cutting fallen coconut trees in order to revive transport routes to affected areas.¹⁹ Military units are also characteristically useful for their self-contained and self-

¹⁴ UNGA Res. A/66/L.33, 19 December 2011; UNGA Res. A/65/L.45, 10 December 2010. Here, “disaster” mainly means extensive damage and injuries caused by natural events undermining economic and social functions in a broad sense, such as typically earthquakes and tsunamis, which require physical rescue and relief operations. The current trend of international practice and discussions formulate “disaster” as covering both natural and technological/industrial damage, including, for instance, cyberattacks and electromagnetic anti-telecommunication pulse explosive devices. See International Law Commission (ILC), Draft Articles on the Protection of Persons in the Event of Disasters, in Report of the International Law Commission, The Work of its Sixty-Eighty Session, ILC Secretariat, 2016.

¹⁵ OCHA, *Guidelines for Civil-Military Coordination in Haiti: Guidelines for the Engagement and Coordination of Humanitarian Actors and Military and Police Actors in Haiti*, Geneva, 2011.

¹⁶ OCHA, Inter Agency Standing Committee (IASC), *Civil Military Coordination during Humanitarian Health Action, Provisional version*, Geneva, 2011: Risk Assessment of Possible Military Involvement in Health Action by Scenario and Typology of Task.

¹⁷ OCHA, *Guidelines Haiti*, above note 15, 1.1.

¹⁸ The Asia Pacific Conference on Military Assistance to Disaster Relief Operations (APC-MADRO), *Asia Pacific Regional Guidelines for the Use of Foreign Military Assets: Natural Disaster Response Operations*, Bangkok, 2015, Background, 3, which states that “there is recognition amongst all these parties that military capacities in Asia Pacific countries are often the first capabilities offered and make a valuable contribution in responding to regional natural disaster emergencies.”

¹⁹ Anonymous interview with governmental official (on file with author), Tokyo, 17 August 2017.

sustaining capabilities, without demanding basic subsistence from local supplies, like water, food, fuel and shelters.²⁰ There are thus no additional cost burdens on the affected host State.

Despite such notable contributions of military units and personnel in the initial stages of a natural disaster, international frameworks and guidelines generally take a restrictive approach to their involvement as a whole. The 2006 Oslo Guidelines on the Use of Foreign Military and Defence Assets in Disaster Relief (revised in 2007) prescribe the principle of “last resort” for military involvement, by virtue of which military units should only be deployed when there is no alternative to civilian organisation.²¹ The military teams are limited in duration and scope, minimizing their missions to what is called “indirect operations”, meaning transport and infrastructure building.²² Given this, the crucial role played by military units for initial rescue/relief operations, with their rapid deployment capacities, are quite undervalued. From the beginning, the Oslo Guidelines define “civilian defence organisations” by formulating an open-ended scope, with reference to paragraph 61 of the Additional Protocol to the 1949 Geneva Convention.²³ This demonstrates the linkage made by the guidelines with military rules on operations. The Oslo Guidelines provide a restrictive approach to military and civilian defence organisations as a whole, considering their inclusion of military elements.

It is curious that, on the other hand, the Oslo Guidelines prescribes highly privileged treatment for military personnel, by respecting each sending State’s military command. The Guidelines propose privileges and immunities for military personnel at the same level as UN Peacekeeping operations personnel as provided in the UN model rules, roughly equivalent with the level of diplomatic privileges and immunities.²⁴ This is beyond the level of immunities under established customary international law, or practice widely prevalent on a “diplomatically referable” basis.

Such a minimalist approach to military involvement is also preserved in several United Nations frameworks, with the principle of “last resort” and a provision for a limited time and scope for missions.²⁵ This reflects an underestimation of the practical role of military units in rescue/relief operations. It may also be derived from

²⁰ Joint Editorial Committee, above note 1.

²¹ OCHA, Oslo Guidelines, above note 13, para. 26, ii.

²² *Ibid.*, 32, iv and 38.

²³ *Ibid.*, Introduction, 3.

²⁴ *Ibid.*, 79 et Annex I; UNGA, Model status-of-forces agreement for peace-keeping operations, Report to the Secretary General, UN Doc. A/45/594, 9 October 1990.

²⁵ OCHA, *The Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies*, 2003, Revision I, 2006.

the traditional dichotomy between civil and military operations, in favour of their separate treatment.

The origins of “military minimalism” in disaster rescue and relief operations can be traced to the following: first, the traditional legal distinction between war and peace situations affects approaches to military involvement.²⁶ The law of armed conflict obliges occupying forces to protect the local population by ensuring the delivery of aid materials, for instance.²⁷ Such rules presuppose military conflicts and hostilities, which are fundamentally different from disaster rescue/relief operations. Second, there is a policy stance that military involvement will lead to intrusion into the host State’s sovereignty, since it is contrary to the principles of neutrality and impartiality.²⁸ Disaster relief operations are conducted on the basis of the consent of the host State, as is the case in most contemporary military operations.²⁹ Third, there is a perception that the presence of foreign military units make them subject to being targeted by external or internal belligerent entities, thus exposing local populations to the risk of military conflicts.³⁰

Possible New Guidelines

Against this backdrop, it can be said that the principles provided under the 2006 Oslo Guidelines, which are the United Nations-authorized guidelines for civil-military disaster relief operations, do not reflect the current need for and practice on the involvement of military units and personnel in disaster rescue/relief operations.³¹ While preserving some provisions of the Oslo Guidelines, principles more suitable for current practice can be summarized as follows:

First, foreign military units and personnel shall be engaged pursuant to the consent of the host State. In addition, their operations shall be in accordance with a humanitarian mandate, in line with respecting sovereignty, territorial integrity and political independence. Military units are prohibited from engaging in activities contrary to neutrality and impartiality.

²⁶ Robert Jennings and Arthur Watts, *Oppenheim’s International Law*, 9th ed., Longman, London, 1992; Ian Brownlie, *Principles of Public International Law*, 4th ed., OUP, 1990.

²⁷ Jane Barry with Anna Jeffreys, *A Bridge Too Far, Aid Agencies and the Military in Humanitarian Response*, Humanitarian Practice Network, Network HPN Paper, 2002.

²⁸ OCHA, *Oslo Guidelines*, above note 13, 9, 95.

²⁹ ILC, above note 13; Sandesh Sivakumaran, “Arbitrary Withholding of Consent to Humanitarian Assistance in Situation of Disaster,” *International & Comparative Law Quarterly*, Vol. 64, CUP, p. 501.

³⁰ David Fisher, “The Law of International Disaster Response: Overview and Ramifications for Military Actors,” *International Law Studies*, Vol. 83, XIX.

³¹ OCHA, above note 13.

Second, if possible, foreign military units shall coordinate with local rescue/relief teams as well as with third countries' teams. This is practically important in avoiding duplications and inefficiency. Geographical allocations for each operation as well as on-the-spot cooperation in rescue/relief activities should be well-coordinated. Information-sharing among rescue/relief teams on local needs and situations is also crucial, and should be done in a timely manner. Military command within each country's unit shall also be preserved, as an essential prerequisite and basis for discipline and efficiency within the military structure.

Third, self-sufficiency for basic subsistence and conditions shall be ensured by the sending State. Foreign military units should not unnecessarily further strain local resources.

Fourth, foreign units should be, in principle, unarmed, given the humanitarian nature of their operations. They may only carry arms with the consent of the host State, if called for by a deteriorating local security situation and for purposes of self-protection (both the protection of individual personnel and his or her unit), unless there is consent from the host State or a multilateral mandate for wider use of arms, including the protection of the local population.

Whether arms may be used in an emergency to protect local people and third parties is an issue beyond humanitarian assistance and disaster relief. The mandate of local security assurance may be granted by the host State's consent to the foreign military unit. Any such controversy on the scope of a mandate should be settled in reference to the mandate, and in accordance with local laws and regulations and established international practice and standards.

Fifth, foreign military units have a duty to respect local laws and regulation, subject to certain privileges and immunities granted to them under statutory instruments or customary international law. The issue of military immunities should be settled in accordance with existing arrangements between the host and sending States, established customary international law (though its substance may not be sufficiently clear as applied), as well as international practice and standards.

These are only some of the basic principles that can be referred to with respect to the involvement of military personnel in disaster relief operations. If the situation at hand involves armed conflict, explicit observance of neutrality and impartiality should also be adhered to, for example, when disaster relief operations are undertaken in a State where different separatist groups are situated. Table 1 summarizes the principles applicable to military personnel and units engaged in rescue and relief operations in natural disasters in foreign territories.

The Status of Foreign Military Personnel under General International Law

Issues to be Examined

This section examines the status of military units involved in rescue and relief operations during disasters in foreign countries, from the viewpoint of customary international law. This issue was particularly relevant in receiving foreign military rescue and relief operations following the 2011 East Japan earthquake. In that case, several States sent military rescue teams to Japan without being covered by a status of forces agreement.³²

The dispatch and acceptance of military rescue/relief teams, whether independently or as part of governmental emergency teams, including civilian rescue workers, should be based strictly upon the consent of the affected State.³³ Following that clearance, legal situations leading to the involvement of military units are quite diverse.

First, there are cases where a status of forces agreement had been concluded between the host and sending States, and on that basis, foreign forces are stationed permanently in the territory of the host State.³⁴ Such forces are swiftly engaged in rescue and relief activities, based upon a request from the host State. This was the case for the United States forces stationed in Japan under the 1960 Japan-US Status of Forces Agreement, which joined in rescue and support activities during the 2011 East Japan Earthquake.³⁵ Multilateral status of forces agreements, like the 1951 North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA), can also be invoked for humanitarian assistance and disaster relief activities, with the participation of NATO members' forces stationed in other members' territories.³⁶ Privileges and immunities are granted to military units under such frameworks.

Second, there are cases where a status of forces agreement for a limited scope and objectives may be relied on, and applied *mutatis mutandis* to disaster relief activities. In the 2011 East Japan earthquake, Australian units used military bases in Japan for transporting aid materials. Such military bases were originally dedicated for use under the 1954 Agreement regarding the Status of the United Nations Forces

³² Joint Editorial Committee, above note 1.

³³ ILC, above note 14.

³⁴ Lazareff, above note 7, p. 6; Woodliffe, above note 7, p. 35.

³⁵ Joint Editorial Committee, above note 1, Fundamental Aspect II.

³⁶ Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces (NATO/SOFA) (19 June 1951) NATO Basic Documents, Selected Texts, NATO (Brussels, 2016) p. 55.

in Japan, which in the relevant texts are intended to support the forces “which are participating in the United Nations action in Korea.”³⁷

Third, as seen in recent practice, defense cooperation agreements or visiting forces agreements, which are not specifically undertaken for mutual or collective defense, can be used for disaster rescue and relief activities, by applying status of forces rules under such agreements. Typically, as a model example, the 2004 France/Australia Defense Cooperation Agreement is aimed to be applied to humanitarian assistance and disaster relief purposes, with its annex on the status of forces.³⁸

Fourth, there are situations where there are no bilateral or multilateral legal instruments regulating the status of forces, but military units are sent to the affected State in order to engage in rescue operations and the transport of emergency aid materials. There may be cases where non-binding instruments are concluded, such as a memorandum or guidelines, aimed for cooperation in natural disasters and facilitating rescue and relief operations to a certain extent.

Without such agreements or guidelines, however, military units are obliged to refer to customary international law, as far as there is reliable clarity and specificity in areas such as entry and immigration, customs duties and taxes, domestic transport, arms carriage, and civil and criminal jurisdictional allocation.³⁹ If customary international law is not considered as sufficiently developed and defined, military units will have to resort to *ad hoc* settlement with the host State.

One cannot set up such settlement instantly in the face of large-scale natural disaster emergencies. This was the case for the South Korean unit engaged in aid material transport in the 2011 East Japan earthquake, which had not been covered under a status-of-forces agreement.⁴⁰ Military rescue operations by foreign units in the 2004 Indonesian tsunami and the 2015 Nepal earthquake also lacked legal frameworks for the treatment of rescue/relief forces.⁴¹ These circumstances have led to a need for clarification and specification of applicable rules or where applicable, customary international law.

³⁷ Agreement regarding the Status of the United Nations Forces in Japan, 10 UNTS 3, 19 February 1954 (entered into force 11 June 1954) Preamble, para. 4.

³⁸ Australia/France Agreement, above note 11, Annex 1.

³⁹ Dieter Fleck (ed.), *The Handbook of the Law of Visiting Forces*, OUP, I.

⁴⁰ Joint Editorial Committee, above note 1.

⁴¹ IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study*, Geneva, 2007.

State Practice and Cases in Early Periods

Rules on military immunities under customary international law have been distinctively vague and ambiguous.⁴² There have been arguments on the conditions and scope for applying domestic laws and regulations to foreign military personnel and units present in a host State, and when they are exempted as privileges and immunities.⁴³ Rules have been particularly crystallized by synthesizing and interpreting the accumulation of cases, including domestic judicial judgments and inter-governmental arbitration awards. The steady creation of bilateral and multilateral legal instruments on the status of foreign forces stationed permanently in peacetime for mutual or collective defense cooperation, through the First to Second World Wars and after, have also blurred the outer limit of customary international law.⁴⁴

Notable positions have been advanced early on in *The Exchange v. McFaddon* (the “Schooner Exchange”), decided by the United States Supreme Court in 1812.⁴⁵ The *Schooner Exchange* concerns a French military ship confiscated by a United States private citizen claiming original ownership thereof in the course of transit within the United States territory, based on the consent by the United States authority.⁴⁶ The Court held that the warship concerned was exempted from United States jurisdiction, judicial procedures and enforcement.⁴⁷

The judgment famously stated that “a public armed ship ... constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by [the sovereign] in national objects,” then was exempted from the host State jurisdiction.⁴⁸ This is an application of the sovereign immunity doctrine that exempts military forces from a host nation’s jurisdiction, based on the need to complete their mission under the sending State’s discipline.⁴⁹ In such a situation, thus, the jurisdiction of a sending State’s court martial applies to its own units, which are exempted from the host State’s legal jurisdiction.⁵⁰

This general reasoning for the conclusion was, however, *obiter*, as the immediate scope of the judgment is a warship in transit in a foreign country.

⁴² Fisher, above note 30.

⁴³ Fleck, above note 39, IV/2.

⁴⁴ *Ibid.*, II.

⁴⁵ *Schooner Exchange*, above note 8.

⁴⁶ *Ibid.*, para. 117.

⁴⁷ *Ibid.*, para. 135.

⁴⁸ *Ibid.*, para. 144.

⁴⁹ *Ibid.*, para. 139.

⁵⁰ *Ibid.*, para. 140.

Thereafter, in their respective writings, Oppenheim has claimed that “military immunity is no longer maintained as state practice,” while Brownlie stated that “military forces [are] subject to home country (host State) rules and disciplines.”⁵¹ This shows a lack of fixed views in that generation of scholastic work. Others highlighted that the judgment was made by a domestic court in a newly emerging State in the nineteenth century.⁵²

In handling the incident in the *Schooner Exchange*, the United States Administration had been in a position to claim diplomatic protection of its citizen’s property against France, following the seizure of the ship by a French military brigade on 30 December 1810.⁵³ It should have been handled on a State-to-State basis, as it concerned military operations by a foreign country. The judgment reflects the United States’ hesitation to claim restitution against France, and to initiate as a last resort a counter-attack against the earlier French military action against the United States citizen’s property.

The *Schooner Exchange* also purportedly relied upon consent by the host State for providing immunities to a foreign warship. Exemption from the local jurisdiction was justified by the interpretation of host State consent at the timing of entry, whether explicitly or implicitly, for the sake of the warship’s efficient operations as a military unit.⁵⁴ If the consent, even implicitly, was well interpreted in such a manner, there was no need for arguing general legal norms. The intention of the host State is a matter of fact, not of law. The judgment, nevertheless, stipulated logic and reasoning based upon general principles, providing a basis for normative consolidation.

One can surmise the reasons advanced for minimizing the precedential value of the *Schooner Exchange*: first, international legal practitioners tend to hold State sovereignty in high regard, hence a wider scope of military immunities as shown in the case could today be seen as intrusion and intervention into a host State’s sovereignty.

Second, since the *Schooner Exchange*, a more restrictive approach to State immunity has emerged, as in the functional immunity doctrine, by which non-public State activities, such as commercial profit-making engagements, are considered not immune from local jurisdiction.⁵⁵

⁵¹ Oppenheim’s, above note 26, p. 1154; Brownlie, above note 26, p. 369.

⁵² Brownlie *ibid.*, c. iii.

⁵³ *Schooner Exchange*, above note 8, para. 117.

⁵⁴ *Ibid.*, para. 137.

⁵⁵ Oppenheim’s, above note 26, p. 1033.

Third, a distinction has existed between how international law applies in peacetime and wartime situations.⁵⁶ Accordingly, in peacetime, military forces are subject to peacetime rules; in situations of armed conflict, *jus in bello* applies.

Finally, there may also be a policy judgement viewing military involvement negatively, with the risk of escalation and security destabilization, thus advancing the position that the free hand of military units should be limited.⁵⁷

The rationale of the Schooner Exchange has been frequently referred to in subsequent United States cases, such as *Coleman v. Tennessee* in 1878 and *Sow v. Johnson* in 1879.⁵⁸ Following Schooner Exchange these judgments upheld military immunities from judicial procedures. The parties in the case concerned the United States Civil War, thus, there might have been rooms for treating them in a war claim context. It may not have been a reasonable treatment if the court had accepted claims against former segregating parties in a single country for their deeds in battles, particularly given the strong need for reconciliation and recommencement at that point in US history.

The 1909 *Casablanca* arbitration award between Germany and France applied the logic of military immunity to deserted consular officials from Germany to France as members of a military organization.⁵⁹ This case, in fact, seems to have concerned the application of consular immunity and its scope of application.⁶⁰ A 1925 Panama Supreme Court judgement also upheld the immunity of United States military units from local jurisdiction, though it appears to be based on the application of a bilateral treaty granting special treatment to US forces.⁶¹

Together, these demonstrate the sporadic but steady accumulation of cases favouring military immunities, lend support to the crystallization of customary international law and demonstrates “general principles of law recognized by civilized nations,”⁶² although some hesitancy in academic fields may remain. One may argue that a customary international rule has been established in favour of the immunity of military forces at least from enforcement jurisdiction, with respect to the implementation of judicial procedures, or in on-duty or *inter se* cases within a force.

⁵⁶ Lazareff, above note 7, p. 6.

⁵⁷ Fisher, above note 30.

⁵⁸ *Coleman v Tennessee*, above note 8; *Sow v Johnson*, 100 US 158, 1879.

⁵⁹ *France v Germany*, the Casablanca Arbitration Award, Permanent Court of Arbitration at the Hague, 22 May 1909, *AJIL* Vol. 3, 1909.

⁶⁰ *Ibid.*, para. 1.

⁶¹ Supreme Court of Justice, Republic of Panama, the Republic of Panama against Wilbert L. Schwartzfiger, 11 August 1925.

⁶² Statute of the International Court of Justice, 188 UNTS 137, 1945, Art. 36,1,c.

Such immunities concern deeds in the performance of duties as well as those related to the interests of military personnel or property of a sending State.

Immunity from local enforcement jurisdiction is in line with the mainstream construction in international law of State and diplomatic immunities.⁶³ It is unthinkable for military immunities to be defined as something greater than diplomatic immunities⁶⁴ which ensure exemption from enforcement jurisdiction. If one follows the logic of allowing for military immunities for State organs, off-duty deeds may be also exempted from local jurisdiction. The trend has been for cases to be more functionally based. As the *Schooner Exchange* judgement stated, mission completion is the purpose of immunities, thus extra-duty matters can be well-settled outside the scope of exemptions, by an application of functional immunity to acts in the course of performance of duties.⁶⁵

Current Practice

The reasoning for minimizing the application of military immunities has lost ground in the post-Second World War period, especially with the increasing use of military units for disaster rescue and relief activities. This could be due to a number of reasons: first, State sovereignty will not be intruded upon when consent by the host State is obtained. Thereafter, it can be argued whether the consent is genuine or not, whether it was made by threat or under external pressure by a foreign State, but that is a matter of the application of rules, and not the rules themselves.

Second, neither peacetime military presence nor natural disaster rescue and relief activities are commercial activities under a claim of functional State immunity. These are governmental public activities, so covered under the restrictive State immunity doctrine.⁶⁶

Third, the legal distinction between wartime and peacetime situations is no longer of practical relevance, given the prevalence of peacetime military cooperation based on host States' consent.⁶⁷

Finally, the policy judgement for refraining from military involvement needs rethinking in light of the fact that military forces are engaged in peacetime cooperation, notably for humanitarian assistance and disaster relief. The use of military units for such operations has been gaining ground.

⁶³ Vienna Convention on Diplomatic Relations, 500 UNTS 95, 1961, Art. 31,1.

⁶⁴ *Ibid*, esp,c.

⁶⁵ *Schooner Exchange*, above note 8.

⁶⁶ Fleck (ed.), above note 39, I.

⁶⁷ Fisher, above note 30.

The above trends have served to expand the reasoning in the *Schooner Exchange*. In practical terms, the rules of military immunities, namely the exemption of military units and personnel from enforcement jurisdiction for on-duty and *inter se* claims, can be viewed on a “diplomatically referable” basis in diplomatic consultations or public statements. Whether diplomats refer to established international law may vary from case to case, due to the generality of customary rules. This reflects the limits of current practice. In the case of the 2011 East Japan earthquake, military units sent from States without status-of-forces agreements did not claim privileges and immunities by referring to customary international law.⁶⁸

Under current international instruments, military immunities have been well-adopted and formulated following the undertaking of bilateral and collective defense frameworks after the Second World War.⁶⁹ In this regard, the 1951 NATO/SOFA provides a basis of standardized patterns of rules for military presence in foreign countries.⁷⁰ NATO/SOFA is wholly or partially adopted in no small number of bilateral and regional military cooperation agreements.⁷¹ Even former Warsaw Pact members reportedly adopted similar rules in their agreements.⁷² Which provisions in NATO/SOFA precisely reflect customary international law, or its modification and expansion, are difficult to identify due to the ambiguity of customary rules.

NATO/SOFA has allegedly introduced some novel rules departing from customary international law: one is the introduction of “concurrent jurisdiction” by the host and sending States, followed by the allocation of “primary jurisdiction” in criminal cases.

Under the NATO/SOFA framework, on-duty and *inter-se* criminal actions are subject to the jurisdiction of the sending State. This is a logical departure from the strict demarcation of State jurisdictions. Its practical application is, however, not totally different from the pre-NATO/SOFA practice of handling criminal cases for stationed soldiers.⁷³ It also departs from absolute military immunities and the strict application of territorial sovereignty. Even under a strict distinction of jurisdiction, a sending State may waive its military discipline jurisdiction, allowing a host State’s territorial sovereignty to persist, and vice versa.

⁶⁸ Joint Editorial Committee, above note 1.

⁶⁹ Fleck (ed.), above note 39, II.

⁷⁰ NATO/SOFA, above note 36.

⁷¹ E.g., Japan/US Agreement for Mutual Cooperation and Security, above note 4.

⁷² Fleck (ed.), above note 39, IV, which states that ‘in respect of criminal jurisdiction, the [Warsaw] Agreements were not dissimilar to their NATO equivalent.’

⁷³ Lazareff, above note 7, Ch. IV and V.

This is practically analogous to the notion of concurrent jurisdiction shared by the host and the sending States, with the allocation of primary rights for exercising jurisdiction. It appears that political considerations have been taken into account by the drafters in order to cater to possible public resistance against the absolute immunities for foreign soldiers stationed in that State.

On the other hand, civil jurisdiction under NATO/SOFA is anchored on the immunity from a host State's local enforcement jurisdiction in case of on-duty deeds.⁷⁴ This may be rooted in customary international law. The framework of civil claims under NATO/SOFA is, in any case, formulated by a practical treatment in favour of efficient and fair process as well as reasonable cost-sharing. It provides mutual waiver for inter-governmental claims as well as substitution for the sending State's personnel by the receiving State, in the case of on-duty actions.⁷⁵ The Agreement provides the offer of *ex gratia* payment handled by the host State, in the case of off-duty actions.⁷⁶

NATO/SOFA provides two more specific novel rules from the viewpoint of ambiguous customary rules; first, it sets out clearly the inclusion of civilian components of a sending State's forces within the scope of exemptions and waiver from the application of local laws.⁷⁷ This is intended to ensure military immunities by reference to military autonomy and internal discipline, and court-martial proceedings. Civilians are not eligible for court-martial in major countries.⁷⁸ The scope has thus been expanded in this case for purposes of the effective fulfilment of missions by stationed forces.

Second, NATO/SOFA allows for civil claims by civil components and locally employed technical staff, having the nationality of the host State, against the host State, if it relates to the interest and property of the sending State's forces.⁷⁹ This is a departure from the rules of diplomatic protection under customary international law which provide strict nationality requirements. Traditionally, a national of the host State is not immune from host State jurisdiction, and is not treated under inter-State rules.⁸⁰

⁷⁴ NATO/SOFA, above note 36, Art. 8.

⁷⁵ *Ibid.*, 5.

⁷⁶ *Ibid.*, 6.b.

⁷⁷ *Ibid.*, Art. 7, 3.

⁷⁸ Fleck (ed.), above note 39, II, which states that "The [US] Supreme Court [held] that US civilians were not subject to Court Martial jurisdiction in Peacetime."

⁷⁹ NATO/SOFA, above note 36, Art. 5, 3.a.

⁸⁰ *Ibid.*

Possible Rules for Civil and Military Coordination in Foreign Rescue and Relief Operations

General Considerations

In most cases, foreign rescue and relief operations are conducted by military and civilian personnel in coordination with each other.⁸¹ In some cases, joint civil and military relief teams are formed and act as one body for operations.⁸² In most cases, military units first engage in initial rescue operations, immediately after the outbreak of disasters. This is followed by civilian medical teams and aid material transport units. Military cargo aircraft may carry both military rescue personnel and civilian aid workers. Civilian infrastructure reconstruction teams may then join at subsequent phases for relief operations.

It is therefore practically reasonable that both military and civilian personnel are treated equally, in order to promote operational efficiency. Both face the same physical bottlenecks and are subject to the same local rules and regulations.

In the course of rescue operations, rescue teams may also destroy local property by negligence. In such cases, military immunities may exempt military personnel from local civil judicial procedures, while civilian personnel become subject to civil claim procedures initiated by a local property owner. This complicates the situation and may hinder operations. If the temporary nature of rescue teams in the host State is taken to account, military and civilian defendants may be treated jointly if they belong to combined operations. Such an issue can be ideally addressed by inter-governmental settlement between the sending and host States on applicable remedies, for example.⁸³

Unlike military units or personnel, for which the scope of military immunities may be established under customary international law, or at least can be identified on a “diplomatically referable basis”, civilian rescue and aid workers are not exempt from local judicial procedures. There are also differences between military and civilian personnel in terms of their legal status, command structures and mentality.

At the same time, it appears to be a trend for inter-governmental arrangements to provide that civilian elements in military forces, such as locally-

⁸¹ Joint Editorial Committee, above note 1.

⁸² International Development Centre of Japan, *Comprehensive Review of Assistance from Overseas for the great East Japan Earthquake*, Tokyo, 2014.

⁸³ UN Model status-of-forces agreement for peace-keeping operations, above note 24, seems on text to apply to military and non-military peace-keeping operations, but such a broad application is not established in international practice. NATO/SOFA, above note 36.

employed civilian technical staff, are covered by the rules for special treatment including exemption from local enforcement jurisdiction.⁸⁴ This is a departure, albeit in limited scope, from the traditional military-civil distinction, including the extension of the sending State's jurisdiction to military personnel subject to its court-martial. There have been cases where a limited extent of exemptions are granted to aid experts and workers, like tax exemptions and liability clearance.⁸⁵

It is worth considering legal frameworks that treat civilian aid workers and military personnel in a similar manner in local civil and criminal procedures, especially if they work in a unit or are under the same command. International standard practice may be applied to civilian personnel, including for instance the provision of consular assistance in criminal cases, and in civil cases, mutual waiver for inter-governmental claims, the host State's substitution for the defendant of the sending State, and pre-calculated amounts of compensation for third party claims.⁸⁶

Based upon these rationales and trends, possible rules and guidance for facilitating joint civil and military foreign rescue and relief operations will be explored in the succeeding part of this article. It particularly presupposes large-scale disasters which occur in a State with insufficient capacity for coping with it. It is hoped that the following examination will fill in gaps overlooked by the International Law Commission during its deliberations for Draft Articles on the Protection of Persons in the Event of Disasters, which mainly focus upon foreign civilian rescue and relief operations.⁸⁷

*Possible General Rules for Rescue and Relief Operations*⁸⁸

Request or Consent

Foreign rescue and relief operations are subject to sovereign consent by a receiving State, unless there are specific exceptions under international law, as in the case of enforcement measures founded on United Nations Security Council resolutions.⁸⁹ Thus, it is widely viewed that foreign rescue and relief operations shall be based upon a request by a receiving State, or, as its corollary, an affected State's consent to offers

⁸⁴ NATO/SOFA, *ibid.*, Art. 8.5.g.

⁸⁵ Agreement on Technical Cooperation between the Association of Southeast Asia Nations and the Government of Japan, 13 May 2019, Art. VI, See https://www.mofa.go.jp/press/release/press4e_002444.html (all internet references were accessed 23 August 2018).

⁸⁶ *Ibid.*, Arts. 7 and 8.

⁸⁷ ILC, above note 14.

⁸⁸ Bruce Oswald, et al., Documents on the Law of UN Peace Operations, OUP, 2019.

⁸⁹ Charter of the United Nations, 1 UNTS VI, 26 June 1945, Ch.VII.

extended by prospective assisting States.⁹⁰ This rule follows the principle of sovereignty under established international law.⁹¹

The practical implications of receiving foreign assistance are also of different dimensions: in most cases of foreign assistance for rescue and relief. An issue can lie in the management and coordination of a large number of offers, or already arriving personnel and materials, especially immediately after the occurrence of natural disasters.⁹² At the initial stage, a responsibility assumed by a sovereign State, and due to the immediacy with which response must be provided, an affected State must engage in disaster assessment and assistance coordination, particularly for domestic rescue and relief teams.

In some cases, there is a genuine need for immediate foreign assistance, such as urgent surveillance and rapid rescue operations with the use of radar and censor facilities, or sometimes, highly-trained special operation teams if capacities for such operations are lacking in the affected State. There is even less time and resources for counting and coordinating the distribution of water bottles and blankets, which are still subject to screening when arriving at airports and seaports.

Governmental assistance is normally offered through diplomatic or consular channels, or collective appeals by international organisations. In some cases, such offers are driven by humanitarian and diplomatic motivations by public-minded foreign States.⁹³ An affected State may well hesitate in flatly refusing such humanitarian offers, which may vicariously result in delays and inefficiency for immediately-required assessment and coordination.

These problems were seen in the 2014 Nepal earthquake, where relevant government officials subsequently pointed out a great deal of uncontrollable offers for rescue and assistance immediately after the outbreak.⁹⁴ This phenomenon was present to a lesser extent in the 2011 East Japan earthquake.⁹⁵ Based on these, it is evident that a clear manifestation of consent in accepting foreign assistance will be of practical use in order to handle orderly rescue and relief operations.

Another issue in practice pertains to the lack of capable local authorities, in situations where there is virtually no one functioning to coordinate rescue and relief

⁹⁰ ILC, above note 13, para. 105; IFRC, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, 2007, as a Red Cross instrument for governmental and non-governmental operations, providing general guidance for practitioners. part I, 3; Macalister-Smith, *International Guidelines for Humanitarian Assistance Operation*, Max Planck Institute for Comparative Law and International Law, Heidelberg, 1991, part I.

⁹¹ Brownlie, above note 26, p. 107.

⁹² IFRC, *A Desk Study*, above, note 41, 8.1; Sivakumaran, above note 29.

⁹³ IFRC, *Guidelines*, above note 90, 10.

⁹⁴ Anonymous interview with government officials, Malaysia, 15 May 2017 (on file with author).

⁹⁵ Centre, above note 82, 2.1.

activities. Natural disasters may destroy central and local administrative functions by depriving a State of necessary human resources and infrastructure. This was the case in the 2011 Haiti earthquake, and even in the 2011 East Japan earthquake, where the destruction of basic infrastructure, including electricity grids and telecommunications, resulted in central governmental coordination not meeting its normal operational capabilities.⁹⁶

Thus, there are cases where legitimately-organized international intervention is required, ideally based upon United Nations Security Council resolutions, or decisions by inter-governmental organisations, either regional or functional, of which the affected State must ideally be a Member State.

There is an issue with respect to non-consent assistance operations without or before authorisation by international organisations, which may be engaged by neighbouring States or States whose nationals are in danger in the affected State.⁹⁷ Urgency, on one hand, and procedural back-ups such as subsequent collective endorsement, on the other hand, should be considered in such cases.

Based upon these considerations, possible texts to address the issue are as follows: (a) a State or international organisation may provide rescue and relief assistance when requested by an affected State, or when it consents to offers of assistance by other States or international organisations; and (b) when the administrative functions of an affected State are gravely impeded as a result of disasters, other States or international organisations may extend rescue and relief assistance on the basis of a resolution by the United Nations Security Council or a decision by a relevant international organisation.

Command and Coordination

In the actual deployment of rescue and relief operations, one practical issue, especially at the initial stage, is how to effectively coordinate activities already initiated locally along with rescue and relief activities extended by other States.⁹⁸ It would be ideal if rescue and relief operations are subject to a single command structure with centralized capacities and authority for assessment and decision-making.

At the very least, foreign rescue teams need support and advice from local agencies, for on the spot guidance and familiarisation with local conditions and

⁹⁶ Disaster Emergency Committee, *Haiti Earthquake Facts and Figures*, London, 2015.

⁹⁷ ILC, above note 14, para. 254.

⁹⁸ IFRC, *A Desk Study*, above note 41, Ch. 8; IFRC, *Guidelines*, above note 90, part III.

circumstances.⁹⁹ Any such governmental assistance team should in principle be subject to its respective command and instructions.

International rules and guidance can provide for or raise awareness on the need for efficient coordination, especially immediately after the outbreak of a natural disaster. When an affected State is severely deprived of its functions as a result thereof, as in the case of the 2011 Haiti earthquake, international organisations or agencies mandated by such organisations may supplement local agencies in coordinating assistance activities.¹⁰⁰ In the case of the Haiti Earthquake, the local headquarters for UN Peacekeeping operations which had been stationed there played a significant role in coordination.¹⁰¹

An experimental text proposal for addressing potential issues in rescue and relief operations coordination is as follows: (a) a foreign rescue and relief assistance mission shall coordinate its functions and tasks with the host State's government authorities, and, if possible, with agencies on the ground in charge of disaster response, and (b) when a locally-based agency is unable to plan and manage rescue and relief operations, local headquarters designated by the United Nations Security Council or appropriate international organisations may coordinate rescue and relief operations.

Self-sufficiency and Cost-sharing.

Another issue which can seriously impact practical operations is the allocation of supporting resources and costs between the affected and the assisting States. This is the case in any type of natural disasters especially when the affected State itself is relatively well-resourced and capable of financial disbursement.¹⁰²

The 2011 East Japan earthquake showed that even well-prepared States like Japan could lack adequate resources for large-scale disasters which have significantly destroyed infrastructure and resulted in exponential suffering.¹⁰³ Existing international rules and guidance vary as to which parties are responsible for material and financial burdens.¹⁰⁴

⁹⁹ IFRC, *A Desk Study* *ibid*, 24; Centre, above note 82, 4.2, 4.3.

¹⁰⁰ Disaster Emergency Committee, above note 96.

¹⁰¹ OCHA, *Guidelines and Methodology*, above note 6, A4.

¹⁰² IFRC, *A Desk Study*, above note 41, 24.

¹⁰³ Centre, above note 82, 2.1.

¹⁰⁴ IFRC, *Analysis of Law in the European Union pertaining to Cross-Border Disaster Relief*, British Institute of International and Comparative Law, 2010, VII; Inter-American Convention to Facilitate Disaster Assistance, 1438 UNTS 245, 16 October 1996, Art. XIV; ASEAN Agreement on Disaster Management and Emergency Response, 26 July 2005, Art. 24, available at <http://agreement>.

It is submitted that the principle of self-sufficiency and cost-bearing on the part of the assisting State should be provided as a general rule, with varying applications if needed, especially in the context of well-resourced countries. Assistance operations are offered by foreign States with voluntary humanitarian intentions. The affected State is a victim and suffering from unexpected disasters for which no negligence or responsibilities are owed to it. In addition, responsibilities are assumed by the affected State in actual rescue and relief operations under the territoriality principle.

In legal terms, foreign assistance should be complementary to the affected State's own efforts, based upon sovereignty. It would be irrational if the assisting State replaced the local agencies' operations by requesting support and costs, such as water, food, fuel, shelter, transport and language interpreting, which can be assisted by, for instance, the sending State's foreign office experts.

There are cases, in which the assisting State is the sole provider for certain technical skills, such as the ground handling of freight at airports.¹⁰⁵ Costs should also in principle be owed by the assisting State. The affected State may at any time voluntarily offer reimbursement for costs of its own will, depending upon their resources and administrative capacities. Based upon these examinations, possible texts addressing the issue are as follows: (a) the assisting State shall provide, or procure, to a reasonable extent, without impeding the needs of locally affected people, food, water, fuel, shelter, and support services such as translation and on the ground guidance; and (b) the assisting State shall bear the costs of rescue and relief operations conducted by its teams, unless the affected State offers payment or reimbursement for all or part of such costs.

Regulatory Facilitation

Sovereign States' domestic laws and regulations may create impediments to the implementation of assistance operations.¹⁰⁶ There are occasional international rules and guidelines addressing such impediments.¹⁰⁷ It would indeed be irrational for affected States to owe material and financial costs for implementing assistance

asean.org/media/download/20190702042042.pdf#search=%27ASEAN+Agreement+disaster+management+emergency+response%27.

¹⁰⁵ IFRC, *A Desk Study*, above note 41, Ch. 14.

¹⁰⁶ IFRC, *Guidelines*, above note 90, part V; Yoshi Kodama, "The Implications of International Rescue and Relief Operation for Domestic Regulatory Regimes: Lessons from the 2011 East Japan Earthquake", *Journal of International Humanitarian Action*, Vol. 6:1, 2021.

¹⁰⁷ IFRC, *Model Act for the Facilitation and Regulation*, Geneva, 2013, Ch. VI; IFRC, *A Desk Study*, above note 41, part III.

operations. Thus, the affected State should eliminate regulatory and institutional impediments on payments by the assisting State, at least.

In addressing deregulatory arrangements, the affected State should not be forced to relax or modify its domestic regulations, given the lack of sufficient resources and infrastructure in the aftermath of natural disaster outbreaks in its territory. It will thus be practical to use language such as “should” or “endeavour to” along with modifiers such as “within its residual capacities” or “to a feasible extend,” rather than using “shall”, which implies strict legal obligations.

Entry and Departure

The prompt and timely arrival of rescue teams is crucial at the initial stage of rescue and relief operations, given the urgent need to save lives. Rescue teams are generally composed of aid workers, rescue dogs, and medical doctors, as well as other supporting members. The teams are transported either by airplanes, ships or land vehicles, thus, pilots or drivers should also be admitted simultaneously.

Therefore, the prompt initiation of rescue operations consists of (1) entry of personnel, (2) entry of rescue dogs, and (3) entry clearance of transport means (airplanes, ships, and land vehicles). The issue of medical qualifications will be discussed later in this section.¹⁰⁸

On immigration procedures for aid personnel, there are a number of international rules and guidelines stipulating either visa exceptions (requiring passports or identification cards only), or the issuance of special visas.¹⁰⁹ Visa exceptions are traditionally seen in military status-of-forces agreements, which may provide a model template for the entry of civilian assistance workers.¹¹⁰ Such treatment will facilitate the entry and departure of aid personnel.¹¹¹

In actual urgent situations, however, special visa or identification card requirements are still cumbersome and insufficient, given the need for immediate and rapid life-saving activities. Immigration rules need, on the other hand, the proper control of incoming foreign nationals, preventing the entry of unacceptable categories of persons, such as former criminals, or those who intend to conduct commercial activities while disguised as tourists.

In order to strike a balance between the urgent need for rescue operations and the prevention of illegal entry, the affected State may admit rescue workers and pilots as well as other members of a rescue team on the list of personnel, with names

¹⁰⁸ Below note 119.

¹⁰⁹ IFRC, *Guidelines*, above note 90, 16; IFRC, *A Desk Study*, above note 41, 10.1.

¹¹⁰ NATO/SOFA, above note 36, Art. 3.

¹¹¹ IFRC, *A Desk Study*, above note 41.

and identification numbers for identifying entrants. Such a list may be provided by the embassy or consular office of the assisting State situated in the affected State. The list may include members of their missions, such as rescue workers, drivers, interpreters, medical doctors, support staff, and so on.

This was the practice in the initial stage of the 2011 East Japan earthquake for purposes of expediting immigration procedures.¹¹² If the affected State has some concerns, it may request from the assisting State's embassy the provision of passport data and additional information, after the passing of the initial rescue phase, which is normally the first seventy-two hours.

For the entry of transport vehicles like airplanes or ships carrying rescue teams and initial aid materials, diplomatic or consular notice describing the composition of teams can also be relied on. Categories and numbers of airplanes or vehicles may be written and sent from the embassy or the consular office to the affected State's relevant agency or local headquarters for international coordination. Such data may be described as "C-17, registration number: AA1, quantity: two" for instance.

The entry of land vehicles may also entail the issue of car registration and driving licenses, which will be discussed later in this section. These measures for simplification may also be adopted for transit cases where rescue teams briefly stay *en route* to the affected State.¹¹³

On the entry of rescue dogs, which is crucial for saving people's lives, similar procedural prioritisation can be considered. Without pre-established domestic deregulatory frameworks or inter-governmental arrangements, there could be difficulties in modifying substantive requirements of vaccination and veterinary proofs. There should be room, however, for expediting documentation requirements. For instance, delayed presentation of veterinary certificates through the relevant embassy or consular office may be accepted, as well as the fast-track screening process for rescue dogs' entry at an airport.

The above elements are addressed in the following textual proposal: (a) the affected State should admit, expedite immigration procedures, and facilitate the departure of members of foreign rescue and relief teams and their means of transportation, based upon a list provided by the embassy or consular office of the assisting State indicating the names and identification numbers of such members or means of transportation; (b) the same treatment should be extended by a transit State when such rescue and relief teams or means of transportation have the affected State

¹¹² Centre, above note 82.

¹¹³ IFRC, *Model Act*, above note 107, Ch. VIII.

for their destination; and (c) the affected State should expedite procedures for admitting foreign rescue dogs for assistance operations in the affected State.

Aid Materials

In international practice, emergency aid materials are treated with less pecuniary burdens and procedural impediments.¹¹⁴ A number of international frameworks stipulate the waiver of customs duties, taxes and charges, as well as simplified procedures, as seen in the 1973 Kyoto Convention on customs procedure simplification, the 1990 Istanbul Convention on temporary importation, as well as the 1998 Tampere Convention on telecommunication equipment, as an advanced sectorial arrangement.¹¹⁵

One may consider better simplification and acceleration of procedures, given urgent need and lacking administrative capacities following the outbreak of large-scale natural disasters. As in the case for expediting immigration procedures, a list of emergency aid materials with the name of items and quantities can be provided by the embassy or consular office of the assisting State, for admission to fast-tracked customs clearance.

Customs clearance for personal belongings carried by aid workers could also potentially be problematic. Such goods should be handled through *ex post* regulations on drugs and other prohibited items, including punitive measures in case of violations. Thus, aid workers carrying arms and drugs should be punished after their entry, taking into account the need to expedite entry procedures for rescue and relief teams. The application of domestic criminal law and regulations will be discussed later in this section.¹¹⁶

The bigger issue relates to non-tariff regulatory impediments, especially upon specific items which are subject to heavy regulatory requirements and endorsement processes, such as in the case of food, pharmaceutical products and medical equipment. General directions given should be founded on a balance between regulatory requirements and an urgent need to save lives.

¹¹⁴ IFRC, *A Desk Study*, above note 41, Ch. 9.

¹¹⁵ International Convention on the Simplification and Harmonisation of Customs Procedures, as amended, Customs Cooperation Council, later World Customs Organisation, 1974, revised 1999, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A106025>; Convention on Temporary Admission, 817 UNTS 313, 26 June 1990; Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operation, 2296 UNTS 5, 18 June 1998.

¹¹⁶ Below note 121.

On the issue of standards and cross-border recognitions, there should ideally be internationally-established standards, either legally-binding agreements or recommendatory guidelines in each area. In emergency situations, the assisting State may guarantee the satisfaction of international standards for specific products, thus self-inspection and self-authorisation by the assisting side should be accepted by the recipient State.

Another issue relates to the adaptation of materials to local needs and conditions. Heavy and thick blankets are not suitable for tropical countries. Prescriptions for medicine may also differ, depending on the needs and physical characteristics of local patients. Ideally, draft work for international standards in each area should take care of such different local conditions. If not, demand and supply match-making should be engaged at the initial phase of relief operations between the affected and assisting States. This would not be practical nor timely in an emergency. Thus, inter-governmental pre-arrangements are needed, along with the harmonisation of specifications for aid-related equipment, such as pallet transport at airports.

It is important for the application of regulatory measures to be on a non-discriminatory basis—that is on a most-favoured nation and national treatment basis—which will provide assisting agencies with clear perspectives on the quality and specifications of materials to be imported.

On the basis of these arguments, a possible textual proposal is as follows: (a) the affected State should exempt customs duties, taxes, and charges upon the importation of materials for rescue and relief operations, as well as expedite customs procedures, based upon a list of materials describing their contents and quantities provided by the embassy or the consular office of the assisting State; and (b) the affected State should expedite the importation of materials for rescue and relief operations, in accordance with international standards on a non-discriminatory basis, based upon the list of materials provided by the embassy or the consular office of the assisting State.

Domestic Transport

The use of land vehicles for transporting rescue teams and aid materials is vital for expediting assistance operations with seamless movement and activities. The international community has already established mutual recognition of vehicle registrations and driving licenses, under the 1949 Convention on Road Traffic with a fairly wide scope of contracting parties.¹¹⁷

¹¹⁷ Convention on Road Traffic, 125 UNTS 3, 19 September 1949, Ch. V.

The treaty stipulates the recognition of foreign registration and licenses for “non-commercial” purposes, which should be interpreted as including transport for rescue and relief operations.¹¹⁸ If such interpretation creates difficulties or ambiguity, one may consider an inter-State framework for applying *mutatis mutandis* the rules under the 1949 Convention on Road Traffic to disaster rescue and relief activities.

A possible textual proposal based upon these considerations is as follows: the affected State should authorize the free access and movement of land vehicles and drivers for rescue and relief operations, in accordance with the Convention on Road Traffic signed in Geneva in 1949.

Medical Qualifications

Rescue and relief operations require medical treatment, including primary life-saving and surgical resuscitation, thus medical doctors as well as supporting personnel should be included in rescue and relief teams. On the other hand, medical professional qualifications are generally subject to most regulated domestic frameworks, given its serious implications upon human lives and security.¹¹⁹

Since there is no internationally-established unified qualification system or mutual recognition arrangement for medical professionals, acceptance of foreign doctors in emergency cases is made on a case-to-case basis, depending on which the assisting State is and the scope of activities. The issue is whether to limit such activities to primary life-saving treatments or include surgical operations, and to restrict to the assisting State’s own nationals or emigrants. North American customary law allows reference to Samaritan laws for medical professions, mitigating the lack of qualifications for humanitarian urgent needs.¹²⁰ It may be difficult to prove that customary international law has analogous established rules.

Based upon these considerations, a possible textual proposal is as follows: the affected State may authorise the qualification of foreign medical doctors for rescue and relief operations, within specified scopes for treatments and patients.

If in the future standardized international medical qualifications are established, the text may be strengthened as follows: the affected State should authorize the qualification of foreign medical doctors for rescue and relief operations, in accordance with international standards, based upon a list of such medical doctors provided by the embassy or the consular office of the assisting State.

¹¹⁸ *Ibid.*, Art. 24.

¹¹⁹ IFRC, *A Desk Study*, above note 41, 10.2.

¹²⁰ *Ibid.*, Ch. 13.3.3.

*Civil and Criminal Jurisdiction*¹²¹

Aid workers are engaged in dangerous operations, which may cause derivative destruction of local facilities in the course of search operations, as in the case of traffic accidents occurring when a rescue team is in an affected area.¹²² Unlike military personnel, civilian aid workers do not benefit from immunities from the host State's domestic laws and regulations.¹²³

It will be reasonable for an assisting State to cover costs and risks on behalf of its own aid workers, from the point of view of rational cost allocations between the assisting State and the receiving State.¹²⁴ It will also be reasonable to save individual workers from risks of legal liabilities as long as it is not from their willful acts or grave negligence, in order to ensure their motivation for engaging in dangerous operations. One may well consider the waiver of civil liabilities will respect to civilian aid workers. The assisting State will substitute such workers in the course of civil legal procedures for damages and compensation.

Based upon these arguments, a possible textual proposal is as follows: (a) the affected State may exempt foreign rescue and relief workers from civil liabilities which arise from their functions,¹²⁵ and (b) the assisting State may substitute its rescue and relief workers in handling claims for civil liabilities raised by a third party.

For military personnel, based upon standardized practice under status of forces and visiting forces agreements, the following formula can be set out, deriving from immunities under customary international law: members of military units shall not be subject to any proceedings for the enforcement of judgements given against

¹²¹ There may be blurring distinction between civil and criminal procedures in legal practical, such as the unifying procedures of civil damages and criminal litigations in some legal systems. Here, the argument follows traditional distinction between civil and criminal procedures, as is seen in NATO/SOFA, above note 36, Arts. 7 et 8; Tampere Convention, above note 112, Art. 5(a); Inter-America Convention, above note 101, Art. XI.

¹²² IFRC, *A Desk Study*, above note 41, 3.1.5.

¹²³ NATO/SOFA, above note 36, Art. 8.5, g; Giulio Bartolini, "Attribution of Conduct and Liability Issues arising from International Relief Missions; Theoretical and Pragmatic Approaches to Guaranteeing Accountability", *Vanderbilt Journal of Transnational Law*, Vol. 48, 2015, p. 1029.

¹²⁴ IFRC, *A Desk Study*, above note 41, 24.

¹²⁵ This civil liability may be limited by adding, for instance, "in the course of rescue and relief operations," as is seen in status-of-forces agreements. NATO/SOFA, above note 36, Art. 8. It can be also considered to add a caveat, "except for those caused by willful acts or grave negligence," as seen in the Inter-American Convention to Facilitate Disaster Assistance, above note 101, Art. XII, b, and the ASEAN Agreement on Disaster Management and Emergency Response, above note 101, Art. 12.

him or her in the receiving State in a matter arising from rescue and relief operations.¹²⁶

If there is a pre-arranged inter-governmental framework on these matters, the text may be reinforced as follows: (a) the affected State should waive civil liabilities pertaining to foreign rescue and relief workers, arising from their activities during rescue and relief operations, except for those caused by willful acts or grave negligence; and (b) the assisting State should substitute its rescue and relief workers in handling claims for injuries or damages raised by a third party, arising from their activities during rescue and relief operations, except for those caused by willful acts or grave negligence.

On the criminal dimensions, there will be no justification for civil workers to be immune from criminal allegations and a subsequent litigation process in the host State, consistent with territorial sovereignty. As for current customary international law, it will be difficult to prove the existence of progressive rules and practice for exempting civilian rescue and aid personnel from criminal litigation.¹²⁷ On the other hand, it will be reasonable to ensure consular access and support for persons suspected of the commission of a crime, as part of consular protection for foreign nationals in the host State.¹²⁸

A general textual proposal can thus be made as follows: the assisting State should have a right of access and assistance, including the provision of legal counsel and translation services, for its rescue and relief workers who are arrested or are in custody for criminal offences under the relevant law and regulations of the receiving State, for activities committed during rescue and relief operations.

For military personnel, the following language can be included, borrowing from the United Nations Law of the Sea Convention¹²⁹ on the treatment of warships: “nothing in this instrument affects the immunities of military units and personnel under customary international law.”¹³⁰

¹²⁶ NATO/SOFA, *ibid.*, Art. 8, g.

¹²⁷ ASEAN Agreement, above note 104; Arab Cooperation Agreement Regulating and Facilitating Relief Operations, Arab League Decision No 39, 3 September 1987. *Contre*: Tampere Convention, above note 115, Art. 5; Inter-American Convention, above note 106, Art. XII.

¹²⁸ Vienna Convention on Consular Relations, 596 UNTS 261, 24 April 1964, Art. 5 (i). Cf. NATO/SOFA, above note 35, Art. 7, 9.

¹²⁹ United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982, Art. 32.

¹³⁰ “instrument” here refers to a hypothetical international document like a treaty, an agreement, or, if non-legally binding, guidelines, which incorporate proposed provisions in this section.

Conclusions

Despite the substantial contribution of foreign military units and personnel, especially in the initial rescue operations, in the aftermath of a large-scale natural disaster, international frameworks and guidelines generally take a restrictive approach to their involvement as a whole. The 2006 Oslo Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (revised in 2007) provides the principle of “last resort” for military involvement, by which military units are deployed when there is no alternative to civilian humanitarian organisations.

The origins of “military minimalism” in disaster rescue and relief operations are considered as follows: the traditional legal distinction between war and peace situations; a policy stance that military involvement will lead to intrusion into the host State’s sovereignty, contrary to neutrality and impartiality; and a perception that the presence of foreign military units will invite external or internal belligerent entities, thus exposing local populations to the risk of military conflict.

However, these arguments do not reflect the current need for and practice favouring the involvement of military units and personnel in disaster rescue/relief operations. Principles more suitable for the current practice can be summarized as follows: first, foreign military units and personnel shall be engaged on the basis of a host State’s consent; second, foreign military units and personnel shall coordinate with local and third countries’ rescue/relief teams; third, self-sufficiency for basic subsistence and conditions shall be ensured by the sending State; fourth, foreign units should, in principle, be unarmed, given the humanitarian nature of their operations; and fifth, foreign units are duty-bound to respect local laws and regulations.

Rules on military immunities under customary international law are vague and ambiguous. Rules have crystallized through the synthesis and re-interpretation of cases that have since accumulated, including domestic judgments and inter-governmental arbitration awards. The early national case of the *Schooner Exchange* decided by the United States Supreme Court in 1812, contained the rationale for the State sovereignty doctrine that exempts military forces from a host nation’s jurisdiction, based on the need for completing their missions by applying their own armed forces discipline.

Commentaries since the judgment appear to favour a restrictive application thereof from the viewpoint of respecting sovereignty. This may have been caused by the development of the restrictive approach to State immunity in general, the traditional legal distinction between peacetime and wartime situations, as well as policy judgments to refrain from military involvement overseas. Currently, there is at least a “diplomatically referable basis” in inter-governmental practice, for

upholding the immunity of military forces from enforcement jurisdiction in on-duty or *inter se* cases.

Foreign rescue and relief operations are frequently engaged by military and civilian personnel cooperating with each other. Thus, it is reasonable for both military and civilian personnel to be treated equally to promote operational efficiency and prioritize life-saving in an effective manner. Unlike military units or personnel, however, civilian rescue and aid workers are not exempt from local judicial procedures. It is worth considering legislative frameworks providing for joint rules in treating civilian aid workers in a similar manner as military personnel, as far as practicable, in their treatment before local civil and criminal procedures.

Table 1. Possible Guidelines for Foreign Military Disaster Rescue and Relief Operations.

PRINCIPLES
<p>ONE <u>CONSENT</u> BY THE RECEIVING STATE</p> <p>In accordance with mandate by the host State, respecting sovereignty, territorial integrity, and political independence: taking care of neutrality and impartiality.</p>
<p>TWO <u>COORDINATION</u> WITH LOCAL OPERATIONS</p> <p>In terms of geographical zoning and information-sharing. Command is reserved for the sending forces.</p>
<p>THREE <u>SELF-SUFFICIENCY</u> FOR BASIC SUBSISTANCE</p> <p>Not affecting local needs and economy. No cost-burden on affected local regions.</p>
<p>FOUR <u>NO ARMS IN PRINCIPLE</u></p> <p>IF ADMITTED, ONLY FOR <u>SELF-PROTECTION</u></p> <p>In emergency, protection of third parties, including civilian rescue workers and local inhabitants, in accordance with local laws and regulations as well as international arrangements.</p>
<p>FIVE <u>RESPECT FOR LOCAL LAWS AND REGULATIONS</u></p> <p>Military immunities in accordance with established international law as well as standard practice.</p>

Displacement of the Rohingya Before the ICJ and the ICC: Same Conduct, Different Crimes in International Law?

Lucas Alcici and Dr. Saba Pipia***

ABSTRACT

This article analyses the ongoing proceedings before the ICJ and the ICC relating to the suppression and persecution of the Rohingya in Myanmar. It outlines the legitimacy of standing of the Gambia to institute proceedings against Myanmar based on the erga omnes nature of the obligation to prevent genocide, and what are the possible outcomes of these proceedings. It also analyses the ongoing investigations at the ICC and the process leading to the authorisation thereof. The focus is pointed to forcible deportation and its legal qualification as a different crime. Moreover, proceedings in the domestic courts of Argentina in light of complementarity and universality are also discussed. The article also focuses on differences and similarities between the proceedings before the ICJ and the ICC. Furthermore, the article provides an overview of potential challenges which the international community may face if the two international courts qualify the same conduct as different crimes under different legal regimes.

Keywords: Rohingya, displacement, genocide, ICJ, ICC, jurisdiction, crimes against humanity, State responsibility

Introduction

On 11 November 2019, The Gambia instituted proceedings against Myanmar before the International Court of Justice (ICJ). In those proceedings, which are still under consideration, The Gambia alleges that Myanmar violated the Convention on the Prevention and Punishment of the Crime of Genocide by committing acts of genocide against members of the Rohingya. Both countries are parties to the Genocide Convention. On 14 November 2019, the Pre-trial Chamber of the

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International Criminal Court (ICC), acknowledging that the ICC may exercise its jurisdiction over the alleged crimes committed against the Rohingya, granted the request made by the Prosecutor to investigate alleged violations which took place in the territory of Myanmar and Bangladesh. The case before the ICJ raises an important issue over the legal standing of a non-injured State (The Gambia) while invoking the responsibility of another State (Myanmar) for violations of a norm of *jus cogens* (prohibition of Genocide) from which obligations *erga omnes* are derived. More specifically, the judgment to be rendered by the ICJ shall answer the question of whether a non-injured State may claim, in addition to the cessation of the internationally wrongful acts which violate obligations *erga omnes*, reparation in favour of the victims of those wrongful acts. The investigation before the ICC, in turn, raises an important issue regarding the jurisdiction of the International Criminal Court. The question is whether the ICC may exercise its jurisdiction over acts that take place partially on the territory of a State which is not a party to the Rome Statute and partially on the territory of a State party to the Rome Statute. Additionally, the ICC shall determine whether those acts qualify as crimes under its jurisdiction.

There is an undisputed complementarity between the jurisdiction of both international courts when dealing with internationally wrongful acts which are crimes under international law. Whilst the ICJ may establish State responsibility for the commission of an internationally wrongful act, the ICC may determine the individual responsibility for the commission of the same act. However, while exercising jurisdiction over the same acts, the ICJ and the ICC may diverge on the scope of their jurisdiction and the classification of a particular act under international law. The fact that both the ICJ and the ICC are simultaneously exercising their jurisdiction over the same acts potentially raise key issues regarding the fragmentation of international law.

The objective of the present article is to provide a commentary on recent developments regarding litigation proceedings in the ICJ and ICC in relation to alleged crimes committed against the Rohingya ethnic minority group in Myanmar. The article will also outline and highlight some of the challenging issues that have emerged from these developments, such as legal standing before the ICJ and the right of a non-injured State to seek reparations on behalf of victims of violations of obligations *erga omnes*; complementarity between ICJ and ICC proceedings and its implications on the possible fragmentation of international law; duplication of criminal proceedings in the domestic courts of Argentina and the territorial scope of the ICC's jurisdiction in relation to the crime of deportation.

The first part of the present article provides an overview of the ongoing proceedings instituted by the Gambia against Myanmar for alleged violations of the Genocide Convention before the ICJ. The second part analyses the legal process at

the ICC starting from its ruling on jurisdiction finishing with possible outcomes of the investigation. The last part examines points of convergence and divergence between the two proceedings and the potential impact of these two proceedings on international law.

1. *Judicial Review of Alleged Genocide at the ICJ*

1.1. *Prevention and prohibition of Genocide: a jus cogens norm from which obligations erga omnes derive*

The ICJ has expressly recognized that the prohibition of genocide is a norm of *jus cogens*. In *Armed Activities on the Territory of the Congo*, it underscored the peremptory nature of the prohibition of genocide.¹ A few years later, in one of the cases concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, the ICJ recalled that the norm prohibiting genocide was a peremptory norm of international law.² The International Law Commission (ILC) has also stated in commentaries on articles 26 and 40 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) that the prohibition of genocide was widely regarded as a peremptory norm of international law.³ Furthermore, the prohibition of genocide is firmly recognized as one of the few generally accepted examples of *jus cogens* by scholars⁴ and in State practice.⁵ The prohibition of genocide was included among the non-exhaustive list of

¹ International Court of Justice, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility*, Judgment, *ICJ Reports 2006*, pp. 31-32, para. 64, available at: <https://www.icj-cij.org/public/files/case-related/126/126-20060203-JUD-01-00-EN.pdf> (All internet references were accessed in July 2021).

² International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports 2007*, pp. 110-111, para. 161, available at: <https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>.

³ United Nations, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, commentaries on Article 26, p. 85, para. 5, and commentaries on Article 40, pp. 112-113, para. 4, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

⁴ Anthony Aust, *Handbook of International Law*, Cambridge University Press, New York, 2005, p. 11.

⁵ The recognition of the prohibition of genocide as a norm of *jus cogens* can also be found in State practice. The domestic courts of countries such as Switzerland, Canada and the United States have recognized the prohibition of genocide as a norm of *jus cogens*. See: United Nations, International Law Commission, Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, p. 37, para. 81, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/024/33/PDF/N1902433.pdf?OpenElement>.

peremptory norms of general international law (*jus cogens*), which forms part of the proposed draft conclusions presented by Special Rapporteur Dire Tladi in his fourth report to the ILC on peremptory norms of general international law.⁶

All norms of *jus cogens*, including the prohibition of genocide, create obligations *erga omnes*, meaning that all States belonging to the international community are bound by such peremptory norms of international law and that all of them have an interest in the observance and protection thereof.⁷ However, it should not be construed that all norms giving rise to obligations *erga omnes* are also necessarily *jus cogens* norms. Other non-peremptory norms of international law (for example, the protection of the natural environment and biodiversity) can also trigger the application of obligations *erga omnes*.

The *Institut de Droit International* defines an obligation *erga omnes* as either:

- (a) an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action; or
- (b) an obligation under a multilateral treaty that a state party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action.⁸

As the ICJ has repeatedly acknowledged throughout its jurisprudence, the obligations to prevent and punish genocide are *erga omnes*.⁹ The fact that an obligation

⁶ *Ibid.*, p. 63, para. 137.

⁷ *Ibid.*, pp. 42-43, paras. 108-109. While the *jus cogens* character of a norm relates to its peremptory substantive nature, the *erga omnes* character of an obligation concerns the scope of application and the recipients of the norm, in other words, the fact that the norm applies to all states and that all of them have an interest in its observance and protection. See: Alain Pellet "Conclusions", in Christian Tomuschat, Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Martinus Nijhoff Publishers, Leiden, 2006, p. 418; Malcom N. Shaw, *International Law*, Cambridge University Press, New York, 2008, p.124.

⁸ Institut de Droit International, Krakow Session 2005, Resolution on obligations *erga omnes* in international law, available at: http://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf.

⁹ The Court did so in *Barcelona Traction, Armed Activities on the Territory of the Congo and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*. The ICJ also stated that those same obligations were *erga omnes partes* in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* and in the Order of 23 January 2020 in *The Gambia v. Myanmar*. See: Marco Longobardo, "The Standing

is *erga omnes*—or owed towards the international community as a whole or to all state parties in a treaty—has a major impact on the question of legal standing.

1.2. Legal standing of The Gambia before the ICJ (including the possible involvement of other members of the international community)

In the *South West Africa* case, the ICJ concluded that there was no *actio popularis*—a right of any State of the international community to bring a claim before the Court invoking a public interest—recognized under international law at that time.¹⁰ This 1966 judgment has been widely criticized¹¹ and the ICJ itself abandoned its reasoning just a few years later in *Barcelona Traction*.¹² Moreover, in 2001, the ILC adopted article 48 of the ARSIWA, which guarantees the right of any State other than the injured State to invoke the responsibility of a State for a breach of an obligation *erga omnes*.¹³ In *Barcelona Traction*, the International Court of Justice outlined the difference between bilateral and *erga omnes* obligations. The ICJ highlighted that:

in particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.¹⁴

The distinction made by the ICJ in *Barcelona Traction* was regarded as the Court's acceptance of the existence of an *actio popularis* in international law.¹⁵ Thus, in claims regarding alleged breaches of *erga omnes* obligations, the State bringing the

of Indirectly Injured States in the Litigation of Community Interests before the ICJ: Lessons Learned and Future Implications in Light of *The Gambia v. Myanmar* and Beyond", *International Community Law Review*, vol. 23, 2021, p. 8.

¹⁰ International Court of Justice, *Southwest Africa, Second Phase*, Judgment, *ICJ Reports 1966*, p. 47, para. 88, available at: <https://www.icj-cij.org/files/case-related/46/046-19660718-JUD-01-00-EN.pdf>.

¹¹ Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, New York, 2006, p. 519.

¹² M. Longobardo, above note 9, p. 6.

¹³ Chittharanjan F. Amerasinghe, *Diplomatic Protection*, Oxford University Press, New York, 2008, p. 33.

¹⁴ International Court of Justice, *Barcelona Traction, Light and Power Company, Limited*, Judgment, *ICJ Reports 1970*, p. 32, para. 33, available at: <https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>.

¹⁵ M. Longobardo, above note 9, pp. 12-13.

claim before the ICJ would not need to demonstrate its individual interest to have its *locus standi* recognized.¹⁶ Thus, due to the evolution of international law, especially after the adoption of article 48 of the ARSIWA, the circumstances that led the ICJ to deny *locus standi* to Liberia and Ethiopia to bring a claim against South Africa in *South West Africa* are no longer compatible with contemporary international law.¹⁷ Article 48 of the ARSIWA reads:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
 - (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
 - (b) the obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
 - (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
 - (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.¹⁸

As the ILC underlined in the commentaries of article 48:

in case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is

¹⁶ A. Orakhelashvili, above note 11, p. 523.

¹⁷ Jamal Seifi, "Peremptory Norms and the Jurisdiction of the International Court of Justice" in James Crawford et al. (eds.), *The International Legal Order: Current Needs and Possible Responses – Essays in Honour of Djamchid Momtaz*, Brill Nijhoff, Leiden, 2017, p. 164; United Nations, Draft Articles on Diplomatic Protection with commentaries, 2006, p. 51, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf.

¹⁸ United Nations, Articles on the Responsibility of States for Internationally Wrongful Acts, above note 3.

highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with paragraph 2 (b), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached.¹⁹

The substantive rules of *jus cogens*, and the relevant obligations *erga omnes* arising therefrom,²⁰ are capable of creating legal consequences on the interpretation and application of certain procedural rules, such as rules relating to *locus standi* or the legitimacy to appear in court. In cases concerning the violation of a bilateral obligation, only an injured State would have legitimacy to bring a claim against a responsible State before an international court. Nevertheless, in the event of a violation of an obligation *erga omnes*, all States would have the legitimacy to bring a claim against the State responsible for breaching the said obligation, in view of the fact that it is owed to the international community as a whole.²¹ In Questions Relating to the Obligation to Prosecute or Extradite, the ICJ stated that all States Parties to the Convention against Torture (CAT) had a common interest in ensuring that acts of torture did not occur, and that if they did, the perpetrators would not stay unpunished. This common interest meant that the obligations under the CAT were owed by one State Party to all other States Parties. Those obligations were *erga omnes partes*, meaning that each State Party would have an interest in its protection and fulfilment.²² In this case brought before the ICJ by Belgium against Senegal, the Court found that obligations *erga omnes partes* arising from the duty to prosecute or extradite persons responsible for acts of torture had a legal effect on the *locus standi*. The ICJ held that Belgium's legitimacy to bring a claim rested on its legal interest in the observance and fulfilment of obligations *erga omnes partes* by Senegal, and that therefore, Belgium could invoke Senegal's responsibility for failing to prosecute or

¹⁹ *Ibid.*, p.127, para. 12.

²⁰ It should be noted that while all obligations arising from norms of *jus cogens* are *erga omnes*, not all obligations *erga omnes* derive from norms of *jus cogens*. United Nations, International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, A/CN.4/L.702, 18 July 2006, pp. 22-23, para. 38, available at: <http://legal.un.org/docs/?symbol=A/CN.4/L.702>.

²¹ Stefan Talmon, "Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished", *Leiden Journal of International Law*, vol. 25, 2012, p. 995; United Nations, ILC, Fragmentation of International Law, above note 20, p. 193, para. 380.

²² Erika de Wet, "Invoking obligations *erga omnes* in the twenty-first century: Progressive developments since Barcelona Traction", *South African Yearbook of International Law*, vol. 37, 2013, p. 15; See also: International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *ICJ Reports 2012*, p. 449, paras. 67-68, available at: <https://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-EN.pdf>.

extradite Hissène Habré, the former president of Chad, who allegedly committed acts of torture in breach of *erga omnes* obligations under the CAT.²³ As Weatherall notes, the general legal interest of all States in the performance of obligations *erga omnes* confers the legal right of States to invoke the international responsibility of a State in breach of such obligations, which in turn informs the question of standing.²⁴ The common interest in the protection of obligations owed to the international community as a whole is what guarantees legitimacy for a State—even a non-injured State—to bring claims before the ICJ regarding the breach of an obligation *erga omnes*.²⁵ When there is a violation of a norm of *jus cogens*, or an obligation *erga omnes*, all States of the international community have the legitimacy to bring a claim before the ICJ, even if their state interests have not been directly affected by that violation.²⁶

Due to the *jus cogens* character of the substantive norm that prohibits the crime of genocide, the *locus standi* should be automatically fulfilled for all States seeking to invoke responsibility for breaches of the *erga omnes* obligations derived from that norm.²⁷ Arguing that the prohibition of genocide is a norm of *jus cogens*²⁸ and that the obligations under the Genocide Convention are owed *erga omnes* and *erga omnes partes*²⁹ (meaning that “any State party to the Genocide Convention is entitled to invoke the responsibility of another State party for the breach of its

²³ Questions relating to the Obligation to Prosecute or Extradite, (Belgium v. Senegal), above note, 22, p. 450, paras. 69-70.

²⁴ Thomas Weatherall, *Jus Cogens: International Law and Social Contract*, Cambridge University Press, Cambridge, 2015, p. 398.

²⁵ *Ibid.*, p. 400.

²⁶ A. Orakhelashvili, above note 11, p. 518.

²⁷ J. Seifi, above note 17, p. 996.

²⁸ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application Instituting Proceedings and Request for Provisional Measures, p. 14, para. 20.

²⁹ The obligations arising from the prohibition of genocide are both *erga omnes* and *erga omnes partes*. On the one hand, they are obligations *erga omnes* due to the *jus cogens* character of the prohibition of genocide, which means that all members of the international community are bound by them and have an interest in their observance. On the other hand, they are *erga omnes partes* as they derive from the Genocide Convention, which means that all States Parties to that treaty, among which The Gambia and Myanmar, are bound by them and have an interest in their enforcement. In *Barcelona Traction*, the ICJ made a distinction between *erga omnes partes* obligations, which “are conferred by international instruments of a universal or quasi-universal character”, and *erga omnes* obligations which “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide (...)”. International Court of Justice, *Barcelona Traction, Light and Power Company, Limited*, above note 14, p. 32, para. 34.

obligations, without having to prove a special interest”³⁰), The Gambia brought claims against Myanmar before the ICJ requesting the Court to adjudge and declare that Myanmar: (a) has breached and continues to breach its obligations under the Genocide Convention (...); (b) must cease forthwith any such ongoing internationally wrongful act and fully respect its obligations under the Genocide Convention (...); (c) must ensure that persons committing genocide are punished by a competent tribunal, including before an international penal tribunal (...); (d) must perform the obligations of reparation in the interest of the victims of genocidal acts who are members of the Rohingya group (...); and (e) must offer assurances and guarantees of non-repetition of violations of the Genocide Convention.³¹

The Gambia claims that the wrongful acts committed by Myanmar against members of the Rohingya, such as mass displacement,³² constitute violations of a *jus cogens* norm from which obligations *erga omnes* derive and that therefore, all States of the international community have a legal interest in their protection. For this reason, The Gambia asserts that it has legal standing to invoke the responsibility of Myanmar for alleged acts of genocide committed against Rohingya individuals and to claim that Myanmar must be compelled to fulfil its obligations as determined by the Genocide Convention and to make reparation to those injured by those acts.³³

1.3. Legal standing of the Gambia to request reparation for victims of violations

The ILC’s draft conclusion 17 on peremptory norms of general international law, adopted by the Drafting Committee in 2019, reads:

1. Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in which all States have a legal interest. 2. Any State is entitled to invoke the responsibility of

³⁰ The Gambia also submitted that “if a special interest were required with respect to alleged breaches of obligations *erga omnes partes*, in many cases no State would be in a position to make a claim against the perpetrator of the wrongful act”. International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 23 January 2020, pp. 12-13, para. 40.

³¹ Above note 28, pp. 57-58, para. 112.

³² Among the numerous actions perpetrated against the Rohingyas which amounted to genocide, the United Nations Independent Fact-Finding Mission on Myanmar found that mass deportation was one of them. United Nations, Report of the detailed findings of the Independent Fact-Finding Mission on Myanmar, 17 September 2018, p. 364, para. 1440, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf.

³³ Above note 28, pp. 41-43, paras. 123-127.

another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts.³⁴

Despite recognizing that a non-injured State might invoke the responsibility of another State for a breach of a norm of *jus cogens*, draft conclusion 17 states that this shall be done in accordance with the rules on the responsibility of States for internationally wrongful acts, thus, falling short of acknowledging that a non-injured State might request reparation on behalf of victims who are nationals of a third State. For this reason, in order to address the question regarding the legal standing of The Gambia, one must refer to the ARSIWA. According to Article 48 (2) (a) of the ARSIWA, which has undoubtedly codified customary international law, all States have the legitimacy to invoke the responsibility of a State responsible for a breach of an *erga omnes* obligation and to claim the cessation of the internationally wrongful act and guarantees of non-repetition.³⁵ However, whether a State other than the injured State or the State of nationality of the victims would have *locus standi* to claim reparation in the interest of the injured State, or of the beneficiaries of the breached obligation *erga omnes*, is still controversial. This is because the ILC highlighted that article 48 (2-b) did not codify customary international law. According to the ILC, this norm should be seen as the progressive development of international law, “which is justified since it provides a means of protecting the community or collective interest at stake”.³⁶

Even though there is still a lack of State practice in support of the customary nature of the norm established in article 48 (2-b), as claims presented by non-injured States are usually limited to the cessation of the violation and guarantees of non-repetition,³⁷ the claim regarding reparation brought by The Gambia in its application

³⁴ United Nations, International Law Commission, Text of the draft conclusions on peremptory norms of general international law (*jus cogens*), A/CN.4/L.936, p. 4, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G19/147/22/PDF/G1914722.pdf?OpenElement>.

³⁵ Giorgio Gaja, *The Protection of General Interests in the International Community: General Course on Public International Law* (2011), Collected Courses of The Hague Academy of International Law, Leiden, Martinus Nijhoff Publishers, 2014, pp. 107-108.

³⁶ As the ILC pointed out: “*In particular, the focus of action by a State under article 48 – such State not being injured in its own account – is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one*”. United Nations, Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries, above note 3, p. 127, para. 12.

³⁷ Elena Crespo Navarro, “El Proyecto de Artículos de la Comisión de Derecho Internacional sobre la Protección Diplomática: La Protección de las Personas Físicas”, *Revista Española de Derecho Internacional*, vol. 57, No.1 (Enero-Junio 2005), p. 237; Enrico Milano, “Diplomatic Protection and

instituting proceedings against Myanmar before the ICJ indicates the emergence of some State practice in favour of the article 48 (2-b).³⁸ Some scholars already support the possibility of a non-injured State claiming reparation in favour of those who were substantially affected by the violation of an *erga omnes* obligation. As Cannizzaro notes: “article 48(2) makes clear that the obligation to reparation is owed *erga omnes*. Consequently, every State of the international community is entitled to claim the performance of this obligation without the need to have a special interest.”³⁹ The Institut de Droit International also supports the legitimacy of non-injured States to invoke the international responsibility of the State responsible for breaching obligations *erga omnes* and to claim reparation in favour of those injured by those violations.⁴⁰

All States of the international community play a fundamental role when facing violations of *jus cogens* and obligations *erga omnes*. They can—and should—act in favour of the injured persons, not only invoking the responsibility of the State responsible for those violations but also claiming reparation in favour of the victims.⁴¹ In the case against Myanmar before the ICJ regarding alleged acts of genocide committed by Myanmar against members of the Rohingya ethnic group, not only did The Gambia claim the cessation of the wrongful act and guarantees of non-repetition, it also claimed reparation in favour of the Rohingya victims.⁴² The ICJ thus had to

Human Rights before the International Court of Justice: Re-Fashioning Tradition?”, *Netherlands Yearbook of International Law*, vol. XXXV, 2004, p. 115.

³⁸ Gaja highlights that cases in which States that were not directly affected by violations of *erga omnes* obligations invoke the responsibility of the State responsible for those violations are rare. He mentions two cases before the ICJ: *East Timor*, brought by Portugal on behalf of the people of East Timor against Australia, and *Questions Relating to the Obligation to Prosecute or Extradite*, brought by Belgium against Senegal for breaches of *erga omnes* obligations set forth in the Convention against Torture. G. Gaja, above note 35, pp. 100-101.

³⁹ Enzo Cannizzaro, “Is There an Individual Right to Reparation? Some Thoughts on the ICJ Judgment in the Jurisdictional Immunities Case”, in Denis Alland *et al* (eds.), *Unité et diversité du droit international: Ecrits en l'honneur du professeur Pierre-Marie Dupuy*, Martinus Nijhoff Publishers, Leiden, 2014, p. 498.

⁴⁰ According to the *Institut de Droit International*: “When a State commits a breach of an obligation *erga omnes*, all the States to which the obligation is owed are entitled, even if they are not specially affected by the breach, to claim from the responsible State in particular: (...) (b) performance of the obligation of reparation in the interest of the State, entity or individual which is specially affected by the breach”. Institut de Droit International, Resolution on Obligations *Erga Omnes* in International Law, Krakow Session, 2005, above note 8, article 2 (b).

⁴¹ Andrea Gattini, “The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?”, *Leiden Journal of International Law*, vol. 24, 2011, p. 196.

⁴² Application institution proceedings, above note 28, p. 38, para. 112; International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 23 January 2020, p. 2, para. 2.

assess whether it had *prima facie* jurisdiction to hear the case and to determine provisional measures, as requested by The Gambia in its application instituting proceedings.⁴³ The ICJ found that it had *prima facie* jurisdiction to hear the claims and that The Gambia had *prima facie* legal standing to present the claims against Myanmar, and decided to determine certain provisional measures.⁴⁴ As the provisional measures requested by The Gambia did not relate to the claim regarding the obligation to make reparation in favour of the victims of the acts of genocide, it is still to be seen whether the ICJ will sustain the legal standing of The Gambia regarding the claim for reparation when rendering the judgment on the merits. If it does, the judgment will be a milestone for the international protection of human rights, as it will recognize the right considered by the ILC as a progressive development in the commentaries on article 48 (2-b) of the ARSIWA, as part of international law as it stands today. This judgment will pave the way for non-injured States to bring claims requesting reparation on behalf of victims of *jus cogens* violations irrespective of their nationality.

2. Proceedings at the International Criminal Court

2.1. Challenging jurisdiction at the International Criminal Court

The international community has become increasingly concerned after numerous reports⁴⁵ highlighted the commission of serious human rights violations against the Rohingya minority group in Myanmar. Thereafter, calls to activate processes before the International Criminal Court gained momentum. Consequently, on 9 April 2018, the Prosecutor of the ICC applied to the President of the Pre-trial Division and requested for a ruling on the potential jurisdiction of the Court.⁴⁶ In the exercise of her right under Article 19(3) of the Rome Statute to seek a ruling from the Court regarding a question of jurisdiction or admissibility,⁴⁷ the Prosecutor argued that

⁴³ *Ibid.*, Order of 23 January 2020, p. 6, paras. 16-17.

⁴⁴ *Ibid.*, p. 13, para. 42.

⁴⁵ High Commissioner for Human Rights, Opening Statement to the 36th session of the Human Rights Council, 11 September 2011; see also OHCHR, Brutal attacks on Rohingya meant to make their return almost impossible – UN human rights report, 11 October 2017; see also Report of the Special Rapporteur on the situation of human rights in Myanmar, Advance Unedited Version, A/HRC/37/70, 9 March 2018.

⁴⁶ International Criminal Court, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018, available at: https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF

⁴⁷ Article 19(3) of the Statute empowers the Prosecutor to “seek a ruling from the Court regarding a question of jurisdiction or admissibility”. As explained by the Prosecutor:

although Myanmar is not a State Party to the Rome Statute, the ICC may nevertheless exercise jurisdiction under Article 12(2-a) of the Statute because an essential legal element of the crime—crossing an international border—occurred on the territory of a State which is a party to the Rome Statute.⁴⁸ After thoroughly examining Prosecutor’s motion, the Pre-trial Chamber concluded: that the acts of deportation presented in the Prosecutor’s request can be reviewed under the framework for crimes against humanity; that the fact that such acts were initiated in a State not Party to the Statute and completed in a State Party to the Statute suffices to find that they fall within the ambit of Article 12(2)(a) of the Statute; and that the ICC has jurisdiction over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh.⁴⁹ With no objections related to the jurisdiction of the ICC, this decision formally paved the way for the Prosecutor to initiate the investigation *proprio motu* under Article 15 of the Rome Statute.

Consequently, the Prosecutor referred the matter to the Pre-trial Chamber, seeking authorisation to investigate crimes within the jurisdiction of the ICC in which at least one element occurred in the territory of Bangladesh, within the context of two waves of violence in Rakhine State on the territory of Myanmar, as well as any other crimes which are sufficiently linked to these events.⁵⁰ Her request was granted on 14 November 2019.⁵¹ In its decision, the Pre-trial Chamber re-examined, *inter alia*, the issue of jurisdiction and, in reference to the objective territoriality principle, ubiquity principle and constitutive element approach, found that “the alleged deportation of

this concise provision is necessarily broad in its scope—for example, it refers generally to any “question of jurisdiction”, and thus permits the Prosecution to request a ruling on the full range of jurisdictional matters arising under the Statute including articles 5-8bis (substantive jurisdiction), 11 (temporal jurisdiction), 12 (territorial and personal jurisdiction), and 13-15ter (triggers for jurisdiction). Article 19(3) is not confined to any particular stage of proceedings—in its own terms, it draws no distinction between a requested ruling on the Court’s jurisdiction in a particular case or a situation as a whole.

See: International Criminal Court, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018, above note 46, paras. 52-53.

⁴⁸ Prosecution’s Request for a Ruling on Jurisdiction, above note 46, para. 2.

⁴⁹ International Criminal Court, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” No: ICC-RoC46(3)-01/18, 6 September 2018, Part VI.

⁵⁰ International Criminal Court, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Request for authorisation of an investigation pursuant to article 15, ICC-01/19, 4 July 2019.

⁵¹ International Criminal Court, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, Pre-Trial Chamber III, ICC-01/19, 14 November 2019.

civilians across the Myanmar-Bangladesh border, which involved victims crossing that border, clearly establishes a territorial link on the basis of the *actus reus* of this crime (i.e. the crossing into Bangladesh by the victims).⁵²

The territorial and personal jurisdiction of the ICC is strictly limited to the States Parties whose nationals commit alleged crimes or in whose territory a crime in question was committed.⁵³ *Commentaries* to the Rome Statute further explain that the jurisdictional nexus is present when the territorial State (where the crime occurred) or the State of the nationality of the accused are States Parties. These are the two primary bases of jurisdiction over offenses in international criminal law and are universally accepted.⁵⁴ Therefore, the crime that commences in the territory of a non-State Party, but which might continue in the territory of a State Party, certainly challenges the conventional understanding of the jurisdictional nexus for the ICC. That Myanmar is not a party to the Rome Statute precludes the ICC from relying on strict territoriality and active nationality in relation to crimes committed in Myanmar's territory by nationals of Myanmar.⁵⁵ Although extra-territoriality appears novel in relation to international crimes, the approach itself is well established in international law. The Pre-trial Chamber also referred to numerous State legislation and international treaties to which Myanmar is a State Party and which support criminal proceedings based on extra-territorial jurisdiction. Most importantly, the Chamber cited the constructive element theory, referring to the well-known *Lotus* case⁵⁶ while finding that customary international law does not prevent States from asserting jurisdiction over acts that took place outside their territory on the basis of the territoriality principle.⁵⁷ Challenging this finding, Gomez argues that

⁵² *Ibid.*, para. 62.

⁵³ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), art. 12(2).

⁵⁴ Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn.), C.H. Beck, Hart, Nomos, 2016, p. 681.

⁵⁵ Marta Bo, "Crimes against the Rohingya: ICC Jurisdiction, Universal Jurisdiction in Argentina, and the Principle of Complementarity", *Opinio Juris* blog, 23 December 2019, available at: <http://opiniojuris.org/2019/12/23/crimes-against-the-rohingya-icc-jurisdiction-universal-jurisdiction-in-argentina-and-the-principle-of-complementarity/>.

⁵⁶ Permanent Court of International Justice, *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). In which the Court held that "The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty." (para. 50).

⁵⁷ Above note 51, para. 56.

“although Lotus’s status in international law is notable, it is unclear whether citing only one case is sufficiently persuasive.”⁵⁸

Consequently, to persuade the Chamber to employ the extra-territoriality principle regarding international crimes, the Prosecutor had to demonstrate that the crimes alleged are of a transboundary nature, meaning that the commission of such crimes allows for the crossing of internationally recognized borders of at least one State. Article 7 of the Rome Statute applies the term “deportation or forcible transfer of population”⁵⁹ as one of the acts, which could potentially be qualified as crimes against humanity provided that other contextual elements which are enumerated in the same article (the so-called *chapeau* elements) are met. The juxtaposition of the acts of deportation and forcible transfer raised the question of whether those are two different dimensions of the same crime, or that they constitute two separate crimes. Notably, a forcible transfer does not necessarily have a cross-border character, therefore the Prosecutor suggested that under the Statute, deportation and forcible transfer constitute two separate offenses, notwithstanding their inclusion in the same provision, and that deportation is a separate crime which inevitably transcends States’ international borders of.⁶⁰ Her views appeared convincing to the Pre-trial Chamber, which agreed with the presented argumentation while establishing the ICC’s jurisdiction.⁶¹

Meanwhile, the Elements of Crimes of the Rome Statute specifies that the perpetrator must have “[deported] or forcibly transferred [...] one or more persons to another State or location [...]”.⁶² As interpreted by the Pre-trial Chamber:

the Elements of Crimes link the conduct and the destinations. In more specific terms, “deported” is linked to the destination of “another State”, while “forcibly transferred” is linked to the destination of “another [...] location”. This means that, provided that all other requirements are met, the displacement of persons lawfully residing in an area to another State amounts to deportation, whereas such displacement to a location within the borders of a State must be characterized as a forcible transfer.⁶³

⁵⁸ Carlos E. Gomez, “The International Criminal Court’s Decision on the Rohingya Crisis: The Need for a Critical Redefinition of Trans-border Jurisdiction to Address Human Rights”, *California Western International Law Journal*, Vol. 50, No. 1 [2020], p.192.

⁵⁹ Rome Statute, above note 53, art. 7(1-d).

⁶⁰ Above note 46, Section B.1.

⁶¹ Above note 49, paras. 53 et al.

⁶² Rome Statute, above note 53, Elements of Crimes, art. 7(1-d), para. 1.

⁶³ Above note 49, para. 55.

Given the inevitably transboundary nature of the crime of deportation and the fact that the deportation of the Rohingya people took place from Myanmar to Bangladesh (a State Party to the Rome Statute), the Pre-trial Chamber concluded that:

the inclusion of the inherently transboundary crime of deportation in the Statute without limitation as to the requirement regarding the destination reflects the intentions of the drafters to, *inter alia*, allow for the exercise of the Court's jurisdiction when one element of this crime or part of it is committed on the territory of a State Party.⁶⁴

Thus, the scope of the investigation into the situation in Bangladesh and Myanmar is strictly limited by the crimes, at least one element of which was executed in Bangladesh, or any other third State Party to the Rome Statute. Concerning the material scope of the investigation, the Pre-trial Chamber authorized the commencement of the investigation in relation to any crime within the jurisdiction of the ICC (other than deportation) provided that such crimes were committed—at least in part—in the territory of Bangladesh, or in the territory of any other State Party or State making a declaration under Article 12(3) of the Statute and provided that these crimes have sufficient linkage with the situation of Rohingya crisis.⁶⁵ In light of the above findings, the scope of investigations will therefore include any crime where the conduct, *including its consequences*, occurred at least in part in the territory of a State Party. This cross-boundary element will thus limit the selection of incidents that will form the basis for charges before the ICC.⁶⁶

Extension of the jurisdiction of the ICC to events that occurred in the territory of a State which is not a party to the Rome Statute was challenged by Myanmar, which abstained from participation in the proceedings before the Pre-trial Chamber claiming that such proceedings gravely violated its State sovereignty.⁶⁷ Myanmar also stressed that extending the ICC's jurisdiction to the conduct in question would circumvent the principles enshrined in the Vienna Convention on the Law of the Treaties, which holds that a treaty does not create either obligations or rights for a third State without its consent.⁶⁸ However, the Chamber observed “that

⁶⁴ *Ibid.*, para. 71.

⁶⁵ Above note 51, para. 126.

⁶⁶ Above note 55.

⁶⁷ Above note 49, para. 35, footnote 55.

⁶⁸ Vienna Convention on the Law of the Treaties, 1155 UNTS 331, 23 May 1969 (entered into force on 27 January 1980), art. 34.

under particular circumstances, the Statute may have an effect on States not Party to the Statute, consistent with principles of international law.”⁶⁹ Indeed, the Commentaries to the Rome Statute also suggest that this does not present a case of a non-State Party being bound thereto and of the ICC overreaching its jurisdiction, but rather of the individual being amenable to the jurisdiction of the ICC where crimes are committed in the territory of a State Party.⁷⁰ Although the authors of the Commentaries described a situation of the ICC exercising personal jurisdiction over a national of a non-State Party to the Rome Statute, the same approach should equally apply to territorial jurisdiction, where part of a crime occurs on the territory of State Party to the Rome Statute, even though other elements of that crime were executed in the territory of a non-State Party.

Article 12(2-a) of the Rome Statute confers jurisdiction on the ICC if “*one or more States, on the territory of which the conduct in question occurred, are parties to the Statute.*” The Chamber relied on the textual interpretation of the word “conduct”, declaring that it is a broad term that encompasses the consequences of the act. Given the transboundary nature of the crime of deportation, the expulsion of Rohingya refugees to the territory of Bangladesh, a State Party to the Rome Statute, constituted an important element of the crime of deportation triggering the ICC’s jurisdiction over the dispute.⁷¹ By widely interpreting the territorial scope of the ICC’s jurisdiction, the Chamber, *inter alia*, referred to the effects doctrine, according to which a State may assert territorial jurisdiction if the crime takes place outside the State territory but produces effects within the territory of the State.⁷² Until 2018, over one million Rohingya refugees had sought refuge in Bangladesh, which is already one of the most densely populated regions of the world. The ICC implied that even if the elements of the crime were not present in its territory, the effects of the crime of deportation did manifest in Bangladesh, which is a State Party.⁷³

The question here is whether the gravity and scale of the deportation are determinant factors in finding that deportation indeed caused an “effect” for Bangladesh or any individual who would possibly seek asylum outside Myanmar could also create such “effect” for the country where he/she flees. In other words, if not for the mass influx of refugees in Bangladesh, could the Pre-trial Chamber still

⁶⁹ Above note 49, para. 44.

⁷⁰ O.Triffterer, K.Ambos, above note 54, p. 682.

⁷¹ Tanushree Nigam “Basis and Implications of the ICC’s Ruling against Myanmar”, *Blog of the Public International Law and Policy Group*, December 2019, available at: <https://www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2020/5/22/basis-and-implications-of-the-iccs-ruling-against-myanmar>.

⁷² Above note 51, para. 56.

⁷³ Above note 71.

authorize the commencement of investigations assuming that all contextual elements of the crime of deportation were met, but deported persons would flee in various countries—several or all of which could be States Parties to the Rome Statute? Even though the Pre-trial Chamber acknowledged that the Prosecutor may extend the investigation to alleged crimes committed at least in part on the territory of other States Parties, it still stayed silent on the issue of whether the gravity and scale of the deportation would be a necessary requirement to produce an “effect” for the State which accommodates the refugees. The Pre-trial Chamber’s decision left open the question of whether the massive nature of the influx is the qualifying feature for the crime of deportation, for purposes of establishing territorial jurisdiction based on the effects doctrine.

The Pre-trial Chamber’s ruling on jurisdiction and decision on the authorization of an investigation into the situation in Bangladesh/ Myanmar potentially have serious implications for future situations brought before the ICC. Notably, these decisions demonstrate that: first, territories and nationals of non-States Parties are not immune from falling under the ICC’s jurisdiction if at least one element of an alleged crime occurred in the territory of the State Party or the conduct which led to the commission of the crime had consequences in the territory of the State Party; second, crimes that are essentially transboundary in nature can fall under the ICC’s jurisdiction if one of the States concerned is a party to the Rome Statute; and third, in case of transboundary crimes, the investigation and ICC’s proceedings are strictly limited with the episodes of alleged crimes, which either occurred in the territory of the State Party or produced significant effects for that State.

2.2. Crime of Deportation: Subsumed under Crimes Against Humanity, but not under Genocide

Qualification of alleged acts committed against the Rohingya people as crimes against humanity is directly based on the Rome Statute which lists the crime of deportation as one of the acts subsumed under Article 7 thereof.⁷⁴ In order to convince the ICC that crimes against humanity were in fact committed, it should be proven that deportation took place as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁷⁵ The term “attack” should be interpreted as a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.⁷⁶ Given that many sources

⁷⁴ Rome Statute, above note 53, art. 7(1-d).

⁷⁵ *Ibid.*, art. 7(1).

⁷⁶ *Ibid.*, art. 7(2-a).

referred to in the proceedings pointed to the heavy involvement of several government forces and other State agents, there existed a reasonable basis to believe that there may have been a State policy to attack the Rohingya.⁷⁷

Although the Pre-trial Chamber authorized investigation for the alleged crime of deportation and persecution⁷⁸ and held that there is no need to assess whether other crimes within the jurisdiction of the ICC may have been committed, it nevertheless did not preclude the possibility that such alleged crimes could be part of the Prosecutor's future investigation.⁷⁹ The Chamber also stressed that the Prosecutor was neither bound to investigate solely the events outlined in her Request nor by their provisional legal characterisation.⁸⁰ By stating this, the Pre-trial Chamber gave the Prosecutor a wide margin of appreciation to qualify alleged conduct as one of the crimes under the ICC's jurisdiction and to provide the legal classification of conduct different from the one provided at the stage of authorisation of investigation. The only limitation for the Prosecutor is that any crimes, which she may potentially claim as having been committed, should have been executed partially in the territory of Bangladesh, and that therefore crimes that were commenced and completed in Myanmar without bearing a cross-border nature are beyond the purview of the future investigation.

In addition to the crime of deportation and persecution, the Prosecutor also alleged that the crime of "other inhumane acts" could also be committed during events leading to the Rohingya crisis.⁸¹ However, the Chamber's determination that the Prosecutor may alter her request at the later stage of investigation paves the way for challenging the commission of other crimes under the ICC's jurisdiction.

One of such crimes can be genocide, which falls under the ICC's jurisdiction.⁸² To determine whether conduct qualifies as genocide or not, firstly it should be found that acts listed in the Rome Statute were committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. The Statute provides an exhaustive list of the acts, which can be considered as conduct that led to the commission of genocide.⁸³ Although the list is complete, and other

⁷⁷ Above note 51, para. 92

⁷⁸ *Ibid.*, para. 110.

⁷⁹ *Ibid.*, para. 96.

⁸⁰ Alessandra Spadaro, "Introductory Note to the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar Decision to Authorize Investigation (ICC) and The Gambia v. Myanmar Order for Provisional Measures (ICJ)", *International Legal Materials by the American Society of International Law*, 2020, p. 1.

⁸¹ Above note 50, paras. 123 et al.

⁸² Rome Statute, above note 53, article 6.

⁸³ *Ibid.* Such acts are (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring

acts, even if they are intended to destroy a protected group, cannot be considered as genocidal conduct, enumerated acts still provide an opportunity for wider interpretation. The definition of Genocide in the Rome Statute is replicated from the Genocide Convention of 1948.⁸⁴ The Commentaries to the Statute explicitly exclude that genocide covers what is known today as ethnic cleansing because it was never the intention of the drafters of the Genocide Convention.⁸⁵ However, if ethnic cleansing is employed as a method to commit acts provided in the Statute, it can also easily become an act that may be qualified as genocide. In other words, ethnic cleansing, as such, is not sufficient to find that the required act for genocide happened, but if the policy of ethnic cleansing was used, for example, to deliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part, it can be qualified as genocide.

This issue was widely discussed by the ICJ in *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)*, in which it held that the term ethnic cleansing is in practice used, by reference to a specific region or area, to mean “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area”.⁸⁶ The ICJ further noted that:

It [ethnic cleansing] can only be a form of genocide within the meaning of the Convention if it corresponds to or falls within one of the categories of acts prohibited by the Convention. Neither the intent, as a matter of policy, to render an area “ethnically homogeneous”, nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is “to destroy, in whole or in part” a particular group, and **deportation** or displacement of the members of a group, even if effected by force, is not necessarily equivalent to the destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as “ethnic cleansing” may never constitute genocide, if

about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

⁸⁴ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 (entered into force 12 January 1951), art.II.

⁸⁵ O.Triffterer, K.Ambos, above note 54, p. 136.

⁸⁶ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports 2007*, p. 43, para. 190.

they are such as to be characterized as, for example, “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”, contrary to the Convention, provided such action is carried out with the necessary specific intent (*dolus specialis*), that is to say with a view to the destruction of the group, as distinct from its removal from the region.⁸⁷

As it is demonstrated, ICJ interpreted ethnic cleansing as an act, which, *inter alia*, encompasses deportation and thus having potential to be a transboundary in nature. However, the Rome Statute does not refer to ethnic cleansing in category of acts, which are explicitly prohibited under it. Notwithstanding the absence of specific reference to ethnic cleansing in the Rome Statute, it seems from the ICJ’s assertion that ethnic cleansing can still be used as a method to commit genocide, provided that other essential elements, such as special intent, protected group, etc. are met.

Genocidal intent is a subjective element, which according to the Elements of Crimes of the Rome Statute might be different from the mental element for other crimes and needs to be decided by the ICC on a case-by-case basis.⁸⁸ Indeed, it will not be easy to prove that acts of deportation were committed with a specific intent to destroy in part or in full a Rohingya group. However, as indicated by the Independent Fact-Finding Mission under the United Nations (UN) mandate:

the systematic stripping of human rights, the dehumanizing narratives and rhetoric, the methodical planning, mass killing, mass displacement, mass fear, overwhelming levels of brutality, combined with the physical destruction of the home of the targeted population, in every sense and on every level make the mission believe to conclude, on reasonable grounds, that the factors allowing the inference of genocidal intent are present and that it is now for a competent prosecutorial body and court of law to investigate and adjudicate cases against specific individuals to determine individual guilt or innocence.⁸⁹

Based on the above considerations, it becomes clear that alleged conduct leading to deportation, apart from being subsumed under crimes against humanity,

⁸⁷ *Ibid.*

⁸⁸ Rome Statute, above note 53, Elements of Crimes, art.6 (introduction-c).

⁸⁹ Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, 17 September 2018, above note 32, paras. 1440-1441, p. 358.

can also be qualified as genocide under the Rome Statute if all the essential requirements for such qualification are met. Certainly, there is an obvious overlap between the definitions of genocide and crimes against humanity, as set out in the Rome Statute, and it will be up to judges to decide whether to allow cumulative convictions or not should charges proceed based on both provisions.⁹⁰ Additionally, as explained above, the Prosecutor is not restricted from raising the issue of genocide at a later stage of the investigation, which makes it completely realistic that charges of genocide may still emerge in subsequent proceedings.

In conclusion, the crime of deportation can be considered both as an act leading to the commission of crimes against humanity and genocide. In the latter situation, deportation as part of the policy of ethnic cleansing should fit under any category of acts prohibited specifically under the genocide clause of the Rome Statute and such deportation should have been carried out with a special intent to destroy fully or in part the protected group. Based on available information and in compliance with procedural limitations, the Prosecutor is free to proceed with charges for both crimes against humanity and genocide, as in both circumstances at least one element of the crime (crossing the border) occurred in Bangladesh. Furthermore, if all other contextual elements are met, the Prosecutor is even allowed to charge persons for both crimes for the same conduct leaving it up to the judges to decide on which charge will be confirmed during the conviction phase.

2.3. Complementarity and Universality: Proceedings before the Domestic Courts of Argentina

On 11 November 2019, a few days before the ICC's Pre-trial Chamber authorized the Prosecutor to commence investigations into the situation in Bangladesh and Myanmar, a domestic court in Argentina received an application by the Burmese Rohingya Organization UK (BROUK) to adjudicate alleged claims of genocide and crimes against humanity committed against the Rohingya people based on the principle of universal jurisdiction.⁹¹ The petitioners claimed that reported systematic oppression and discrimination, ethnic cleansing, applying isolation measures, directing attacks, sexual and gender-based violence and other atrocities amounted to the commission of two international crimes: genocide and crimes against humanity.⁹² BROUK claimed that its legal standing is based on the principle of universal jurisdiction, which permits all States to exercise jurisdiction over crimes under international law and allows for the ability to investigate and prosecute individuals suspected of responsibility for war crimes and crimes against humanity, torture,

⁹⁰ O. Triffterer, K. Ambos, above note 54, p.142.

⁹¹ Application of BROUK, available at: [https://burmacampaign.org.uk/media/Com plaint-File.pdf](https://burmacampaign.org.uk/media/Com%20plaint-File.pdf).

⁹² *Ibid.*, pp. 18-33.

genocide and enforced disappearances, regardless of where the crime was committed or the nationality of the suspect or victim.⁹³

The Argentinian court rejected the case, holding that it would duplicate the investigation launched by the ICC. Upon appeal, the Federal Appeals Court in Buenos Aires overturned the previous decision not to pursue a case against military and civilian leaders of Myanmar for their role in atrocities committed against the Rohingya people⁹⁴—a move that was largely hailed by civil rights defender organisations globally.⁹⁵ These organisations argued that the ICC’s jurisdiction is limited to crimes that have occurred across the border, whereas an investigation under the principle of universal jurisdiction would be able to look into crimes committed against the Rohingya inside Myanmar.⁹⁶ These two litigations mark the first time that an investigation of international crimes based on universal jurisdiction begins in parallel with ICC investigations, which raises important questions regarding the application of the principle of complementarity in relation to the exercise of universal jurisdiction by a State.

The scope of investigations in Argentina is much wider being based on universality than the scope of the investigation at the ICC, which is strictly limited to transboundary crimes. Thus, these two parallel proceedings should continue hand in hand, complementing each other in enforcing justice for the victims of atrocities. However, if the prosecution would investigate the same episodes against the same persons and eventually convict them in one court, this would prevent the other court to proceed with the case since it would be in breach of the double-jeopardy rule, which is well-established principle of criminal law⁹⁷ and is also enshrined in the Rome Statute.⁹⁸ Therefore in some instances, this complementary nature of two parallel proceedings may well become concurrent. Indeed, at the commencement of and during an ICC investigation, concurrent investigations or prosecutions at the national level must be taken into consideration by the Prosecutor while assessing the admissibility of *potential cases* subject to an investigation by the ICC.⁹⁹

⁹³ Official Statement by the BROUK, available at: <https://www.brouk.org.uk/argentinean-courts-urged-to-prosecute-senior-myanmar-military-and-government-officials-for-the-rohingya-genocide/>.

⁹⁴ Official Statement by the BROUK, available at: <https://www.brouk.org.uk/argentinean-judiciary-moves-closer-to-opening-case-against-myanmar-over-rohingya-genocide/>.

⁹⁵ See joint statement of some civil right defender organizations, available at: <https://crd.org/2020/06/23/the-european-burma-network-welcomes-prospect-of-continued-argentinean-investigation-into-atrocity-crimes-against-the-rohingya/>.

⁹⁶ *Ibid.*

⁹⁷ William A. Schabas, *The International Criminal Court (2nd Edition): A Commentary on the Rome Statute*, Oxford University Press, 2016, p. 503.

⁹⁸ Rome Statute, above note 53, art. 20.

⁹⁹ Above note 55.

Notably, Argentina's move to proceed with the investigation based on universal jurisdiction follows the recommendations issued by the UN Independent Fact-Finding Mission in Myanmar, which encouraged Member States of the UN to exercise jurisdiction to investigate and prosecute alleged perpetrators of serious crimes under international law committed in Myanmar.¹⁰⁰ Invoking universal jurisdiction is not novel for domestic courts globally. However, universal jurisdiction is usually relied on when all other means of prosecution appear to be ineffective and despite this, to ensure that justice is served. In the present situation, it is obvious that ICC can be considered as an effective international mechanism to execute justice for Rohingya victims of deportation. Therefore, it is not clear whether the proceedings in the Argentinian courts will complement the ICC's mandate or will challenge the admissibility of some cases brought before the trial chamber by the Prosecutor.

3. Points of Convergence and Divergence between Proceedings before the ICJ and the ICC

After analyzing ongoing proceedings related to the alleged crimes against the Rohingya both at the ICJ and the ICC, this article will discuss what expectations there are on the potential outcomes of these proceedings and to what extent such outcomes can challenge the uniformity of international law, if at all. In particular, the present chapter will analyse whether two proceedings in different international courts on the same subject could complement one another or potentially hinder enforcement of justice globally.

One of the similarities between these two proceedings is that the jurisdiction of both courts to review the issue is challenged. In the case of the ICJ, it is contended whether The Gambia is legally capable to bring the claim against Myanmar, while the ICC deals with the legality of extending its own jurisdiction to alleged crimes which originated on the territory of a non-Member State, when at least one element of the crime occurred on the territory of a Member State. One thing which we should not expect from both courts is for them to invoke the same mode of responsibility because the ICJ explicitly deals with State responsibility, while the ICC can only impose responsibility on individuals. Perhaps the most striking point in these proceedings is the legal qualification of conduct. Whereas the ICJ is limited to discussing whether Myanmar (as a State) committed genocide or not, the ICC so far seems to examine if the same conduct (the displacement of Rohingyas) amounts to crimes against humanity. These points certainly raise questions regarding the

¹⁰⁰ Compilation of all recommendations made by the Independent International Fact-Finding Mission on Myanmar, to the Government of Myanmar, armed organizations, the UN Security Council, Member States, UN agencies, the business community and others. A/HRC/42/CRP.6, 16 September 2019, para. 102.

interplay between these two proceedings and whether results from both proceedings can impact the uniformity of international law.

Once the proceedings are fully completed before these two international courts, we may face the reality that they each qualify the same conduct as different crimes. The question here is whether this should be considered the globalisation of international law or the fragmentation thereof. On globalisation and fragmentation, authors have argued that globalisation encompasses notions of interdependence and linkages between problems and solutions, whereas fragmentation implies isolation and disconnection between regimes and institutions.¹⁰¹ It should also be noted that fragmentation is defined as the emergence of specialized and autonomous rules or rule complexes, legal institutions, and spheres of legal practice.¹⁰² Although fragmentation itself does not imply an inherently positive or negative value judgment, it reflects an unprecedented regulatory and institutional expansion of international law or a positive demonstration of the responsiveness of legal imagination to social change.¹⁰³

From the outset, it should be outlined that the applicable law is different in these two proceedings. The ICJ applies the Genocide Convention, which sets a different legal regime than the Rome Statute, which is the applicable law under the ICC proceedings. However, if we assume that the same conduct could potentially be qualified as two different crimes, it certainly implies “regulatory expansion of international law and demonstration of responsiveness of legal imagination to social change.”

The objective of the present article is neither to assess whether the phenomenon of fragmentation is positive or negative nor to explicitly argue that disparate qualification of the same conduct is a clear example of fragmentation. In contrast, the article merely argues that the qualification of the same conduct as two different crimes by two international courts can challenge the uniformity of international law. Without a doubt, it is indeed a positive development that nowadays various institutional and legal regimes can provide avenues for mass atrocities, such as crimes against humanity or genocide, to be properly addressed at

¹⁰¹ Keren N. Scott ‘Managing Fragmentation through Governance: International Environmental Law in a Globalised World’ in Andrew Byrnes *et. al* (eds.), *International Law in the New Age of Globalization*, Martinus Nijhoff Publishers, Leiden/Boston, 2013, p. 207.

¹⁰² ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, Finalized by Martti Koskeniemi, UN Doc A/CN.4/L.682, 13 April 2006, 11, para.8.

¹⁰³ For effects of fragmentation see: Anne Peters, “The refinement of International Law: From Fragmentation to Regime Interaction and Politicization”, *International Journal of Constitutional Law*, 15(3), 2017, 671-704.

the international level. Nevertheless, those regimes should ideally complement one another, rather than be concurrent to each other. The uniformity of international law can be challenged by the fact of two different international legal instruments (the Genocide Convention and the Rome Statute) and two different institutional regimes (the ICJ and the ICC) diverging on their legal qualification of the same conduct under international law. This may raise questions on whether international law is fragmented on the crime of deportation and possibly lead to a different interpretation of this crime under the Genocide Convention and Rome Statute.

As the proceedings continue, both international courts face challenging issues to be discussed during the hearings. One of such issues is whether legal standing at the ICJ somehow undermines the enduring requirement of consent to jurisdiction,¹⁰⁴ or whether the extension of the ICC's territorial jurisdiction over crimes which originated in non-Member State but transcended to territories of Member State violates the former's state sovereignty. However, jurisdictional issues are not so significant once the courts start reviewing the merits of the case. During this stage, legal qualification can potentially become the subject of disagreement between these two courts. Indeed, we have previously already witnessed the ICJ's displeasure in its *Genocide* judgment¹⁰⁵ when it employed a different control test for the same set of events, than that relied on by the International Criminal Tribunal for the Former Yugoslavia in the well-known *Tadic* case.¹⁰⁶ Notably, in those proceedings, both courts applied different legal norms. Therefore, it can be expected that in Rohingya litigations, qualification of displacement as different crimes by two courts can also create disagreement among them.

Conclusion

Based on the above considerations, the chances of the displacement of the Rohingya people being differently qualified as international crimes by the ICJ and the ICC are arguably high. However, the ruling of the ICC's pre-trial Chamber left the possibility for the Prosecutor to change such legal qualification in subsequent stages of the proceedings. For purposes of international humanitarian law or international criminal law, it is immaterial whether such displacement is qualified as a crime against humanity or if genocide by displacement is a prohibited act during armed conflict. However, divergent consideration by two different courts on the legal

¹⁰⁴ Priya Urs, "Obligations *erga omnes* and the question of standing before the International Court of Justice", *Leiden Journal of International Law*, vo.24, issue 2, 2021, pp. 518-521.

¹⁰⁵ *Genocide case*, above note 86, paras. 402 et al.

¹⁰⁶ International Criminal Tribunal for Former Yugoslavia, *Prosecutor v. Dusko Tadic*, Judgment of the Appeals Chamber, Case No.: IT-94-1-A, 15 July 1999, para. 145.

qualification of the same conduct can potentially raise concerns over the uniformity of international law.

On the one hand, it could be argued that this is a clear demonstration of the expansion of international law because under one proceeding the State may be held responsible for genocide, while under the other proceeding individual perpetrators may be punished for mass atrocities. This is indeed a strong indication of the globalisation of international law, as two institutional and legal systems complement each other in ensuring that justice is served globally. However, on the other hand, different qualifications of the same conduct raise the question of whether the current state of international law is so fragmented and disintegrated that, different institutional and legal regimes have ended up qualifying the same conduct as different crimes. The purpose of this article was not to answer these questions, but rather to outline that in case proceedings continue before both international courts, these are the points which are likely to attract the most attention. But given that both proceedings are at relatively very early stages, it may be too early to convincingly claim what impact their outcome could have on the future of international law.

Prosecution of War Crimes in Australia: Prospects for Victim Participation

Mary Flanagan*

ABSTRACT

An Office of Special Investigator has been established to investigate alleged war crimes committed by Australian Defence Force personnel in Afghanistan. The development follows an unprecedented investigation by the Inspector-General of the Australian Defence Force into alleged criminal conduct of Australian Special Forces. While the investigations to date have been extensive, there has been little public discussion regarding the participation of victims and their families in the investigations and their ability to participate in the potential criminal prosecutions. This article outlines the legal jurisdictions in which Australian Defence Force personnel could be prosecuted in Australia and explores the legal framework for victim participation in those jurisdictions, including alternative third-party participation avenues such as amicus curiae and intervenor applications.

The limited participation rights available for victims in Australian proceedings is contrasted with the wide-ranging participation rights that victims have in proceedings before the International Criminal Court. The underlying principles of the victim participation model at the ICC is explored as well as criticisms of the ICC model. In assessing both jurisdictions, the article considers the status of the victim in the proceedings; the stage of proceedings at which victims are permitted to participate; the scope of the victims' ability to contribute; the provision of legal representation; and the overall impact victims can have on the outcome of proceedings. Insights are drawn from the practical experience of victims in each jurisdiction including the physical location of trials, the process and scope for requesting reparations, the relative complexity of each victim participation model and the likely delay victims would encounter when attempting to participate in each jurisdiction. The article concludes that, while the ICC model for participation is subject to many criticisms, it provides greater agency and control for victims than the participation model provided in the Australian legal system. Overall, the ability of Afghan victims to meaningfully participate in potential criminal proceedings in Australia will be limited.

Keywords: Australian war crimes prosecutions, victim participation, victim reparations, third party intervention, amicus curiae, intervenors, International Criminal Court

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Introduction

Australia has launched a landmark special investigation into alleged war crimes committed by Australian Defence Force (ADF) personnel in Afghanistan.¹ The announcement of the investigation followed an extensive report prepared by the Inspector-General of the Australian Defence Force confirming that there is substance to recent rumours and allegations of criminal conduct by Australian Special Forces in Afghanistan (IGADF Report).² The report is based on five years of investigations by the Australian Defence Force into allegations of unlawful killings, inhuman treatment of prisoners, competition killings, cover-ups of unlawful conduct and other atrocities.³ Incidents of interest involve a total of thirty-nine individuals killed and a further two cruelly treated, and implicate twenty-five ADF personnel as perpetrators.⁴ The IGADF Report provides a detailed account of the investigative process that was followed during the inquiry.⁵ It involved the review of over 20,000 documents and 25,000 images and the interview of 423 witnesses.⁶ There is limited information in the IGADF Report on the extent to which victims and their families have been included in the investigations.⁷ Some advocates have criticized the inquiry for failing to properly include victims and their families, with reports that families of victims were not interviewed or were not made aware that the IGADF Report was being released.⁸ Advocates have called for greater participatory rights for victims and

¹ “Joint media release with the Hon Scott Morrison MP and Senator the Hon Linda Reynolds CSC - Statement on IGADF inquiry”, *Ministers for the Department of Home Affairs*, 12 November 2020, available at: <https://minister.homeaffairs.gov.au/peterdutton/Pages/statement-on-igadf-inquiry.aspx> (all internet references were accessed on 2 September 2021).

² Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report*, 10 November 2020, available at: <https://afghanstaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf> (“IGADF Report”).

³ *Ibid.*, pp. 3-4 and 49-50.

⁴ *Ibid.*, p. 29.

⁵ *Ibid.*, pp. 126-143.

⁶ *Ibid.*, p. 37.

⁷ *Ibid.*, p. 131 and 136. The IGADF Report states that an in-country call for information was not done in Afghanistan. Instead, the inquiry sought to obtain key documents, complaints and leads from liaison with external bodies, including United Nations Assistance Mission Afghanistan, International Committee of the Red Cross, the North Atlantic Treaty Organisation and the Office of the Prosecutor, International Criminal Court. The IGADF Report states that the inquiry sat in Kabul for a month in 2019 “to hear evidence from a number of Afghan nationals who could give evidence of relevance to the Inquiry.”

⁸ See Housnia Shams, “‘Much more’ than 39 alleged unlawful SAS killings in Afghanistan, victims’ families say”, *ABC*, 27 November 2020, available at: <https://www.abc.net.au/news/2020-11-27/families-of-slain-afghan-victims-say-many-more-killed-sas/12926592>.

their families in further investigation procedures and the potential resulting criminal prosecutions.⁹

The extent to which victims can participate in a criminal prosecution process varies across countries and jurisdictions.¹⁰ It can simply mean the provision of information on procedures and processes under the legal system, or entail obligations on the part of criminal justice agencies to request and consider victims' preferences regarding prosecutor decision-making. It can involve providing a victim an opportunity to be heard about the impact that a crime has had on their lives in order to influence sentencing decisions or providing a victim the opportunity to request reparation for loss and damage suffered. In more robust participation models, victims may be allowed to appear in court, provide evidence, make submissions and/or cross-examine witnesses.

This article provides an outline of the Australian legal framework for victim participation in potential war crime prosecutions of ADF personnel. It starts with an overview of the jurisdictions in which the alleged perpetrators could be prosecuted and the relevant procedural rules for victim participation. Thereafter, it explores the limited opportunities for victim participation available in the relevant Australian jurisdictions, including the difficulty of pursuing alternative third-party participation avenues such as *amicus curiae* and intervener applications. Such limited prospects for victim participation in Australia is contrasted with the extensive opportunities for victims to participate in criminal proceedings at the International Criminal Court (ICC). The underlying principles of the victim participation model at the ICC is explored as well as criticisms of the ICC model.

Background to war crimes investigations

The Australian contribution to the International Security Assistance Force in Afghanistan lasted from approximately 2001 to 2014.¹¹ The deployments were largely drawn from the Special Air Service Regiment, the Commando Regiment and the Special Operations Engineer Regiment.¹² The role of the Australian forces was to destroy terrorist networks in Afghanistan including disrupting Taliban command and

⁹ *Ibid.* See also Eva Buzo, "Australia, the Rome Statute and the War Crimes Proceedings: Where are the Victims", *Opinio Juris*, 30 June 2020, available at: <https://opiniojuris.org/2020/06/30/australia-the-rome-statute-and-the-warcrimes-proceedings-where-are-the-victims/>.

¹⁰ See Victorian Law Reform Commission, "The Role of Victims of Crime in the Criminal Trial Process", Consultation Paper, July 2015, available at: https://www.lawreform.vic.gov.au/sites/default/files/VLRC_Victims_of_Crime_consultation_paper_for_web_0.pdf.

¹¹ IGADF Report, above note 2, pp. 243-251.

¹² *Ibid.*, p. 26.

supply routes, conducting combat patrols of remote regions and conducting reconnaissance and surveillance operations.¹³ From approximately 2015 onwards, rumours of war crimes began to emerge in the Special Forces community.¹⁴ The allegations primarily concerned unlawful killings and mistreatment of detainees.¹⁵ The then Special Operations Commander commissioned a cultural review of the Command.¹⁶ The reports prepared detailed “‘deeply concerning norms’ within Australian Special Forces, including the shift from ‘unacceptable behaviour’ to war crimes; the glorifying of these crimes as being a ‘good’ soldier; ‘competition killing’ and ‘blood lust’; the inhumane and unnecessary treatment of prisoners; and cover-ups of unlawful killings and other atrocities”.¹⁷

At the request by the Chief of Army, the IGADF in 2016 appointed a judge of the New South Wales (NSW) Court of Appeal to begin an inquiry to ascertain whether there was substance to the rumours and allegations.¹⁸ Following an approximately four and a half year inquiry, Justice Major General Brereton wrote to the IGADF on 29 October 2020, confirming, in short, that there was substance to the rumours.¹⁹ The inquiry found that there is credible information of twenty-three incidents in which one or more non-combatants or persons *hors de combat* were unlawfully killed by or at the direction of members of the Special Operations Task Group in circumstances which, if accepted by a jury, would be the war crime of murder, and a further two incidents in which a non-combatant or person *hors de combat* was mistreated in circumstances which, if so accepted, would be the war crime of cruel treatment.²⁰ The incidents involved thirty-nine individuals killed and a further two cruelly treated, and implicated twenty-five ADF personnel as perpetrators.²¹ The inquiry also found that there is credible information that some members of the Special Operations Task Group carried out “throwdowns”—foreign weapons or equipment to be placed with the bodies of “enemy killed in action” for the purposes of site exploitation photography, in order to portray that the person killed had been carrying the weapon or other military equipment when engaged and was a legitimate target.²² Following the delivery of the IGADF Report, the Australian Prime Minister announced that a special investigator would be appointed to examine

¹³ *Ibid.*, pp. 243-251.

¹⁴ *Ibid.*, p. 119.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.* pp. 119-122.

¹⁸ *Ibid.*, pp. 45-46.

¹⁹ *Ibid.*, pp. 10-11.

²⁰ *Ibid.*, pp. 28-29.

²¹ *Ibid.*, p. 29.

²² *Ibid.*

its findings and, if appropriate, refer briefs of evidence for prosecution.²³ The Special Investigator and the Director-General of the Office of the Special Investigator were appointed in December 2020 with the office formally established in January 2021.²⁴

Jurisdiction for prosecution in Australia

In order to assess the extent to which Afghan victims and their families could participate in potential war crime prosecutions of ADF personnel in Australia, it is necessary to determine the range of possible jurisdictions for these types of prosecutions. There are two jurisdictions under which the conduct detailed in the IGADF Report could be prosecuted. The first is a prosecution by the Director of Military Prosecutions (DMP) under the Defence Force Discipline Act 1982 (Cth) and the second is a prosecution by the Commonwealth Director of Public Prosecutions (CDPP) under the Criminal Code Act 1995 (Cth). While both jurisdictions are considered below, the Office of the Special Investigator has confirmed that it will focus on preparing briefs of evidence for referral to the CDPP for prosecution where appropriate.

Defence Force Discipline Act 1982 (Cth)

The Defence Force Discipline Act 1982 (Cth) (DFDA) is the primary legislation that establishes the service discipline component of the Australian military justice system, and is applicable to all branches of the ADF: the Australian Army, Royal Australian Navy and Royal Australian Air Force.²⁵ The DFDA defines, amongst other things, disciplinary offences,²⁶ and the mechanics and powers of the service tribunals that have the jurisdiction to try disciplinary offences.²⁷ The DFDA applies to ADF personnel conduct outside Australia and there is no doubt as to its application to the

²³ Joint media release with the Hon Scott Morrison MP and Senator the Hon Linda Reynolds CSC, above note 1. Note however that in the course of the IGADF investigations, a number of “exceptional” matters were already referred by the Chief of the Defence Force and the Minister for Defence to the Australian Federal Police. See IGADF Report, above note 2, p. 129.

²⁴ Department of Home Affairs Media Release, “Office of the Special Investigator”, 16 December 2020, available at: <https://minister.homeaffairs.gov.au/peterdutton/Pages/office-of-the-special-investigator.aspx#:~:text=%E2%80%8BThe%20Morrison%20Government%20has,Office%20of%20the%20Special%20Investigator.>

²⁵ Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth), pp. 1-2.

²⁶ Defence Force Discipline Act 1982 (Cth), pt III (DFDA).

²⁷ *Ibid.*, pts VII-VIII.

conflict in Afghanistan.²⁸ Part III of the DFDA contains a range of disciplinary offences which can be divided into three broad categories:

- unique military offences, for example, “endangering morale”, (s 18) or “prejudicial conduct” (s 60);
- offences based on civilian offences, such as assault (s 33); and
- “territory offences”, which operate under s 61 of the *DFDA*.

Section 61(3) of the DFDA states:

A person who is a defence member or a defence civilian commits an offence if:

- (a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and
- (b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place).

Criminal Code Act 1995 (Cth)

The Criminal Code Act 1995 (Cth) (Criminal Code) codifies the general principles of criminal responsibility under laws of the Commonwealth. In 2002, the Commonwealth Parliament passed the International Criminal Court (Consequential Amendments) Act 2002 (Cth) to amend the Criminal Code in order to incorporate international crimes recognised by the ICC into Australian law. These offences include war crimes, crimes against humanity and genocide.²⁹ The amendments took effect on 26 September 2002 and were therefore applicable throughout the relevant period of the ADF’s deployment in Afghanistan. Under Division 268 of the Criminal Code as inserted in 2002, Australia can prosecute individuals suspected of committing offences regardless of where, or by whom, the crimes were committed and whether the crimes were committed against Australian citizens or Australian

²⁸ *Ibid.*, s 9. See also IGADF Report, above note 2, p. 282.

²⁹ These crimes were incorporated into Australian domestic law in order to fulfil Australia’s obligations under the Rome Statute, which it ratified on 1 July 2002: Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute).

property.³⁰ The consent of the Commonwealth Attorney-General is required to prosecute offences under Division 268 and offences can only be prosecuted in the name of the Attorney-General.³¹

While private citizens can institute private prosecutions for Commonwealth offences, the High Court has confirmed that this does not include the war crime offences under Division 268. In *Taylor v. Attorney-General (Cth)*,³² a private citizen attempted to bring a private prosecution for crimes against humanity against the Minister of the Office of the President and Foreign Minister of the Republic of the Union of Myanmar, Aung San Suu Kyi. The plaintiff sought the Commonwealth Attorney-General's consent to the commencement of the prosecution. The Attorney-General refused and the matter came before the High Court. The majority of the High Court noted that it was not legally open to the Attorney-General to consent to the private prosecution and held that persons with the capacity to prosecute an offence against Division 268 is limited to: the person for the time being holding or occupying the office of Attorney-General; such other Ministers or members of the Executive Council as the Attorney-General might authorize to prosecute; and such other persons who might have authority conferred on them to prosecute in the name of the Attorney-General, including the CDPP under s 9(1) of the Director of Public Prosecutions Act 1983 (Cth).³³ In other words, private citizens cannot institute private prosecutions for the war crime offences under Division 268.

Jurisdiction for prosecution

Depending on the nature of the preferred offences, alleged perpetrators could be prosecuted by: 1) the DMP before a service tribunal such as a court martial for: offences under the DFDA, or offences under the Crimes Act 1900 (ACT) or Division 268 of the Criminal Code (pursuant to territory offences provision in s 61(3) of the DFDA); or 2) the CDPP in a State or Territory court for offences under Division 268 of the Criminal Code. In a prosecution by the DMP under a Division 268 offence as a territory offence, both the consent of the Commonwealth Attorney-General and the CDPP would be required.³⁴ If prosecuted by the DMP for territory offences under the Crimes Act 1900 (ACT), the alleged perpetrators could be prosecuted for offences

³⁰ Sections 15.4 and 268.117 of the *Criminal Code* provide that the relevant offences under Division 268 are subject to "extended geographical jurisdiction" (Category D jurisdiction), which is the most extensive scheme of geographical jurisdiction available under the Code.

³¹ Criminal Code, s 268.121.

³² (2019) 372 ALR 58.

³³ *Ibid.* 583 (Kiefel CJ, Bell, Gageler And Keane JJ).

³⁴ Criminal Code, s 268.121(1); DFDA, s 63.

such as murder (s 12), manslaughter (s 15), intentionally inflicting grievous bodily harm (s 19), or assault occasioning actual bodily harm (s 24). If prosecuted by the DMP or the CDPD for offences under the Criminal Code, the alleged perpetrators could be prosecuted for war crimes under Subdivision F and G of Division 268.³⁵ These include the war crimes of murder, torture and cruel treatment.

As regards prosecutions for offences under the DFDA, some commentators have suggested that, with the ratification of the Rome Statute, the use of DFDA service offences to prosecute Rome Statute war crimes committed by ADF members may be inadequate for purposes of complementarity. This is, first, because it may be difficult to find a “matching” ordinary crime for certain ICC crimes and, second, because the sentencing regime for an ordinary crime may not be of sufficient gravity for Rome Statute crimes.³⁶ The IGADF Report notes:

It is, therefore, at the very least arguable that prosecution as a Service offence (for example, s33A - assault occasioning actual bodily harm), of conduct that could come within the scope of a Criminal Code Division 268 offence (for example, 268.74 War crime - outrages upon personal dignity), could be problematic from the perspective of complementarity.³⁷

The IGADF Report suggests that the use of the s 61 territory offences mechanism, with its direct linkage to the substantive offences in Division 268, might offer a safer course of action to satisfy complementarity requirements.³⁸ If prosecutions are to occur, it will be by the CDPD under the Criminal Code in the civilian criminal courts, rather than as service offences or in service tribunals.³⁹ This is consistent with the recommendation in the IGADF Report.⁴⁰ The reason provided was that:

³⁵ The crimes set out in Subdivision F and G of Division 268 concern war crimes committed in the course of an armed conflict that is not an international armed conflict.

³⁶ Timothy McCormack, Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Melbourne, 14 March 2001, 134, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/icc/hearin_gs.htm. See also: Jann Kleffner, “The Impact of Complementarity on National Implementation of Substantive International Criminal Law”, *Journal of International Criminal Justice*, Vol. 1, 2003, pp. 95-97.

³⁷ IGADF Report, above note 2, p. 284.

³⁸ *Ibid.*

³⁹ Office of the Special Investigator Opening Statement, Additional Estimates Opening Statement, 22 March 2021, available at: <https://www.osi.gov.au/news-and-resources/additional-estimates-22-march-2021>.

⁴⁰ IGADF Report, above note 2, pp. 284 and 285.

some of the suspected perpetrators are no longer serving and thus not amenable to DFDA jurisdiction, that there are considerable overlaps in the conduct and individuals in question so that a single agency should be responsible for any criminal investigation, avoiding any potential problem with complementarity, and any arguable constitutional complication (for example, with the constitutional guarantee under s 80 of trial by jury).⁴¹

Legal framework for victim participation

Opportunities for victim participation under the DFDA and the Criminal Code is limited. This reduced role for victims is reflected in several aspects described below, including: the circumscribed status of the victim in the proceedings; the late stage of the proceedings at which victims are permitted to participate; the confined scope of the victims' ability to contribute; the lack of formal legal representation provided to victims; and the overall limited impact that victims can have on the outcome of the proceedings. These constraints arise from Australia's common law tradition whereby the investigation, prosecution and punishment of crimes is controlled by the State. The State performs this role in the interest of the community, which includes vindication for the victim. However, the criminal trial is ultimately an adversarial contest between the State and the accused and the overriding element of state control inevitably pits the power of the State against the individual accused. The rules of criminal procedure are thus focused on protecting the accused's interests within this power imbalance to ensure that there is "equality of arms".⁴² Victims are not parties to the legal proceedings and do not have a seat at the bar table during the prosecution proceedings in order to protect the accused's right to a fair trial including, in particular, the accused's right to the presumption of innocence.⁴³

In the previous five decades, criminal justice systems in common law jurisdictions such as Australia have been criticised for their treatment of victims.⁴⁴ Advocates have argued that the exclusion of victims from the prosecution process

⁴¹ *Ibid.*

⁴² See Victorian Law Reform Commission, "The Role of Victims of Crime in the Criminal Trial Process", Report, August 2016, para. 3.30, available at: http://lawreform.vic.gov.au/sites/default/files/VLRC_Victims%20Of%20Crime-Report-W_0.pdf.

⁴³ *Ibid.*, para 3.32.

⁴⁴ See Bree Cook, Fiona David and Anna Grant, "Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia", *Research and Public Policy Series*, No 19, 1999, pp. 81–4.

renders victims marginalized, voiceless and demoralized.⁴⁵ Following a growing victims' rights movement in common law countries, some limited reforms have been gradually implemented to increase the participatory rights of victims. At the federal level in Australia, such reforms include the ability of victims to provide victim impact statements outlining the impact of the offence on the victim and the ability to make requests for reparations from the convicted offender during sentencing hearings. The reforms also include prosecution policies which require prosecutors to consult more widely with victims regarding key decisions in the prosecution process. These reforms are reflected in the victim participation provisions of the Criminal Code and CDPP policies, and to a lesser extent in the DFDA and DMP policies.

Prosecution by the CDPP under the Criminal Code

During the trial process in a prosecution by the CDPP or the DMP, the status of the victim is generally limited to that of a witness who gives evidence on behalf of the prosecution. If a victim is not a witness, they have no formal role at all. There are a number of CDPP policies and procedures which require the CDPP to informally consult with victims and witnesses in federal criminal prosecutions. For example, the Prosecution Policy of the Commonwealth sets out guidelines for the making of decisions in the prosecution process.⁴⁶ It defines a victim of crime as an individual who has suffered harm as the direct result of an offence or offences committed against Commonwealth law or prosecuted by Commonwealth authorities.⁴⁷ "Harm" includes physical or mental injury, emotional suffering or economic loss.⁴⁸ Where available and "appropriate", the policy requires the views of any victims to be considered and taken into account when deciding whether it is in the public interest to: commence a prosecution; discontinue a prosecution; agree to a plea negotiation; or decline to proceed with a prosecution after a committal.⁴⁹ Similarly, the CDPP Victims of Crime Policy states that victims should, "on request", be kept informed of the progress of the prosecution in a timely manner, including: a decision to commence a prosecution (and the charges laid); a decision not to commence a

⁴⁵ See Erin O'Hara, "Victim Participation in the Criminal Process", *Journal of Law & Policy*, Vol. 13, 2005, 239-40. See also, Rachel King, "Why a Victims' Rights Constitutional Amendment is a Bad Idea: Practical Experiences from Crime Victims", *University of Cincinnati Law Review*, Vol. 68, 2000, p. 362.

⁴⁶ Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth, Guidelines for the Making of Decisions in the Prosecution Process*, available at: <https://www.cdpp.gov.au/sites/default/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf>.

⁴⁷ *Ibid.*, para. 5.2.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, para 5.3.

prosecution; the date and place of hearing of any charges laid; the outcome of any bail proceedings; plea negotiations; and the outcome of proceedings, including appeal proceedings.⁵⁰ The CDPP also has a Witness Assistance Service which provides assistance nationally to witnesses and victims of Commonwealth crimes.⁵¹ The number of victims and/or witnesses who can be provided with a direct service is restricted.⁵²

Pre-conviction and sentencing, the participation of victims in the proceedings is thus limited to informal consultation by the prosecution as required by the various CDPP policies. If the accused(s) are convicted, then only at that late stage of the proceedings does the ability of a victim to participate in the proceedings increase, in that the victim may provide a victim impact statement and make a request for financial reparations during the sentencing hearing. These opportunities are clear in a CDPP prosecution but less clear in a prosecution by the DMP. If the alleged perpetrators are prosecuted by the CDPP, the matter(s) will be heard before a State or Territory court.⁵³ State or Territory laws will therefore apply “so far as they are applicable”.⁵⁴

The Crimes Act 1914 (Cth) (Crimes Act) sets out the federal provisions for the prosecution and sentencing of federal offenders. The sentencing principles are set out in Part IB thereof, particularly in s 16A. The extensive nature of the provisions of Part 1B generally leave limited scope for State or Territory laws to apply.⁵⁵ Section 16A(2) of the Crimes Act sets out a non-exhaustive list of matters to which the court must have regard when passing sentence. These include matters which are of relevance to victims such as: the nature and circumstances of the offence (s 16A(2)(a)); the personal circumstances of any victim of the offence (s 16A(2)(d)); any injury, loss or damage resulting from the offence (s 16A(2)(e)); and any victim impact statement (s 16A(2)(ea)).

⁵⁰ Commonwealth Director of Public Prosecutions, *Victims of Crime Policy*, para. 4, available at: https://www.cdpp.gov.au/sites/default/files/Victims%20of%20Crime%20Policy_0.pdf.

⁵¹ Commonwealth Director of Public Prosecutions, *Victims and Witnesses* (Web Page), available at: <https://www.cdpp.gov.au/victims-and-witnesses>.

⁵² Commonwealth Director of Public Prosecutions, *Witness Assistance Service Referral Guidelines*, July 2021, para. 2, available at: <https://www.cdpp.gov.au/sites/default/files/2021%20WAS-Referral-Guidelines.pdf>.

⁵³ Judiciary Act 1903 (Cth), ss 68(1) and 68(2).

⁵⁴ *Ibid.* s 68(1).

⁵⁵ In *R v Pham* (2015) 256 CLR 550, the majority observed at [22], “[t]o the extent that Pt IB of the *Crimes Act 1914* (Cth) specifically or impliedly provides for sentencing considerations which are different from otherwise applicable State and Territory sentencing considerations, the Crimes Act is exclusive” (French CJ, Keane and Nettle JJ; Bell and Gageler JJ agreeing on this ground).

Victim impact statements

Section 16AAA and s 16AB of the Crimes Act set out the provisions on the receipt of victim impact statements during sentencing. These sections were inserted into the Crimes Act by the Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013 (Cth). These amendments therefore only apply to offences committed, or alleged to have been committed, on or after 29 June 2013. A victim impact statement can be made by the victim, a member of the victim's family if the court gives leave, or a person appointed by the court.⁵⁶ The statement must describe the impact of the offence on the victim, including details of the harm suffered by the victim as a result of the offence.⁵⁷ A court sentencing a federal offender for offences committed, or alleged to have been committed prior to 29 June 2013, could receive victim impact statements by relying on a general power at common law to receive information as it thinks fit to enable it to impose a proper sentence.⁵⁸ The CDPP has also relied on sections 16A(2)(d) and (e) of the Crimes Act, and on applied State and Territory legislation, to enable a victim impact statement to be tendered.⁵⁹

Reparation orders

If a person is convicted of a federal offence, s 21B of the Crimes Act enables the court to make a reparation order in respect of any loss suffered or expenses incurred "by reason of the offence". A court may order reparation "to any person, by way of money payment or otherwise, in respect of any loss suffered, or any expense incurred, by the person by reason of the offence".⁶⁰ Before a reparation order can be made there must be "a close or significant connection" between the loss and the offence which caused it. This will not be made out where a "secondary loss occurs by way of a ripple effect".⁶¹ The CDPP has the discretion to decide whether to ask the court to make a

⁵⁶ Crimes Act, s 16AAA(a).

⁵⁷ Crimes Act, s 16AAA(b).

⁵⁸ Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners*, First edition, 2018, para. 161, available at: https://www.cdpp.gov.au/sites/default/files/Sentencing%20of%20Federal%20Offenders%20in%20Australia%20-%20a%20Guide%20for%20Practitioners_300718.pdf.

⁵⁹ *Ibid.*

⁶⁰ Crimes Act, s 21B(1)(d).

⁶¹ *R v. Foster* [2009] 1 Qd R 53 [74].

reparation order on behalf of a victim⁶² while the court has discretion as to whether to make a reparation order and the amount of the order.

The provision of a victim impact statement and requests for reparations represent the very limited apex of victim participation in criminal prosecutions in Australia. Even where such an opportunity does arise because a conviction has been secured, the impact of participation is limited in that the discretion to request reparations remains ultimately a prosecutorial decision and the victim impact statement is but one of several factors considered by a judge when handing down a sentence.

Prosecution by the DMP under the DFDA

Similar to CDPD Prosecution Policy, the Prosecution Policy of the DMP contains some requirements for the DMP to informally consult with complainants regarding prosecution decisions under the DFDA.⁶³ For example, in deciding whether charges under the DFDA should be pursued, one of the factors the DMP may consider is the “interests of the complainant” including the effect upon the complainant of proceeding or not proceeding with a charge.⁶⁴ Where practicable, the policy states that the views of the complainant will be sought and taken into account in decisions to discontinue a prosecution and whether or not to agree to a plea proposal made by the accused.⁶⁵

Unlike the Criminal Code, there are no express provisions in the DFDA which provide victims an opportunity to participate in prosecutions. However, victim participation may be possible under the following sentencing provisions. Section 70 of the DFDA sets out the sentencing principles to be followed by a tribunal:

- (1) A service tribunal, in determining what action under this Part should be taken in relation to a convicted person, shall have regard to:
 - (a) the principles of sentencing applied by the civil courts, from time to time; and

⁶² Commonwealth Director of Public Prosecutions, *Reparation Orders and Victims of Crime Factsheet*, available at: <https://victimsandwitnesses.cdpp.gov.au/sites/default/files/2019-02/Reparation%20orders.pdf>.

⁶³ Office of the Director of Military Prosecutions, *Director of Military Prosecutions Prosecution Policy*, 26 October 2015, available at: <https://www.defence.gov.au/mjs/docs/2019-DMP-Annual-Report.pdf>.

⁶⁴ *Ibid.*, para. 1.5(d).

⁶⁵ *Ibid.*, paras. 1.6 and 8.

(b) the need to maintain discipline in the Defence Force.

Given that victim impact statement schemes have been implemented in all other Australian state and federal jurisdictions⁶⁶, it may be argued that the consideration of the personal circumstances of victims and their loss resulting from an offence is a well-established sentencing principle in civil courts. Section 70 of the DFDA could therefore provide a basis for the provision of victim impact statements in a prosecution under the DFDA.

Section 84(1) of *DFDA* sets out the power of the tribunal to make reparation orders. It states:

Where a person is convicted by a service tribunal of a service offence, the tribunal may, instead of, or in addition to, imposing a punishment or making an order under subsection 75(1), order the person to pay such amount as it thinks just by way of reparation to a person who has sustained loss or damage through or by reason of that service offence.

This section would also provide a basis for victims to make a submission to a tribunal regarding their loss and injury, most likely as part of a victim impact statement.

Other avenues for participation

Aside from informal consultation by the prosecution, the provision of victim impact statements and requests for reparations, one other narrow option victims might consider to seek to participate in the potential prosecutions, outside the rubric of the legislative and policy provisions, are applications to become an intervener or an *amicus curiae*.

Amicus curiae

The role of an *amicus curiae* is to assist the court by drawing attention to some aspect of the case which might otherwise be overlooked. The grant of leave is entirely in the

⁶⁶ See Crimes (Sentencing) Act 2005 (ACT), ss 47, 53; Sentencing Act 1995 (NT), ss 106A, 106B; Crimes (Sentencing Procedure) Act 1999 (NSW), ss 28; Victims of Crime Assistance Act 2009 (QLD) s 15(1); Sentencing Act 2017 (SA) ss 13, 14; Sentencing Act 1991 (VIC), Pt 3 Div 1C; Sentencing Act 1995 (WA) s 24.

Court's discretion.⁶⁷ In order to succeed in an application, a victim needs to demonstrate that they can “offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted”.⁶⁸ The court will take the following considerations into account when deciding whether a person will be permitted to act as an amicus: the degree to which relevant issues would otherwise not be adequately canvassed;⁶⁹ whether the court considers that it will be significantly assisted by the submissions of the *amicus curiae*;⁷⁰ whether it is in the parties’ interests that an *amicus curiae* be permitted to make submissions;⁷¹ and whether such costs as are occasioned by consideration of those submissions are not disproportionate to the assistance expected.⁷² In relation to questions of fact, the *amicus curiae* may be permitted to tender non-controversial pieces of evidence, but it is doubtful whether this may be done over the objection of a party. Rarely, if ever, would an *amicus curiae* be permitted to tender controversial evidence, and the *amicus curiae* has no right to lead evidence.⁷³

Intervener

In order to succeed in an application to intervene, an intervener needs to show that their rights and interests are affected by the proceeding. Where the impact of a decision is less direct, applications for leave to intervene will not be granted unless the applicant’s interests could be substantially affected by a decision.⁷⁴ While the role of an *amicus curiae* is to assist the court, the role of an intervener is to represent the intervener’s own legal interests in the proceedings. An intervener becomes a party to the proceedings with the benefits and burdens of that status.⁷⁵ In appropriate proceedings, an intervener may adduce evidence, call witnesses, cross-examine, and

⁶⁷ *Levy v. Victoria* (1997) 189 CLR 579, 606 (Levy).

⁶⁸ *Ibid.*

⁶⁹ *Levy*, above note 67, 604 (Brennan CJ); *Roadshow Films Pty Ltd v. iiNet Ltd* (2011) 248 CLR 37, 38-9 [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (*Roadshow*) 39 [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁷⁰ *National Australia Bank Ltd v. Hokit Pty Ltd* (1996) 39 NSWLR 377, 381 (Mahoney P) (NSWCA) (*Hokit*); *Levy*, above note 67, 604-5 (Brennan CJ).

⁷¹ See, eg, *Hokit*, above note 70, 381 (Mahoney P).

⁷² *Ibid.*; *Levy*, above note 67, 604-5 (Brennan CJ).

⁷³ *Bropho v. Tickner* (1993) 40 FCR 165, 172-3 (Wilcox J). As to leading evidence, see *Corporate Affairs Commission v. Bradley* [1974] 1 NSWLR 391, 399 (Hutley JA) (NSWCA).

⁷⁴ *Levy*, above note 67, 601-2 (Brennan CJ); *Roadshow*, above note 69, 38-9 [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *PBU v. Mental Health Tribunal* (2018) 56 VR 141 [38] (Bell J).

⁷⁵ *Trop Nominees Pty Ltd v. Liquor Licensing Cmr* (1987) 46 SASR 255.

exercise any right of appeal enjoyed by other parties.⁷⁶ Orders for costs can also be made for and against an intervening party.⁷⁷

Case law

Applications to intervene or act as *amicus curiae* are uncommon in criminal law cases and are difficult to succeed in.⁷⁸ Such applications are generally brought by interested third parties such as government bodies or nongovernmental organizations. One of the most authoritative and recent decisions regarding the intervention of third parties in criminal proceedings is the High Court case of Strickland (a pseudonym) v. Commonwealth Director of Public Prosecutions.⁷⁹ The primary judge in the criminal prosecutions granted the Australian Crime Commission (ACC) leave to intervene to provide submissions on issues affecting the ACC and to object to evidence on grounds of legal professional privilege and public interest immunity. Upon appeal to the High Court, the appellants were obliged by the High Court Rules 2004 (Cth), to join the ACC as a respondent to the appellants' applications for special leave to appeal. During the course of argument, the appellants objected to the ACC making submissions in the appeal, for the reason, among others, that they were not submissions in which the CDPP joined or which the CDPP adopted. In allowing the objection, Kiefel CJ, Bell and Nettle JJ held as follows:

As the appellants submitted, where an accused is put on trial for a criminal offence, the issues are joined between the Crown and the accused and it is for the Crown and no one else to represent the community. Here, the Crown appears by the CDPP and so it is for the CDPP and for no one else to represent the community. Occasionally, circumstances arise in which it is appropriate in a civil appeal for this Court to hear an intervener but only if a substantial affection of the intervener's legal interests is demonstrable (as where the intervener is a party to a pending proceeding) or likely. Very occasionally, the Court may hear an intervener on a criminal appeal. Thus far, however, the Court has only ever been disposed to do so in circumstances where the Crown embraces or supports the

⁷⁶ *Ibid.*

⁷⁷ Rushby v. Roberts [1983] 1 NSWLR 350, 354 (Street CJ).

⁷⁸ For examples of unsuccessful applications, see R v. GJ (2005) 16 NTLR 230; R v. Thomas (2006) 14 VR 47; R v. Collaery (No 2) [2019] ACTSC 296. For examples of successful applications, see R v. Murphy (1986) 5 NSWLR 18; Karim v. R (2013) 83 NSWLR 268.

⁷⁹ (2018) 266 CLR 325.

intervener's contentions or the intervener's contentions directly support those of the Crown. Where, as here, the Crown and the intervener are not as one in relation to the issues which the intervener seeks to agitate, the intervener should ordinarily not be heard. It would be unfairly prejudicial to the putative offender in that it would require him or her in effect to meet two different cases.⁸⁰

In *Palmer v. The State of Western Australia*,⁸¹ the National Association of People Living with HIV Australia (Inc) (NAPWHA) sought leave to appear as *amicus curiae* and to adduce evidence in a criminal sentencing appeal. In its submissions, NAPWHA made it clear that it did not wish to support any particular party in the proceedings before the court, and that it only sought to assist the court to understand "important and recent developments in the Australian HIV response". Although NAPWHA did not seek leave to intervene in the case, Mildren J stated as follows (Riley and Southwood JJ concurring):

[T]o allow intervention in this case would cut across time-honoured principles that criminal proceedings are joined between the State of Western Australia (in Commonwealth cases, the Crown) and the accused. It is the State which represents all of the interests of the community, including the individual interests of the victims of crime, and no one else. At least ordinarily an intervener will not be allowed to raise issues not raised by the State, as to do so would be unfairly prejudicial to require the accused to meet two different cases.⁸²

The court also rejected the request of NAPWHA to appear as *amicus* on the basis that the appellant was represented by experienced senior counsel and the court at first instance already had the benefit of detailed expert evidence.⁸³

While an *amicus* application may be possible, it will likely be difficult for a victim or a victim's group to provide submissions on issues of law or fact that would not already have been covered by the prosecution. Intervention by way of an *amicus* application would also provide a less satisfactory option for victims given the limited scope of the participatory rights provided to *amici curiae*. While participation as an intervener would provide a victim broader participatory rights, there does not appear

⁸⁰ *Ibid.*, 371-2 [109]-[110] (Kiefel CJ, Bell and Nettle JJ).

⁸¹ [2018] WASCA 225.

⁸² *Ibid.*, [11].

⁸³ *Ibid.*, [17].

to be any reported cases in which an application to intervene was made by a victim or a victim's group in a criminal prosecution. For the reasons discussed in Strickland, it is unlikely that such an application would be entertained.

Unlike at the ICC discussed below, the right of Afghan victims to participate in potential criminal proceedings in Australia remains mostly limited to "service" rights i.e., rights which aim to provide better treatment and experience under the criminal justice system. Their status in the proceedings is limited to that of a witness in support of the prosecution's case. While guidelines require that they be informally consulted regarding significant decisions by the prosecution, such guidelines are non-binding. Victims will not be entitled to be legally represented at the bar table. The only "procedural" rights that Afghan victims will have to influence the decision-making process will be the provision of victim impact statements and requests for reparations via the prosecution at sentencing, provided the case proceeds to that stage. Other common law avenues for third party intervention in the proceedings are unlikely to succeed.

Victim participation at the International Criminal Court

The limited opportunities for victim participation in Australia contrast sharply with opportunities available before the ICC. The victim participation model enshrined in the Rome Statute has been heralded as "a new era in victim participation in international criminal law".⁸⁴ The practice and procedure of the ICC is drawn from both common and civil law systems. States with civil law inquisitorial criminal justice systems, where victim participation is more common, lobbied strongly for the inclusion of provisions relating to victim participation and redress into the Rome Statute.⁸⁵ While victims are not considered a full party to the proceedings,⁸⁶ the ICC provides victims with a much greater status by affording them the opportunity to present their views and concerns throughout various stages of the proceedings.⁸⁷

⁸⁴ Bridie McAsey, "Victim Participation at the International Criminal Court and its Impact on Procedural Fairness", *Australian International Law Journal*, Vol. 18, 2011, 106.

⁸⁵ Brianne McGonigle, "Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court", *Florida Journal of International Law*, Vol. 21, 2009, p. 114.

⁸⁶ International Criminal Court, *Prosecutor v. Katanga and Chui*, Case No ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, [75].

⁸⁷ Rome Statute, above note 29, art. 68(3). See also International Criminal Court, *Prosecutor v. Katanga and Chui*, Doc No ICC-01/04-01/07 OA 11, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010, [3], [40].

Unlike Australia, the Rome Statute provides for the participation of victims at any stage of the proceedings, not merely the sentencing stage. Victims are afforded the opportunity to participate from the “Situation Phase” (once the Prosecutor has opened investigations), through to the “Trial Phase” provided they satisfy the relevant threshold criteria regarding “harm” and “personal interests”. Participation also goes way beyond mere informal consultation with victims having the right “to put their views and concerns directly to the judges”.⁸⁸ However, the ICC Chambers have repeatedly emphasised that such victim participation should only occur “if their intervention would make a relevant contribution to the determination of truth and does not prejudice the principles of fairness and impartiality of the proceedings before the Court”.⁸⁹ Following a successful application to have their views and concerns heard, victims will either be represented by a legal representative of their own choosing, or the relevant chamber will designate multiple victims a common “Legal Representative of Victims”.⁹⁰

During the Situation Phase, a prosecutor must request authorisation from a Pre-Trial Chamber under article 15 in order to proceed with an investigation that he or she has initiated. Article 15(3) permits victims to make “representations” to the Pre-Trial Chamber during authorisation proceedings. In the past, such representations have included requests that an investigation cover a longer period of time than requested by the prosecutor or have requested that an investigation include a broader range of war crimes.⁹¹

During the Pre-Trial phase, Article 19(3) permits victims to “submit observations to the Court” during proceedings to determine whether a case falls within the ICC’s jurisdiction. In *Prosecutor v. Katanga and Chui*,⁹² the Court clarified that victim participation during this phase includes the following: the ability to access all filings, transcripts and decisions contained in the record of the case, excluding ex parte decisions;⁹³ making submissions on issues relating to the

⁸⁸ International Criminal Court, *Victim’s Booklet: A guide for the participation of victims in the proceedings of the ICC* (Web Page) 16, available at: https://www.icc-cpi.int/about/victims/Documents/VPRS_Victim-s_booklet.pdf.

⁸⁹ *Prosecutor v Katanga and Chui*, above note 86, [65].

⁹⁰ International Criminal Court, *Victims Booklet*, above note 88, 23.

⁹¹ International Criminal Court, *Situation in the Republic of Côte d’Ivoire*, Case No ICC-02/11-14-Corr, Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, 15 November 2011, [148].

⁹² International Criminal Court, *Prosecutor v. Katanga and Chui*, Case No ICC-01/04-01/07, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008 (DRC Decision).

⁹³ *Ibid.*, [127]-[130].

admissibility of evidence and to examine such evidence;⁹⁴ examination of witnesses as part of evidentiary debate following examination by the Prosecution;⁹⁵ providing oral motions, responses and submissions;⁹⁶ and filing of written motions, responses and replies.⁹⁷

During the Trial Phase, victims can attend and participate in the proceedings through their legal representatives.⁹⁸ A key element of participation is the ability for victims to present opening and closing statements following the prosecution's case and prior to the defence's case.⁹⁹ Legal representatives of victims can also make applications to question witnesses, experts or the accused, either verbally or in writing¹⁰⁰ and have also been permitted to tender evidence and call witnesses.¹⁰¹

Reasoning for greater victim participation

Proponents for stronger victim participation rights argue that it benefits victims by formally and publicly recognizing that victims have suffered wrongdoing.¹⁰² Victims may "find meaning in being heard, in having a witness who affirms that [their abuse] did happen, that it was terrible, [and] that it was not their fault."¹⁰³ Affording victims the opportunity to participate allows them to contribute to fact-finding and truth-telling which can validate their experience and assist in the process of healing from trauma and degradation.¹⁰⁴ Others have argued that victim participation assists the

⁹⁴ *Ibid.*, [134].

⁹⁵ *Ibid.*, [137]-[138].

⁹⁶ *Ibid.*, [141].

⁹⁷ *Ibid.*, [142].

⁹⁸ International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) (Rules of Procedure and Evidence), Rule 91.

⁹⁹ Prosecutor v. Katanga and Chui, above note 86, [68].

¹⁰⁰ *Ibid.*, [72].

¹⁰¹ International Criminal Court, *Prosecutor v. Lubanga*, Case No ICC-01/04-01/06, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, [96]-[98]; International Criminal Court, *Prosecutor v. Katanga and Chui*, Doc No ICC-01/04-01/07, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, [82]-[83].

¹⁰² Victims' Rights Working Group, "Submission to the Hague Working Group of the Assembly of States Parties: The Importance of Victim Participation", 8 July 2013, available at: http://www.vrwg.org/VRWG_DOC/2013_July_VRWG_HWG_Participation_FINALrevised.pdf.

¹⁰³ Jamie O'Connell, "Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?", *Harvard International Law Journal*, Vol. 46, 2005, p. 330.

¹⁰⁴ Susana SáCouto, "Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?", *Michigan Journal of Gender and the Law*, Vol. 18, No. 2, 2012, p. 315.

Court in its fact-finding role because victims are uniquely placed to ensure that the Court is provided with a richer and more nuanced version of events.¹⁰⁵ Post-conviction, some emphasize that the provision of information on the harm suffered by the victim increases proportionality and accuracy in sentencing decisions.¹⁰⁶

While the ICC model for victim participation is widely regarded as the high-water mark for participatory rights of victims in an international criminal justice process, it has also been the subject of criticism. These include the fact that the large number of applications for victim status places a significant burden on the resources of the Court, with some arguing that the lengthy time taken to consider and respond to applications for victim status undermines the accused's right to an expeditious trial.¹⁰⁷ Of specific relevance to the Australian jurisdiction is the criticism that allowing victims to have a seat at the bar table engenders the presumption that a crime has occurred and undermines the accused's right to the presumption of innocence.¹⁰⁸ The ability of victims to question witnesses, submit evidence and call witnesses also creates the risk that they become "secondary prosecutors" undermining the principle of equality of arms.¹⁰⁹

From the victim's perspective, a recent Independent Expert Review on the ICC highlighted many criticisms of the victim participation processes at the ICC.¹¹⁰ Noting that only a fraction of the victim groups from an area of conflict become victim participants¹¹¹, the report concludes that, for victims "[...] the Court is not functioning and delivering as envisioned."¹¹² Delays in the reparations process are described as "profound"¹¹³ leading to "unfulfilled expectations among victims" denting victims' confidence in the credibility of the Court.¹¹⁴ The Review received

¹⁰⁵ *Ibid.*, p. 301.

¹⁰⁶ Edna Erez, Pamela Tontodonato, "The Effect of Victim Participation in Sentencing on Sentence Outcome", *Criminology*, Vol. 28, August 1990, p. 3.

¹⁰⁷ International Bar Association, "Enhancing the Efficiency and Effectiveness of ICC Proceedings: a Work in Progress", January 2011, *International Bar Association Human Rights Institute*, 23, available at: <https://www.ibanet.org/document?id=January-2011-Enhancing-Efficiency-and-Effectiveness>.

¹⁰⁸ Victorian Law Reform Commission, "The Role of Victims of Crime in the Criminal Trial Process, The International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process", May 2015, para. 73, available at: http://lawreform.vic.gov.au/sites/default/files/Role_of_Victims_of_Crime_Info_Paper_3_Web.pdf.

¹⁰⁹ *Ibid.*, para 74.

¹¹⁰ Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, pp.270 to 305, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

¹¹¹ *Ibid.*, [862].

¹¹² *Ibid.*, [885].

¹¹³ *Ibid.*, [879].

¹¹⁴ *Ibid.*, [886].

submissions that the participation procedure is “overly complex, bureaucratic, inconsistent, and far removed from the reality many victims find themselves”.¹¹⁵

Comparing the ICC and Australian experience and processes

Greater victim participation in Australian criminal trials would require a significant cultural change from the adversarial model and root and branch reform of existing trial structures to accommodate meaningful participation of third parties.¹¹⁶ While there have been moves to provide victims greater “service” rights in the recent times, the type of radical reform required for an ICC model of victim participation is unlikely to occur in the near future in Australia. If the issues subject of the IGADF Report were investigated and prosecuted by the ICC as opposed to in Australia, some aspects of the experience would likely remain similar for victims. For example, the physical location of the investigators and prosecutors would still be in a venue distant from where the crimes were committed, requiring interpreters, telephone consultations, international travel to the venue of the trials or where possible and/or necessary, the provision of evidence via video link.¹¹⁷ The isolation and frustrations caused by this physical distance would be similar in both venues but would be ameliorated slightly in the ICC system where victims would at least have the support and guidance of their legal representatives.¹¹⁸ The range of potential crimes the perpetrators could be prosecuted with would also be similar regardless of whether the matter is prosecuted in the ICC or in an Australian court. The offences contained in Division 268 of the Australian Criminal Code are essentially a “domestication” of the more generally expressed corresponding offences contained in the Rome Statute.¹¹⁹

¹¹⁵ *Ibid.*, [858].

¹¹⁶ Jonathan Doak, “Victims’ Rights in Criminal Trials: Prospects for Participation”, *Journal of Law and Society*, Vol. 32, No. 2, 2005, p. 298.

¹¹⁷ In April 2021, Afghan civilian witnesses were permitted to give evidence via video link from Kabul in an ongoing defamation case in New South Wales regarding war crimes allegations against an ADF soldier. See Christopher Knaus “Ben Roberts-Smith: Afghan civilians to testify via video link in former soldier’s defamation case”, *The Guardian*, 1 April 2021, available at: <https://www.theguardian.com/australia-news/2021/apr/01/ben-roberts-smith-afghan-civilians-to-testify-via-video-link-in-former-soldiers-defamation-case>.

¹¹⁸ Paolina Massidda, “The Participation of Victims Before the ICC: A Revolution Not Without Challenges”, in Rudina Jasini and Gregory Townsend (eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice*, University of Oxford, 2020, 33, 40.

¹¹⁹ Section 3 of the International Criminal Court Act 2002 (Cth). IGADF Report, above note 2, p. 265.

As described above, victims would undoubtedly have a greater opportunity to participate if the proceedings were prosecuted at the ICC. Unlike in Australia, they would not need to rely on the informal obligations of prosecutors to consult with them regarding significant prosecutorial decisions. Instead, they could be legally represented and, through their counsel, actively participate and have their views considered by the various Chambers.¹²⁰ They would not need to wait until after a conviction at the sentencing phase to have an opportunity to be heard directly by the Court and could participate as early as proceedings before the Pre-Trial Chamber to authorise an investigation or hearings regarding jurisdictional issues.¹²¹

Arguably the procedure for reparations at the ICC is more favourable for the victims than the procedure available in an Australian criminal trial. In Australia, reparation would be limited to financial compensation for losses incurred by individual victims as a result of the crime committed against them.¹²² Prosecutors have a discretion to seek a decision on compensation, and victims would have little or no control over the application.¹²³ While there are also a number of State and Territory administrative victim compensation schemes in Australia, there is no Commonwealth compensation scheme for victims of Commonwealth crime.¹²⁴ A recent case before the New South Wales Court of Appeal indicates that it is likely to be difficult for Afghan victims to apply for compensation under State and Territory regimes. The recent NSW case concerned an application for victim support by five women of Yazidi ethnicity who reported that they endured acts of violence in 2014 in Syria and Iraq at the hands of an Australian citizen.¹²⁵ In upholding the decision to reject the application under the NSW victims compensation legislation, the Court of Appeal confirmed that, for the NSW scheme to apply, the “act of violence” must have occurred in NSW, and not otherwise.¹²⁶ An application for leave to appeal was rejected by the Australian High Court.¹²⁷

At the ICC, victims do not rely on the prosecution to make a request for reparation on their behalf and can apply from the outset directly to the Court to

¹²⁰ International Criminal Court, *Victims Booklet*, above note 88, 17-18

¹²¹ *Ibid.*

¹²² Crimes Act, s 21B(1)(d).

¹²³ Commonwealth Director of Public Prosecutions, *Reparation Orders and Victims of Crime Factsheet*, above note 62.

¹²⁴ Commonwealth Director of Public Prosecutions, *Victims and Witnesses Compensation* (Web Page), available at: <https://victimsandwitnesses.cdpp.gov.au/support-and-entitlements/support-and-entitlements/compensation>

¹²⁵ *DRJ & Ors v. Commissioner of Victims Rights & Anor* (2020) 103 NSWLR 692.

¹²⁶ *Ibid.*, [1], [42], [184].

¹²⁷ *DRJ & Ors v. Commissioner of Victims Rights & Anor* [2021] HCASL 53.

receive reparations or apply during the reparations phase.¹²⁸ At the end of the trial, victims can also receive reparation by way of an individual or a collective award.¹²⁹ Similar to the Australian criminal law system, the award of reparations is at the discretion of the Court and whether a particular victim can benefit depends on the charges for which the perpetrator is convicted.¹³⁰ Individual awards are provided to individual victims or groups of victims for actual quantifiable losses or another form of standardized payment.¹³¹ Collective awards are intended to benefit large numbers of individuals or entire communities of victims and can be made up of symbolic or commemorative awards,¹³² including, for example, support for housing, income-generating activities, education programmes and psychological support services. In the present circumstances, given the limited number of Afghan victims, it is likely that the victims could receive individual reparations awards as well as some form of collective award if convictions were secured in the ICC. While this is broader than the Australian criminal law system where no such collective reparations programme exists, the ICC reparations scheme is often subject to criticism and has been described as time-consuming, a huge burden on victims and extremely slow.¹³³

At the ICC, Afghan victims would also potentially benefit from support from the ICC's Trust Fund for Victims which is mandated to implement reparations orders emanating from the Court and to provide broader forms of assistance to victims and their families.¹³⁴ The latter mandate is intended to provide urgent assistance to victims without having to wait often decades until the conclusion of a case to receive support, and also, to take into account the fact that Court-ordered reparations may not reach all victims in a particular situation.¹³⁵ No such mechanisms for urgent assistance, even in the limited form of the Trust Fund's

¹²⁸ Rules of Procedure and Evidence, above note 98, Rule 94.

¹²⁹ *Ibid.*, Rule 97(1).

¹³⁰ International Criminal Court, *Victims Booklet*, above note 88, 17. Crimes Act, s 21B(1)(d).

¹³¹ International Criminal Court, *Prosecutor v. Lubanga*, ICC-01/04-01/06-3129-AnxA, Order for Reparations (amended), 3 March 2015, n38.

¹³² Rules of Procedure and Evidence, above note 98, Rules 97–98.

¹³³ See Luc Walley, "The Participation of Victims in the Process of Collective Reparations at the ICC" in Rudina Jasini and Gregory Townsend (eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice*, University of Oxford, 2020, 77, 89.

¹³⁴ *Rome Statute*, above note 29, art. 75 and Rules of Procedure and Evidence, above note 98, Rule 98.

¹³⁵ However, for criticisms of the implementation of the Trust Fund for Victims' mandate, see Carla Ferstman, "Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness" in Rudina Jasini and Gregory Townsend (eds) *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice* (University of Oxford, 2020) 57, 66.

assistance mandate, would be available to victims via the Australian criminal or military law system. However, the IGADF Report recommended that where there is credible information that an Afghan national was unlawfully killed, Australia should now compensate the family of that person, without waiting for the establishment of criminal liability. The Department of Defence has promised to determine an approach to compensating victims by the end of 2021.¹³⁶

While the ability of victims to participate in the trial and reparation proceedings at the ICC is greater, there are several notable frustrations with the ICC system for the victims. This includes not least that the progress of cases at the ICC is notoriously slow, sometimes taking decades.¹³⁷ These delays are due in no small part to the large number of victims seeking to participate in proceedings and the resulting delay from the Chamber's review of their requests for participation and the participation of victims themselves in the proceedings.¹³⁸ That said, Afghan victims have already been waiting an extremely long time for any potential criminal proceedings to commence in Australia. The allegations in the IGADF Report pertain to conduct that allegedly occurred eight to fifteen years ago and investigations to date have already taken six years still with no criminal or military proceedings commenced.

Another drawback of ICC proceedings are the limited resources of the Court and the resulting selectivity of proceedings. These factors lead to a situation where only individuals with the highest responsibility are prosecuted, and only certain crimes specifically addressed, meaning that victims of comparable crimes will often be excluded from the proceedings.¹³⁹ This contrasts with the potentially broader scope of national prosecutions because States have the responsibility to investigate all international crimes, and try all those against whom there is sufficient evidence. So far, the investigations by Australian authorities have been wide-ranging. The scope of the IGADF inquiry was largely unlimited, broadly covering "whether there is any substance to persistent rumours of criminal or unlawful conduct by or concerning Special Operations Task Group deployments in Afghanistan during the period [2005]

¹³⁶ Department of Defence, Afghanistan Inquiry Reform Plan, 30 July 2021, available at: https://afghanistaninquiry.defence.gov.au/sites/default/files/2021-07/Afghanistan_Inquiry_Reform_Plan_0.pdf.

¹³⁷ Benjamin Gumpert and Yulia Nuzban, "Part I: What can be done about the length of proceedings at the ICC?" *EJIL: Talk*, available at: <https://www.ejiltalk.org/part-i-what-can-be-done-about-the-length-of-proceedings-at-the-icc/>.

¹³⁸ Paolina Massidda, "The Participation of Victims Before the ICC: A Revolution Not Without Challenges" in Rudina Jasini and Gregory Townsend (eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice*, University of Oxford, 2020, 33, 40.

¹³⁹ Christoph Safferling (2012) *International Criminal Procedure*, Oxford: Oxford University Press, p. 177.

to 2016”¹⁴⁰ with the IGADF Report finding that in at least twenty-three cases, there is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge the individuals involved with war crimes.¹⁴¹

Another structural challenge of the ICC is the difficulty that victims have in navigating the various organs and sections that they receive communications from. This includes the outreach staff in a given country, staff members of the Victims Participation and Reparations Section, investigators of the Prosecution or Defence, or counsel for victims. It has been reported that “[t]his multiplicity of actors and interlocutors often creates confusion in the minds of victims”.¹⁴² A similar confusion might arise in the context of Australian proceedings with the various actors involved including investigators, prosecutors and limited witness assistance services, but given the lack of a formal infrastructure for victim participation in the Australian proceedings, the complexity for victims is likely to be more limited.

Conclusion

National criminal justice systems remain the most proximate entities to ensure accountability for international crimes and justice for the victims of these crimes. Unlike at the international level, the opportunity for all victims to participate is greater at the national level because States have the responsibility to investigate all international crimes, and try all those against whom there is sufficient evidence.

The efforts that have been made to date to investigate the allegations against ADF personnel and the establishment of the Office of the Special Investigator demonstrate that Australia is taking rigorous steps to ensure that the principle of complementarity is enlivened such that the jurisdiction of the ICC to prosecute is displaced. If prosecutions proceed, they will take place in Australia and will be carried out by the Australian CDPP for offences under the Criminal Code. For victims, this means that their ability to participate in the prosecution process will be very limited. There has been little public discussion regarding the importance and value of victim participation in the investigation and prosecution processes to date. An integral part of the purpose of the criminal law system is to ensure the provision of procedural and substantive justice for victims. In the absence of meaningful victim

¹⁴⁰ Terms of Reference, IGADF Report, available at: <https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.

¹⁴¹ IGADF Report, above note 2, pp. 28-29.

¹⁴² Paolina Massidda, “The Participation of Victims Before the ICC: A Revolution Not Without Challenges” in Rudina Jasini and Gregory Townsend (eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice*, University of Oxford, 2020, 33, 41.

participation infrastructure under the Australian legal system, there is a potential role for appropriate civil society actors in Australia or abroad to provide a support role to Afghan victims and their families. At the very least, assistance could be provided to victims to understand the progress of investigations undertaken in Australia to date; how war crimes are prosecuted in Australia; the legal framework for victims to engage with the investigations and potential prosecutions; and the implication of Australian investigations on any action by the ICC. With such limited formal roles for victims in Australia's criminal legal system, much will depend on the informal efforts made by the investigators and the prosecutors to consult with and include victims in prosecutorial decisions. As the Office of the Special Investigator begins its work, it is hoped that the importance of victim participation will form part of the investigative and prosecutorial approaches of both the special investigator and the prosecutors.

ASIA-PACIFIC JOURNAL OF INTERNATIONAL HUMANITARIAN LAW **PART II**

REPORTS AND DOCUMENTS

Promoting the Comprehensive Protection of Cultural Property: The 8th Regional Conference on International Humanitarian Law in Asia-Pacific, 24-26 September 2019, Bali, Indonesia

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ABSTRACT

This article provides an overview of the 8th Regional Conference on International Humanitarian Law in Asia-Pacific, which carried the umbrella theme of protection of cultural property. Co-hosted by the International Committee of the Red Cross (ICRC) and the United Nations Education, Scientific, and Cultural Organisation (UNESCO), the Regional Conference served as an avenue for the participating States to discuss and exchange views as well as good practices on the comprehensive protection of cultural property. The sub-themes covered during the Regional Conference were inter alia the international protection regime of cultural property, how cultural property is protected in times of emergency such as armed conflict or natural disaster, the importance of national implementation to protect cultural property, and the roles of government agencies and non-government organisations in protecting cultural property both at national, regional, and international levels. Besides sessions on the cultural property protection, the participating States also commemorated the seventieth year of the 1949 Geneva Conventions adoption by reflecting the relevance and importance of international humanitarian law to the Asia-Pacific region, and they were briefed on the thirty-third International Conference of the Red Cross Red Crescent Movement. In addition, this article will outline several concluding recommendations from the ICRC and the UNESCO which may be useful in assisting efforts to protect cultural property in various contexts.

Keywords: cultural property protection, international humanitarian law, national implementation, Geneva Conventions

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Introduction

In 2019, the International Committee of the Red Cross (ICRC) and the United Nations Educational, Scientific and Cultural Organization (UNESCO),¹ with the support of the Government of the Republic of Indonesia, co-organized the Eighth Regional Conference on International Humanitarian Law on the theme of cultural property protection (hereinafter, the “Regional Conference”). Attended by more than fifty State officials from fourteen countries in the Asia-Pacific region², the regional conference was initiated out of the strong interest for sharing good practices on the protection of cultural property. Previous to this edition of the conference, participating countries to the Seventh Regional Conference³ expressed a wish to better understand issues surrounding the protection of cultural property.

Taking place in Indonesia, which is home to nine World Heritage Sites,⁴ the Regional Conference had the following objectives:

- to strengthen the capacity of State representatives, with a view to putting in place in their respective countries comprehensive policies to (a) protect cultural property in the event of armed conflict and other emergency situations associated with disasters caused by natural and human-induced hazards, and (b) to prevent illicit trafficking of cultural property;
- to raise awareness about the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols;
- to identify effective national mechanisms to implement the previously mentioned treaties;

¹ This conference was the first major collaboration between the ICRC and the UNESCO for the promotion of the protection of cultural property in the Asia-Pacific region, following the signing of a Memorandum of Understanding in 2016.

² Representatives from the relevant ministries and departments on foreign affairs, defence, justice and cultural affairs of the following countries participated in the regional conference: Brunei Darussalam, Cambodia, People’s Republic of China, Fiji, Republic of Indonesia, Republic of Korea, Lao PDR, Malaysia, Mongolia, Myanmar, the Philippines, Thailand, Timor-Leste and Viet Nam.

³ Organized by the ICRC with the support of the Government of Indonesia, the 7th Regional Conference on International Humanitarian Law in Asia-Pacific was held in Jakarta, Indonesia on 26-27 September 2018. The participating countries were: Australia, Brunei Darussalam, Cambodia, Republic of Indonesia, Lao PDR, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, Thailand, Timor-Leste and Viet Nam.

⁴ For more information on the World Heritage Sites in Indonesia, see UNESCO, “World Heritage List”, *World Heritage Convention*, available at: <https://whc.unesco.org/en/list/?order=country#alphaI> (accessed 24 February 2021).

- to share best practices on the protection of cultural property from participating States;
- to provide a platform for exchange on current developments in International Humanitarian Law (IHL) generally, and on IHL related to Cultural Property Protection specifically; and
- to assist States in constituting and developing National IHL Committees as a key means for effective IHL implementation.

As reflected in the above objectives, the Regional Conference discussed encompassing issues on IHL with cultural property protection as an anchor. The forum also commemorated the seventieth anniversary of the adoption of the 1949 Geneva Conventions⁵ and the twentieth anniversary of the adoption of the 1999 Protocol to the 1954 Hague Convention.⁶ The participating countries were able to exchange best practices and share experiences on the protection of cultural property, with insights from experts and practitioners. In their opening remarks, representatives of the Government of Indonesia, the ICRC and the UNESCO all agreed that protecting cultural property means protecting and preserving humanity's legacy, identity, memory and knowledge.

A representative of the Ministry of Foreign Affairs of Indonesia underlined that the protection of cultural property in times of emergency is not of lesser importance than the protection of people. Likewise, the ICRC viewed the conference as a forum not only to discuss the protection of cultural property during armed conflict, but also in times of natural disasters and against illicit trafficking. A representative of UNESCO's Culture Sector recalled the landmark United Nations (UN) Security Council Resolution 2347,⁷ adopted in March 2017, which called on all UN Member States to ratify the 1954 Hague Convention and its two Protocols as one of the essential measures to ensure better protection of cultural heritage without discrimination.

⁵ 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 the Wounded, Sick, and Shipwrecked Members of the 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 Civilians in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, 249 UNTS 215 (entered into force 7 August 1956); Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 26 March 1999, 2253 UNTS 172 (entered into force 9 March 2004).

⁷ UNSC Res. 2347, 24 March 2017, Operational Paragraph 7.

Given the comprehensive coverage of the Regional Conference, this article will focus on the highlights of the conference, including best practices in the field of cultural property protection. The article is structured into three parts. The first will be on the sessions that looked at cultural property protection from a comprehensive point of view, covering issues related to the international protection regime for cultural property, national implementation measures to protect cultural property, civil-military relations in the protection of cultural property and the role of law enforcement agencies in protecting cultural property. Second, discussions during the three general sessions on IHL will be reviewed—specifically these are the commemorative session on the seventieth year of the adoption of the four 1949 Geneva Conventions, an introductory session on the thirty-third International Conference of the Red Cross Red Crescent Movement, and an experience-sharing session on best practices to implement IHL at national level. Lastly, the article will outline concluding recommendations from UNESCO and ICRC, which may be useful in assisting efforts to protect cultural property in various contexts.

Sessions on the Protection of Cultural Property

The Regional Conference was tailored to provide a comprehensive outlook on the protection of cultural property. Sub-topics covered include: an overview of the international protection regime for cultural property; the 1999 Protocol to the 1954 Hague Convention; a comprehensive policy for cultural property protection; national implementation measures for cultural property protection; the role of the Armed Forces and civil-military relations in the protection of cultural property and the role of law enforcement agencies in protecting cultural property.

Overview of the International Protection Regime for Cultural Property

Cultural property protection is often discussed through a prism of situations of conflict, though this may not be applicable to all scenarios. With this starting point, a representative of UNESCO's Culture Sector discussed the various international frameworks for the protection of cultural properties. The 1954 Hague Convention and its two Protocols, which are at the core of cultural property protection during armed conflict, are complemented by other international instruments including the 1970 UNESCO Convention,⁸ the 1972 Cultural Heritage Convention,⁹ and the 2001

⁸ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972).

⁹ Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

Underwater Heritage Convention.¹⁰ These treaties are further strengthened by relevant UN Security Council Resolutions, in particular, Resolution 2199 (2015) condemning the destruction of cultural heritage in Iraq and Syria by the Islamic State of Iraq and the Levant (ISIL), Al-Nusrah Front and related entities¹¹, Resolution 2249 (2015) condemning the destruction and looting of cultural heritage by ISIL,¹² and Resolution 2347 (2017) also condemning the destruction, looting and smuggling of cultural properties by parties to the conflict.¹³

Given the specific contexts where attacks by non-State armed groups against cultural heritage sites have taken place in Syria, Iraq, Yemen and other territories, the importance of viewing the protection regime under the 1954 Hague Convention together with the 1970 UNESCO Convention has been underscored. It is also necessary to engage domestic agencies such as the military, police and customs officials, in the implementation of the conventions. International cooperation is also necessary, and institutions such as UNESCO, ICRC, International Criminal Police Organization (INTERPOL), the International Criminal Court and other regional organisations could play a role in cultural property protection during armed conflict. The second speaker, a representative for the ICRC, emphasized that dialogue between States and other relevant actors should be sustained, to ensure accountability. A representative of the World Customs Organisation (WCO) underlined the practical consideration that prosecution becomes impossible when the lines of responsibility among relevant agencies are unclear. Strong cooperation between law enforcement officials and cultural heritage experts is necessary for putting a stop to the rapid movement of cultural property across borders, during times of emergency.

It was further raised during the discussion that attacks against cultural property in armed conflict are often precursors to other humanitarian and human rights law violations. To mitigate this situation, measures for protection should be prepared and implemented before the outbreak of an armed conflict, otherwise there would be insufficient time to take measures effectively. To do so, local actors' expertise on cultural property would also need to be galvanized to ensure that measures taken are implemented well within the context of local practices and values. A representative of the Government of Indonesia provided the example of how its Ministry of Education and Culture works with local experts to classify heritage sites to receive cultural property protection under the applicable national legislation.

¹⁰ Convention on the protection of the underwater cultural heritage of 2 November 2011, 2562 UNTS (entered into force 2 January 2009).

¹¹ UNSC Res. 2199, 12 February 2015, Operational Paragraph 15.,

¹² UNSC Res. 2249, 20 November 2015, Operational Paragraph 3.

¹³ UNSC Res. 2347, 24 March 2017, Operational Paragraph 11.

Twenty Years of the 1999 Second Protocol: Relevance and Effectiveness

This session commemorates the relevance and effectiveness of the 1999 Second Protocol to the 1954 Hague Convention, on the occasion of its twentieth anniversary. As pointed out by an academic expert on international cultural heritage law, there are two key elements to the Second Protocol's complementing and strengthening the protection regime under the 1954 Hague Convention. First, States Parties are required to establish serious violations of the Second Protocol as criminal offences under domestic law, a significant pillar in ensuring the accountability of alleged perpetrators. Second, the Second Protocol extends the protection of cultural property to non-international armed conflicts, which had not been the case under the 1954 Hague Convention and its First Protocol. In addition to these two elements, the same expert elaborated several specific preparatory measures that should be carried out in peacetime, such as the development of military regulations, training of military personnel, recruitment of specialized military personnel and inventory of cultural property sites. The Second Protocol also introduced the concept of "enhanced protection status", which requires a specific military rank for the application of the military necessity waiver, and which has also served to strengthen the protective regime for cultural property.

To further understand the relevance and effectiveness of the Second Protocol, conference participants were able to listen to stakeholder experiences from Cambodia and France.¹⁴ Cambodia has established various legal measures to protect cultural heritage sites, including through the creation of the Authority for the Protection of the Site and Management of the Region of Angkor in 1995. Besides designating an entity for this task, Cambodia has also benefited from international cooperation: more than sixty temple restorations have been implemented for the Angkor archeological site through partnership with over seventeen States and twenty-eight international organisations. For France, on the other hand, the French Code of Defense specifies military and civil sanctions for violations of provisions related to the protection of cultural property. Similar sanctions can also be found in the French Criminal Code and the Criminal Procedural Code. In practice, the Second Protocol is routinely applied by the French Armed Forces by establishing lists of non-targetable objects in the preparation of attacks, as was seen during Operation Chammal in Iraq and Syria, where such exercise was carried out in cooperation with UNESCO. It was also noted that while a strong cooperation among relevant national

¹⁴ Both Cambodia and France are parties to the 1999 Second Protocol. Cambodia became a State party in 2013 and France in 2017. The full list of States Parties to the 1999 Protocol is available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=590 (accessed 12 March 2021).

agencies is important, identification of key counterparts within each institution is also necessary.

Cultural Property Protection as a Matter of Comprehensive Policy

As part of the 2019 regional conference's objectives to look at the protection of cultural property comprehensively, this session heard recommendations and good practices from different contexts. A representative of the UNESCO Secretariat reiterated the key message that cultural property protection is multifaceted, whether during armed conflict or periods of natural disaster. First, there is the inter-temporal dimension which is focused on the risk management cycle before, during and after an emergency. It is important for States to have the necessary capacity to prevent, diminish and overcome the loss of cultural property, which could all be avoided with adequate preparedness. Second, cooperation and coordination among the relevant actors are crucial for the inter-sectoral dimension. For instance, cooperation between UNESCO and relevant cultural and emergency actors in Mali in 2018 for capacity-building emphasized the added value of integrating first aid into cultural heritage in traditional emergency operations. The integration of cultural heritage protection elements is also evident in the peacekeeping regime i.e., as is shown by the cultural property protection mandate of the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA).¹⁵ The third dimension is multi-level—one that requires cultural property protection efforts to be conducted at the international, national and sub-national levels. This is seen in community engagement in search and rescue and the implementation of safeguarding measures following the April 2015 earthquake in Nepal.¹⁶ Another example looks at transnational efforts at the UN to the combatting of illicit trafficking of cultural objects.¹⁷ For instance, States are urged to develop and implement broad law enforcement as well as judicial cooperation with the assistance of United Nations Office on Drugs and Crime and in cooperation with UNESCO and INTERPOL to combat illicit trafficking of cultural objects.¹⁸

¹⁵ See UN Security Council Resolution 2100, UN Doc. S/RES/2100 (2013), 25 April 2013, Operational Paragraph 16(f).

¹⁶ UNESCO, "On anniversary of Nepal earthquake, a new partnership for heritage", undated, available at: <https://en.unesco.org/news/anniversary-nepal-earthquake-new-partnership-heritage> (accessed 11 August 2021); UNESCO Kathmandu Field Office, "Recovery and rehabilitation of cultural heritage", undated, available at: <https://en.unesco.org/fieldoffice/kathmandu/culturalheritage> (accessed 11 August 2021).

¹⁷ See UN Security Council 2249, UN Doc. S/RES/2249 (2015), 20 November 2015 and UN Security Council 2347, UN Doc. S/RES/2347 (2017), 24 March 2017.

¹⁸ UNSC Res. 2347, 24 March 2017, Operational Paragraph 11.

Reflections on cultural property protection policies were also shared from the national perspective of Thailand and China. In Thailand, authorities have recently decided to revise legislation to provide a more comprehensive coverage for cultural property protection. Working with local communities where cultural heritage sites are located is also important, as this would help ensure respect for religious or cultural sensitivities, and guarantee mutual respect *vis-à-vis* national actors. In China, on the other hand, cultural property protection during times of armed conflict is anchored on the Constitution, the Law on the Protection of Cultural Relics and its implementing regulations, the Law on National Defense, the Law on Public Security Management and Punishment¹⁹ and the Law on the Protection of Military Facilities.²⁰ Having created a national committee in 2007 to work on IHL dissemination and capacity-building, China also strengthens this legal regime by incorporating elements of cultural property protection into military regulations, decrees and orders, as well as by engaging cultural property professionals who can advise the military on protection measures. China has also integrated elements of cultural property protection into its international agreements with other States on military exercises.

It appeared from the discussions during this session that all States represented in the conference has an existing legal framework on the protection of cultural property. However, these often do not distinguish between situations of armed conflict and peacetime. Another element that is central to achieving a comprehensive policy for the protection of cultural property is inter-ministerial cooperation at the domestic and international levels (e.g., between the Ministry of Culture, armed forces, and law enforcement officials). To this end, the Association of Southeast Asian Nations (ASEAN) has previously initiated a cooperation framework in protecting cultural property and mitigating the impacts of climate change and natural disasters through the ASEAN Vientiane Declaration on Reinforcing Cultural Heritage²¹ and the ASEAN Declaration on Culture of Prevention for a Peaceful, Inclusive, Resilient, Healthy and Harmonious Society.²²

¹⁹ This law regulates minor illegal acts towards cultural property.

²⁰ This law distinguishes between objects of cultural property and military objects.

²¹ Vientiane Declaration on Reinforcing Cultural Heritage of 6 September 2016, available at: <https://asean.org/wp-content/uploads/2016/09/Vientiane-Declaration-endorsed-by-7th-AMCA-24Aug2016.pdf> (accessed 11 August 2021).

²² Declaration on Culture of Prevention for a Peaceful, Inclusive, Resilient, Healthy and Harmonious Society of 13 November 2017, available at: https://asean.org/wp-content/uploads/2021/01/9.-ADOPTION_12-NOV-ASCC-Endorsed-Culture-of-Prevention-Declaration_CLEAN-1.pdf (accessed 11 August 2021).

National Implementation Measures to Protect Cultural Property

This session drew conference participants' attention to national implementation measures on cultural property protection. A representative of the UNESCO Secretariat highlighted several national implementation measures which must be respected both in peacetime and during armed conflict, pursuant to the 1954 Hague Convention and its two Protocols. These measures are *inter alia* (i) ensuring that cultural properties are not used for military purposes and not to be attacked, (ii) placing peacetime safeguarding measures such as the preparation of inventories and the preparation of emergency measures for protection against fire or structural collapse, (iii) ensuring the military receive adequate training and instructions on cultural property protection, and (iv) adopting adequate criminal legislation to deter and sanction crimes against cultural properties. These measures reiterate that while the protection of cultural property is not an active obligation, it is the ultimate objective of the 1954 Hague Convention regime.

National implementation measures in Japan and China were also discussed at this session. Japan implemented the 1954 Hague Convention through its Law on the Protection of Cultural Properties²³ and the Law on the Protection of Cultural Properties in the Event of Armed Conflict²⁴ (and its Implementing Regulations). These instruments provide the legal framework on the definition of cultural property, the distinctive emblems and sanctions for their violation. The inventory of cultural property in Japan is carried out at the national and sub-national levels and is recorded in the "Cultural Heritage Online" database. Japan has also ensured the inclusion of training on cultural property protection in the teaching curricula of the Ministry of Defence and the Self-Defence Forces.

China, on the other hand, actively protects cultural properties for its value to the State and to all of humanity. Chinese authorities have invested in the upgrading of internal systems, manpower and resources as well as updating laws for the protection of tangible and intangible cultural relics. Due to the large number of cultural properties and sites in China, cooperation between the central government and local governments, as well as social organisations, is essential. The protection of

²³ Law No. 214 of 30 May 1950 as amended by Law No. 7 of 30 March 2007 on the Protection of Cultural Property, available at: https://en.unesco.org/sites/default/files/japan_law_protectionproperty_entno.pdf (English translation) (accessed 11 August 2021).

²⁴ Law for the Protection of Cultural Property in the Event of Armed Conflict of 2007, available at: https://en.unesco.org/sites/default/files/jap_law_protection_cultural_property_jporof.pdf (in Japanese) (accessed 11 August 2021). Other national implementation measures on the protection of cultural property in Japan are available at: <https://en.unesco.org/cultnatlaws/list>.

cultural properties is also integrated with regulations on the construction of roads and other infrastructure.

Participants to this session also emphasized how ratifications of the 1954 Hague Convention and its two Protocols reflect and strengthen political commitment among States, which is especially beneficial for small States. The use of technology to protect cultural properties was also discussed, and how it could help raise awareness on the subject through social media and the recording of data on cultural sites destroyed by conflicts.

The Role of the Armed Forces and Civil-Military Cooperation

The first speaker in this session presented the British Army's experience on the protection of cultural property. Even before its ratification of the 1999 Protocol in 2017, the United Kingdom had adopted a policy for its military on cultural property protection and the collection of cultural property geospatial information. More importantly, in 2018, the military established a Cultural Property Protection Unit that consisted of fifteen reserve officers. This unit is tasked to perform training, liaising and support for the planning of military activities, investigate international crimes and support post-conflict cultural property recovery. The Unit's establishment was welcomed by the military early on due to the high level of awareness among the ranks about the importance of cultural property protection for all stakeholders. The United Kingdom also has a specific military working group on cultural property protection, composed of military officers, law enforcement officials, international organisations and non-governmental organisations.

The second speaker, a representative of Blue Shield Pasifika (BSP), presented an overview of its activities on cooperation with the military to protect cultural properties. From its inception, the BSP aimed to enhance civil-military cooperation on cultural property protection by bringing together some fifty senior officials of the Republic of Fiji's Military Forces, law enforcement agencies, cultural institutions and civil society organisations. Outside Fiji, the BSP has also been active in raising awareness in other Pacific Island countries. Besides working together with international partners such as Blue Shield International, UNESCO, and the International Council of Museums (ICOM), the BSP also networks with civil society organisations in the Pacific region. BSP also has experience in using popular media to show the importance of protecting cultural property and the military's role therein, through the screening of films such as *Monuments Men*.²⁵

²⁵ UNESCO, "Screening of the film *Monuments Men*", undated, available at: <https://en.unesco.org/events/screening-film-monuments-men>; ICRC, "Ten must-see films and series for IHL buffs", 2

A legal expert from the Republic of Korea also shared its national experience, where the legal frameworks on the cultural property protection has greatly evolved since 1962. In 2002 a law was adopted to expand the concept of cultural heritage to encompass not only moveable objects, but also the intangible ones. Due to political considerations, the Republic of Korea has not been able to ratify the 1954 Hague Convention as well as specific legislation on the protection of cultural property in the event of armed conflict. However, its domestic legislation has been consistent with the Convention's objectives.

The Role of Law Enforcement Agencies in Countering Illicit Trafficking of Cultural Property

The first speaker in this session represented the WCO, which has identified the control of fragile borders affected by violence and conflict, as one of the biggest challenges in countering the illicit traffic of cultural property. It is thus important to raise customs administrations' awareness on the various issues influencing illicit trade in cultural objects. Since protecting cultural objects from illicit trafficking cannot be left only to customs agencies, it is therefore critical for relevant ministries such as the Ministry of Culture and the Ministry of Foreign Affairs to work together in ensuring that law enforcement agencies have the necessary mandate to operate. The WCO also conducts a specialized training for frontline customs officers to prevent illicit trafficking of cultural property.

An expert from the UNESCO Bangkok Regional Office also reiterated the need for an active collaboration between institutions in charge of cultural heritage and law enforcement agencies. Theft, the dismantling of monuments and illegal ground and underwater excavations particularly affect cultural heritage in the Asia-Pacific region. To further aid stakeholders, practical tools also exist such as the UNESCO database on national cultural heritage laws, the INTERPOL Stolen Works of Art Database, and the ICOM's Red List of Cultural Objects at Risk.

The third speaker from Indonesia spoke of the country's challenging experience in countering illicit trafficking of cultural property across its 17,000 islands. Indonesian legislation includes a specific definition of what constitutes a cultural property. It stresses that, legally, cultural properties can only be removed from Indonesian territory in the interest of research, cultural promotion, and/or exhibition. Indonesia also maintains a national register of cultural property, which includes databases and interactive maps.

November 2017, available at: <https://www.icrc.org/en/document/colombia-ten-must-see-films-and-series-ihl-buffs> (accessed 11 August 2021).

General Sessions on IHL

The Regional Conference also presented an opportunity for the participating delegations to take stock of other important issues in IHL. The three general sessions looked at (1) the continued relevance of IHL in Asia-Pacific seventy years after the adoption of the 1949 Geneva Conventions, (2) the contribution of the International Conference of the Red Cross and Red Crescent Movement to IHL and (3) the best practices from the Asia-Pacific region on the implementation of IHL at national level. These sessions were geared at laying down avenues and best practices for IHL implementation in general, but also assisted in enriching the discussion on cultural property protection.

The Continued Importance of IHL in the Asia-Pacific

Seventy years after the adoption of the 1949 Geneva Conventions, there remain questions on the bearing of IHL in the Asia-Pacific. An IHL expert from China asserted that from the beginning of the diplomatic conference that negotiated the 1949 Geneva Conventions, countries from the region have been familiar with humanitarianism in war. In fact, 13% of the participating States in the diplomatic conference are from the Asia-Pacific. Nevertheless, Asia-Pacific States need to be more open in documenting the implementation of IHL within their borders. This effort would contribute to increasing the understanding of IHL among Asia-Pacific States, and provide opportunities for academic experts to broaden such knowledge base through research and public discussions.

On the subject of implementation and promotion of IHL by different States from the region, delegates from the Philippines and Indonesia shared their national experience. IHL is particularly important to the Philippines given ongoing armed conflicts in the country and their humanitarian consequences. The Philippines has enacted legislation on IHL, including Republic Act 9851 of 2009 giving court's jurisdiction to punish serious IHL violations, and Republic Act 11188 of 2019 providing for the Special Protection of Children in Situations of Armed Conflict. Furthermore, the Philippines has also ratified or acceded to a number of IHL treaties, including the Convention on Cluster Munitions, in 2019. Actual implementation of these legal instruments is key to the reduction of suffering for non-combatants. Indonesia, on the other hand, has also contributed to IHL at the national, regional and international levels. On the national level, it established an inter-ministerial committee on IHL in 1980, and in 2018 enacted legislation to protect the distinctive emblems of red cross and red crescent. Regionally, Indonesia hosted two conferences in 2019 on humanitarian assistance in emergencies and on the protection of civilians in peacekeeping operations. At the international level, Indonesia initiated an open

debate on the protection of civilians in armed conflicts during its UN Security Council presidency in May 2019, which concurrent with the seventieth year of the Geneva Conventions.

During this session, conference participants noted the importance of having States join IHL treaties, so that they can participate in the formulation of international policy frameworks. The role of the ASEAN in the region was also discussed, including the organisation in 2017 of the Regional Conference on Convergences of Humanitarian Actions by the ASEAN Institute for Peace and Reconciliation and the ICRC. The session was concluded with a consideration of the role of the academe in enhancing public awareness on IHL.

The 33rd International Conference of the Red Cross and Red Crescent Movement

The 33rd International Conference of the Red Cross and Red Crescent Movement (33rd IC) was scheduled to be held from 9-12 December 2019.²⁶ Through this session, the ICRC gave conference participants a preview of the issues that will be covered at the forthcoming IC, which is the highest deliberative platform of the Red Cross and Red Crescent Movement for discussing humanitarian issues and setting forth the roadmap for humanitarian actions.

The 33rd IC was to have two main types of outcome documents, the first of which are resolutions to be adopted by the international conference.²⁷ Resolution 1 on “Bringing IHL Home” is focused on strengthening the IHL implementation at national level.²⁸ Resolution 1 also provided suggestions to assist States in implementing IHL, such as defining a roadmap on IHL implementation. The IC’s second type of outcome documents are Pledges, which can be made by States, National Societies and observer organisations. Pledges serve as a voluntary expression of commitment to take action in a certain area, including IHL implementation, which could be reported in the next cycle of the international conference. The ICRC also published a report on “IHL and the Challenges of Contemporary Armed Conflicts” to assist delegations’ preparations for the

²⁶ As one of the statutory meetings of the Red Cross and Red Cross Movement, the 33rd IC gathers all pillars of the Movement, namely the ICRC, the International Federation of the Red Cross and Red Crescent Societies and all National Societies, as well as representatives of the 1949 Geneva Conventions States Parties. More information on the 33rd IC can be found at: <https://rcrcconference.org/about/33rd-international-conference/> (accessed 24 February 2021).

²⁷ Resolutions adopted in the international conference are not legally binding. Adopted resolutions from the 33rd IC can be found at: <https://rcrcconference.org/about/33rd-international-conference/documents/> (accessed 24 February 2021).

²⁸ The full version of Resolution 1 can be accessed at: https://rcrcconference.org/app/uploads/2019/12/33IC-R1-Bringing-IHL-home_CLEAN_ADOPTED_FINAL-171219.pdf (accessed 24 February 2021).

Conference. This report reflects the ICRC's view on contemporary challenges to IHL such as new technologies and the urbanization of conflicts.²⁹

Best Practices on National Implementation of IHL

In the last substantive session, the conference participants were given a brief overview on the best practices for achieving a comprehensive policy on IHL. A member of the Indonesian Permanent Committee of IHL shared the view that a sustained consolidation process is essential, to allow the bridging of different perspectives from relevant ministries into a common ground. This was the practice of the Indonesian Permanent Committee of IHL when considering the possibility of the State's ratification of the 1999 Protocol and working towards consolidating views from different ministries. Cooperation among stakeholders is also an important pillar for a comprehensive policy to work. For instance, various exercises organized by the ICRC and/or UNESCO, including the instant regional conference, had been very helpful in assisting Indonesia to understanding the 1999 Second Protocol. The mammoth task in certifying cultural properties is also another instance in which cooperation becomes a necessity as authorities need to join forces with cultural property experts to complete the certification process.

Recommendations from UNESCO and the ICRC

At the end of the conference, UNESCO and ICRC formulated five recommendations³⁰ for the conference participants:

1. Encourages countries to consider ways to strengthen protection of cultural property as part of their ongoing efforts to implement a comprehensive policy on IHL at the national level;
2. Encourages States to consider the relevance of ratifying or acceding to the relevant international treaties, particularly the 1954 Hague Convention and its two Protocols;
3. Encourages States to take all appropriate implementing measures, including but not limited to legislative, administrative and practical measures, that a ratification or accession entails;

²⁹ The 2019 report can be found at: <https://www.icrc.org/en/publication/4427-international-humanitarian-law-and-challenges-contemporary-armed-conflicts> (accessed 24 February 2021).

³⁰ The recommendations do not, in any nature, bind the conference participants or the participating countries. Instead, they serve as a set of proposals from the ICRC and UNESCO to guide the conference participants or their countries in areas discussed during the conference.

4. Encourages participating countries to bring the protection of cultural property to the agenda of their national committees of IHL and National Commissions for UNESCO to ensure good cooperation between these entities; and
5. Encourages peer-to-peer exchanges between States to allow for share of information and good practices on the protection of cultural property.

In the span of three days, the 8th Regional Conference was able to provide a forum for several Asia-Pacific States to share their views and practices, and discuss ways forward towards better protection of cultural property in the region, through the lens of IHL.

Course and Meeting Report: International Humanitarian Law Course for Academicians and Practitioners 2019*

Azhari Setiawan** and Dhani Akbar***

ABSTRACT

International humanitarian law (IHL) as “Law of War” or “Law of Armed Conflict” is regulated by the Hague Conventions of 1899 and 1907, which regulate how war is carried out, and the Geneva Conventions of 1949 and the 1977 Additional Protocols regulating the protection of victims and prisoners of war. IHL also includes conventions and agreements on the protection of cultural and environmental property during armed conflict, as well as the protection of victims of armed conflict. IHL is designed to protect people who do not or no longer participate in hostilities; and it maintains the basic rights of civilians, victims, and non-combatants in armed conflict. This paper reports a IHL course and meeting held by International Committee of the Red Cross (ICRC) in collaboration with Department of International Relations, Universitas Muhammadiyah Malang Indonesia. Held in Batu, Malang, Indonesia from 18 to 23 August 2019, the ICRC-UMM International Humanitarian Law (IHL) Course 2019 was intended to provide lecturers and practitioners in the field of international law and international relations an understanding of IHL, and to bridge diverse research findings on these subjects by participants’ papers which were presented in the course. The course also included a joint symposium for lecturers, practitioners, journalists and researchers from universities and civil society organizations in Indonesia and Timor-Leste. This report highlights the main ideas, topics and discussions related to IHL covered in each course and meeting session.

Keywords: Course Report; International Humanitarian Law Course; ICRC

Introduction

International humanitarian law (IHL) is also known as “Law of War” or “Law of Armed Conflict”. It includes the Hague Conventions of 1899 and 1907, which

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regulate how war is carried out, and the Geneva Conventions of 1949 and the 1977 Additional Protocols, which govern the protection of victims and prisoners of war. IHL also includes conventions and agreements on the protection of cultural and environmental property during armed conflict, as well as the protection of victims of armed conflict. IHL is designed to protect people who do not or no longer participate in hostilities; and it maintains the basic rights of civilians, victims and non-combatants in armed conflict.

Course Method

The goals of the course were: (1) to provide sufficient understanding on the application of IHL in special situations, (2) to improve the quality of teaching and research by university lecturers and professors on teaching and conducting research projects in IHL, (3) to encourage participants to incorporate IHL materials into their respective curricula and (4) to increase awareness on IHL issues to foster active implementation thereof in the participants' respective countries.¹

All participants were required to submit an article on IHL prior to the course. The five-day program covered material presentations and discussions on IHL including from International Committee of the Red Cross ("ICRC") Indonesia and Timor Leste experts: Kushartoyo B.S., Christian Donny Putranto, Novriantoni Kaharuddin and Muhammad Awfa; Major Ahmad Fadilah, Brig Gen (Ret.) Natsri Anshari and Admiral Kresno Buntoro from the Indonesian National Armed Forces (TNI); Yunizar Adiputera from Universitas Gadjah Mada; and Azharuddin from Indonesia's Ministry of Law and Human Rights. Each session ended with a course evaluation and problem-solving quiz.

Seventy Years of Geneva Conventions

The first session was a course on the seventieth anniversary of the Geneva Conventions: a source of inspiration to address a humanitarian crisis, presented by Christian Donny Putranto, S.H., LLM, Legal Adviser of the ICRC Regional Delegation for Indonesia and Timor Leste. Mr. Putranto discussed the historical aspects of IHL and provided an introduction to studying the field. Discourse on IHL began with the Diplomatic Conference of Geneva of 1949, which christened IHL as a set of rules and regulations which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not, or are no longer, participating in

¹ Term of Reference: International Humanitarian Law Course 2019, International Committee of the Red Cross (ICRC), 19-23 August 2019, p. 2.

hostilities and imposes limits on the means and methods of warfare. IHL deals with “how” wars are conducted, not “why” or “when” wars could be carried out. Military necessity and humanitarian consideration are two fundamental principles, which IHL seeks to balance. Regionally, it was also stated in the ASEAN Charter states that ASEAN and its Member States shall uphold IHL. It thus remains for Member States to implement IHL domestically: first, while the Geneva Conventions enjoy universal ratification this does not necessarily translate to universal respect of IHL; second, such respect is best attained through dissemination to members of armed forces and civil society; and third, adoption of legislation and setting up of special domestic structures is also another way to ensure respect for IHL.

Classification of Conflicts

During the second session, Mr. Putranto discussed the scope of the law applicable during armed conflict and conflict classification. There are two classifications of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC). IAC occurs when there is: (1) a resort to armed force between two or more States (one shot theory), (2) a State intervenes militarily on the territory of another State or (3) a State exercises control over the whole part of another State’s territory. Occupation is a special category of IAC. Article 42 of the Hague Regulations 1907 states that “territory is considered occupied when it is actually placed under the authority of the hostile army.”² The applicability of IHL ends when an IAC ends which is considered by a general close of military operations and/or upon the release, repatriation and resettlement of specific affected persons.

On the other hand, a NIAC requires that: (1) at least one of the parties to a conflict is a non-State armed group, (2) the non-State armed group is sufficiently organized and pursues a clear military and political objective and (3) the non-State armed group has sufficient military capacity to control territory. Based on Additional Protocol II (AP II) to the Geneva Conventions, the indicators (indicative and not cumulative) of the organization of armed groups are: (1) a hierarchical structure and chain of command, (2) capacity to plan and launch coordinated military operations, (3) logistics, including capacity to recruit, train and equip fighters, (4) ability to speak with one voice, (5) minimum capacity to control/discipline members and ensure

² Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Annex to The Convention: Regulations Respecting The Laws and Customs Of War On Land - Section III: Military Authority Over The Territory Of The Hostile State – Regulations, Art. 42.

respect for basic IHL obligations and (6) territorial control.³ The indicators for the intensity criterion indicatively are: (1) number, duration and gravity of the armed confrontations, (2) number of fighters and types of forces involved, (3) means used or type of weapons, (4) number of victims, damage caused and (5) effects on the civilian population, e.g., displacement.⁴ Based on Article 1(2) of AP II, there is still a distinction between NIAC and certain situations of violence such as internal disturbances and tensions like riots, isolated and sporadic acts of violence, etc. In this situation, the applicability of IHL ends when the NIAC ends. This is generally considered when a peaceful settlement is achieved.⁵ Thus, a NIAC ends when: (1) at least one of the opposing parties has disappeared or otherwise no longer meets the requisite level of organization, (2) hostilities have ceased and there is no risk of their resumption and (3) in the context of the support-based approach: lasting disengagement from the collective conduct of hostilities.

Mandate and Role of ICRC as well as RCRC Movement

For the third session, Mr. Generesius Blomen Nomer from the ICRC Delegation for Indonesia and Timor-Leste discussed the movement, role and dynamics of the International Committee of the Red Cross and the International Red Cross and Red Crescent (RCRC) Movement, which is also contributing in the International Federation of Red Cross and Red Crescent Societies (IFRC).⁶ The discussions covered the history of the RCRC Movement, the narrations on symbol or emblem, and the role of IFRC. The mission of the IFRC is to inspire, encourage, facilitate and promote at all times all forms of humanitarian activities by National Societies⁷. In its

³ Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 1.

⁴ Christian Donny Putranto “Scope of the Law Applicable in Armed Conflict”, *Course Material*, p. 16.

⁵ United Nations International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995, available at <https://casebook.icrc.org/case-study/icty-prosecutor-v-tadic>.

⁶ About the IFRC, available at <https://www.ifrc.org/about-ifrc> (accessed on 21 September 2021)

⁷ National Societies are the backbone of the International Red Cross and Red Crescent Movement. Each one is made up of an unparalleled network of community-based volunteers and staff who provide a wide variety of services. The specific role of National Societies and the services they provide varies country by country. This is due to the different needs of communities, as well as the different relationships National Societies have with their respective authorities. National Society volunteers are often first on the scene when a disaster strikes. And they remain active within affected communities long after everyone else has left. In some cases, National Societies are the only organizations able to operate in countries experiencing disasters, conflicts, or a collapse in their social fabric.

operations, the IFRC applies the relevant principles of humanity, impartiality, neutrality, independence, voluntary service, unity and universality.

The session also covered the dynamics and development of the logo that has been chosen to represent the International Red Cross and Red Crescent Movement. ICRC uses the red cross while the Red Crescent uses the red crescent. When the ICRC, IFRC and National Red Cross and Red Crescent Societies operate together, the logo consists of red cross and red crescent emblems side by side. Their activities include (1) protection, (2) aid or assistance, (3) prevention, (4) cooperation, (5) economic resilient support, (6) habitat and water preservation, (7) health, (8) capacity-building and (9) natural disaster family separation tracing. With respect to regions, the greatest number of operations and activities take place in Africa. On a per country basis, meanwhile, ICRC's top five sites of operation are in the Syrian Arab Republic, South Sudan, Iraq, Yemen and Nigeria. ICRC funding is sourced from State contributions (83%), national societies (5%), the European Union (9%) and others (3%), with the United States being the largest donor country.

Protection of Medical Services in Armed Conflict

For the fourth session, Major Achmad Fadilah, Legal Officer of TNI, talked about the protection of medical services in armed conflict. Mr. Fadilah introduced the concept of “*salus aegroti suprema lex est*” (which translates to “the well-being of the patient is the most important law”) as the credo of the medical services in armed conflict. Medical services are generally divided into two categories: military and civilian. Each category is also further divided into two types of status and rights: those who are prisoners of war (POWs) and those who are not. Medical services not only concern people but also medical buildings and armed or unarmed vehicles. Military personnel from medical services are also armed and militarily trained. The use of arms in medical services, whether for the protection of people or vehicles, is limited to self-defense. Aspects relating to medical services are regulated by the Geneva Conventions: Chapter III on medical units and establishments, Chapter IV (Article 26 on personnel of aid societies, Article 29 on status of auxiliary personnel), Chapter V on buildings and material, and Chapter VI on medical transport. Mr. Fadilah also shared several real-life stories about medical services and prisoners of war who were treated in a manner not consistent with the Geneva Conventions, most of whom were tormented, killed, sexually harassed and even used as objects of biological experimentation by doctors.

Command Responsibility under IHL and National Law

During the fifth session, Brigade General (ret.) Natsri Anshari discussed the nature of command responsibility under national law and how command responsibility is regulated under IHL. He began by sharing two stories from the field about command responsibility violations by Phalangist attacked in Sabra and Shatilla Massacre on Palestinians refugee in Lebanon and the case of Capt Ernest Medina for involuntary manslaughter under the Uniform Code of Military Justice. A military commander has two responsibilities, namely, to command and to control his soldiers. Command responsibility corresponds to a military commander's responsibility, in view of his position in the hierarchical system of the command structure, for war crimes committed by his soldiers. There are generally four command levels: the policy command (head of the State, high officials); the strategic command (war cabinet, joint chiefs of staff), the operational command, which has full command to prevent war crimes and the tactical command which is directly positioned on the field.

Camp commanders are responsible for handling POWs while executive commanders are responsible toward all civilians on the field or region that is under his/her control. Commanders can also be criminally liable based on direct and indirect responsibility. Direct responsibility refers to instructions, commands or duties given to soldiers or groups that cause direct criminal effects and/or acts, while indirect responsibility is associated with omissions that cause indirect criminal effects and/or acts. The criminal responsibility of commanders is based on the handling of any breach of duty, that is, a duty to prevent, stop and to punish. Commanders must have authority and competence to handle war crimes and any breach of duty.

Protection of Civilian Population and Objects in the Event of Armed Conflicts

For the sixth session, Dr. Arlina Permanasari, a law professor from Universitas Trisakti, lecture on how IHL protects civilians. The discussions also covered direct participation in hostilities and the use of emblems for the protection of civilians. The protection of civilians in times of war are regulated under the Part IV of the Geneva Conventions and AP I of 1977. The fundamental principles of IHL and basic rules concerning the means and method of warfare consist of the principle of distinction and limitations upon the right to adopt means and methods of warfare. The principle of distinction basically provides for who are combatants or civilians and which military objectives or civilian objects are. As for limitations on the means and methods of warfare, the relevant principles are that: first, the right of belligerents to adopt means and methods of warfare is not unlimited; second, it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to

cause superfluous injury or unnecessary suffering and third, it is prohibited to employ methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment.

The prohibition of attacks on civilian persons and property includes all acts of violence. Attacks or threats to terrorize the civilian population are prohibited. Indiscriminate attacks are prohibited. The civilian population must not be used to shield military objectives. Parties to the conflict must facilitate the evacuation of the wounded, sick, disabled, elderly, women and children. As for civilian objects such as foodstuff, agricultural areas, crops, livestock, drinking water installation, and irrigation works must neither be attacked, destroyed, removed, nor rendered useless, to prevent starvation of the local population. IHL also regulates the special protection of certain types of properties such as cultural property, places of worship and works and installations containing dangerous forces (such as dams, dykes, nuclear electrical, generating stations which must not be attacked even if they constitute military objectives).

IHL also regulates some special zones such as safety zones, neutralized zones, non-defended localities and demilitarized zones. Safety zones are established to protect wounded, sick, aged persons, children under 15 and expectant mothers. These zones may be set up near sites of cultural property.

Secondly, Neutralized Zones are established in fighting areas and based on agreement. The function of neutralized zones is to shelter from the dangers of war, all persons who are not taking part in hostilities, those who are *hors de combat*, and those who do not perform any work of military nature. Neutralized zones may also be set up near places of cultural property.

Thirdly, Non-defended Localities are any inhabited places near or in a zone which armed forces are in contact with, and which are open to occupation by the adversary. The following rules apply to non-defended localities: first, all combatants and mobile weapons/military devices must have been evacuated; second, there shall be no hostile use of fixed military installations; third, there shall be no act of hostility committed by the authorities/population; and fourth, there shall be no activity in support of military operations.

Finally, Demilitarized Zones, has rules stating: there shall be no military operations based on express agreement that may be concluded verbally or in writing, directly or through a protecting power or any impartial humanitarian organization. The function of demilitarized zones is to create a zone fulfilling the same conditions as for non-defended localities.

To implement the relevant regulations, certain precautionary measures must be observed, including: verifying whether the objectives to be attacked are definitely military objectives; choosing means and methods of attack which avoid incidental

losses and damage to civilians; refraining from launching an attack if it could appear to be excessive; providing advance warning to civilian populations if an attack may affect them and avoiding positioning military objectives in the vicinity of civilian population or objects.

Protection of Cultural Property in the Event of Armed Conflicts

On the sixth session, Dr. Permanasari discussed the legal framework of cultural property protection and different levels of this protection regime. Under IHL, cultural property is usually perceived as an icon of victory or a trophy for disputing parties, e.g., the destruction of the statue of President Saddam Hussein during the Iraq War. IHL protects cultural property in the event of armed conflicts as “silent victims of war”. The protection forms are preservation, law protection, restoration and conservation. The establishment of the timeline for the legal framework for cultural property could be divided into three parts, beginning in 1648: customary rules from ancient times (1648-1880); inserted, unratified regulations (1889-1949) and legally binding instruments (1954-1999).

The foundational Convention for the Protection of Cultural Property in the Event of Armed Conflict was signed on 14 May 1954. Under this Convention, cultural property can only be attacked in case of imperative military necessity. The definition of cultural property under this Convention has three elements: (1) movable or immovable property of great importance to the cultural heritage of every people such as monuments of architecture, art or history, archaeological sites, groups of buildings of historical or artistic interest, works of art, manuscripts, books and other objects of artistic, historical or archaeological interest, as well as scientific collections and important collections of books or archives or of reproductions of the property; (2) buildings whose main and effective purpose is to preserve or exhibit movable cultural property such as museums, large libraries and depositories of archives; and (3) so-called centers containing monuments, which contain large numbers of cultural property. Under the same Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property. The High Contracting Parties also undertake to prepare in time of peace for the safeguarding of cultural property situated in their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.

IHL and Multinational Forces (MNF) and Operations

For the seventh session, Brig Gen (ret.) Natsri Anshari discussed the application of IHL to, and the use of force by, multinational operations. He started

the discussion by giving examples of violations against safe zones in the context of multinational operations. The legal framework of the United Nations (UN) Peace Operations consists of the following: the UN Charter, primarily; special rules on peacekeeping operations or concerning multinational forces, UN Security Council mandate(s), status of mission (SOMA) or status of forces (SOFA) agreements, agreements between participating States and rules of engagement; national laws (of the host and sending States), and international law (IHL, international human rights law, international criminal law, the 1946 Immunity Convention, the 1994 Personnel Safety Convention and other areas of law).⁸

Multinational Forces are responsible for monitoring ceasefires and the implementation of peace agreements. The dynamics of the forces, circumstances and operations in the field expand MNF roles spectrum to conflict prevention, peacekeeping, peacemaking, peace enforcement and peacebuilding, as can be seen in the case of the MNF in Afghanistan, DRC, Somalia, Libya and Mali. Considering the types of operational environment and level of military means and activities, peace operations are generally divided into four categories: first, observation missions, when the level of military means is low and the operational environment is under control; second, traditional peacekeeping, when military means are less-low and the operational environment is less under control; third, multidimension operations, when military means are sufficiently high and the operational environment is close to a belligerent category; and fourth, peace enforcement, when the level of military means is high and the operational environment is of a belligerent category.

Principles on Conduct of Hostilities

During the seventh session, TNI Major Achmad Fadilah discussed important principles on the conduct of hostilities and lawful targets. He demonstrated how the conduct of hostilities is normatively regulated by IHL and empirically occurs in the field, in relation to prohibited weapons of warfare. The body of such regulations on the means and methods of warfare are often referred to as Hague Law. Regarding means and methods, the session looked at three main topics: the target, means and methods of warfare. In the battlefield, the target is the first thing that must be set, examined and considered through a cost-benefit analysis for operation continuity. A target could be either a lawful or unlawful target, depending on the application of the principles of proportionality, limitation and precaution. Meanwhile, the means of warfare or combat equipment are regulated by the 1863 Lieber Code (instructions for the government of armies of the United States in the field); 1869 St. Petersburg

⁸ Natsri Anshari, "International Law on Multinational Forces", *Course Material*, p. 6.

Declaration (renouncing the use in time of war of explosive projectiles under 400 grams weight); the Hague Conventions (on respecting the laws and customs of war on land); and the 1977 Additional Protocols. The basic rules under Hague Law regulates the prohibition on employing weapons projectiles and means and methods of warfare of a nature that will cause superfluous injury or unnecessary suffering.⁹

TNI Major Achmad Fadilah also explained and demonstrated the concepts of perfidy and ruses of war as regulated methods of war. Perfidy is a kind of deception wherein someone promises to act lawfully but has every intention of breaking that promise later. The most common example of perfidy is that of an enemy raising a flag as a symbol of truce, only to attack the opposing side as they come forward to meet in the battlefield. Perfidy is prosecuted as a war crime because it takes advantage of applicable legal protections. On the other hand, ruses of war are not prohibited. As they are considered part of war tactics and strategy. Article 24 of the 1907 Hague Regulations states, “Ruses of war and the employment of methods necessary for obtaining information about the enemy and the country are considered permissible.”

Judicial Enforcement of IHL

On the eighth session, Mr. Putranto elaborated on State obligations to enforce IHL, ICRC’s role in enforcement of IHL, and the relationship between ICRC and the UN in the enforcement of IHL. IHL violations consist of grave breaches, serious violations of IHL and war crimes. These violations are dealt with by international criminal law which proscribes international crimes and imposes upon States the obligation to prosecute and punish at least some of those crimes. It also regulates international proceedings for prosecuting and trying persons accused of such crimes.¹⁰

Grave breaches of IHL are specific violations of the rules of IHL applicable to international armed conflicts and which are specifically listed in the Geneva Conventions and AP I as being particularly serious (Article 50/51/130/147 GC I-IV; Article 85 AP I). The regulation covers willful killing, hostage taking, attacking persons *hors de combat*, making civilian populations the object of an attack, torture and inhuman and degrading treatments, etc. Other serious violations of IHL consist of committing outrages upon personal dignity, in particular, humiliating or degrading treatment and desecration of the dead, enforced sterilization, compelling the

⁹ 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. 35/2 [hereinafter API].

¹⁰ Cassese Antonio & Paola Gaeta, *International Criminal Law 3rd Edition*, Oxford University Press, Oxford, 2013.

nationals of the adverse party to take part in military operations against their own party, killing or wounding a combatant who has surrendered or is otherwise *hors de combat*, making improper use of distinctive emblems indicating protected status, resulting in death or serious personal injury, etc. The following may also be considered war crimes: using prohibited weapons, launching an indiscriminate attack resulting in death or injury to civilians or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage, making non-defended localities and demilitarized zones the object of attack, using human shields, slavery, collective punishment and using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies.

Implementation of IHL at the National Level

Mr. Putranto continued to discuss IHL implementation at the national level during the ninth session. He discussed the obligation to implement IHL, the concept of a national committee of IHL and ICRC's role in IHL implementation. The legal basis for implementation takes root in Article 1 common to the four 1949 Geneva Conventions, which states that the High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances.

The ICRC Advisory Service on IHL has the role on advising governments on all national measures necessary to ensure full implementation to their obligations under IHL. The objectives relate to the ratification of IHL treaties, national implementation of obligations under these treaties, promotion of its work through National Committees on IHL and information exchange on national IHL implementation measures. To achieve its objectives, the Advisory Service provides legal, technical and drafting assistance, organizes seminars and meetings of experts, regional conferences and peer meetings, collects and promotes information exchange, prepares publications, e.g., fact sheets, ratifications kits, guidelines and model laws, biannual reports, regional reports, etc. and maintains contact with government officials and National Committees.

As of September 2018, 113 countries have National Committees on IHL made up of representatives from government ministries and other public institutions. National Committees should include qualified legal personnel and evaluate existing national law in light of existing obligations under the IHL conventions. National Committees also make recommendations to improve regulation and legislation, disseminate information, provide legal interpretation, develop relations with the armed forces, and conduct emblem review.

Role of National Committee in IHL Implementation: PANTAP Hukum Humaniter Indonesia

During the tenth session, Azharuddin from PANTAP Hukum Humaniter Indonesia, Secretariat Ministry of Law and Human Rights of Indonesia, discussed the mandates and roadmap of Panitia Tetap Hukum Humaniter (PANTAP). PANTAP ensures all national agencies and institutions which are linked with IHL implementation and development to execute mandate from Geneva Conventions and carry out harmonization of IHL legal frameworks towards national law. PANTAP was established based on Ministry of Justice Act No. M. 01. PR. 01-1980. Its Chairman is the Minister of Justice and Human Rights, while the Directorate General of General Law Administration serves as its Vice Chairman. Other members include the Ministry of Justice and Human Rights, Ministry of Health, Coordinating Minister for Political, Legal and Security Affairs, Ministry of Foreign Affairs, Ministry of National Education and Culture, Ministry of Defense, Indonesian National Army and Universities or higher education institutions. The latest IHL ratification in Indonesia which is facilitated by PANTAP are Undang-Undang No. 1 2018 on Red Cross and Government Act No. 7 2019 on Implementation Regulation on UU 1/2018. PANTAP has duties on formulating Indonesia position policy paper preparation on the 33rd International Conference of the Red Cross Crescent. PANTAP also provides action plan on developing IHL four years forward.

PANTAP's current programs include: formulating national laws on cultural property protection in time of armed conflict (long-term program); AP II to the Geneva Conventions, 1977 on enhanced protection for cultural property in the time of armed conflict (mid-term program); and studies on the possibility of Indonesia ratifying Additional Protocol (II) to the Geneva Conventions, 1977. Some of PANTAP program challenges involve inter-member coordination, existing law harmonization and IHL dissemination for stakeholders. To handle the challenges, PANTAP expects to increase research on IHL instruments that have not yet been ratified, as well as international cooperation with stakeholders to develop IHL concepts and theories.

Key Issues on Maritime Security and Armed Conflict at Sea

The eleventh session continued with a presentation by First Admiral Kresno Buntoro, Ph.D., Head of the Legal Service, Indonesian Navy, Center for Law and Naval Operations. First Admiral Kresno Buntoro explained how IHL protects the sick, wounded and shipwrecked. He also elaborated on the challenges of policing at sea and requirements of hospital ships. In armed conflict at sea, those entitled to be

respected and protected according to IHL are: the wounded, sick, shipwrecked and the bodies of the deceased; civilians (including migrants drowning at sea); Shipwrecked and stranded on a remote island; and persons in the hands of a neutral power. IHL protection at sea also follows the relevant rules on jurisdiction, depending on maritime zones, namely: zones under State sovereignty (internal waters, territorial sea, and archipelagic waters); zones where States enjoy sovereign rights (exclusive economic zone and continental shelf); zones not subject to State jurisdiction (high seas and the Area (deep seabed) as a common heritage of mankind), and special zones such as the contiguous zone.

The application of the law of armed conflict at sea also relates to the law of naval warfare, special targeting rules at sea, protective measures for persons and objects at sea, economic warfare measures, and maritime neutrality law. Fundamental Law of Armed Conflict principles are applied by general principles and operation level rules. Such general principles include humanity—that is, by diminishing human suffering by protecting and caring for protected persons and not utilizing weapons that cause unnecessary suffering; and military necessity, by limiting the use of force in relation to the perceived military advantage. The operational level rules consist of distinction (to attack military objects only), proportionality (expected incidental loss), and the application of precautionary measures. There are also special rules on naval targeting. The general rule is that military objectives are legitimate targets, and such status is ascertained on the basis of whether their nature, use, location or purpose make an effective contribution to military action and whether their destruction offers a definite military advantage. Thus, merchant vessels become military objectives when they are used to take part in hostilities, act as auxiliaries (e.g., troops or military material transport ships), sail under the convoy of enemy warships, breach or attempt to breach a blockade or actively resist belligerent visit and search.

Convergences between IHL and Islamic Law

IHL and Islamic Law were discussed during the eleventh session by Novriantoni Kaharudin, Lc., M.Si, Networking Adviser, ICRC Jakarta. Mr. Kaharudin started the discussion by reciting and discussing Qur'an Surah An-Nisa 76. The session covered the relationship between IHL and Islamic law, as well as their similarities and differences. The discussion was also based on the books of Abu Zuhrah, Ameer Zemmali, Miftah Ghamaq, Ahmed Al-Dawoody, Hamid Al-Saghir and Muhammad Iqbal An-Nadwi. Like IHL, the Islamic law on humanitarian law also invokes the principles of military necessity and humanity. It talks about limitation, which bears relation to distinction, precaution and proportionality. Humanitarian law under

Islamic law is also guided by the following principles: *Dharurah Harbiyyah* (military necessity according to IHL), *Insaniyyah* (humanity according to IHL), *Tafriqah* (distinction) and *Tanasub*—balance. Islamic law also provides for protected persons (*Ashab al-A'dzar*): (1) women (*al-Nisa*), (2) children (*Al-Dzurriyyah*), (3) elders (*Syaikhun Fani*), (4) scholars and/or chaplains or clergymen (*'Ulama, al-Ruhban*), (5) the sick and wounded, (*al-Mardha wa man fi Hukmihim*), (6) farmers, peasants and laborers (*al-Fallahun wal 'Usafa*) and (7) delegations or emissaries (*al-Rusul aw al-Mab'ututhin*). There is also "*Ashabul A'dzar*": people or groups that are weak or unable to participate in war.

Under the Islamic law on humanitarian law, there are also several prohibited means and methods of warfare, including: the use of catapults (*al-Manjanik*), poison or fiery arrows, human shields (*al-Tatarrus*) and the staging night attacks (*al-Bayat*), taking hostages (*Rahain*) and attacks on cultural property. Exchanging guarantees is also permissible through an agreement if two hostile parties lack confidence in their opponents. In Islamic law, human guarantees are considered part of security guarantees. They must not be killed and hurt. It is not justified for Muslims to be the first party to betray the agreement. Human guarantees must not be killed even if the enemy betrayed first.

The challenge in the discourse between IHL and Islamic IHL relates to several things. First, there is a diversity of interpretations on the basic foundations of Islamic war rules. Islamic IHL is not talking about positive law, but rather the views and opinions of jurists or fiqh experts (*fuqaha*). In addition, there is no standardization and there are weak collective efforts to propose an Islamic perspective on humanitarian laws. The writers of contemporary jihad fiqh are generally not jihadis so there are issues related to authority and legitimacy.

IHL and New Technologies

During the twelfth session, Mr. Putranto discussed how IHL regulates the use of new weapons technology, especially autonomous weapons. Technology determines how wars can be fought but IHL determines how wars may be fought. ICRC and its counterparts are still in the process of working on autonomous weapons regulations. The proposed working definition for autonomous weapons is "any weapon system with autonomy in its critical functions". Autonomous weapons systems (AWS) include missile and rocket defense weapons, vehicle "active protection" weapons, certain loitering munitions and torpedoes, and some sentry weapons. Weapons systems have autonomous modes to identify, track, select and attack targets. They could be fixed on ships, ground installations, tanks and other armored vehicles. ICRC's definition does not refer to lethality for two reasons: first, lethality is not

inherent to a weapon but depends on its characteristics and the way it is used; second, weapons do not need to have lethal effects to trigger obligations under IHL. ICRC's definition also does not refer to fully autonomous weapon systems because it is autonomy in the critical functions of targeting that are most relevant for ensuring respect for IHL, and the core legal and ethical issues are not dependent on technological sophistication but on the degree of human involvement. The purpose of a working definition is not to define the AWS of concern but rather to distinguish AWS from human-controlled weapons (including remote controlled weapons), to provide a baseline for discussion and to enable greater understanding of the legal and ethical issues based on existing experiences of autonomy in weapons systems and the use of force.

The use of AWS should be regulated by IHL according to its basic rules, especially the prohibition to use methods and means of warfare that cause superfluous injury or unnecessary suffering. New weapons also are obliged to undergo legal review, as stated in *A Guide to the Legal Review of New Weapons, Means, and Methods of Warfare: Measure to Implement Article 36 of Additional Protocol I of 1977*, Article 36 stated,

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.¹¹

ICRC has emphasized the need to focus on the legal obligations and responsibilities of humans—be it in the programming, development or operational phase of the AWS—and to determine the type and degree of human control required to fulfil these obligations. The need for human control for compliance with IHL is crucial for human combatants or fighters to make lawful judgments on how to respect distinction, proportionality and precautions in attack, thus, a minimum level of human control must be available over any weapon system. There is also a need to consider the compatibility of autonomous weapons systems with the principles of humanity and the dictates of public conscience.

¹¹ AP I, above note 9, Art. 36.

Humanitarian Disarmament: Landmines, Cluster Munitions, Arms Trade Treaty

During the thirteenth session, Yunizar Adiputera, Lecturer at Department of International Relations, Gadjah Mada University and Researcher at Institute of International Studies discussed weapons conventions related to incendiary weapons, arms trade, nuclear weapons, chemical and biological weapons, drones and killer robots, as key issues in humanitarian disarmament. There are three paradigms on rules about weapons: arms control, non-proliferation and disarmament. Arms control pertains to rules for limiting arms competition, in particular those intended to: (1) freeze, limit, reduce, or abolish certain categories of weapons; (2) prevent some military activities; (3) regulate the deployment of armed forces; (4) proscribe transfers of militarily important items; (5) reduce the risk of accidental war; (6) constrain or prohibit the use of certain weapons or methods of war; and (7) build up confidence among states through greater openness in military matters. Non-proliferation is related to the means and methods for preventing the acquisition, transfer, discovery or development of materials, technology, knowledge, munitions/devices or delivery systems related to WMD. Disarmament is related to the reduction or destruction of some of a State's weapons—or the withdrawal of armed forces—and, in international weapons law, rules referring to treaties or initiatives that prohibit or restrict the production, stockpiling and/or transfer of weapons.

Why do States adopt rules on weapons? States have the interest in the preservation or enhancement of their national security against external threats. Uncontrolled weapons could have a destabilizing effect on the balance of power among States or give any one of them incentives for perpetrating aggression without suffering severe consequences. The primary concern to impose rules on weapons is therefore the State's survival. The ban on biological weapons and chemical weapons, both of which are WMDs, is grounded on this logic. There are shifting paradigms on rules about weapons. First is the expansion of IHL into weapons prohibitions, with the aim of preventing the use of those methods which are of a nature to cause superfluous injury or unnecessary suffering. Second is the emergence of the concept of human security in Human Development Report 1994, by UN Development Programme which was less State-centric. Then there is the blurring of boundaries between state or military security and human security even on arms control, non-proliferation and disarmament. The paradigm shifted congruently with further

expansion to conventional weapons and also the nuclear weapons ban in 2017—Treaty on the Prohibition of Nuclear Weapons.¹²

Disarmament can be developed through the humanitarian aspect. It should bring humanitarian arguments and considerations into the centerstage, with the human as the referent object. It should bring more actors into arms control, non-proliferation, and disarmament discussions. Multilateralism and the democratization of the process are necessary. There are three characteristic of humanitarian disarmament treaties, which are that: they establish absolute bans on the use, production, transfer and stockpiling of specific weapons to prevent harm in the future; they supplement such obligations with requirements for remedial measures that reduce the effects of past use, such as victim assistance and clearance of mines and unexploded ordnance; and they espouse a cooperative approach to implementation that maximizes States Parties' potential to fulfil the relevant treaties' humanitarian goals.

The Arms Trade Treaty (ATT) is one of the international regulations on weapons or arms trade. ATT regulates the international trade of conventional arms and seeks to prevent and eradicate illicit trade and diversion of conventional arms by establishing international standards governing arms transfers. ATT requires all States Parties to adopt basic regulations and approval processes for the flow of weapons across international borders, establishes common international standards that must be met before arms exports are authorized and requires annual reporting of imports and exports to a treaty secretariat. The scope of ATT consists of battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers and small arms and light weapons. It also includes ammunitions/munitions, parts and components. The center of the regulations is international trade which comprises export, import, transit, trans-shipment and brokering.

Humanitarian Consequences of Nuclear Weapons

During the fourteenth session, Yunizar Adiputro discussed the humanitarian consequences of nuclear weapons. Nuclear weapons are capable on producing an explosion and massive damage and destruction by the sudden release of energy instantaneously from self-sustaining nuclear fission and/or fusion. Nuclear weapons are not only used for strategic purpose when in a larger yield, but also for tactical

¹² United Nations Treaty on the Prohibition of Nuclear Weapons, available at <https://www.un.org/disarmament/wmd/nuclear/tpnw/> (accessed on 21 September 2021).

purposes in battles, usually of a smaller yield. The first use of “nukes” in armed conflict was in Hiroshima (6 August 1945) and Nagasaki (9 August 1945) during World War II by the United States. In Hiroshima, the United States dropped a uranium bomb equal to 15,000 tons of TNT and caused an estimated 140,000 deaths by the end of 1945. Meanwhile in Nagasaki, a larger plutonium bomb levelled 6.7 km² of the city and killed 74,000 people by the end of 1945. Ground temperatures reached 4,000 degree Celsius and radioactive rain poured down.

Other existing legal instruments on nuclear weapons can be classified as follows: first, the main instruments: the Nuclear Non-Proliferation Treaty (NPT), Comprehensive Test-Ban Treaty (CTBT) and Treaty on the Prohibition of Nuclear Weapons (TPNW); second, regional instruments: the Nuclear Weapons-Free Zones treaties (Tlatelolco 1967, Rarotonga 1985, Bangkok 1995, Pelindaba 1996, Semipalatinsk 2006;) and third, bilateral instruments—ABM Treaty, SALT, and START. The Nuclear Non-Proliferation Treaty has three pillars: non-proliferation (Art. I-III), disarmaments (Art. VI), and peaceful uses (Art. IV). It states that all parties must pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race and for nuclear disarmament, and for a treaty on general and complete disarmament under strict and effective international control. The significance of regulations on nuclear weapons is determined by how the parties address the legal gaps of the regulations.

IHL and Counter-Terrorism Measures

In the last session, Muhammad Awfa, researcher from IHL Department, ICRC Indonesia and Timor-Leste discussed IHL and counter-terrorism measures. The discussion included national counter-terrorism legislation and its coherence with IHL and the criminalization of humanitarian assistance. IHL does not automatically criminalize every act of violence by a terrorist, as IHL regulates both lawful and unlawful acts of violence by all parties. IHL governs equal rights and obligations for all parties to the conflict without any adverse distinction. United Nations Security Council Resolution urges State,

When designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities,

that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law¹³

Conclusion

The course not only delivered new important insights on IHL but also raised some questions among the participants, such as: what will be the next challenges in the practice and implementation of contemporary IHL? What will be the next opportunities for academicians and practitioners of IHL to develop and implement IHL not only in the international level, but also with respect to regional and national law implementation? What are the potential best approaches to combine multiple modalities in the research and practices of IHL? More definite answers and insights may only be expected when these issues are transformed into the design of subsequent courses and research projects. This would be a starting point for better IHL development and implementation in the future.

¹³ UNSC Res. 2462, 28 March 2019, Art. 5.

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