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CONTENTS

EDITORIAL

Welcome to the OCTOBER 2020 issue of ANZSIL *Perspective*.

My editorial team and I are delighted that the ANZSIL *Perspective* is maintaining the high level of contributions shared with members and freely available on the ANZSIL website for the international community.

This month we are very pleased to have four excellent contributions fro a range of authors on some interesting and sometimes controversial topics. We look forward to monthly or fast turnaround contributions as we move towards our revised conference arrangements.

As ANZSIL *Perspective* continues grows, so does our regional representation in international law practice and academia. This month I am delighted that, once again, we have articles from a diverse range of authors giving voice to a diverse range of international law issues, including serious issues which affect the profession.

As you know, in my role as editor I am keen to encourage contributions from across our membership and the wider international legal community, especially those with emerging careers. I am also pleased that our contributions over the last few months have included discussion and responses to earlier publications so that ***ANZSIL Perspective*** is also contributing to continued debate and education. I look forward to the submissions for November 2020 which will be our last one for 2020.

Felicity Gerry QC (Editor)

The deadline for the next ANZSIL *Perspective* is 13 November 2020. The current call for *Perspectives* and submission details and guidelines are on the ANZSIL *Perspective* webpage.

The views expressed in contributions to ANZSIL *Perspective* are those of the authors. Those views are not necessarily shared by ANZSIL or the Editors of *Perspective.*

Prisoners of war: Updating our thinking on the law of armed conflict

By Wing Commander Tim Wood, Royal New Zealand Air Force

In an era in which a number of developed nations, including the United States, the United Kingdom, Australia and New Zealand have been accused of ill-treating or unlawfully killing captured persons or persons under their control, the need for international bright-lines has never been more important.

I have experienced the realities of a prisoner of war camp. While serving as a military lawyer with the Royal Air Force (UK), I was responsible for chairing what are known as Article 5 tribunals, where the status is decided of people who have taken up arms and have 'fallen into the hands of the enemy'. I have supported the investigation of allegations of abuse by the armed forces of a state and have published academic writing on alleged detainee abuse. I am, therefore, well placed to comment on the need for relevant and operable international humanitarian law that reduces or removes ambiguity surrounding the treatment of prisoners of war and complements the purpose of the law of armed conflict: to limit, as much as possible, the suffering, loss and damage caused by armed conflict; to protect persons who do not take a direct part in conflict; and to facilitate the restoration of peace.

The Geneva Convention relative to the Treatment of Prisoners of War of August 12 1949, more commonly known as Geneva Convention III or GC3, applies to international armed conflicts (or IAC). That is, armed conflict or war between two or more states. Such

conflicts are now less common although not yet completely extinguished. Contemporary conflicts are more likely to be contested between the armed forces of a state and dissident armed forces or other organised armed groups, or between such groups. These conflicts are known as non-international armed conflicts (or NIAC). NIAC can be confused and complex particularly with respect to identifying the objectives and allegiances of competing organised armed groups. If you then include direct or an indirect third state, such as proxy conflict, involvement into a NIAC, the situation becomes even more opaque.

International humanitarian law in respect of NIAC is limited. It can be controversial in certain areas and prone to dramatically different interpretations by some states. As a result, certain parts of the legal framework for NIAC are not applied by all. This is problematic when states are involved in a NIAC or respond to the request of the United Nations Security Council to provide forces to address international or regional security situations.

New Zealand has a proud record of contributing personnel to UN operations around the world. In some circumstances there may be ambiguity within the international community about the applicable legal regime for a given conflict. In common with other states, New Zealand's approach is to apply certain IAC principles and standards to a NIAC in order to provide certainty of understanding. It is in this regard that the continued relevance of GC3 is most apparent and why maintaining the contemporaneity of the Commentary on GC3 is so necessary.

Critics of GC3 tend to fixate upon the more anachronistic provisions of the Convention. They scoff at the continued inclusion of provisions about the payment of allowances in

Swiss francs; the reference to telegrams and telegraphs; and the maintenance of a colonial class-based hierarchical structure with privileges accorded to officers to the exclusion of the other ranks. Read literally, the Convention can appear out-dated. But to extrapolate the redundancy of the complete Convention from a few provisions is misguided and opportunistic. GC3 is more than just a script for another classic prisoner of war movie. It provides a structure upon which those who have fallen into the hands of the enemy can be safely and successfully confined until returned to their own country. It also provides a template to ensure respect of a prisoner's person and their honour is accorded.

In my experience, captured persons, be they prisoners of war or detainees, are at risk of being exposed to treatment that could be considered inhumane or where an adverse distinction is made on the basis of race, colour, religion or faith, sex, birth or wealth or any other similar criteria. Such treatment is meted out as result of expediency, vengeance, or simple ignorance. In contrast, it only takes a moment to treat a captured person with a degree of kindness and respect. Typically, they are scared and vulnerable, irrespective of age or sex. To greet someone in their mother tongue and to explain why they are going to be asked a few questions demonstrates a certain empathy; rather that than yelling orders and attempting to dehumanise an individual.

It was with this experience that I undertook the peer review process of the updates to the Commentary on GC3 published by the International Committee of the Red Cross (ICRC) in June 2020. Batches of articles were periodically sent to me by the responsible unit within the Legal Division of the ICRC. Throughout the 18-month review process, I attempted to provide a synergy between some of the scholarly submissions and a practical application of the particular provisions of GC3. Finding the point of consensus

between those that apply GC3 and those that monitor the application remains a challenge. It is essential that all concerned collaborate where possible in order to make and sustain advances in this regard.

As a military lawyer with practical experience in the field of detention of captured persons, I believe GC3 remains the go-to international humanitarian law document, and the updated Commentary a starting point to find updated interpretations of its provisions. Seventy plus years on from its original publication there are certain aspects where it is showing its age. But in the absence of international consensus to even attempt to draft a contemporary version of the Convention, its provisions and overall intent remains principled and relevant. The secret to success is how it is applied. And the Commentary, with its updated interpretations of the Convention's provisions, can play a role in guiding operators in their application.

About the author: Wing Commander Tim Wood joined the RNZAF in 2016. Initially responsible for revitalising the NZDF's LOAC training, he is currently the Chief Legal Adviser, Headquarters Joint Forces NZ. Wood previously served as a legal officer in the RAF. Retiring as a Group Captain his final post was with the Iraq Historic Allegations Prosecution Team. Following emigration Wood joined the staff of Massey University. His first academic publication was, *'Detainee Abuse during Op TELIC. A Few Rotten Apples?'* Wood is a Research Fellow of the Centre of Military and International Humanitarian Law, National Defence University of Malaysia.

Perceived Threats to the Making and Enforcement of International Law

By Bill Campbell

Two key elements underpinning international law and the important role it plays in the international system appear to be under some stress. Those two underpinnings are the development and subsequent acceptance of rules of international law to meet emerging international challenges and the application and enforcement of existing rules of international law.

Threats to the development and acceptance of rules of international law

First, with some notable exceptions, it is becoming increasingly difficult to develop new and effective treaty rules on matters requiring global attention, where the subject matter is challenging and/or the threat faced is both imminent and real. Without attempting to be comprehensive, the factors behind this difficulty include national interest - some would say national self-interest - differing national perceptions of the problem to be addressed and ideological differences.

An example of treaty negotiations on an important matter which have been dogged for decades by such factors are the negotiations for a *Comprehensive Convention on International Terrorism* which commenced in 1996 and are ongoing. Indeed, one of the fundamental sticking points continues to be the very definition of 'terrorism'.

Then there is the matter of the effectiveness of new treaties that are negotiated, in terms of the robustness of the text. Resorting to the lowest common denominator, or vague language which is capable of varying interpretations (so-called 'constructive ambiguity') or expressly giving an individual party a licence to determine the extent of its own

obligations under a treaty – these factors lessen the effectiveness of treaties. Many will respond that it was ever been thus - but is the problem getting worse?

The *Paris Agreement* on climate change rightly is regarded as a success but how effective will it really be in combatting climate change given the looseness of language in some of its key provisions such as Article 4.2, which provides: 'Each Party shall prepare, communicate and maintain successive *nationally determined* contributions that *it intends to achieve*. Parties shall pursue domestic mitigation measures, *with the aim of achieving the objectives of such contributions*' [emphasis added]. The weakness of those provisions has been identified by former US National Security Adviser John Bolton as one reason why the US withdrew its signature from the Paris Agreement: 'That deal had all the real-world impact on climate change of telling your prayer beads and lighting candles in church…The agreement simply requires signatories to set national goals but doesn't say what those goals should be, nor does it contain enforcement mechanisms.' (John Bolton, *The Room Where it Happened*, Simon and Schuster, 2020, 173). To be fair, there were other far more political reasons behind the US withdrawal and it would be interesting to know the extent of US involvement in the drafting of provisions such as Article 4.2.

By way of contrast, an example of a recent treaty that does address in firm and binding terms a global threat perceived by a significant number of states is the *Treaty on the Prohibition of Nuclear Weapons* of 7 July 2017. It was adopted despite significant opposition or disinterest on the part of other States. As of 8 October 2020, 46 states, including New Zealand, had ratified the Treaty with a total of 50 being required for its entry into force. An example of the firm language used in the treaty is Article 1 which in part provides that 'Each State Party undertakes never under any circumstances to

…develop, test, produce, manufacture, … use or threaten to use nuclear weapons or other nuclear explosive devices…'. Of course, the Treaty may not be effective for an entirely different reason – that being non-participation by the nuclear weapons states and their allies. In this respect, the Australian Department of Foreign Affairs and Trade website contains a succinct statement of the position of the current Australian Government: 'Australia does not support the "ban treaty" which we believe would not eliminate a single nuclear weapon.' Nevertheless, the Treaty does lay a good foundation for the ultimate prohibition of nuclear weapons under international law should that occur at some time in the future.

A second point concerns states that routinely do not become a party to treaties they have been involved in negotiating or, where they have accepted those treaties and then withdrawn, the US being the most prominent example.

The US does have the constitutional requirement for the concurrence of a two third's majority of the Senate which can inhibit its acceptance of many treaties such as the 1982 *United Nations Convention on the Law of the Sea* (the 1982 Convention). That aside, its withdrawal from - or stated intention not to become a party to - a significant number of treaties has ballooned under the current administration. One recent example is the April 2019 announcement by President Trump of his intention to withdraw US signature of the *Arms Trade Treaty* and in so doing stating 'we will never allow foreign bureaucrats to trample on your Second Amendment Freedoms.' Other examples include the *Intermediate-Range Nuclear Forces Treaty*, the *Paris Agreement* mentioned above, the *Trans-Pacific Partnership* and the Iran nuclear deal (*Joint Comprehensive Plan of Action*). In many cases the US has played a key role in the negotiation of the relevant multilateral agreements and had a significant influence on their content. That content may have been

very different had the US not been involved in the negotiations. The US also has pulled out recently from participating in various bodies such as the UN Human Rights Council and UNESCO.

How should other States react? They should press ahead and not be influenced by such action or inaction. This has happened – witness the European Union and others pressing ahead with the Iran nuclear deal and the continued negotiation and entry into force of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*.

Threats to the enforcement of existing rules of international law

The first such threat relates to States seeking to withdraw from, or significantly qualify their acceptance of, the jurisdiction of international courts and tribunals either in anticipation of, or as a response to an adverse decision. Again, this is nothing new – older examples being France's 1974 withdrawal of its acceptance of the ICJ jurisdiction under Article 36 (2) of the ICJ Statute in anticipation of a legal challenge to its then atmospheric nuclear testing and Australia's 2002 exclusion of maritime boundary delimitation from its acceptance of ICJ jurisdiction under Article 36(2) at a time when it was negotiating maritime boundaries with both New Zealand and Timor-Leste.

But is the trend of withdrawal increasing? More recently, Japan qualified its acceptance of the ICJ jurisdiction to exclude the exploitation of marine resources, including whales, six months after it lost the *Whaling in the Antarctic* Case in the ICJ. The United Kingdom in 2017 made two further qualifications to its acceptance of ICJ jurisdiction, one procedural concerning prior notice of a claim and one substantive concerning nuclear weapons and disarmament. Even more recently, the US announced that it would be withdrawing from its *Treaty of Amity* with Iran and the *Optional Protocol to the Vienna*

Convention on Diplomatic Relations after it was taken to the ICJ by Iran and Palestine respectively. John Bolton when he was US National Security Adviser is reported to have said that 'the US will commence a review of all international agreements that may expose the United States to purported binding jurisdiction, dispute resolution in the International Court of Justice' and that 'the United States will not sit idly by as baseless politicised claims are brought against us' having described the Court as "politicised and ineffective".

Secondly, and perhaps even worse, is the outright rejection by certain States of the undoubted jurisdiction of a court or tribunal even where the jurisdiction has formally accepted by those States - usually by simply not turning up to the hearing. Prominent recent examples include the refusal of the Russian Federation to participate in the *Arctic Sunrise* Annex VII Arbitration under the 1982 Convention and China's 'have your cake and eat it too' non-participation in the *South China Sea* Annex VII arbitration. While it did not turn up to the arbitration, it did provide a position paper and other material to the arbitral tribunal setting out comprehensively its views on various matters relating to the case. By way of response to the refusal of state to participate, Courts and tribunals, as well as applicant states, have taken the proper course and simply pressed on regardless.

However, any over-reach by international courts and tribunals both in terms of jurisdiction and substantive findings will only serve to exacerbate these two trends of withdrawal from jurisdiction and non-participation. Examples of recent jurisdictional and discretionary over-reach include the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion* of the ICJ and the *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, *Advisory Opinion* of the International Tribunal for the Law of the Sea. A relatively recent example of

substantive over-reach are the findings of the Annex VII Tribunal in the *South China Sea Arbitration* in relation to the interpretation and application of Article 121 of the 1982 Convention concerning the relevance of islands in the declaration of maritime zones.

Government indifference?

One additional point concerns the failure at times on the part of the national governments of states to accept, acknowledge or even recognise the relevance of international law to a particular issue. This can lead governments not to seek advice on whether a proposed action is consistent with their obligations under international law or to ignore such advice with attendant consequences such as international criticism or international litigation. One solution may be the development of a closer relationship between legal advisers and those in the government with a view to raising the level of awareness in government about the importance of compliance with international law. However the ability to do this is dependent on the receptiveness of the government of the day as recent events in the United Kingdom concerning its *Internal Market Bill* illustrate. Another avenue is what has been described as 'aggressive' legal advice – an unfortunate term for the routine and pro-active practice of an international legal adviser providing advice to a national government without having received a request for that advice.

Conclusion

The purpose of this article is not to cause despondency about the place of international law in the 21st century, but rather to identify some factors that need to be recognised and addressed in order to enhance the role of international law as a key pillar supporting

international relations. It is apparent from the above analysis that the starting point for such recognition and remedial action is at the level of national governments.

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A Community-based approach to address refugee resettlement in Australia

By Shamreeza Riaz

In the backdrop of the COVID-19 pandemic, Australia's current refugee Community Sponsorship Program (CSP) in Queensland needs socially distinct community-led support. The concept of a community sponsorship-based approach to address the refugee crisis is not new and was advocated in 1983 by the Gervase JL. Coles, a United Nations High Commissioner for Refugees (UNHCR) legal researcher. Coles argued that 'Man is a social being who needs a community not only for the security that it gives but also for the provision of the conditions necessary for his general well-being and for the realization of his potential'. According to Coles, 'international protection should be seen as a necessary 'bridge' between one community to another'. He considered the need for access to the community to be a refugee's basic right. Coles' views on social dimension of community support to resolve the issue of refuge deserve serious consideration as this social dimension can encompass both the root causes of flight and a durable solution. Refugees leave their communities due to unavoidable situations and true settlement can only be achieved through joining a new community both as a safe place and to have a feeling of belonging. The aims of the Australian national settlement services include living in harmony and multiculturalism. The community program assists in finding homes for millions of refugees and others displaced by conflict, persecution, or events seriously disturbing public order. The key goal of settlement is perceived through the CSP through direct participation of community into the resettlement process.

The United Nations High Commissioner for Refugees (UNHCR) published its global report for 2019 which suggests that the number of refugees rose from 36.4 million people in 2009 to over 86.5 million people at the end of 2019. This clearly doubled the number of refugees under the UNHCR's responsibility and no doubt this rise contributes to the appeal to countries worldwide to do more to respond to the global refugee crisis. In Canada, local communities have played a vital role to address these crises engaging with the government's existing initiatives. Canada's private refugee sponsorship model is consistent with the UNHCR's Global Refugee Sponsorship Initiative which calls on countries to adopt private or community sponsorship programs alongside existing government-assisted programs to increase resettlement places for refugees.

Davide Strazzari, Associate Professor of Legal Studies at the University of Trento, in his recent article 'Resettlement, Populism and the Multiple Dimensions of Solidarity: Lessons from US and Canada' published in 2020, argues that experiences of both US and Canada's private sponsorship programs suggest that 'Resettlement involves not only an international dimension of solidarity, but also an intra-national one which, in turn, is both vertical and horizontal. Strazzari refers to the role of the subnational units with regard to the selection and the distribution of refugees crossover the country, together with the involvement of civil society in some elements of their identification or reception.

As Australia is a party to the United Nations 1951 Convention relating to the Status of Refugees and the subsequent 1967 Protocol, it is therefore obliged to develop law and policy to give effect to the Convention and Protocol. Australia ran a Community Refugee Settlement Scheme (CRSS) from 1978-1997 that was designed initially to support Australia's settlement of Indo-Chinese refugees, but expanded to help successfully resettle and integrate over 30,000 refugees from around the globe into the Australian

community. In 2017, the Community Support Programme (CSP) was introduced. This allows individuals, community groups and businesses to sponsor eligible humanitarian entrance to resettle in Australia. This programme does not encourage widespread community participation in the welcoming and supporting of refugees due to three major reasons. First, CSP focuses on individuals or business sponsors and does not require the involvement of a group of individuals from the Australian community in sponsorship. Second, the costs associated with the scheme are prohibitively high which is not seen as encouraging widespread community participation. Third, the CSP program gives priority to applicants with highest education and skill level which inevitably excludes others in desperate need of resettlement. Finally, CSP is limited as sits under the Refugee and Humanitarian Program which has a fixed annual visa quota. Organizations working closely with the resettlement of refugees have raised concerns with CSP and called on the Australian government to revise and improve the model.

In early 2018, the Refugee Council of Australia, Save the Children Australia, Amnesty International Australia, the Welcome to Australia initiative, Rural Australians for Refugees and the Australian Churches Refugee Taskforce joined together to establish the Community Refugee Sponsorship Initiative (CRSI). They advocate for a fairer community sponsorship program to scale up Australia's response to the current global refugee crisis. These organizations are calling on the Australian Government to adopt an inclusive, well-designed and community-led refugee sponsorship program that draws on the most successful aspects of the Canadian private sponsorship experience. These groups have engaged in discussion with individuals, organisations, faith groups, community hubs, schools and local MPs how a fairer sponsorship program would allow everyday Australians and their communities to support refugees in coming to Australia and settling

into the community. These discussions have indicated that communities, including individuals, organizations, council, and members of the local government, are willing to sponsor and help resettle refugees.

This support has included more than 35 councils, several organisations, and over 35,000 Australians. IN response, the Federal Government commenced a formal review into the current sponsorship scheme in 2020.

A new community sponsorship model could harness this goodwill and compassion to increase the number of resettlement places offered by Australia and contribute to the successful settlement of refugees in active and cohesive Australian communities and transform the future of refugees resettlement program. Expansion of the Special Humanitarian Program, along with the contribution of communities to the successful settlement of refugees, is capable of giving that sense of belonging in active and cohesive Australian communities that Gervase JL. Coles suggested. Designing rather more detailed features of Australia's community refugee sponsorship program could also contribute to economic progress. Amnesty International has indicated it would be happy to facilitate such developments in design and implementation and thus transform refugee resettlement.

About the author: Shamreeza Riaz, PhD: Lawyer/Legal Researcher/Human Rights Activist. Ambassador – My New Neighbour and Amnesty International Australia.

Accountability for the perpetration of war crimes in Afghanistan

By Azadah Raz Mohammad, Anna McNeil and Felicity Gerry QC

The history of modern Afghanistan is one of internecine and systemic violence. The current prospects for peace and security in Afghanistan after more than four decades of war are uncertain. The question now is whether Afghanistan can move forward without addressing the legacies of its violent past. If it does decide to address them, what are the available or appropriate remedies to achieve accountability for these atrocities?

After nearly two decades of conflict, the United States (U.S.) and the Taliban movement (The Taliban) signed a peace agreement on 29th of February 2020, aimed at ending the U.S.'s longest running war. The agreement set the stage for intra-Afghan peace talks and a possible power-sharing agreement between the Taliban and the Government of Afghanistan. The intra-Afghan peace negotiations started in Doha on the 12th of September 2020 where the two sides negotiated the Taliban's future role in governing Afghanistan and a permanent ceasefire (among other important topics). However, this negotiation has failed to include international impartial observers, victim groups, and a strong female representation. As a result, the negotiations are being viewed sceptically by Afghans, particularly the Afghan women and minority groups who fear a return to repression under the ultra-conservative Taliban. In addition, the Taliban, since its emergence in 1994, has perpetrated acts of terrorism, war crimes, crimes against humanity, and serious human rights violations. These violations have not been addressed in either the U.S./Taliban agreement or the Intra-Afghan negotiation agenda. To prevent

future human rights abuses and international humanitarian law violations, judicial accountability is necessary, achieved either domestically or internationally.

Contravention of International Humanitarian Law - Alleged Acts of Terrorism, War Crimes and Crimes Against Humanity Committed by the Taliban (1994-2020)

In the context of a non-international armed conflict, the actions of the Taliban are held accountable under Common Article 3 and customary international law. However, since 10 November 2009, they are also held accountable under the Additional Protocol of the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. There is evidence that the Taliban has violated these obligations.

Taliban commanders have publicly claimed responsibility for deliberate attacks on civilians and protected sites including hospitals, schools, and mosques. The Taliban has dispensed collective punishment and discrimination based on gender, religion and ethnicity, torture and corporal punishment, and the inhumane treatment of prisoners amongst other violations.

The emergence of the Taliban

The Soviet Union occupation in 1979 and subsequent civil war after their withdrawal in 1989 rendered Afghanistan into state of chaos with the collapse of central government. In 1994, the Taliban took control of the country imposing a strict Sharia interpretation of Islamic law, which included amputation and stoning to death of alleged criminals. Human Rights Watch recorded systematic violations against women and girls, cruel corporal punishments including executions, extreme suppression of freedom of religion,

expression, and education, attacks against Afghanistan's historical and cultural heritage, and arbitrary mass killings of religious and ethnic minorities.

In areas where they encountered resistance, Taliban forces responded by massacring civilians and other non-combatants and burning down villages. Sharing the same ideology, the Taliban and Al-Qaida turned Afghanistan into a ruined wasteland, executing inhabitants, destroying orchards and vineyards, and expelling the people. The Taliban regime collapsed soon after the September 11 attacks in 2001 and the U.S. led war on terror against Al-Qaida and the Taliban.

Resurgence of the Taliban in 2004

After the Taliban collapse in 2001, attempts to pursue accountability for Taliban atrocities were deprioritized by the international community in the face of weak governance, lack of political will, and mixed international support. In 2004, a fragile Afghanistan relapsed into widespread violence, and the resurgence of the Taliban was assisted by unaddressed punishment for their past crimes and their exclusion from the Bonn Agreement negotiations.

The Taliban continued deliberate targeting of civilians and civilian populated areas by escalating their attacks in major cities, garnering 'wider attention and shaking public confidence in the government.' In 2019, the United Nations Assistance Mission in Afghanistan (UNAMA) recorded more than 10,000 civilians killed and injured in one year, attributing the majority of those causalities to the Taliban and its affiliated groups. The report also provides that more than 100,000 civilians have been killed or injured since 2009 when UNAMA started collecting this data.

The Taliban has claimed responsibility for most of the deadliest attacks on civilians and has claimed justification by stating that 'anyone working for the government of Afghanistan, including civil servants, is a valid military target.' These attacks and their justification are in clear violation of international humanitarian law and should lead to prosecution of the perpetrators for war crimes and crimes against humanity.

The Intra-Afghan Peace Negotiations: The Government of Afghanistan and the Taliban

The Afghanistan Government has established democratic institutions, such as the Parliament and the 2004 Afghan Constitution which reflects democratic values and respect for human rights. The legitimacy and robustness of these institutions is threatened by the failure to deal with the crimes of the past. Responses to mass atrocities and human rights abuses are integral to any peace-building mission led by national governments, bilateral donors, regional organizations, and international institutes. The trajectory of peace processes in Afghanistan has been largely oriented around peace now-justice later rather than traditional justice processes for an enduring peace.

For the first time in 19 years, the Taliban and the Government of Afghanistan have come face to face to negotiate terms of a peace process. The Taliban's ambitions for a post-peace settlement and their position on reconciliation, power-sharing, and governance are unclear. In particular, the Taliban's statement on women's and minorities' rights is opaque, while its internal stances on these crucial issues vary greatly. The Taliban has only stated their demands are complete withdrawal of foreign troops, and a state based on Sharia law. Alternatively, the Afghan government has emphasized immediate

ceasefire and the establishment of an inclusive government with respect for the rights of women and minority groups.

Domestic Prosecutions

Impunity for grave atrocities has long been the norm in Afghanistan's history. Both the Bonn Conference and Geneva Accord (the agreement for the Soviet withdrawal) processes failed to include victim groups or to maintain an inclusive negotiation on the country's future with all relevant stakeholders. Most importantly, perpetrators of war crimes and crimes against humanity were not held accountable. However, history shows that States can be reluctant to prosecute their nationals for such crimes and without political willingness, there is a failure to deliver justice.

Despite the international organizations and foreign government initiatives to reform the Afghan judicial system post 2002, institutionalised corruption and frustration with the Afghan justice system is rampant. In the face of widespread corruption and political bias, the risk of a compromised judicial system is acquittals of higher-ranking perpetrators which could create a permanent sense of injustice. Therefore, accountability for war crimes cannot be secured through domestic courts.

International Prosecution

In 2006 the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) initiated *proprio motu,* a preliminary examination on the situation in Afghanistan. However, on 12th of April 2019, the Pre-Trial Chamber (PTC) rejected the submissions made by the OTP to open a formal investigation concerning alleged crimes committed in Afghanistan since 2003. The decision acknowledged a reasonable basis to believe that

the crimes within the jurisdiction of the Court may have been committed in Afghanistan. Nevertheless, it concluded that authorizing a formal investigation 'would not serve the interests of justice.' However, on appeal, the ICC Appeals Chamber reinstated the PTC's decision authorising the OTP to launch its formal investigation into the situation in Afghanistan. The Appeals Chamber decision states that if there is 'a reasonable basis to proceed with an investigation, and that the case falls within the jurisdiction of the Court, it shall authorize the commencement of the investigation.'

Despite the OTP's authorisation, it is still unclear how the OTP will proceed with its formal investigation in Afghanistan.

Conclusion

The peace negotiations with the Taliban have created many uncertainties in terms of commitment and consequences. However, a major impediment to peace in Afghanistan is the lack of accountability for the perpetration of war crimes. The Afghan people have suffered greatly as regime after militia group after warlord have ravaged their homeland and destroyed their lives and livelihoods. In an effort to rebuild for a peaceful future, accountability for the perpetration of these crimes is a key ingredient not only for victims to seek justice, but a civilian population to feel empowered.

The authors would like to thank Sara Kowal and Karin Forde for their input and review of this article

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Azadah Raz Mohammad has an extensive work experience with International Organizations, the Government of Afghanistan and academia.She has worked on humanitarian and human rights related projects in close collaboration with the Afghanistan Independent Human Rights Commission and the Afghan Ministry of Justice amongst other. Besides, she has worked with the Administrative Office of Afghan President and as an adjunct

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AnnaMcNeil is a highly experienced lawyer with significant experience in Australia and internationally. She has defended in various high-profile cases before the Extraordinary Chambers in the Courts of Cambodia, the United Nations International Residual Mechanism for Criminal Tribunals, and the International Criminal Tribunal for the former Yugoslavia. Currently, Anna is a Solicitor at the Victorian Office of Public Prosecutions and has previously worked at the Victorian Department of Justice and the Commonwealth Attorney-General's Department. Anna has particular expertise in genocide, crimes against humanity, and joint criminal enterprises in an international context. Her interests lie in international criminal law, international humanitarian law and international refugee law, with her pro-bono work assisting refugees in Australia and overseas.

Felicity Gerry QC (ANZSIL Perspective Editor) is on the lists of counsel for the ICC and KSC, is admitted in England and Wales and Australia (Victoria and the High Court Roll) and specializes in complex criminal law cases, generally involving an international or human rights element. She is also Professor of Practice at Deakin University where she teaches a unit on Contemporary International Legal Challenges. Thus far, topics include Modern Slavery, Terrorism, Climate Change, War Crimes and Digital Defence law. She is widely published in diverse areas including women & law, technology & law and reforming justice systems.