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**The obligation to respect and to ensure respect in all circumstances
pursuant to Common Article 1 of the Four Geneva Conventions of August
1949 and Additional Protocols I and III: an Australian weapons law
perspective**

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Abstract

Article 1, common to the Four Geneva Conventions of August 12, 1949 and Article 1(1) of Additional Protocols I and III to the Geneva Conventions of 1977 and 2005 respectively, state that '[t]he High Contracting Parties undertake to respect and ensure respect' for the Conventions and Protocols 'in all circumstances' (collectively Common Article 1). This thesis considers the nature and scope of the obligation found in Common Article 1. Common Article 1 has two components: the obligation to respect international humanitarian law (IHL); and the obligation to ensure respect for IHL. The obligation to respect IHL requires the good faith implementation of the provisions of IHL by the High Contracting Parties. The obligation to ensure respect for IHL is concerned with states actions in respect of violations, or potential violations of IHL, by parties to a conflict. That is, third party states must exercise due diligence in relation to violations or potential violations of IHL by parties to a conflict. The thesis supports the view that the scope of this obligation is one that is relative to the capacity and influence of a state and that it should be seen as the source of an opportunity for states to provide strong support for humanitarian outcomes.

The thesis considers how Australia has approached one aspect of IHL - namely weapons law - in recent history. It notes that Australia has both undermined Common Article 1 in its approach (cluster munitions and nuclear weapons prohibitions are used as examples) and ignored Common Article 1 in its approach (the Arms Trade Treaty and new weapons technologies are used as examples). The thesis proposes that Australia give greater consideration to Common Article 1 when approaching weapons law, so as not to breach its obligation under Common Article 1 and to be a nation with credibility and influence in this field. Australia must work to fully implement the provisions of IHL in good faith and, because it has significant capacity in terms of resources, where it has influence over other states and/or non-state actors it must use this influence in support of Common Article 1.

Declaration by author

This thesis is composed of my original work, and contains no material previously published or written by another person except where due reference has been made in the text. I have clearly stated the contribution by others to jointly-authored works that I have included in my thesis.

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List of abbreviations used in the thesis

ADF	Australian Defence Force
AP I	Additional Protocol 1 to the Geneva Conventions of 1949 and relating to the protection of victims of international armed conflict (1977)
AP II	Additional Protocol 2 to the Geneva Conventions of 1949 and relating to the protection of victims of non-international armed conflict (1977)
AP III	Additional Protocol 3 to the Geneva Conventions of 1949 and relating to the Adoption of an Additional Distinctive Emblem (2005)
ATT	Arms Trade Treaty (2013)
CCM	Convention on Cluster Munitions (2008)
CCW	Convention on Conventional Weapons (1980)
CWC	Chemical Weapons Convention (1993)
DECO	Defence Export Control Office (Australia)
DFAT	Department of Foreign Affairs and Trade (Australia)
DOD	Department of Defence (Australia)
ERW	Explosive remnants of war
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949
GC II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949
GC III	Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949
GC IV	Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (1966)
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
NPT	Nuclear Non-Proliferation Treaty (1970)
UN	United Nations

CHAPTER ONE: INTRODUCTION

The aim of this thesis is to better understand the nature and scope of the obligation to respect and ensure respect for IHL and to practically link this obligation to its application to a part of IHL - namely weapons law. The aim of this thesis is also to explore the ways in which Australia has engaged with Common Article 1 of the Geneva Conventions, in the context of its approach to recent weapons law negotiations, and to investigate whether Australia should give greater consideration to Common Article 1 when approaching weapons law. Chapter one provides an introduction to the topic of the thesis. It also explains the significance of the thesis and sets out the objectives, research questions, methodology and structure of the thesis.

1. Topic

Article 1, common to the Four Geneva Conventions of August 12, 1949¹ (Four Geneva Conventions) and Article 1(1) of Additional Protocols I and III to the Geneva Conventions of 1977 and 2005² (AP I and AP III) respectively, provide that '[t]he High Contracting Parties undertake to respect and ensure respect' for the Conventions and Protocols 'in all circumstances' (collectively Common Article 1). This thesis considers the nature and scope of the obligation found in Common Article 1. Common Article 1 has two components: the obligation to respect international humanitarian law (IHL); and the obligation to ensure respect for IHL. The obligation to respect IHL requires the good faith implementation of the provisions of IHL by the High Contracting Parties.³ The obligation to ensure respect for IHL is concerned with their actions in respect of violations, or potential violations of IHL, by parties to a conflict. That is, third party states⁴ must exercise due diligence in relation to violations or potential violations of IHL by parties to the conflict. The thesis supports the

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

² *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem*, 8 December 2005, 2404 UNTS 261 (entered into force 14 January 2007).

³ The Four Geneva Conventions have been universally ratified and as such the obligations of the High Contracting Parties are the obligations of all states. The term states will be used hereafter.

⁴ In IHL this term is used to describe states which are not parties to the conflict (rather than states which are not party to a particular treaty).

view that the scope of this obligation is one that is relative to the capacity and influence of a state and that it should be seen as the source of an opportunity for states to provide strong support for humanitarian⁵ outcomes.

The thesis considers how Australia has approached one aspect of IHL – namely weapons law - in recent history. It notes that Australia has both undermined Common Article 1 in its approach to some issues (using the examples of cluster munitions and nuclear weapons prohibitions) and ignored Common Article 1 in its approach to other issues (using the examples of the Arms Trade Treaty (ATT) and new weapons technologies). The thesis proposes that Australia give greater consideration to Common Article 1 when approaching weapons law, so as not to breach its obligation under Common Article 1 and to be a nation with credibility and influence in this field. Australia must work to fully implement the provisions of IHL in good faith and, because it has significant capacity in terms of resources, where it has influence over other states and/or non-state actors it must use this influence in support of Common Article 1.

2. Background

2.1 The Four Geneva Conventions and Common Article 1

The Four Geneva Conventions and their Additional Protocols⁶ form the central tenets of IHL. These rules establish the minimum standards applicable to the conduct of armed conflicts. Regardless of the legality or otherwise of the use of armed force, or the reasons for it, they seek to protect those who are not, or who are no longer taking part in the hostilities. The wounded and sick, the shipwrecked, prisoners of war and civilians are protected. Military personnel, while able to be targeted by those complying with the rules, are also protected against unnecessary suffering.⁷

⁵ Being the alleviation of human suffering.

⁶ See also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

⁷ See ICRC, *What is international humanitarian law* (31 July 2004) ICRC <https://www.icrc.org/en/document/what-international-humanitarian-law#.VO_LyU101aR>; See generally Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar, 2013); Gretchen Kewley, *Even Wars Have Limits: The Law of Armed Conflict* (Australian Red Cross, 2nd ed, 1993).

IHL is a significant body of law. All States have agreed to be bound by the Four Geneva Conventions, and more than two-thirds by AP I and Additional Protocol II (AP II).⁸ IHL is enshrined in traditions of warfare in cultures and religions across the world.⁹ The principles are generally very basic and they are ones that often serve military interests. Indeed no State would have signed the Four Geneva Conventions had they been an impediment to the exercise of the right of self-defence enshrined in article 51 of the Charter of the United Nations. The principle of distinction for example, requiring warring parties to target only military objectives and to spare civilians and civilian objects,¹⁰ is reflective of military principles of economy of effort¹¹ which require that military resources are directed towards the targets which will most assist the war effort.

IHL is also vitally important for humanity. Gilbert,¹² in writing the foreword for a book by Durham and McCormack,¹³ paraphrased HG Wells ('[h]istory is more and more a race between education and catastrophe') writing, '[h]istory ... is more and more a race between the increasingly terminal disaster of war and the effective realisation of IHL'.¹⁴ This 1999 summation is an apt one; sadly, 16 years later, IHL only has more challenges facing it today.

Unlike many areas of international law where most discussion focuses on the state as the subject of the law¹⁵, most IHL discussions are concerned with the actions of individuals – whether they be acting themselves or in command of others. IHL provides for both individual and command responsibility for serious violations of the law and customs of war, more commonly known as war crimes. There are, however, also a number of obligations on states which derive from IHL. Chief among them is the obligation to respect and ensure respect for

⁸ ICRC, *States Party to the Following International Humanitarian Law and Other Related Treaties as of 13-Apr-2015* (6 August 2015) ICRC <<https://www.icrc.org/IHL>>

⁹ Helen Durham and Eve Massingham, 'Moving from the mechanics of accountability to a culture of accountability' in Petrovic, J (ed) *Accountability for Violations of International Humanitarian Law: Essays in Honour of Tim McCormack*, (Routledge, 2015) 276-277.

¹⁰ AP I art 48.

¹¹ Economy of effort is the prudent allocation and application of only those resources needed to achieve the desired results. ...Economy of effort maximises the contribution of resources to the achievement or the maintenance of the aim: Australian Defence Doctrine, 'Foundations of Australian Military Doctrine' (3rd ed, 2012, Defence Publishing Service Canberra), [23].

¹² Then Vice Chancellor of the University of Melbourne.

¹³ Dr Helen Durham is the Director of International Law and Policy for the ICRC. She was the first woman, first Australian and youngest person to ever to be appointed to this position in July 2014. Professor Tim McCormack is, among other appointments, the Special Advisor on IHL to the Prosecutor of the ICC.

¹⁴ Tim McCormack and Helen Durham (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Kluwer Law International, 1999) xiii.

¹⁵ See Antonio Cassese, *International Law* (Oxford University Press, 2005, 2nd ed) 3.

the Four Geneva Conventions and APs I and III. Pursuant to Common Article 1 '[t]he High Contracting Parties undertake to respect and ensure respect' for the Conventions and Protocols 'in all circumstances'. Customary international law further establishes that states have an obligation to respect and ensure respect for IHL in both international and non-international armed conflicts, regardless of the status of their signature and/or ratification of particular treaties.¹⁶

The obligation to respect and ensure respect for the provisions of IHL is a core legal obligation of every country in the world. Whilst widely cited in many contexts, the interpretation of the Common Article 1 obligation has been the subject of some debate. It was recently described as 'being beset by uncertainty' and that there is 'a need to elucidate the extent of this obligation'.¹⁷ This thesis provides an examination of this obligation, with particular emphasis on Australia's record of respecting and ensuring respect for the Four Geneva Conventions and APs I and III, and IHL more broadly, in relation to weapons.

2.2 Justifications for focusing on weapons law

In addition to the protections enshrined in IHL mentioned above, these rules also place restrictions on the means and methods of conducting warfare, and in particular, on the types of weapons that can be employed by warring parties. While not specifically naming weapons or categories of weapons, AP I to the Geneva Conventions notes that 'methods or means of combat which cannot be directed at a specific military objective' are prohibited.¹⁸ Further, 'weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering' and those 'methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment' are prohibited.¹⁹ As such, the means and methods of warfare selected by a party to a conflict play a significant role in whether or not that party is able to respect IHL.

¹⁶ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law Volume 1: Rules*, (ICRC, 2005) (hereinafter ICRC Customary Law Study) rule 139. This is discussed further below.

¹⁷ Knut Dormann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations' *International Review of the Red Cross First View Articles* (CUP, 30 January 2015) 3.

¹⁸ AP I art 51(4).

¹⁹ AP I art 35.

By virtue of these provisions many weapons are unable to be used in armed conflict and other weapons have their use restricted to particular targeting situations. However, in addition, since the late 19th century a number of weapons-specific legal frameworks have been developed to add to the limitations on weapons use and to add clarity on their use vis-à-vis the principle of IHL. These treaties have also had the added benefit of going beyond IHL to provide for an arms control element.²⁰ That is, they not only prohibit use but also include prohibitions on production, acquisition, stockpiling and transfer of the weapons. Weapons have been selected as the case study focus to conduct this analysis because a country's choice of weapon is central to the ability of its armed personnel to comply with the fundamental principles of IHL (provided that the lawful weapon is then also used in a lawful manner).

This connection has been made particularly clear in recent times. In 2003, the States Party to the Four Geneva Conventions adopted Final Goal 2.3 of the 28th International Conference of the Red Cross and Red Crescent which directly linked Common Article 1 to controls on weapons.²¹ In February 2014, Juan Manuel Gomez Robledo, Deputy Minister of Foreign Affairs of Mexico and Chair of the Second Conference on the Humanitarian Consequences of Nuclear Weapons, spoke about the need to conclude a legally binding instrument prohibiting the use of nuclear weapons. He noted '[i]n our view, this is consistent with our obligations under international law, including those derived from the NPT as well as from Common Article 1 to the Geneva Conventions'.²² A recent article in the *International Review of the Red Cross* has also made strong linkages between Common Article 1 and the ATT.²³

2.3 Selection of case studies topics

The use of weapons case studies has enabled an original and contemporary assessment of one way in which a State Party, specifically Australia, approaches compliance with broader IHL

²⁰ See also Tim McCormack, 'The Use of Force' in Sam Blay, Ryszard Piotrowicz & B Martin Tsamenyi (eds), *Public International Law: an Australian Perspective* (Oxford University Press, 1997) 223, 249.

²¹ 'Final Goal 2.3 - Reduce the human suffering resulting from the uncontrolled availability and misuse of weapons. In recognition of States' obligation to respect and ensure respect for international humanitarian law, controls on the availability of weapons are strengthened – in particular on small arms, light weapons and their ammunition – so that weapons do not end up in the hands of those who may be expected to use them to violate international humanitarian law.' Red Cross Red Crescent, *International Conference on the Red Cross and Red Crescent Declaration, Agenda for Humanitarian Action, Resolutions* (28th Conference, Geneva, 2-6 December 2003).

²² Juan Manuel Gomez Robledo, 'Chair's Summary' (Speech delivered at the Second Conference on the humanitarian impact of nuclear weapons, Nayarit, Mexico, 14 February 2014).

²³ Dormann and Serralvo, above note 17.

obligations. The case study topics - namely cluster munitions, nuclear weapons, the ATT and new weapons technologies - have been selected for three reasons.

The first reason is their currency. The Cluster Munitions Convention (discussed in chapter three) and the ATT (discussed in chapter five) are the most recently concluded major international agreements pertaining to weapons law while nuclear weapons (discussed in chapter four) and new weapons technologies (discussed in chapter six) are the subject of current and ongoing discussion at the international level. Whilst a historical analysis could also be of some value and may be the subject of future work, the current approach to weapons law by Australia is the most telling indication of the current influence of Common Article 1 on Australia with regards to weapons law.

The second reason is that each of these case studies provides evidence of fundamental change in the global thinking about arms to have humanitarian security as a central element.²⁴ The Cluster Munitions Convention (discussed in chapter four) was the culmination of work dating back to the 1960s and really cemented the focus of weapons law as being that of addressing issues of human impact (rather than military utility).²⁵ The Humanitarian Impacts of Nuclear Weapons project²⁶ (discussed in chapter five) demonstrates the coming of age of a fundamental shift in thinking about nuclear weapons from a Cold War focus on the strategic interests of arms control to a focus on humanitarian consequences and on prohibition. The ATT (discussed in chapter six), which traces its trajectory back as far as the 1870s, is a shift in thinking from limiting the use of these weapons (under IHL - and other legal frameworks when they are being used outside of the context of an armed conflict), to limiting the proliferation of them and will have significant humanitarian benefits. New weapons technologies (discussed in chapter seven) are significant because, while new technologies have always been emerging, the rapid pace of technological development is challenging this

²⁴ Denise Garcia, 'Humanitarian security regimes' (2015) 91 (1) *International Affairs* 55. Garcia notes that 'chief goals of humanitarian security regimes are to reduce human suffering, to prohibit harm and to protect victims'.

²⁵ John Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won*, (UN Institute for Disarmament Research, 2009), 313. Borrie notes (at 320) the inclusion of individuals affected by cluster munitions as part of a 'collective reframing of cluster munitions and the humanitarian responses to them'.

²⁶ 'This project aims to challenge the way in which the nuclear weapons issue is currently framed by highlighting the humanitarian approach to nuclear disarmament. The project brings together a range of diverse opinions, engaging both academics and humanitarian ('boots-on-the-ground') workers from developing countries to participate and contribute their specialized knowledge.' Chatham House, *Humanitarian Impact of Nuclear Weapons*, 2014 <<http://www.chathamhouse.org/about/structure/international-security-department/humanitarian-impact-nuclear-weapons-project#>>.

field in ways not seen before – and leading to new questions relating to attribution of responsibility and ethical considerations about outsourcing warfare to robots.

The third reason is that these case studies represent a cross section of approaches taken by Australia to both prohibition treaties and regulatory treaties, as will be seen in the chapters which follow. In short, the case studies demonstrate a case where Australia has been beholden to concerns about interoperability with the United States (cluster munitions), a case where Australia has been reluctant to join the challengers to the status quo (nuclear weapons) and a case where Australia has sought to be a leader (ATT). The new weapons technologies discussion then demonstrates potential for the future in terms of Australia's approach and current thinking.

2.4 Selection of Australia

A country specific analysis (in this work using Australia) will add content to the Common Article 1 obligation (including its scope and the methods by which compliance might be achieved), as well as providing a critique of one country's record. Australia is a suitable study for this work by virtue of its influence in the international community on weapons related issues and the various approaches it has taken. Australia is generally accepted to have 'middle power' status.²⁷ While arguments can be made that there is little influence that middle powers such as Australia can have, Beeson notes that middle powers 'can make material and ideational choices that have a powerful impact on their own welfare and help to legitimate the extant international order'.²⁸ Indeed, Beeson specifically mentions nuclear disarmament and also defence spending as areas where a middle power such as Australia, through its actions is having global reach.²⁹ McCormack notes that 'Australia has taken a leading role in the promotion of global multilateral arms controls and disarmament

²⁷ Andrew Carr, 'Is Australia a middle power?' A systemic impact approach' (2014) 68 (1) *Australian Journal of International Affairs* 70, 70, 79-81. Carr defines middle power as being a state that has the defence capacity to defence itself, 'without great capacity for coercing others' and the ability to shape parts of the international system. Carr references a number of studies citing Australia as a middle power and also adopts the view that it is using his systemic impact approach. He also notes that 'the Australian government's claim to middle power status is increasingly under threat, given the lack of recent demonstration of capacity to influence specific elements of the international system'.

²⁸ Mark Beeson, 'Can Australia save the world? The limits and possibilities of middle power diplomacy' (2011) 65 (5) *Australian Journal of International Affairs* 563, 567. See also Tracy Slagter, 'International Norm Entrepreneurs: A Role for Middle Powers?' (Paper presented at Annual Meeting of International Studies Association, Montreal, 17-20 March 2004).

²⁹ Beeson, above note 28, 567.

agreements’ and has credited Australian efforts as being ‘largely responsible for a successful conclusion’ to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC).³⁰

Further, Australia does not appear to have given consideration to Common Article 1 in its approach to weapons law. As such it is hoped that this thesis is of value to the Australian Department of Foreign Affairs and Trade (DFAT), the Australian Defence Force (ADF) and the Commonwealth Attorney- General’s Department in demonstrating the significance and potential value of this provision. As a middle power that has taken a leading role in weapons law Australia should be looking to frame discussions and regulations in terms of Common Article 1. Australia has the wealth and resources, capacity to influence, culture of defence force training and legal expertise to take this leading role.

A broader study of approaches taken, either by Australia, or by other States Party, may suitably form the content of some further work to build on the understanding of the practical implications of Common Article 1 in other areas including those aspects of the Geneva Conventions relating to the protection of those not, or no longer, taking part in hostilities.

3. Significance

This thesis is significant because it considers the practical application of this seminal and unique provision of IHL, namely Common Article 1. In doing so the thesis develops the body of literature on Common Article 1 and explores the nature and scope of this provision. The body of work on Common Article 1 is limited with only a few key references in case law and a few key articles in the literature. With the exception of Focarrelli’s analysis³¹ and a recent article by the International Committee of the Red Cross (ICRC)³² much of this analysis is dated.

This thesis is also significant because no study has looked at Common Article 1 from a weapons law perspective. As such it fills a gap in the literature. However, despite the lack of common understanding as to its meaning in the literature, increasingly reference is being

³⁰ Tim McCormack, *The Use of Force*, above note 20, 250.

³¹ Carlo Focarrelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’ (2010) 21(1) *The European Journal of International Law* 125.

³² Dormann and Serralvo, above note 17.

made in the international community to Common Article 1³³ and similar obligations³⁴ in the context of weapons law. The thesis demonstrates how Australia has approached weapons law in recent negotiations. It is thereby hoped that this thesis will contribute to the literature aimed at a better understanding of Common Article 1 and aimed at promoting opportunities for better utilising Common Article 1 for humanitarian ends in the weapons law space.

4. Aim and objectives

The aim of this thesis is to better understand the nature and scope of the obligation to respect and ensure respect for IHL and to practically link this obligation to its application to a part of IHL - namely weapons law. The aim of this thesis is also to explore the ways in which Australia has engaged with Common Article 1 in the context of its approach to recent weapons law negotiations and to investigate whether Australia should give greater consideration to Common Article 1 when approaching weapons law.

The objectives of this thesis are:

1. To review the case law and literature on the meaning of the obligation to respect and ensure respect for IHL pursuant to Common Article 1
2. To explore the nature and value of the obligation to respect and ensure respect for IHL pursuant to Common Article 1
3. To consider the approach taken by Australian in recent history to weapons law negotiations
4. To determine the level of deference given by Australia to the obligation to respect and ensure respect for IHL in the weapons law context
5. To examine whether Australia should give greater consideration to Common Article 1 when approaching weapons law, so as not to breach its obligation under Common Article 1 and to remain a nation with credibility and influence in this space.

³³ Juan Manuel Gomez Robledo, above note 22.

³⁴ *Arms Trade Treaty*, opened for signature 3 June 2013, (entered into force 24 December 2014) art 7.

5. Research Questions

The research questions guiding this thesis are as follows:

1. What is the nature of the obligation to respect and ensure respect pursuant to Common Article 1?
2. What constitutes respecting and ensuring respect pursuant to Common Article 1 when it comes to the regulation of weapons for use in armed conflict?
3. What approach has Australia taken to the regulation of weapons by international law?
4. Specifically, what approach has Australian taken to the regulation of cluster munitions, nuclear weapons, the ATT and new weapons technologies?
5. What conclusions can be reached from this evaluation regarding the approach of Australia to compliance with the obligation to respect and ensure respect pursuant to Common Article 1?

6. Methodology

The methodology of this thesis is doctrinal research. Doctrinal research is defined by the 1987 Pearce Committee looking into Commonwealth Tertiary Education as ‘[r]esearch which provides a systematic exposition of the rules covering a particular legal category, analyses the relationship between the rules, explains areas of difficulty and, perhaps predicts future developments’.³⁵ Hutchinson notes that the doctrinal method involves two parts. First, finding the law and second interpreting and analysing the law.³⁶

This thesis presents research into the law of both Common Article 1 of the Geneva Conventions and into various areas of weapons law, both in the context of international law and Australian domestic law. The research draws on primary and secondary materials, including international treaty and customary law, Australian domestic legislation, government policy documents and statements (including Department of Defence (DOD) materials), international conference preparatory materials and reports, various UN documents including Security Council resolutions and relevant academic and professional literature in

³⁵ Cited in Terry Hutchinson, *Research and writing in law* (3rd ed, 2010, Thomson Reuters) 7.

³⁶ *Ibid.*

order both to identify legal practice and legal principles, and to draw conclusions on Common Article 1 and Australia's approach to the weapons laws the subject of this thesis.

The thesis incorporates global weapons law developments and Australian legislative and policy changes to 17 December 2015.

7. Thesis structure

Chapter one provides an introduction to the topic of the thesis. It also explains the significance of the thesis and sets out the objectives, research questions, methodology and structure of the thesis.

Chapter two reviews literature on Common Article 1, including its drafting history. It answers the question what is the nature of the obligation to respect and ensure respect pursuant to Common Article 1? It notes that, despite some uncertainty surrounding the meaning of Common Article 1 over the years, today, it is understood as constituting a clear legal obligation. The scope of this obligation is articulated in part (respect) by other provisions of the Geneva Conventions themselves and the requirement to implement these provisions in good faith, and in part (ensure respect) determined by the capacity and influence of a state to ensure respect by a third state in a particular circumstance. The chapter examines the application of the principles of good faith and due diligence obligation to the interpretation of the scope of Common Article 1. It argues that Common Article 1 has an important role to play, and that states should view it as the source of an obligation to act to assist victims of IHL violations.

Chapter three considers the overarching concepts and processes that contribute to a country respecting and ensuring respect for IHL with regards to weapons law with particular reference to Australia. It answers the question what constitutes respecting and ensuring respect pursuant to Common Article 1 when regulating of weapons for use in armed conflict? This chapter outlines Australia's record of adopting weapons law treaties, its implementation of the obligation pursuant to article 36 of AP I to review new weapons technologies in light of their compatibility with the rules of IHL, its approach to weapons law as evidenced in military training and military manuals and policy and the import and export control regimes in Australia on weapons and weapons development materials.

Chapter four provides an overview of the Convention on Cluster Munitions (CCM)³⁷ which was adopted in 2008 and grounded in the rules of IHL, in particular, the principle of distinction. It considers the approach taken by Australia to the negotiation of the CCM, and its implementation by Australia. It answers the questions what approach has Australia taken to the regulation of cluster munitions by international law and what conclusions can be reached from this evaluation regarding the approach of Australia to compliance with the obligation to respect and ensure respect pursuant to Common Article 1? It argues that at least most of the types of cluster munitions now prohibited by the Convention are those that are incompatible with IHL. As such Common Article 1 applies to states in respect of these weapons. It notes that Common Article 1 has not featured in Australia's approach to the treaty to date. The chapter raises particular issues with Australia's approach in light of the Common Article 1 obligation. It argues that Australia has undermined Common Article 1 in relation to cluster munitions by working to ensure that the CCM allows Australia to operate with other forces using cluster munitions, even though the use of such weapons would violate the principles of IHL.

Chapter five provides an overview of the failure of humanity, to date, to eliminate nuclear weapons, despite commitments outlined in the Nuclear Non-Proliferation Treaty (NPT). It notes the current international move towards a ban-treaty which would unequivocally prohibit the use of nuclear weapons. The chapter adopts the view that the use of nuclear weapons, as they are understood today, cannot comply with the principles of IHL and that, as such, states would be taking a clear opportunity to comply with the obligation in Common Article 1 through their positive progress towards a legally binding instrument clearly prohibiting the use of nuclear weapons. It answers the questions what approach has Australia taken to the regulation of nuclear weapons by international law and what conclusions can be reached from this evaluation regarding the approach of Australia to compliance with the obligation to respect and ensure respect pursuant to Common Article 1? It argues that Australia is undermining efforts to unequivocally prohibit the use of nuclear weapons, in breach of its obligation to respect and ensure respect for IHL. Australia must reconsider its position on nuclear weapons in light of this obligation and, if it does so, it is well placed to

³⁷ *Convention on Cluster Munitions*, 30 May 2008, 48 ILM 357 (entered into force 1 August 2010) Preamble final paragraph.

use its capacity to influence other states towards a position of respecting IHL with respect to nuclear weapons.

Chapter six provides an overview of the newest international instrument regulating weapons, namely the ATT, and its development. It considers the approach taken by Australia to the negotiation of the ATT and its implementation by Australia. It answers the questions what approach has Australia taken to the regulation of small arms and light weapons by international law and what conclusions can be reached from this evaluation regarding the approach of Australia to compliance with the obligation to respect and ensure respect pursuant to Common Article 1? It notes that Common Article 1 has not featured in Australia's approach to the treaty to date, but that the treaty itself includes provisions (in articles 6(3) and 7) which have strong links to Common Article 1. The real work with the ATT begins now, in the early years of implementing the treaty. Australia has taken a leading role in the negotiation and promotion of the treaty to date. Australia also has significant capacity to assist other states to ensure respect for IHL. The ATT should be a vehicle for Australia doing so.

Chapter seven provides an overview of the new weapons technologies which are currently attracting attention from an IHL perspective. It considers the approach taken by IHL scholars to each of these weapons concluding that the principles of IHL clearly apply to them, and it is imperative that the principles of IHL are not compromised in the adoption of any new rules pertaining to their use. It answers the questions what approach has Australia taken to the regulation of these weapons and what conclusions can be reached from this evaluation regarding the approach of Australia to compliance with the obligation to respect and ensure respect pursuant to Common Article 1? It notes Australia has released relatively little by way of guidance as to its thinking on new weapons technologies, although Australian researchers have shown great interest in this area. The chapter urges Australia to consider Common Article 1 obligations to respect and ensure respect for IHL in relation to these weapons and the development of legal frameworks around them going forward. By promoting the ability of existing IHL principles to apply to new weapons technology, and promoting compliance with Article 36 of AP I weapons review obligations, Australia can achieve this.

In the concluding chapter, Chapter eight, the analysis in Chapters two to seven is drawn on to demonstrate the nature of the obligation to respect and ensure respect pursuant to Common Article 1 and how the approach Australia has taken to the regulation of weapons by

international law either ignores or undermines the scope of this obligation. The conclusion details the answers which have been determined to the research questions. Recommendations for further work as well as limitations of the research are also outlined. The thesis proposes that Australia give greater consideration to Common Article 1 when approaching weapons law, so as not to breach its obligation under Common Article 1 and to remain a nation with credibility and influence in relation to IHL.

8. Preliminary points

8.1 Australia and international law

It is necessary to make a few observations about the implementation of international law more generally in Australia's domestic legal framework before delving to consider the implementation of international legal obligations by Australia with respect to weapons law. This material forms the backdrop to the more specialised discussions in all the subsequent chapters.

Australia is a party to the Four Geneva Conventions by virtue of its signature of 4 January 1950 and its ratification on 14 October 1958.³⁸ Australia implemented its obligations as a State Party into Australia law via the *Geneva Conventions Act 1957* (Cth). Australia is a party to AP I to the Geneva Conventions of 1977 by virtue of its signature of 7 December 1978 and its ratification on 21 June 1991.³⁹ Australia is a party to AP III to the Geneva Conventions of 2005 by virtue of its signature of 8 March 2006 and its ratification on 15 July 2009.⁴⁰ For completeness, although AP II to the Geneva Conventions of 1977 does not include a provision in the nature of Common Article 1, Australia is a party by virtue of its signature of 7 December 1978 and its ratification on 21 June 1991.⁴¹ Australia's status regarding other weapons law treaties is discussed further in Chapter two.

Cassese notes the existence of three 'principal theoretical constructs' regarding the intersection of international law and domestic law,⁴² one theory being of the supremacy of domestic law, one being of the primacy of international law (these both being monistic

³⁸ ICRC, above note 7.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Cassese, above note 15, 213.

conceptions) and the third being the dualist approach, whereby national legal systems incorporate international law in order for it to have binding effect.⁴³ The Australian legal system is reflective of the third of these constructs. Triggs describes it as ‘axiomatic in Australian law that a treaty to which it is a party has no direct application in domestic law in the absence of implementing legislation’.⁴⁴ While, as is noted below at 8.3, Australian’s are entitled to assume that the Australian government will comply with its obligations under international law, many different views have been expressed by courts in Australia regarding the process of incorporating international obligations into domestic law. As recently as 2015 the High Court of Australia has reiterated the principle that international law is only able to be applied by the Australian courts in so far as it is incorporated into domestic law.⁴⁵ Keane J noted ‘Australian courts are bound to apply Australian statute law even if that law should violate a rule of international law’.⁴⁶

So how does international law become part of Australian law and therefore applicable before Australian courts? The power of Australia to enter into international treaties has been confirmed to be an executive power under Section 61 of the Constitution of Australia.⁴⁷ (English history and its effect on common law is the main reason for this).⁴⁸ However, as we have just seen, this does not make these treaties part of Australian law. The power of the Commonwealth parliament to pass legislation to implement the executive’s treaty commitments into Australian law stems from the external affairs power in section 51 (xxix) of the Constitution:

⁴³ Ibid 213-5.

⁴⁴ Gillian Triggs, ‘Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law’ (2003) 25(4) *Sydney Law Review* 507, 516.

⁴⁵ *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 (28 January 2015) 462 (per Keane J).

⁴⁶ citing: *Polites v The Commonwealth* [1945] HCA 3; (1945) 70 CLR 60 at 69, 74, 75, 78, 79, 81; [1945] HCA 3; *Koowarta v Bjelke-Petersen* [1982] HCA 27; (1982) 153 CLR 168 at 204; [1982] HCA 27; *Kartinyeri v The Commonwealth* [1998] HCA 22; (1998) 195 CLR 337 at 384 [97]; [1998] HCA 22. See also Hans Kelsen, *Principles of International Law* (1952) 245 and Rosalie Balkin ‘International Law and domestic Law’ in Blay et al (eds) *Public International Law* (2nd edition, OUP, 2005) 122-123 and 124-125 regarding the separation of powers.

⁴⁷ *R v Burgess; Ex Parte Henry* (1936) 55 CLR 608 per Latham CJ at 644; *Polyukhovich v Commonwealth* [1991] HCA 32; (1991) 172 CLR 501, especially Mason CJ at 528; Balkin, above note 46, 134. See generally re executive power Peter Gerangelos, ‘The Executive Power of the Commonwealth of Australia: section 61 of the Commonwealth Constitution, ‘Nationhood’ and the Future of the Prerogative’ (2012) 12 (1) *Oxford University Commonwealth Law Journal* 97, 108; Gabrielle Appleby and Stephen McDonald, ‘Looking at the Executive Power through the High Court’s New Spectacles’ (2013) 35 *Sydney Law Review* 253.

⁴⁸ L Zines, *The High Court and the Constitution* (The Federation Press, 5th edn, 2008) 358.

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...
(xxix) external affairs;
...⁴⁹

The DFAT notes that ‘all treaties (except those the Government has decided are urgent or sensitive) are tabled in both Houses of Parliament for at least 15 sitting days prior to binding treaty action being taken’.⁵⁰ The Joint Standing Committee on Treaties considers the treaty. This process, which is accompanied by a National Interest Analysis of the treaty, is, ordinarily, put before parliament prior to the treaty being binding on Australia.⁵¹ The process of implementation follows, which often involves the parliament in considering and passing legislation, for the treaty to become part of Australian law.

8.2 International and non-international armed conflicts and respect for the Geneva Conventions or for international humanitarian law

It is also necessary to make some comments about the application of IHL because, while a number of provisions of IHL are applicable at all times⁵², the bulk of IHL is only applicable during times of armed conflict (that is, when certain thresholds of conflict have been reached). Different aspects of IHL may apply in certain circumstances depending on the nature of the conflict and the legal frameworks (and sometimes policy frameworks) binding on the parties involved. The International Criminal Tribunal for the former Yugoslavia has held that,

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.⁵³

This is to be distinguished from a situation of violence that falls short of this threshold, such as ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of

⁴⁹ *Australian Constitution*

⁵⁰ Australian Government, *Treaty making process* <<http://www.dfat.gov.au/international-relations/treaties/treaty-making-process/Pages/treaty-making-process.aspx>>.

⁵¹ *Ibid.*

⁵² Including many provisions discussed in this thesis such as Common Article 1, Article 36 of AP I and the obligations to disseminate the texts of the Four Geneva Conventions and their APs.

⁵³ *Prosecutor v. Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (ICTY Appeals Chamber, 2 October 1995) [70]. See also *Prosecutor v Kunarac*, (Judgment) (ICTY, Appeals Chamber, 12 June 2002) [55]–[56].

violence and other acts of a similar nature'⁵⁴, which are specifically excluded from the application of the laws of armed conflict.

The Four Geneva Conventions of August 12, 1949 and AP I thereto, apply in times of international armed conflict. That is, when two or more states resort to armed force between each other. Specifically, Common Article 2 of the Four Geneva Conventions provides that,

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation ... even if the said occupation meets with no armed resistance.

Article 3 of AP I notes that it applies 'in the situations referred to in Article 2 common to those Conventions'.

Common Article 3 extends a small part of the scope of the Four Geneva Conventions to situations of armed conflicts not of an international character, and consequently Common Article 1 to situations of armed conflicts not of an international character.⁵⁵ Common Article 3 provides for minimum standards of treatment in all situations of armed conflict and prohibits conduct such as torture, the taking of hostages and summary executions, as well as requiring the care of the sick and wounded.⁵⁶ It has been noted that, by virtue of Common Article 3, the obligation to respect and ensure respect the subject of this thesis is applicable to both states and organized armed groups.⁵⁷

The specific legal framework for non-international armed conflicts is provided for in AP II. Non-international armed conflicts differ from 'armed conflicts not of an international character' in that they are specifically identified, by AP II, as conflicts,

which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible

⁵⁴ AP II art 1(2).

⁵⁵ Crowe and Weston-Scheuber, above note 7, 150.

⁵⁶ Common Article 3 (1).

⁵⁷ Dormann and Serralvo, above note 17, 2.

command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.⁵⁸

AP II does not include a reference to respect and ensure respect. Further, Article 3(2) notes that,

[n]othing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

As such, reading the treaty law, it can be concluded that in times of international armed conflict there is an obligation on States Party to the Geneva Conventions and AP I to respect and ensure respect for the rules contained in those documents. However, the applicability of this obligation to situations of non-international armed conflict, and to the field of IHL more broadly is not so clear. Customary IHL has been held to take the obligation further than the treaty text.

The ICRC Customary Law Study rule 139 provides that ‘[e]ach party to the conflict must respect and ensure respect for IHL by its armed forces and other persons or groups acting in fact on its instructions, or under its direction and control’.⁵⁹ It is also noted that case law, the Security Council and some national military manuals and legislation extend this obligation to ensuring that civilians also do not violate IHL.⁶⁰ Rule 144 provides that ‘[s]tates may not encourage violations of IHL by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of [IHL]’.⁶¹ The ICRC Customary Law Study notes that ‘the obligation to respect and to ensure respect for [IHL] is found in numerous military manuals’.

Further, it is clear from the case law of the International Court of Justice (ICJ) that, in so far as the distinction between types of armed conflicts exists, it is immaterial to the application of the customary law obligation to respect and ensure respect for IHL. The ICJ in *Nicaragua*, after finding the existence of ‘an armed conflict which is “not of an international

⁵⁸ AP II art 1.

⁵⁹ ICRC Customary Law Study, above note 16, rule 139.

⁶⁰ *Ibid*, 496.

⁶¹ *Ibid* 509.

character”⁶², went on to find that the obligation ‘in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them’ applies.⁶³

As such, in this thesis the Common Article 1 obligation is discussed on the understanding that it applies to all situations to which IHL applies, either by treaty or by custom.

8.3 The value of complying with Common Article 1

This thesis argues for the existence of a legal obligation under Common Article 1 and encourages more to be done by Australia towards compliance with this legal obligation. The underlying principle behind making any argument that a legal obligation should be complied with is the importance of the rule of law to our very way of life. Justification for why a nation should comply with the rule of law is at least a thesis topic itself. It has been widely noted that the rule of law does not have a universal definition.⁶⁴ This thesis does not attempt to go much beyond stating that because Common Article 1 imposes on Australia, as a State Party to the Four Geneva Conventions and their Additional Protocols, a legal obligation (the content of which is discussed in Chapter two) then Australia should comply with it. As was noted by the High Court of Australia in *Teoh*,

ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention.⁶⁵

Further, it is clear that there is also the added value that comes with being, and being seen to be, a good international citizen that attaches to compliance with this legal obligation. It is clear that Australia prides itself on being a good international citizen and on respect for the rule of law. This tradition, which is enshrined in the Australian Constitution⁶⁶, is often cited by leaders in both political and judicial life. Australian Herbert (Doc) Evatt who presided over the General Assembly of the United Nations (UN) when it adopted the Universal

⁶² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, (Judgment) [1986] ICJ Rep [219]

⁶³ *Ibid* [220].

⁶⁴ See, eg. Kevin Lindgren, ‘The Rule of Law: its State of Health in Australia’ (Paper presented <<http://www.ruleoflaw.org.au/wp-content/uploads/2012/10/Lindgren-Rule-of-Law-Its-State-of-Health-in-Australia-20121.pdf>>.

⁶⁵ *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353 per Mason CJ and Deane J at 365

⁶⁶ But see Andrew Sykes, ‘The Rule of Law As An Australian Constitutional Promise’ (2002) 9 (1) *Murdoch University Electronic Law Journal* <<http://www.austlii.edu.au/au/journals/MurUEJL/2002/2.html>>.

Declaration of Human Rights in 1948 is often remembered with great respect for his strong belief in the rule of law.⁶⁷ The Hon Murray Gleeson, then Chief Justice of Australia, quite simply noted ‘public confidence demands that the rule of law be respected’.⁶⁸ John Howard, then Prime Minister of Australia noted ‘the strength and vitality of Australian democracy rests on three great institutional pillars... [including] the rule of law upheld by an independent and admirably incorruptible judiciary’.⁶⁹ Debate exists from time to time in this country as to Australia’s record of compliance with the rule of law. Former Prime Minister Malcolm Fraser’s 2007 address noted that ‘[i]n the name of national security in the last seven years, there has been increasing disregard for the Rule of Law’.⁷⁰ However, that the rule of law is a principle fundamental to our democracy is never in dispute.

Australia also expects compliance with the rule of law by other nations.⁷¹ The Attorney-General’s Department declares ‘[w]e advance the rule of law internationally by actively promoting adherence to the global rules-based system and helping to build effective governance and stability in our region.’⁷² In announcing Australia’s new aid paradigm the Foreign Minister Julie Bishop announced that ‘effective governance to help development partners strengthen accountability, transparency and the rule of law’ as one of six core priority areas for the Australian aid program.⁷³ Further, promoting adherence to the rule of law is also frequently cited by the ADF as a reason for its deployment. The ADF notes ‘[p]rinciples of democratic government, including a respect for the rule of law and human

⁶⁷ George Williams, ‘What would Evatt do?’ (2011) 10(1) *Evatt Journal* <http://evatt.org.au/papers/what-would-evatt-do.html>.

⁶⁸ Murray Gleeson, ‘Courts and the Rule of Law’ (Speech delivered at Melbourne University Rule of Law Series, 7 November 2001).

⁶⁹ John Howard, ‘A sense of balance: the Australian Achievement in 2006’ (Speech delivered at the National Press Club, Canberra, 25 January 2006).

⁷⁰ Malcom Fraser, ‘Finding Security in Terrorism’s Shadow: The importance of the rule of law’ (Speech delivered at The University of Melbourne, 25 October 2007).

⁷¹ Recently Australian Foreign Minister Julie Bishop is reported to have raised the rule of law with both Nauru and China. See, eg. Andie Noonan, ‘Foreign Minister Julie Bishop ‘seeks assurances’ from president Baron Waqa that Nauru adhering to rule of law’ *ABC News* (online) 9 July 2015 <http://www.abc.net.au/news/2015-07-10/bishop-seeks-assurances-nauru-adhering-to-rule-of-law/6610946>; John Garnaut, ‘Australia will stand up to China to defend peace, liberal values and the rule of law: Julie Bishop’ *Sydney Morning Herald* (online) 9 July 2014 < <http://www.smh.com.au/federal-politics/political-news/australia-will-stand-up-to-china-to-defend-peace-liberal-values-and-the-rule-of-law-julie-bishop-20140709-zt1rf.html>>.

⁷² Australian Government, ‘Rule of Law’, Attorney-General’s Department <https://www.ag.gov.au/About/Pages/Ruleoflaw.aspx>

⁷³ Julie Bishop, The new aid paradigm (Speech delivered at the National Press Club, Canberra, 18 June 2014).

rights, as well as social equity and fairness, are important to all Australians'.⁷⁴ Australia also prides itself on a strong tradition of compliance with IHL. Then Chief of the Defence Force, Admiral Barrie, included compliance with the laws of armed conflict as one of the seven core qualities of the ADF in his publication *The Australia Approach to Warfare*.⁷⁵

In light of both these claims to compliance with legal frameworks, and the fact that Common Article 1 is a legal obligation that Australia has agreed to be bound by, there is value in Australia doing so. However, this does still raise the question why should this cause be taken up by Australia in the absence of any real capacity of the international community to enforce compliance with Common Article 1. There is an increasing international acceptance of the notion that the most serious violations of the laws and customs of war should induce those states with capacity to ensure respect to do so (as evidenced by the Responsibility to Protect notion and arguably international actions such as the UN Security Council response in Libya in 2011⁷⁶). The international community remains a long way from achieving universal respect for the Four Geneva Conventions, but states are now less able to stand by and do nothing in the face of serious violations of international law than they were 20 years ago. However, sadly for the victims of armed conflict, the obligation to take positive steps 'in order to stop severe violations' of the Four Geneva Conventions is only actioned in some cases⁷⁷ and states can choose from a range of measures (as discussed further in chapter two) available to fulfil this obligation – subject to their discretion and their ability to influence the violating state.⁷⁸ In this sense Common Article 1 presents an opportunity for states to play a role as a force for good in the international community in seeking to prevent violations of IHL from occurring, both domestically and in relation to conflicts abroad. This means that, for well-resourced and influential states, such as Australia, Common Article 1 can be seen as providing a basis for a range of actions, both domestically and vis-à-vis other states, to respect and ensure respect for IHL. Australia should embrace this and in doing so make a valuable contribution to creating an international norm of effective IHL compliance.

⁷⁴ Australian Defence Doctrine Publication–D (ADDP–D)—Foundations of Australian Military Doctrine, edition 3 (31 May 2012) [4.9]. See also [1.7], [2.32].

⁷⁵ CA Barrie, *The Australian Approach to Warfare*, (DOD, June 2002), 27.

⁷⁶ UN SCOR, 6491th mtg, UN Doc S/RES/1970 (26 February 2011)

⁷⁷ States will keep their own interests paramount in choosing whether to adopt a certain course of action.

⁷⁸ Birgit Kessler, The Duty to 'Ensure Respect' Under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts, 44 *German Yearbook of International Law* (2001) 498, 505.

CHAPTER TWO: THE NATURE OF THE OBLIGATION TO RESPECT AND TO ENSURE RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN ALL CIRCUMSTANCES

Chapter two reviews literature on Common Article 1, including its drafting history. It answers the question what is the nature of the obligation to respect and ensure respect pursuant to Common Article 1? It notes that, despite some uncertainty surrounding the meaning of Common Article 1 over the years, today it is understood as constituting a clear legal obligation. The scope of this obligation is articulated in part (respect) by other provisions of the Geneva Conventions themselves and the requirement to implement these provisions in good faith, and in part (ensure respect) determined by the capacity and influence of a state to ensure respect by a third state in a particular circumstance. The chapter examines the application of the principles of good faith and due diligence obligation to the interpretation of the scope of Common Article 1. It argues that Common Article 1 has an important role to play, and that states should view it as the source of an obligation to act to assist victims of IHL violations.

1. Introduction

Common Article 1 provides that '[t]he High Contracting Parties undertake to respect and to ensure respect for the [...] Convention [and Protocol] in all circumstances'.¹ This is a unique provision in international law² and its meaning and significance have been the subject of some debate and evolution over the years. It has been called both 'the nucleus for a system of collective responsibility'³ and 'highly problematic'.⁴ Common Article 1 has been proclaimed

¹ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (hereinafter GC I); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (hereinafter GC II); *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (hereinafter GC III); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (hereinafter GC IV); *Protocol Additional to the Geneva Conventions of 12 August 1949*, and relating to the Protection of Victims of International Armed Conflicts (hereinafter AP I), 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol additional to the Geneva Conventions of 12 August 1949*, and relating to the Adoption of an Additional Distinctive Emblem (hereinafter AP III), 8 December 2005, 2404 UNTS 261 (entered into force 14 January 2007).

² While the same wording is used in Article 38(1) of the Convention on the Rights of the Child, that provision is derivative from the IHL obligations in Common Article 1 in so far as it requires that 'States parties undertake to respect and to ensure respect for the rules of IHL applicable to them which are relevant to the child'. *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 2 (entered into force 2 September 1990).

³ Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions revisited: Protecting collective interests' (2000) 837 *International Review of the Red Cross* 67, 68.

to have quasi-constitutional status like the Martens Clause⁵ and to have developed into customary IHL.⁶

Debate has existed as to whether the intention behind Common Article 1 was to restate existing principles of international law or create specific obligations.⁷ Focarelli has described it as either ‘redundant’ or having ‘introduced a new concept into international law’.⁸ In 1999 Kalshoven wrote a comprehensive analysis of the provision. He described it as a ‘ripening fruit’ that had emerged from a ‘tiny seed’ and noted the work of the ICRC in seeking to bring this obligation to the attention of states.⁹ However, Kalshoven concluded Common Article 1 creates a moral obligation, rather than a legal one.¹⁰ Kalshoven suggested that it could be a ‘suitable “new millennium pledge”’ for the UN to adopt ‘a solemn moral undertaking to respect and to ensure respect for [IHL].¹¹ As recently as 2010 another comprehensive analysis was undertaken by Focarelli. Focarelli also shies away from finding a specific legal obligation. Focarelli notes concern over its ‘indeterminacy’¹² and concludes Common Article 1 to be ‘a generic reminder of an obvious obligation to abide by the Geneva Conventions and of the fact that all contracting states are expected to see to it that all others abide by [them]’.¹³

However, as outlined below, a number of factors point to a further evolution of Kalshoven’s ‘tiny seed’ since his article in 1999. These factors include the ICJ’s decision in the *Wall*

⁴ Carlo Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’ (2010) 21(1) *The European Journal of International Law* 125, 171.

⁵ See Boisson de Chazournes and Condorelli, above note 3. Cf Focarelli, above note 4, 171.

⁶ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law – Volume 1: Rules*, (ICRC, 2005) (hereinafter ICRC Customary Law Study) rules 139, 144.

⁷ See generally, Theodor Meron, ‘The Geneva Conventions as Customary Law’ (1987) 81 (2) *American Journal of International Law* 348; Marco Sassoli, ‘State responsibility for violations of international humanitarian law’ (2002) 846 *International Review of the Red Cross* 421.

⁸ Focarelli, above note 4, 132.

⁹ Frits Kalshoven, ‘The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit’ (1999) 2 *Yearbook of International Humanitarian Law* 3, 4, 60. See also Hans- Peter Gasser, ‘Chapter 2 Ensuring respect for the Geneva Conventions and Protocols: The role of third states and the United Nations’ in Meyer, M (ed) (1993) *Effecting Compliance: armed conflict and the new law* (British Institute of International and Comparative Law, London, Vol 2) 15, 48. Even those who dispute the legal basis for this, see it as a moral obligation: ‘when it comes to reading into Article 1 any effect beyond the sphere of the state’s internal affairs, it lies in adding to the state’s *right* as a Party to the Conventions to make other states respect their terms, a *moral incentive* or ‘obligation’ to do so’.

¹⁰ *Ibid.* Moral rather than legal in the sense that it is not a primary obligation for which, in failing to implement it, states can be held legally responsible.

¹¹ *Ibid.* 61.

¹² Focarelli, above note 4, 170.

¹³ *Ibid.*

*Advisory Opinion*¹⁴, Common Article 1's citation as a catalyst for a nuclear weapons prohibition¹⁵, the ICRC's continued push for recognition of the role of the Common Article 1 obligation¹⁶ and the general move by the international community towards accountability of both states and individuals for crimes against humanity, genocide and war crimes as evidenced by the development of the Responsibility to Protect doctrine, the findings of the ICJ in the *Bosnia Genocide case*¹⁷ and the establishment of the International Criminal Court (ICC). Further, the concern over Focarelli's 'indeterminacy' of Common Article 1 is not determinative of it not having a legal status. Rarely has an international obligation been held to be too vague to create legal obligations.¹⁸ Despite some uncertainty surrounding the meaning of Common Article 1 over the years, it now seems settled that states have a number of obligations that stem, at least in part, from Common Article 1.¹⁹

This chapter explores the meaning of this provision to arrive at the conclusion that a specific legal obligation²⁰ exists, both within a state or on a territory, and vis-à-vis third party states²¹ or other actors, to respect and ensure respect for IHL. The obligation to respect IHL requires the good faith implementation of the provisions of IHL by states. Part two of this chapter considers the interpretation of the respect component of Common Article 1. However, while

¹⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 [158]. Note that this decision pre-dates Focarelli's analysis. Focarelli discusses the Wall Advisory Opinion: Focarelli, above note 4, 168-9.

¹⁵ Juan Manuel Gomez Robledo, 'Chair's Summary' (Speech delivered at the Second Conference on the humanitarian impact of nuclear weapons, Nayarit, Mexico, 14 February 2014).

¹⁶ See particularly, Knut Dormann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations' *International Review of the Red Cross First View Articles* (CUP, 30 January 2015), 3.

¹⁷ *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgement) (2007) ICJ Rep 43.

¹⁸ The ICJ has specifically held that Common Article 1 creates legal obligations. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 [158]. For example a provision that has been held to be too vague *contra*, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary objections)* [1996] ICJ Rep. Article 1 of the Treaty of 1955 between Iran and the United States, '[t]here shall be firm and enduring peace and sincere friendship between the United States ...and Iran'. The Court held (at [28]) 'that Article 1 must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied' and at [31] that 'Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court'.

¹⁹ Marco Sassoli, above note 7, 421.

²⁰ See also Cassese, who phrases this as a 'secondary rule' laying down 'a general obligation relating to how all the specific obligations laid down in the Conventions must be fulfilled by each specific contracting State both as regards its own compliance with those obligations and compliance by other contracting States. Antonio Cassese, *International Law* (Oxford University Press, 2005, 2nd ed) 18.

²¹ See generally regarding the controversy over the third State obligations Focarrelli, above note 4, 127 and 144-151.

the obligation is one with clear legal parameters, that the scope of the obligation in relation to ‘ensure respect’ will vary in each circumstance depending on the capacity of the third state and the ability of the third state to influence the transgressor state or other actor. Part three of this chapter considers the interpretation of the ensure respect component of Common Article 1. In doing so it considers the principles of treaty interpretation and the concept of due diligence in international law. Part four outlines the actions not envisaged by Common Article 1. Part five notes possible actions third party states may take to ensure respect.

2. Respect for IHL in all circumstances – good faith treaty implementation

The Geneva Conventions themselves mention a number of measures that States Party are required to take to implement them. These include:

- disseminating the texts of the Geneva Conventions²²
- protecting the red cross, red crescent and red crystal emblems²³
- the requirement to enact legislation to provide effective penal sanction for breaches²⁴
- ensuring that medical and religious personnel have adequate identification (such as a distinctive emblem and identity card)²⁵
- identifying potential hospital and safety zones²⁶
- identifying medical aircraft²⁷
- ensuring that there is the capacity and process to create a national information bureau for prisoners of war and civilians detained.²⁸

There is an obligation for states to ensure that their armed forces comply with IHL when abroad²⁹ and that legal advisors of the armed forces are available to commanders in the

²² GC I art 47, GC II art 48, GC III art 127, GC IV art 144, AP I art 83, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1979), art 19.

²³ GC I art 53; see also AP III.

²⁴ GC I art 49; GC II art 50; GC III art 129; GC IV art 146; AP I art 86.

²⁵ GC I art 40.

²⁶ GC I art 23.

²⁷ GC I art 36; GC II art 39.

²⁸ GC III art 122; GC IV art 137.

field.³⁰ Some recommendations are also included such as ensuring that journalists have specific identity cards should they wish to carry them.

With regard to weapons, States Party to AP I must consider the compatibility of new weapons technologies with the fundamental principles of IHL.³¹ States must also ensure that the principles of weapons law, particularly as set out in AP I, are known to the members of their armed forces. This chapter will explore these measures in considerably more detail.

Many of these obligations apply in times of peace as well as in times of war. Meeting these obligations is a process that requires involvement from a range of areas within government and society including town planners, educational institutions, hospitals, the press, civil society, Red Cross and Red Crescent societies, weapons manufacturers, civil defence, shipping and aircraft authorities and environmental advisors.³² Implementing the Geneva Conventions requires significant expertise, resources and commitment from the implementing state, and may include assistance from the international community,³³ including that which is rendered under Common Article 1.

The obligation to respect in all circumstances also refers to actions by states themselves to make sure those within their jurisdiction and territory respect IHL. That is, states must take measures to ensure that all individuals and entities within their jurisdiction and territory know about and comply with IHL. This raises difficulties for states when trying to instill respect in non-state armed actors and also in corporations within their territory and control. There are a number of initiatives by states, and international organisations, which are looking at best practice in terms of getting non-state armed actors to comply with IHL. These including the Montreux Document on pertinent international legal obligations and good practices for states

²⁹ *Prosecutor v. Dusko Tadic (Judgment)* (ICTY, Appeals Chamber, Case No. IT-94-1, 15 July 1999); see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Provisional Measures)* [1993] ICJ Rep Order of 8 April 1993, 1, and Order of 13 September 1993, 325.

³⁰ AP I art 82

³¹ AP I art 36.

³² Ibid 182.

³³ Helen Durham, 'From Paper to Practice: The role of treaty ratification post conflict' in Bowden et al (eds) *The Role of International Law in Rebuilding Societies after Conflict*, CUP, 2009 at p. 180. Note also the ICESCR actually states that States must take advantage of the support of other States to achieve their obligations.

related to operations of private military and security companies during armed conflict³⁴ and Geneva Call's Deed of Commitment³⁵ through which non-state actors can adopt IHL obligations.

Relevantly, what is required of states, in relation to discharging the respect obligation, is that they act in good faith.³⁶ The good faith obligation has been described as 'one of the oldest principles of international law'³⁷. This principle is reflected in Article 26 of the *Vienna Convention on the Law of Treaties* which provides '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'.³⁸ Villiger notes that good faith includes the notions that 'legitimate expectations raised in other parties are to be honoured' and 'the prohibition on the abuse of rights, flowing from good faith, prevents a party from evading its obligations'.³⁹ Meron notes that this obligation includes not encouraging violations of treaties but also taking extra measures to ensure no violations.⁴⁰

In the 1987 Commentaries to the Additional Protocols the ICRC notes that the respect obligation is included in the good faith obligation, in Article 26 of the *Vienna Convention on the Law of Treaties*. As such, based on the principle of good faith, all states have obligations to implement the provisions of IHL in good faith in order to respect IHL.

2.1 A note about 'in all circumstances'

The 'in all circumstances' phrase, in Common Article 1, has been interpreted many different ways.⁴¹ In the debates on the 1929 Geneva Conventions, it was argued that the phrase 'in all circumstances' precisely intended to make clear that the Conventions did not just apply

³⁴ *Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict*. (Swiss Government and ICRC, 2009)

³⁵ Geneva Call, *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action* (2000), *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict* (2010), *Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination* (2012) < <http://www.genevacall.org/how-we-work/deed-of-commitment/>

³⁶ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 8 ILM 679 (entered into force 27 January 1980) ('*Vienna Convention on the Law of Treaties*') art 26.

³⁷ Christopher C Joyner, *International Law in the 21st Century: Rules for Global Governance* (Rowman & Littlefield Publishers, 2005) 55

³⁸ *Vienna Convention on the Law of Treaties* art 26.

³⁹ Villiger, M 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage,? The 'Crucible' Intended by the International Law Commission' in Cannizzaro, E (ed) *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 109

⁴⁰ Meron, above note 7, 353-4.

⁴¹ See Focarelli, above note 4, 137 and 157-163.

where all parties to the conflict were State Parties to the Conventions, but also when one party to the conflict was not a party to the Conventions.⁴² The 1930s Commentaries also noted that the 'in all circumstances' reference confirms that the Convention must be implemented in peace time as well as in times of international armed conflict.⁴³ The 1950s Commentaries note these earlier interpretations. However, further to this idea, it was posited that 'no Power bound by the Convention can offer any valid pretext, legal or other, for not respecting the Convention in all its parts'⁴⁴ and that the Conventions apply to wars of aggression or unjust wars just as they do to self-defence or just wars.⁴⁵ The Commentary to AP I particularly notes the idea that 'any idea of reciprocity should be disregarded'.⁴⁶ It is noted that 'in all circumstances' does not apply to internal armed conflict. This is in accordance with the fact that the Geneva Conventions (save for Common Article 3) do not apply in times of internal armed conflict.⁴⁷

Although 'in all circumstances' in Common Article 1 is not necessarily the only source for the ideas in the preceding paragraph⁴⁸ they continue to be understood through, among other sources, Common Article 1. Focarrelli notes the phrase:

is frequently included in other specific provisions of the Geneva Conventions, and more often than not its more plausible meanings in relation to common Article 1 are already found in other *ad hoc* provisions of the same Conventions.⁴⁹

In light of this it is clear that little turns on this phrase and that respect and ensure respect are the key components of Common Article 1.

⁴² Focarrelli, above note 4, 158.

⁴³ Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949. Volume I* (ICRC, 1952) 26-27.

⁴⁴ *Ibid.*

⁴⁵ *Ibid* 27: 'no Power bound by the Convention can offer any valid pretext, legal or other, for not respecting the Convention in all its parts. The words "in all circumstances" mean in short that the application of the Convention does not depend on the character of the conflict. Whether a war is "just" or "unjust", whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected.'

⁴⁶ Y. Sandoz, C. Swinarski and B. Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC and Martinus Nijhoff, Geneva, 1987), 37.

⁴⁷ See particularly Geneva Conventions Common Article 2. This is save for the clauses contained in Common Article 3 and those aspects which have been found to constitute customary international humanitarian law binding in times of non-international armed conflict.

⁴⁸ Focarrelli, above note 4, 163-4.

⁴⁹ Focarrelli, above note 4, 163-164.

3. Ensuring respect for IHL in all circumstances – as interpreted pursuant to treaty interpretation rules and the principle of due diligence

The concept of ensuring respect for IHL is not as easy to articulate as the concept of respect for IHL. However, as Sassoli notes the Common Article 1 obligation ‘is today unanimously understood as referring to violations by other States’.⁵⁰ Further, in a recent article ICRC Chief Legal Officer Knut Dormann and his colleague Jose Serralvo stated that Common Article 1:

goes beyond an entitlement for third States to take steps to ensure respect for IHL. It establishes not only a right to take action, but also an international legal obligation to do so.⁵¹

Dormann and Serralvo further note that ‘the question...is not so much whether [Common Article 1] imposes a binding obligation, but rather what type of obligation lies beneath it’.⁵² In order to determine the meaning and scope of Common Article 1’s ensure respect component the principles of treaty interpretation in the *Vienna Convention of the Law of Treaties*⁵³ and the international law principle of due diligence are discussed.

Article 31 of the *Vienna Convention on the Law of Treaties* provides that:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.

⁵⁰ Marco Sassoli, above note 7, 421.

⁵¹ Dormann and Serralvo, above note 16, 17.

⁵² Ibid.

⁵³ Note that the Vienna Convention on the Law of Treaties is being used here to interpret what is both a treaty and customary law obligation.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 provides that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Merón notes there is no evidence to suggest that Common Article 1 was intended to codify existing principles of international law: '[t]hey appear to have chosen the words "and to ensure respect" deliberately "to emphasize and strengthen the responsibility of the Contracting Parties"'.⁵⁴ Benvenuti also asserts that Common Article 1 is clearly expressing a particular obligation through its going beyond the ordinary obligation to act in good faith to identify a specific obligation.⁵⁵ However, as the ordinary meaning is not clear, as evidenced by the literature, and there has not been any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, this chapter will look at the subsequent practice in the application of the treaty⁵⁶ (Article 31(3)(b)), other relevant rules of international law applicable in the relations between the parties (Article 31(3)(c)) and the drafting history of Common Article 1 (Article 31(4) and Article 32).

This will be followed by a consideration of the due diligence principle.

3.1 Subsequent practice in the application of the treaty

The ICRC Customary Law Study shows that most references to Common Article 1 and/or the wording 'respect and ensure respect for IHL' are in the context of calls to warring parties to comply with their obligations to respect the principles of IHL.⁵⁷ For example, the wording of Security Council Resolutions is often couched as an 'appeal to both parties strictly to abide by applicable rules of [IHL]' or indeed as an appeal to the 'leaders' to ensure their group or

⁵⁴ Merón, above note 7, 353.

⁵⁵ Paolo Benvenuti, 'Ensuring Observance of International Humanitarian Law: Function, extent and limits of the obligations of third states to ensure respect for IHL' [1989-90] *Yearbook of International Law*, 30.

⁵⁶ This provision is customary international law: Cassese, above note 20, 129 citing a number of cases.

⁵⁷ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law – Volume II (Part 2): Practice*, (ICRC, 2005), 3156-3187.

faction complies with IHL.⁵⁸ The Council of Europe has adopted the approach of inviting member states to ‘appeal’ to warring parties to respect the Geneva Conventions.⁵⁹

At the Teheran Conference on Human Rights in 1968, attended by 84 states⁶⁰, the notion of third party states having responsibilities to ensure respect for the Conventions received support. Resolution XXIII of the Teheran Conference held that:

States parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in armed conflict.⁶¹

However, Kessler notes that it was really in the aftermath of the International Conference for the Protection of Victims of War in 1993 that it could be argued that ‘no State can deny any longer the existence of a positive obligation under Common Article 1 to ensure that the Conventions are respected’.⁶² The Final Declaration of the International Conference for the Protection of Victims of War specifically referenced Common Article 1 and noted an undertaking by the participants to:

to act in cooperation with the UN and in conformity with the UN Charter to ensure full compliance with international humanitarian law in the event of genocide and other serious violations of this law.⁶³

UN General Assembly Resolution on the Decade of International Law in 1993 reminded ‘all States of their responsibility to respect and ensure respect for IHL in order to protect the victims of war’.⁶⁴ Further, the UN Sub-Commission on Human Rights adopted a resolution on the role of universal or extraterritorial competence in preventive action against impunity

⁵⁸ Ibid 3168-73. See also Dormann and Serralvo, above note 16, 12.

⁵⁹ Council of Europe, Parliamentary Assembly Res 984 (30 June 1992).

⁶⁰ United Nations, *Proclamation of Tehran* (UN Audiovisual Library of International Law) <http://legal.un.org/avl/pdf/ha/fatchr/fatchr_ph_e.pdf> .

⁶¹ *International Conference on Human Rights*, Held in Teheran, Iran from (22 April – 13 May 1968).

⁶² Birgit Kessler, The Duty to ‘Ensure Respect’ Under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts, 44 *German Yearbook of International Law* (2001) 498, 505.

⁶³ *Final Declaration of the International Conference for the Protection of Victims of War*, Geneva (30 August - 1 September 1993). Note Kessler’s reference to this.

⁶⁴ UN GAOR, UN Doc G/R/48/30 (9 December 1993) .

which specifically referenced Common Article 1.⁶⁵ The Conference of High Contracting Parties to the Fourth Geneva Convention declared:

The participating High Contracting Parties welcome and encourage initiatives by States Parties, both individually and collectively, according to art. 1 of the Convention and aimed at ensuring respect...⁶⁶

A Declaration made at the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict noted a ‘determination to do everything in our power in order that States and all parties to armed conflicts honour their duties as regard International Humanitarian Law’.⁶⁷ The Security Council has acknowledged its role to ‘ensure respect’ in resolutions such as SC Resolution 1502 of 2003 condemning violence against UN and humanitarian personnel in conflict zones: ‘[r]eiterating its primary responsibility for the maintenance of international peace and security and, in this context, the need to promote and ensure respect for the principles and rules of international humanitarian law.’⁶⁸

The scope of the positive obligation to ensure respect is more difficult to articulate because it is dependent on the capacity of the third-party state in question. Following the 1977 kidnap of a number of French citizens in Mauritania by POLISARIO, the French Foreign Minister, referencing Common Article 1, noted Algeria was obligated not to support a violation of the prohibition on kidnapping.⁶⁹ Palestine relies on the Common Article 1 interpretation that says that other states are under an obligation to ensure that Israel complies with the Fourth Geneva Convention as regards its occupation of Palestinian lands.⁷⁰ In response to the Libyan conflict in 2011, sanctions against Libyan leaders provide an example of ensuring respect for IHL.⁷¹ And similarly in respect of Syria other states have taken some measures to try and ensure

⁶⁵ UN Sub-Commission on Human Rights, preamble, Res 2000/24(18 August 2000).

⁶⁶ Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention, Held at Geneva (5 December 2001) 4-5, 12 and 17.

⁶⁷ Declaration made at the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Held in Niger (18-20 February 2002) 4.

⁶⁸ SC Res 1502, UN SCOR, 4814th mtg, UN Doc S/RES/1502 (26 August 2003).

⁶⁹ Kessler, above note 62, 503.

⁷⁰ Kalshoven, above note 9, 57. The SC has also acknowledged this: see for example SC Res 681, UNSCOR, 2970 mtg, UN Doc S/RES/681 (20 December 1990). See also Dormann and Serralvo, above note 16, 14-15.

⁷¹ Dormann and Serralvo, above note 16, 15.

respect for IHL⁷², although the ongoing suffering in that country makes one question its effectiveness.

3.2 Evolution under international law towards extra-territorial effect

Pursuant to Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* other relevant rules of international law applicable in the relations between the parties may be considered in interpreting Common Article 1. Five concepts are particularly relevant to the discussion here: jurisprudence of the ICJ; commentary of the ICRC; obligations *erga omnes*; widely accepted human rights treaties which contain similar phrases and concepts; and the notion of complicity and the duty to cooperate to end serious breaches of peremptory norms. These concepts collectively support an interpretation of Common Article 1 having third party state effect because they demonstrate that the international community is increasingly finding all states have a role to play in preventing violations of the most serious of crimes.⁷³

3.2.1 Jurisprudence of the ICJ

Specific obligations not to engage in particular conduct vis-a-vis third party states have also been detailed by the ICJ with reference to Common Article 1. The *Nicaragua* judgment held that encouraging violations of IHL – in particular the provision of advice on how to violate – constitutes a breach of the Common Article 1 obligation to ensure respect for IHL.⁷⁴ Further, in the *Wall Advisory Opinion* case the ICJ held that all states were not ‘to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory...’; were not to ‘render aid or assistance in maintaining the situation created by such construction’; and were ‘under an obligation ... to ensure compliance by Israel with IHL as embodied in that Convention’.⁷⁵ This finding was made in light of both the *erga omnes* nature of the obligation of Israel to ‘respect the right of the Palestinian people to self-

⁷² Ibid 15.

⁷³ See generally, Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 (2) *International and Comparative Law Quarterly*, 279-320. McLachlan notes that Article 31 (3)(c) is expressing the idea that international law treaties are part of a the broader international law system and as such should be applied in the context of each other in so far as they can be. See especially 280-281.

⁷⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, (Judgment) [1986] ICJ Rep 388-9, [220]. But see Kalshoven, above note 9, 55-57.

⁷⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 [159].

determination, and certain of its obligations under international humanitarian law⁷⁶ and the Common Article 1 obligation.⁷⁷

3.2.2 *Commentary of the ICRC*

It is clear the ICRC sees a broad role for Common Article 1. There are a number of instances where the ICRC has appealed to third party states in relation to humanitarian concerns. The 1979 appeal by the ICRC with regards to the conflict in Rhodesia (now Zimbabwe) which called on all parties to comply with international humanitarian law, also requested States Party to the Geneva Conventions to take action.⁷⁸ In 1983, 1984 and 1989 appeals were made to all States Party to do their utmost to assure compliance by Iran and Iraq with international humanitarian law.⁷⁹ The August 1992 appeal of the ICRC to the parties involved in the Bosnia and Herzegovina conflict also included a reference to the collective responsibility of the ‘community of States party’ for compliance.⁸⁰

In his 60th Anniversary of the Geneva Conventions address Dr Jakob Kellenberger, Former President of the ICRC, noted

it has always been the view of the ICRC that all States have an obligation not only to respect, but also to ensure respect for international humanitarian law, as stated in common Article 1 of the Geneva Conventions. One way of doing so is through diplomatic means, whether through quiet diplomacy or in the intergovernmental bodies just mentioned. The ICRC sees great potential in making common Article 1 more operational and there are encouraging developments in this regard ...⁸¹

Some commentators have criticised the ICRC for its approach to interpreting parts of IHL more broadly than states intended them.⁸² However, Kessler credits the ICRC appeals to the international community to take action to stop violations, and the lack of criticism by states of these calls, as having created, throughout the 1980s and 1990s, a binding positive

⁷⁶ Ibid [155].

⁷⁷ Ibid [158].

⁷⁸ ICRC Annual Report, 1979, 13, see further ‘Action by the ICRC in the event of breaches of International Humanitarian Law’ (1981) 21 *International Review of the Red Cross* 76-83.

⁷⁹ ICRC Annual Report, 1983, 56-7; Annual Report, 1984, 60; Annual Report, 1989, 85.

⁸⁰ (1985) 25 *International Review of the Red Cross* 30-34. See also Dormann and Serralvo, above note 16, 13-15.

⁸¹ Jakob Kellenberger, ‘Ensuring respect for international humanitarian law in a changing environment and the role of the United Nations’ (Speech delivered at Ministerial Working Session, Geneva, 26 September 2009)

⁸² Kalshoven, above note 9; Focarelli, above note 4.

obligation on states to take such action to ensure respect for the Geneva Conventions by others.⁸³

More recently, Dormann and Serralvo note that in response to the current conflict in Syria, the European Union has held that ensure respect is ‘a collective obligation on all of us not only to respect but also to ensure that the parties to the conflict respect their humanitarian obligations’.⁸⁴

3.2.3 *Obligations erga omnes*

Obligations *erga omnes* are those obligations which, due to their nature as the most important of rights, concern all states when they are not protected.⁸⁵ The *Barcelona Traction* case in 1970 established the notion of ‘obligations towards the international community as a whole’ which were, by ‘their nature ...the concern of all States’ and which, ‘[i]n view of the importance of the rights involved, all states can be held to have a legal interest in their protection...’.⁸⁶ The ICJ has also held for the existence of obligations *erga omnes partes*, that is obligations owed to the States Party to the treaty in question, in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.⁸⁷

Meron states ‘the language to ensure respect’ was a conventional precursor to the *erga omnes* principles enunciated by the Court in *Barcelona Traction*’.⁸⁸ Gasser holds that ‘a substantial part of the rules of humanitarian character applicable in armed conflict are essential parts of the international legal order, either because they are so basic that they express “elementary considerations of humanity”, or because they are universally accepted as treaty law or as the

⁸³ Kessler, above note 62, 504. For a list of some of the appeals see in particular footnote 29. See also Meron, above note 7, at 354.

⁸⁴ Dormann and Serralvo, above note 16, 15-16 citing European Union Statement, with the alignment of Iceland, Montenegro, Serbia, Albania, Bosnia and Herzegovina and the countries of the Stabilization and Association Process, UN General Assembly: Humanitarian Situation in Syria (25 February 2014) <www.eu-un.europa.eu/articles/en/article_14647_en.htm>.

⁸⁵ See also Article 48 of the Articles on State Responsibility - any State, other than an injured State, is entitled to invoke the responsibility of another State, if the obligation breached is owed to the international community as a whole. *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UNGAOR, 56th sess, 85th plen mtg, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex.

⁸⁶ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase, Judgment)* [1970] ICJ Rep. 32 [33].

⁸⁷ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Judgment)* (20 July 2012) [2012] ICJ Rep, 31-32.

⁸⁸ Meron, above note 7, 353-4.

expression of uncontroversial custom.⁸⁹ These aspects of IHL are as such, obligations *erga omnes* and all states therefore have an interest in respecting them but also in ensuring respect for them – which includes taking steps to ensure this respect.⁹⁰

The links between obligations *erga omnes* and Common Article 1 were given consideration by the ICJ in the *Wall Advisory Opinion*.⁹¹

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I. C. J. Reports 1996 (I)*, p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.⁹²

Merón notes that the *erga omnes* character of much of IHL implies that third states have not only the right to make appropriate representations urging respect for these norms to states allegedly involved in violating them, but also a duty not to encourage others to violate the norms, and, perhaps, even to discourage others from violating them.⁹³ As such it is clear that concept of *erga omnes* supports a third party state interpretation of Common Article 1.

⁸⁹ Gasser, above note 9, 22-23.

⁹⁰ *Ibid* 23.

⁹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 [157-8]. Note however, the separate opinion of Judge Kooijmans at [40]-[41] regarding the Court's confusion between obligations *erga omnes* and serious breaches of preemptory norms. Note also the observations regarding the ICJ's eschewal of *jus cogens*: Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 (3) *European Journal of International Law* 491, 501-502.

⁹² *Ibid* [157-8].

⁹³ Merón, above note 7, 355.

3.2.4 Human rights treaties

International human rights law includes a number of provisions which contain similar wording or concepts to the obligation to respect and ensure respect which can be considered in light of Article 31(3)(c) *Vienna Convention on the Law of Treaties*. Article 2(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides:

[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.

Article 2(1) of the ICCPR, on reading its text, requires ensuring that such freedoms are secured within a State's territory or jurisdiction, apparently specifically limiting its application.⁹⁴ The original intention of the provision that became Article 2(1) of the ICCPR was to make it clear that states needed to implement the treaty into their own domestic legal frameworks should that be required for it to become binding on them.⁹⁵ However, it is clear that a positive duty well beyond implementing legislation is now understood by that provision.⁹⁶ This duty to ensure includes the state ensuring that it can itself respect the ICCPR but also that private actors are also prevented from 'impeding another individual's enjoyment of his rights'.⁹⁷

⁹⁴ See also the Convention on the Rights of Persons with Disabilities the phrase 'States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities' is used. However, article 4 is followed by a list of individual-compliance mechanisms, so any suggestion that the provision was intended to have relevance to other States is easily rebutted. *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 189 UNTS 137 (entered into force 3 May 2008) art 4.

⁹⁵ Manfred Nowark, *UN Covenant on Civil and Political Rights CCPR Commentary* (NP Engel Publisher, 2nd ed, 2005) 30-31 noting a US draft from 1949. The phrase '[e]ach State Party hereto undertakes to ensure to all individuals within its territory the rights set forth in this Convention' had added to it, by suggestions from France and Lebanon, the words respect and jurisdiction.

⁹⁶ Kabaalioglu, H 'The obligations to 'respect' and to 'ensure' the right to life' in Ramcharan, BG (ed) *The Right to Life in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1985) 180; Klein, E 'The duty to protect and ensure human rights under the International Covenant on Civil and Political Rights' in Klein, E (ed) *The duty to protect and ensure human rights* (Verlag Arno Spitz GmbH, Berlin, 2000) 298.

⁹⁷ Klein, above note 96, 302. Article (2) ICCPR that it should not be confused with the 'duty to fulfil' (that is an obligation on a State to transfer benefits to an individual such that they could realise a right). See also, Article 1 of the 1969 American Convention on Human Rights, provides that 'The States Parties to this Convention undertake to respect the rights and freedoms recognised therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms'. The Inter American Court of Human Rights interpreted this phrase to mean that 'to the effect that contracting states have an obligation to protect the rights set out in the Convention not only from their own acts but also from other non-state entities'. Focarelli, above note 4, 141.

Further, subsequent developments have partly expanded the jurisdictional element of these treaties.⁹⁸ General Comment 31 for example makes it clear that there is an extraterritorial nature to the ICCPR where another State Party has power or effective control.⁹⁹ The European Court of Human Rights has also rejected the notion of human rights treaties application being territorially limited.¹⁰⁰

The ICJ has also implied that customary international law obligations are not territorially limited.¹⁰¹

Further, Article 1 of the *Convention on the Prevention of Genocide and Punishment of the Crime of Genocide*¹⁰² imposes an obligation on States Party to ‘undertake to prevent and punish’ cases of genocide.¹⁰³ The ICJ held that this obligation:

is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever its circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonable available to them, so as to prevent genocide as far as possible.¹⁰⁴

The ICJ specifically noted that its decision in that case should not be seen as applicable to all treaties which contain obligations on States to prevent the commission of certain acts.¹⁰⁵ As will be discussed further below at 3.4, the observations around the capacity of the State to respond and around what constitutes due diligence by the ICJ in the *2007 Genocide case* are highly informative with regards to Common Article 1.

This analysis supports the third party State interpretation of Common Article 1.

⁹⁸ *Contra* Focarelli, above note 4, 139.

⁹⁹ UN Human Rights Committee. General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant (29 March 2004) [2]-[10]. The principle of respect and ensuring the rights of the Convention applying also ‘to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.’

¹⁰⁰ See *El Masri v The Former Yugoslav Republic of Macedonia* (2012) Eur Court HR; *Al Nashiri v Poland* (2014) Eur Court HR.

¹⁰¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Preliminary objections)* (1996) ICJ Rep [31].

¹⁰² *Convention on the Prevention of Genocide and Punishment of the Crime of Genocide*, 78 UNTS 277 (entered into force 12 January 1951).

¹⁰³ Of course indirectly Common Article 1 does this by referencing states ensure respect for the Conventions which includes the grave breach provisions.

¹⁰⁴ *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgement)* (2007) ICJ Rep [430].

¹⁰⁵ *Ibid* [429].

3.2.5 *Complicity and the duty to cooperate to end serious breaches of preemptory norms*

Conceptually similar in many ways to the idea of ensure respect in Common Article 1 are the notions of rules of state complicity¹⁰⁶ and the duty to cooperate to end serious breaches of preemptory norms in international law. In respect of states that are complicit in wrongful acts, the articles of state responsibility provide for their responsibility for being complicit.

For example, Article 16 of the Articles on State Responsibility¹⁰⁷ provides that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.¹⁰⁸

Further, Article 41 of the Articles on State Responsibility provides that States shall cooperate to bring to an end through lawful means any serious breaches by States of any obligations which arise under a peremptory norm of general international law.¹⁰⁹

In light of Article 31(3)(c) *Vienna Convention on the Law of Treaties*, which allows reference in treaty interpretation to ‘other rules of international law applicable between the parties’, the development of these rules and their application¹¹⁰ is also reflective of an evolution under international law towards a third party State interpretation of Common Article 1.¹¹¹

3.3 **Drafting history**

Article 31 of the *Vienna Convention on the Law of Treaties* provides that ‘[a] special meaning shall be given to a term if it is established that the parties so intended’. As will be seen the intended meaning of Common Article 1 was not clearly articulated by the

¹⁰⁶ Complicity in this context refers to a state aiding or assisting another State to carry out a wrongful act. See Georg Nolte and Helmut Philipp Aust, ‘Equivocal helpers - complicit states, mixed messages and international law’ (2009) 58(1) *International and Comparative Law Quarterly* 1, 5.

¹⁰⁷ See generally Cassese, above note 20, chapter 13; Malcolm N Shaw, *International Law* (2008) chapter 14. Debate exists as to the customary nature of this provision. See Nolte Aust, above note 106, 7-10.

¹⁰⁸ *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UNGAOR, 56th sess, 85th plen mtg, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex.

¹⁰⁹ *Responsibility of States for Internationally Wrongful Acts*, above note 85, arts 40 and 41.

¹¹⁰ See generally, James Crawford, *State Responsibility The general part* (CUP, 2013).

¹¹¹ Note Nolte and Aust, above note 106, who indicate many States preach the contrary of what they practice in some situations. See particularly, 27, 30.

Diplomatic Conference of 1949. Indeed, Kalshoven notes ‘how conspicuously little time and energy the Diplomatic Conference of 1949 spent on draft Article 1’.¹¹² As such it is not possible to argue that a special meaning was intended by the parties in respect of this provision.

Article 32 of the *Vienna Convention on the Law of Treaties*¹¹³ provides that the drafting history of a treaty provision can be considered to confirm the ordinary meaning of the provision which has been ascertained from the application of Article 31 of the *Vienna Convention on the Law of Treaties*. Subsequent practice in the application of the provision has shown that meaning today is ‘unanimously understood as referring to violations by other States’¹¹⁴. This can be confirmed by looking at the drafting history. The drafting history of Common Article 1 demonstrates that while very little attention was paid by States Party to this provision in the drafting of the Geneva Conventions, by the time of the 1977 Additional Protocols it was accepted that ensure respect was concerned with ensuring respect by third party States.

From a treaty interpretation perspective there are three dates which require analysis: 1929, 1949, 1977.¹¹⁵

3.3.1 1929

Article 25 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 27 July 1929 and Article 82 of the Convention relative to the Treatment of Prisoners of War of 27 July 1929, both in identical terms, provide:

The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances.

If, in time of war, a belligerent is not a party to the Convention, its provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto.¹¹⁶

¹¹² Kalshoven, above note 9, 27.

¹¹³ *Vienna Convention on the Law of Treaties* art 32.

¹¹⁴ Marco Sassoli, above note 7, 421.

¹¹⁵ The ICRC is currently undergoing a project to update the Commentaries on the Geneva Conventions and their additional protocols to ‘reflect the experience gained in applying the Conventions and Protocols during the last few decades’. Common Article 1 was specifically noted as being a particular area in which the commentaries needed updating as ‘[t]he international community’s understanding of the obligation ... has significantly expanded since the 1950s and it was noted that the updated Commentaries seek to capture and present this understanding.’: Jean-Marie Henckaerts, ‘Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the 21st Century’ (Transcript of ICRC interview, 12 July 2012). The updated Commentary on Common Article 1 was not yet available as at 17 December 2015.

The documents - the former of which was a revision of the original First Geneva Convention, the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, concluded in August 1864 and the latter of which was a new development in IHL arising principally from the maltreatment of prisoners of war during the First World War¹¹⁷ - are predecessors to the current Geneva Conventions concluded in 1949 which contain Common Article 1.

The origins of this particular wording came from an ICRC proposal (in the form of draft Conventions submitted to the 1929 Diplomatic Conference) to abolish the *si omnes* concept (that is that 'provisions shall cease to be obligatory if one of the belligerent Powers should not be a signatory to the Convention')¹¹⁸, with respect for the Conventions being required in all circumstances except specifically between a State Party and a non- State Party. That is, the involvement of a non- State Party would not affect the application of the rules between the State Parties involved.

With regards to the obligation to respect, Kalshoven argues:

paragraph 1 is the more or less accidental and, in effect, largely meaningless by-product of a heated debate about an entirely different issue of some importance, viz., the application of the Conventions in a war between belligerents not all of whom are parties to these instruments.¹¹⁹

That is, the wording that supports the notion of an obligation to respect the Conventions actually came about as a result of trying to make it clear that the provisions applied to a State even if its foe was not bound.¹²⁰ However, as is evident from the 1930 Commentary to the Conventions by the 1929 Diplomatic Conference Secretary General, the ICRC's Paul Des Gouttes, others read more into this. In particular, De Gouttes notes that the 'all

¹¹⁶ Article 82 differs very slightly in punctuation in part two of this paragraph: In time of war if one of the belligerents is not a party to the Convention, its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto.

¹¹⁷ Albeit drawing on earlier rules including the *Hague Rules* of 1899 and 1907. Gretchen Kewley, *Even Wars Have Limits The Law of Armed Conflict* (Australian Red Cross, 2nd ed, 2000) 31-32.

¹¹⁸ Kalshoven, above note 9, 7-8.

¹¹⁹ Ibid 7-8.

¹²⁰ Ibid 7-9. Kalshoven contrasts this provision with earlier treaties on this subject, such as the 1899 Hague Convention on Land Warfare, which allow for non-compliance with such treaty obligations when engaging in conflict with a non-State Party.

circumstances’ reference is to confirm that Convention must be implemented in peace time as well as in war time (albeit only during times of international armed conflict).¹²¹

3.3.2 1949 – the inclusion of ‘ensure respect’

The Diplomatic Conference which concluded the Four Geneva Conventions in their current form was held from April – August 1949.¹²² The obligation to respect and ensure respect was the subject of neither the Red Cross’¹²³ preliminary conference of July/August 1946 nor the April 1947 conference of government experts meetings.¹²⁴ However, shortly before the April 1947 conference an internal ICRC note, written by ICRC staff lawyer Claude Pilloud, raised the issue, apparently for the first time.¹²⁵ The note proposed the inclusion in each of the four Conventions of the first sentence of Article 25 and Article 82 – requiring respect and ensuring respect for the Conventions in all circumstances. The *si omnes* clause in Article 2 separated this issue out.¹²⁶ A subsequent internal ICRC note from August 1947, raised the question of how to bring civil war within the scope of the Conventions. This is the first indication of a ‘different mood’.¹²⁷ Whilst it did not lead to any discussion on this point at this time, Pilloud’s suggestion was ‘of singular importance, foreshadowing as it does the introduction of the phrase ‘to ensure respect’’.¹²⁸ A government, through signing the Conventions, does not just bind itself to the treaty, but also in effect its citizens, and the concept which underpins ‘ensure respect’ is that governments must not only respect the

¹²¹ See further, Ibid 6-10.

¹²² Final Record of the Diplomatic Conference convened by the Swiss Federal Council for the Establishment of the International Conventions for the Protection of War Victims and Held at Geneva (21 April – 12 August 1949) vol I 47, 61, 73, 113.

¹²³ Although national Red Crescent Societies were officially recognised from 1929, until the 26th International Conference of the Red Cross and Red Crescent Societies, which was held in Geneva in December 1995, the meetings refereed only to Red Cross societies. For example the 25th International Conference was known as the 25th International Conference of the Red Cross.

¹²⁴ Kalshoven, above note 9, 11.

¹²⁵ Ibid.

¹²⁶ Article 2 includes the following ‘[a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.’

¹²⁷ Kalshoven, above note 9, 11. However, the ICRC had long been working on increasing its involvement in internal armed conflict. It is noted at the XVIth International Red Cross Conference that ‘the Commission unanimously recognised that the Convention must apply to all armed conflicts between States, and that its humanitarian principles must be respected under all circumstances’. Report on the Interpretation, Revision and Extension of the Geneva Convention of July 27, 1929 (Document 11a, Sixteenth International Red Cross Conference, London, June 1939)

<http://www.cid.icrc.org/library/docs/CDDH/CI_1938/CI_1938_DOC11_ENG.pdf>, 8.

¹²⁸ Kalshoven, above note 9, 12-13.

Conventions but also ensure their citizens, particularly members of the military, respect the Conventions.

The May 1948 draft of the Conventions as submitted to the Stockholm Conference contained the following Common Article 1:

The contracting Parties, undertake, in the name of their peoples, to respect and to ensure respect for the Conventions in all circumstances.¹²⁹

The preparatory materials do not shed any further light on where this wording came from¹³⁰ but the ICRC notes that the drafts were the product of work by the Red Cross as well as government experts and other humanitarian associations, and were the subject of a ‘series of remarks’.¹³¹ The Stockholm Conference led to the deletion of the phrase ‘in the name of their peoples’ although it is not clear why.¹³²

At the Diplomatic Conference of Geneva of 1949 draft Common Article 1 was adopted without modification following short consideration by the Joint Committee (five committees having been set up – one for each of the four subject areas: Sick and Wounded on Land; Sick and Wounded at Sea; Prisoners of War; Civilians (Committees 1-4 respectively); and one for all Common Articles – the Joint Committee) and only slightly longer consideration by a special sub-committee of the Joint Committee designated to look specifically at non-international armed conflict issues.¹³³ Pilloud was the only person who requested to speak to Common Article 1 in the Joint Committee in the main and his comments were brief and did not add context to its drafting or inclusion.¹³⁴

In the special sub-committee few further points were made. The Norwegian and United States representatives both supported the application of the article to the ‘population as a

¹²⁹ Draft revised or new Conventions for the protection of war victims established by the ICRC with the assistance of government experts, national Red Cross societies and other humanitarian associations put to the Seventeenth International Red Cross Conference, Stockholm (August 1948); Dormann and Serralvo, above note 16, 6.

¹³⁰ Kalshoven, above note 9, 13.

¹³¹ Dormann and Serralvo, above note 16, 6-7.

¹³² Ibid 21. See also, ICRC, *Revised and New Draft Conventions for the Protection of War Victims: Texts approved and amended by the XVIIth International Red Cross Conference* (Revised Translation, Geneva, 1948), 9.

¹³³ Final Record of the Diplomatic Conference convened by the Swiss Federal Council for the Establishment of the International Conventions for the Protection of War Victims and Held at Geneva (21 April – 12 August 1949), vol IIB, 7th mtg, 17 May 1949, 26 and 9th mtg, 25 May 1949, 53; see also Kalshoven, above note 9, 19.

¹³⁴ Ibid 7th mtg, 17 May 1949, 26.

whole' and Lamarle, representing France, considered that the meaning of 'to ensure respect' was the same as that intended by the deleted reference in the ICRC draft to 'in the name of the peoples'.¹³⁵ Pilloud referenced the universal application of the Conventions. Yingling, of the United States, also noted that 'Article I did not imply the obligation to enact penal sanctions'.¹³⁶ Maresca, representing Italy, made a prescient comment raising concern over the lack of clarity of 'undertake to ensure respect' – noting this was either a redundant provision 'or introduced a new concept into international law'.¹³⁷ This unfortunately was not further discussed.¹³⁸

The original Commentaries to the Four Geneva Conventions¹³⁹ were published in the 1950s and 1960 by the ICRC. The Commentary to the First Geneva Convention was published in 1952 with comments to Common Article 1 written by ICRC Legal Advisor Frederic Siordet. The Commentary clearly introduces the notion that third party States may and should play a role in the promotion of respect for the Convention:

The use of the words "and to ensure respect" was, however, deliberate: they were intended to emphasize and strengthen the responsibility of the Contracting Parties... if it is to keep its solemn engagements, the State must of necessity prepare in advance, that is to say in peacetime, the legal, material or other means of loyal enforcement of the Convention as and when the occasion arises. It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention.¹⁴⁰

This obligation is put slightly higher in Geneva Convention II and IV which articulate:

in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may and should endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention **demand**s in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but **should do everything in their power**

¹³⁵ Ibid 9th mtg, 25 May 1949, 53.

¹³⁶ Ibid 9th mtg, 25 May 1949, 53.

¹³⁷ Ibid.

¹³⁸ See also Dormann and Serralvo, above note 16, 8-9.

¹³⁹ The basis of this analysis relies upon the Commentaries to the Geneva Conventions, authored by the ICRC. Whilst not strictly drafting history, they have been included here, with other information about the provision for two reasons. The ICRC was created *sui generis* and is mandated by the international community to play a unique role in relation to the Geneva Conventions - in particular in relation to the drafting of preparatory conferences to their creation. Second, as is pointed out by Cassese, these views were taken up by both States Party and by the ICJ in subsequent consideration of Common Article 1 and therefore have considerable bearing on the understanding of its interpretation. Cassese. above note 20, 18. Cf Kalshoven, above note 9.

¹⁴⁰ Jean Pictet, *Commentary GCI*, above note 43, 26.

to ensure that the humanitarian principles underlying the Conventions are **applied** universally.¹⁴¹ (emphasis added)

In the Commentary to Geneva Convention III interestingly ‘may and should’ is replaced simply by ‘should’ and the obligation is put in terms of universal respect not universal application:

in the event of a Power failing to fulfil its obligations, each of the other Contracting Parties (neutral, allied or enemy) **should** endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is **respected** universally.¹⁴² (emphasis added)

Kalshoven is very critical of the Commentaries on Article 1 for their disregard for the drafting history of the provision and argues they are an attempt by the authors to impose their ‘lofty views’ on the Convention as a whole (and ‘optimism about the intrinsic force of Article 1’).¹⁴³ Kalshoven concludes ‘despite my thorough investigations, I have not found in the records of the Diplomatic Conference even the slightest awareness on the part of the government delegates that one might ever wish to read into the phrase “to ensure respect” any undertaking of a contracting state other than an obligation to ensure respect for the Conventions by its people “in all circumstances”’.¹⁴⁴ The recent article of Dormann and Serralvo notes that intended universal application of Common Article 1 means that a domestic only focus could not have been envisaged.¹⁴⁵

The evolution of Common Article 1 and the pre-eminence with which the ICRC is held in this field for their work – including in drafting the Commentaries, makes it clear that, ‘ensure respect’ cannot be as narrow as Kalshoven, or indeed some at the Diplomatic Conference, may have envisaged. Whilst it may not be clear where the authority existed in 1952 to say that ‘it follows therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to

¹⁴¹ Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949. Volume II* (ICRC, 1960) 25-26; Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949. Volume IV* (ICRC, 1958)16.

¹⁴² Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949. Volume III* (ICRC, 1960) .

¹⁴³ Kalshoven, above note 9, 30, see also 37 and 38. Note however that while Kalshoven disputes the validity of the approach of the ICRC and others in crafting this as a legal obligation, Kalshoven is very supportive of the moral obligation of States to ensure respect for international humanitarian law. See further 60-61.

¹⁴⁴ Ibid 28.

¹⁴⁵ Dormann and Serralvo, above note 16, 6-10.

an attitude of respect for the Convention’, this commentary has proven accurate in practice by subsequent events.

3.3.4 1977

The original approach to AP I, in drafts prepared by the ICRC, was that it was not necessary to reaffirm the general principles common to the Geneva Conventions in AP I but rather that AP I would be supplementary to the Geneva Conventions. Common Article 1 however again became the focus of discussions relating to the nature of armed conflict – specifically the plan to extend the scope of the Additional Protocol to cover wars of national liberation. The end result was that this issue was dealt with in Article 2, but that Common Article 1 was included in AP I. Commentary on why this occurred as part of the Additional Protocol is, again, sparse and uninformative.¹⁴⁶

The argument about the phrase relating only to internal compliance was starting to be settled. AP II of the Conventions did not include a corollary of Common Article 1.¹⁴⁷ This omission is telling because if Common Article 1 was thought to be entirely about internal compliance and ensuring respect within a State’s boundaries then logically the phrase should have been included in Additional Protocol II as well.

In the Commentary to AP I the ICRC notes that the obligation to respect is already included in the good faith obligation, but that obligation to ‘ensure respect’ goes beyond the simple respect obligation because it has a third party element to it. Specifically it requires States to ‘endeavour to bring [a State in breach of the Conventions] back to an attitude of respect for the Convention’.¹⁴⁸

A further sign that this point of view had widespread support was that this interpretation was not the subject of any debate or contest; the international community also included provisions

¹⁴⁶ Focarelli, above note 4, 135; Kalshoven, above note 9, 45- 47; Official records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, Meeting of Committee I, 12 March 1974 (CDDH/I/SR.4), [26].

¹⁴⁷ Kalshoven, above note 9, 48.

¹⁴⁸ See also Y. Sandoz et al, above note 46, 35-36.

for facilitating the implementation of this obligation – including meetings as provided for in Article 7 of Additional Protocol I and co-operation in Article 89 of Additional Protocol I.¹⁴⁹

Further evidence that no State had any concerns about the ICRC interpretation came almost three decades later when the international community adopted Additional Protocol III with the same wording in Article 1(1) as the Conventions and Additional Protocol I. The Commentaries to Additional Protocol III state of Common Article 1 that it is taken verbatim from the earlier Conventions and ‘no specific comments are called for in the context’ of the AP III. Reference can therefore be made back to the earlier commentaries and in particular the Commentary to Additional Protocol I.¹⁵⁰

As such, this analysis also supports the third party State analysis of Common Article 1. This chapter will now consider how the scope of the legal obligation to ensure respect by third party states and other entities is determined.

3.4 Due diligence of states in respect of their international obligations

International law includes a principle of due diligence.¹⁵¹ This principle has been discussed in the literature as relevant to an examination of the nature and scope of Common Article 1. The application of this principle is different depending on the circumstances – including the nature of the primary rule¹⁵² to which the principle is being applied to and the capacity of the State with the due diligence obligation. As Tzevelekos points out ‘we are only now starting to understand how this principle can find application in a wide range of areas of international

¹⁴⁹ Ibid 36. The Commentary to Article 89 of AP I notes that ‘this mechanism for execution and supervision...actually has as its purpose the ensuring of respect for the law, and more especially, the prevention of breaches being answered by further breaches’, 1032.

¹⁵⁰ ICRC, *Commentary on Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, 8 December 2005 (ICRC, 2007).

¹⁵¹ Robert Barnidge, ‘The Due Diligence Principle under International Law’ (2006) 8 *International Community Law Review*, 81, 121; Vassilis P Tzevelekos, ‘Revisiting the Humanisation of International Law: Limits and Potential’ (2013) 1 *Erasmus Law Review* 62, 73; Oxford University Press, *Max Plank Encyclopaedia of Public International Law* (at February 2010) ‘Due Diligence’.

¹⁵² ‘[T]he solution to the problem of diligence (and fault) essentially depends on the particular content of each primary rule’: Riccardo Pissillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’, 35 (1992) *German Yearbook of International Law*, 49. Barnidge points out that the International Law Commissions work on state responsibility shows that due diligence obligations are ‘to be resolved by the underlying primary rules, not the secondary rules of state responsibility’: Barnidge, above note 151, 86.

law'.¹⁵³ Barnidge notes the questions of 'how, whether, and with what breadth the due diligence principle is applied, however, remain[] one[s] of political will'.¹⁵⁴ The due diligence principle has been particularly adopted by certain fields of international law including international environmental law¹⁵⁵, cultural property law¹⁵⁶ and with regards to the duty to safeguard the security of aliens.¹⁵⁷

Tzevelekos provides a very useful summary of the principle:

for the state to escape responsibility for lack of diligence, it needs to demonstrate that it did everything that was possible to fight wrongfulness. To comply with diligence, states need to suitably use the pertinent means at their disposal. By definition, due diligence generates obligations of means, that is, a concept that is directly linked to the old idea of responsibility because of 'state fault' – requiring a subjective appreciation of the available means, their suitability and the necessity to make good use of them in order to reach the goals of due diligence.¹⁵⁸

The focus of the work of Pisillo-Mazzeschi is in the distinction between the concepts of obligations of conduct (what the State does) and obligations of result (what actually eventuates from the conduct). He concludes, 'it is logical that international law may only impose on the State the obligation "to make every effort" to reach [a] result; that is, only an obligation of diligent conduct'. In further unpacking the scope of the rule Pisillo-Mazzeschi notes that the standard to which due diligence is required is 'the average general standard of behavior by the "civilized" or "well-organized" State'.¹⁵⁹

A caution in relation to the due diligence concept is offered by Hessbruegge when speaking about its application to weak states. He notes, '[t]he law cannot indefinitely set off the relocation of functions to the non-state sector by burdening weak states with increased duties of due diligence and an ever-increasing ambit of state responsibility'.¹⁶⁰ While this was being discussed in the context of preventing terrorism, this warning must also apply to Common

¹⁵³ Tzevelekos, above note 151, 73. For a comprehensive discussion of the application of the due diligence principle in a number of cases see Barnidge, above note 151, 91-121.

¹⁵⁴ Barnidge, above note 151, 121.

¹⁵⁵ Oxford University Press, Max Plank, above note 151, [3].

¹⁵⁶ *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, opened for signature 24 June 1995. 34 ILM 1322 (entered into force 1 July 1998) art 4(4).

¹⁵⁷ Pisillo-Mazzeschi, above note 151, 22.

¹⁵⁸ Tzevelekos, above note 151, 73 (citations omitted).

¹⁵⁹ Pisillo-Mazzeschi, above note 152, 45. See also 41-44.

¹⁶⁰ Jan Arno Hessbruegge, 'The Historical development of the doctrines of attribution and due diligence in international law' (2003-4) 36 *New York University Journal of International Law and Politics* 265, 306.

Article 1. It has also been held by the European Court of Human Rights that such obligations must not impose an ‘impossible or disproportionate burden on the authorities’.¹⁶¹

So the question is: what is required by a State in order to meet its due diligence obligations under Common Article 1?

The answer is that the obligation is one that is related to capacity and influence. States are required to do what is reasonable to ensure respect and their own capacity is perhaps the most significant aspect of reasonableness. As noted above, the approach of Pisillo-Mazzeschi in considering some international obligations in terms of a ‘duty of diligent conduct’¹⁶² (discussed above) has been adopted by the ICRC in talking about Common Article 1.¹⁶³

Dormann and Serralvo have specifically considered due diligence in relation to Common Article 1, finding the obligation is one which must be determined on a case by case basis.¹⁶⁴ The ‘capacity to influence’ and the ‘seriousness of the potential violation’ are the two key factors requiring consideration.¹⁶⁵ For example, a small, non-influential State, removed from the conflict region would have a due diligence obligation to ensure respect that would include actions such as supporting UN General Assembly resolutions calling on parties to respect IHL. Whereas, ‘a State with close political, economic and/or military ties (for example, through equipping and training of armed forces or joint planning of operations) to one of the belligerents has a stronger obligation to ensure respect for IHL by its ally’.¹⁶⁶

This idea that States are required to ‘make every effort’ is helpfully understood with reference to the ICJ decision in the *2007 Genocide Case* where the due diligence standard for States adopted by the Court was described as depending on ‘the capacity to influence

¹⁶¹ In *Osman v United Kingdom*, the European Court of Human Rights was called upon to consider the level of vigilance a State must show in seeking to protect its citizens. The context was that a man had been murdered by a stalker in circumstances where that stalker had been reported to the police by the family. The court held that the obligations of the police in these circumstances were ‘such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities’. *Case of Osman v The United Kingdom*, [1998] Eur Court HR, [116].

¹⁶² Riccardo Pisillo-Mazzeschi, above note 152, 97.

¹⁶³ Dormann and Serralvo, above note 16.

¹⁶⁴ Dormann and Serralvo, above note 16, 19.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.* 18. See also, Nathalie Weizmann ‘What happens if American-Trained Rebels commit War Crimes’ *Just Security* (online) (18 August 2015).

effectively the action of persons likely to commit, or already committing, genocide'.¹⁶⁷ Capacity was said to depend on factors including 'geographical distance', 'strength of political [and other] links' and 'legal position'.¹⁶⁸ Due diligence is a concept that requires its parameters to be considered in the circumstances of a particular case.¹⁶⁹

4. Actions not encapsulated by the Common Article 1 ensure respect obligation

There is clearly not an obligation for States to take all possible and imaginable measures capable of inducing transgressor States to compliance.¹⁷⁰ As Focarelli puts it, '[an] unqualified list of possible measures supposedly envisaged by Common Article 1 is not satisfactory unless an inquiry is conducted into whether these measures are *per se* lawful or unlawful and whether contracting States are required, empowered, or only invited to take them'.¹⁷¹ Focarelli makes this point even clearer by noting that to read Article 1 as imposing an obligation to ensure respect, results in 193 breaches of Common Article 1 every time the Conventions are breached - which is not the practice of States and seems implausible.¹⁷²

The other extreme is doing nothing in response to a violation. Third party States doing nothing is also neither the intention, nor the practice, in today's world. The terrible atrocities that continue to be inflicted upon the Syrian people in 2016, following the outbreak of war in Syria in 2012,¹⁷³ are evidence that the world is often not able to do what is necessary to prevent atrocities. However, it is clear that third state responsibility for humanity is increasingly a part of the modern day legal, if not always political, landscape. This is illustrated by the concept of *erga omnes*, the establishment of the ICC¹⁷⁴ and by the

¹⁶⁷ *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgement) (2007) ICJ Rep [430].

¹⁶⁸ Ibid.

¹⁶⁹ Robert Barnidge, above note 151, 118.

¹⁷⁰ Focarelli, above note 4, 167.

¹⁷¹ Ibid 146.

¹⁷² Focarelli, above note 4, 171. However, that is not to say that the obligation does not exist.

¹⁷³ 'Syria: The Story of the Conflict', *BBC News* (online), 11 March 2016 www.bbc.com/news/world-middle-east-26116868

¹⁷⁴ The idea of an international criminal court dates from at least 1872 when Gustave Moynier proposed the establishment by treaty of an international tribunal. Christopher Hall, 'The first proposal for a permanent international criminal court' (1998) 322 *International Review of the Red Cross*. The ICC, which came into being in 1998 with, albeit limited, jurisdiction over those individuals most responsible for the most serious of international crimes – including genocide, crimes against humanity and war crimes is demonstrative of the increasing international interest in preventing such atrocities. *Rome Statute of the International Criminal Court*, 17 July 1998, 37 ILM (1998) 999 (entered into force 1 July 2002) arts 12-15. The validity of this mechanism is shown by the fact that the jurisdiction of the court has been exercised twice in response to referrals by the UN Security Council.. SC Res 1593, UN SCOR, 5158th mtg, UN DOC S/RES/1593 (31 March 2005); UN SCOR,

development of the notion of Responsibility to Protect.¹⁷⁵ The ICC and these concepts seeks to provide the international community with solutions in the face of the most serious of violations by individuals (in the case of the ICC) and States (in the case of *erga omnes* and the Responsibility to Protect) against holders of rights. They find their genesis in the underlying principles first set out in Common Article 1 and rely on the idea of a state being obliged to ensure compliance with the Geneva Conventions. The obligation to respect and ensure respect is not one owed by a state to another state but rather to the international community as a whole.¹⁷⁶

In accordance with the UN Charter two actions are clearly not permitted. First, unilateral military action to ‘ensure respect’ for the Conventions is not made lawful by Common Article 1.¹⁷⁷ This would be in breach of the UN Charter’s prohibition on the use of force.¹⁷⁸ Second, pursuant to Article 2(7) of the UN Charter there is a prohibition on intervention in the domestic affairs of a State. That being said, as the ICTY has noted armed conflict constitutes a threat to international peace and security¹⁷⁹ and therefore actions relating to armed conflict (including non-international armed conflict) are not the internal affairs of a State. Indeed, a State which is in conflict cannot legitimately accuse a third party state to be acting unlawfully in interfering (through lawful measures) to ensure respect for IHL.¹⁸⁰

Gasser makes an important point that ‘influencing the way humanitarian obligations are carried out by a belligerent party must necessarily be clearly explained, convincingly justified

6491th mtg, UN Doc S/RES/1970 (26 February 2011). While this court is concerned with individual criminal responsibility, when seen in context with the development with other concepts like the Responsibility to Protect it goes to the pattern of less international acceptance of mass atrocity crimes.

¹⁷⁵ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect Report* (International Development Research Centre, Canada, 2001) VII The Responsibility to Protect idea, that ‘the international community should, as appropriate, encourage and help States to exercise th[e] responsibility’ ‘to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity’ *2005 World Summit Outcome Document*, UN GAOR, 60th session, UN Doc A/Res/60/1, (15 September 2005). See also International Commission on Intervention and State Sovereignty, *The Responsibility to Protect Report* (International Development Research Centre, Canada, 2001); SC Res 1674, UN SCOR, 5430th mtg, UN Doc S/RES/1674 (28 April 2006).

¹⁷⁶ *Prosecutor v. Zoran Kupreskic and others (Judgment)* (ICTY, Trial Chamber, Case No. IT-95-16-T, 14 January 2000) [519]. Also note the discussion by Sassoli, above note 7, 422-3, as to whether Article 1 creates a right of action (as understood in the State Responsibility sense articulated by Draft Article 42 which requires the obligation breached to be owed to the State individually rather than the international community as a whole) and his conclusion that breaches of international humanitarian law treaties do not create this right of action.

¹⁷⁷ Gasser, above note 9, 29; Kalshoven, above note 9, 53, Kessler, above note 62, 500, Umesh Palwankar, ‘Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law’ (1994) 298 *International Review of the Red Cross* 9, 13.

¹⁷⁸ UN Charter Article 2(4)

¹⁷⁹ *Prosecutor v. Dusko Tadic (Judgment)* (ICTY, Appeals Chamber, Case No. IT-94-1, 15 July 1999), 43.

¹⁸⁰ Benvenuti, above note 55, 33.

and properly carried out if such action is not to be misunderstood as improper interference in the internal affairs of a sovereign State'.¹⁸¹ What these measures may be will now be discussed.

5. Different measures states could take to ensure respect

A number of authors have given consideration to measures a state can take to ensure that a third state respects the Geneva Conventions – both in times of peace and in times of conflict.¹⁸² In peace time States' actions could include the provision of legal advisors to assist in developing or adapting national legislation and penal codes for effective implementation of IHL, training legal advisors within the armed forces, teaching IHL as part of military co-operation, holding regional and international seminars with the participation of States to discuss the issues and helping set up regional databanks on various aspects related to national measures and their implementation.¹⁸³ The ICRC Customary Law Study concludes that state practice 'shows an overwhelming use of (i) diplomatic protest and (ii) collective measures through which States exert their influence, to the degree possible, to try and stop violations of [IHL]'.¹⁸⁴

States can also help to 'ensure respect' by offering humanitarian assistance. The Geneva Conventions require states in receipt of such assistance to facilitate relief operations.¹⁸⁵ A number of provisions of Geneva Convention IV require States to 'allow the free passage' of relief consignments, and 'agree to relief schemes...and ... facilitate them'.¹⁸⁶ Article 69 of AP I and Article 18 of AP II add to these provisions – although state consent for the relief activities is required where civilians are suffering undue hardship in situations of non-international armed conflict.¹⁸⁷ Further, Article 64 of AP I relating to civilian civil defence organisations of neutral or other states requires that the Parties to the conflict receiving assistance under this provision 'should facilitate international cooperation'.

¹⁸¹ Gasser, above note 9, 27.

¹⁸² Ibid 29; Kalshoven, above note 9, 53, Kessler, above note 62, 500, Palwankar, above note 176, 13.

¹⁸³ Umesh Palwankar, above note 177, 11. See also Gasser, above note 9, 25.

¹⁸⁴ ICRC Customary Law Study, above note 6, 512.

¹⁸⁵ Kessler, above note 62, 502; See for example GC IV art 23.

¹⁸⁶ GC I art 23; GC II art 59(3); GC III art 61(3); GC IV arts 70(2), 70(3).

¹⁸⁷ See further Schindler, D 'Humanitarian Assistance, Humanitarian Interference and International Law' in Macdonald, R (ed) *Essays in Honour of Wang Tieya* (Martinus Nijhoff Publishers, 1994) 689, 696-7; SC Res, UN SCOR, 2941th mtg, UN Doc S/Res/668 (20 September 1990) and GA Res 45/170 (18 December 1990) condemned the refusal of humanitarian assistance by Iraq, from both humanitarian organisations, and in the case of the General Assembly resolution, from the Government of Kuwait.

Some provisions of the Conventions are themselves mechanisms for ensuring respect for IHL. Examples include Article 7 of AP I which provides for meetings to be convened addressing concerns about the application of the Protocol, Article 89 AP I pertaining to joint or individual action in cooperation with the UN in situations of serious violations of the Conventions, and Article 90 AP I pertaining to the establishment of an International Fact Finding Commission.¹⁸⁸

Further, although, as is noted by Dormann and Serralvo, the Common Article 1 obligation is one that is distinguishable from the obligation in Article 48 of the Articles on State Responsibility, invoking Article 48 could constitute an appropriate “ensure respect” action.¹⁸⁹ Article 48 allows states, other than an injured state, to invoke the responsibility of another State, if the obligation breached is owed to the international community as a whole (*erga omnes*).

There is therefore no checklist for states in the implementation of Common Article 1. Good faith and due diligence are both required and naturally the actions which must be taken depend on the circumstances.

Clearly one of the challenges is convincing states to take seriously their ensure respect obligations. Convincing states to comply with IHL has long been premised on the military value of compliance. Principles such as economy of effort, the potential for prosecution for individual criminal responsibility, that the prohibition on unnecessary suffering is about protecting military personnel themselves and that states do not want to see media reports of their soldiers committing war crimes (the CNN factor) have long convinced military personnel of their interest in complying with the rules of war. Indeed IHL was created on the battlefield and it makes sense for military reasons. Making Common Article 1 relevant to states involves a slightly different approach in so far as it, like other areas of international law, appeals to a sense of right rather than a sense of self-interest.

6. Conclusion

The obligation to respect and ensure respect for IHL is clearly one that has evolved over time. Despite some uncertainty surrounding the meaning of Common Article 1 over the years,

¹⁸⁸ The ICRC is currently engaged in a project on ‘Strengthening legal protection for victims of armed conflict’ See < <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/>>.

¹⁸⁹ Dormann and Serralvo, above note 16, 17.

today it is understood as constituting a legal obligation to respect and ensure respect for IHL.¹⁹⁰ The scope of this obligation is articulated in part by other provisions of the Geneva Conventions themselves (and the requirement to implement in them in good faith), and in part determined by the capacity of a state, and its influence, to ensure respect in a particular circumstance. While it was not necessarily envisaged that states not involved in the conflict would have obligations vis-a-vis third states, today this aspect of the provision is confirmed by an analysis of the subsequent practice, a discussion of comparable international legal developments in respect of *erga omnes* and human rights law, and an evaluation of the drafting history of the provision.

The obligation is not an obligation for States to take any set measures or specific steps in relation to violations of the Geneva Conventions by other States or non-State actors, but rather to take those measures required by due diligence and which are within their capacity and influence. There are a range of ways that a State may endeavour to bring States which are not respecting or ensuring that their armed forces respect the Geneva Conventions back to an attitude of respect for them.

The obligation to ensure respect for the Geneva Conventions can therefore be seen as providing a source of opportunity for states to assist others in achieving compliance with the Geneva Conventions. What is meant by this is that effectively, for influential and well-resourced states, such as Australia, Common Article 1 can be seen as providing a basis for a range of actions, both domestically and vis-à-vis other states to respect and ensure respect for IHL.

Common Article 1 provides scope for third-party states to play a role as a force for good in the international community in seeking to prevent violations of IHL from occurring. While the ‘indeterminacy’ of Common Article 1 cannot be overlooked just by giving the concept preeminent status¹⁹¹, the potential power of Common Article 1 as the source of an opportunity for states to improve humanitarian outcomes is clear. States that engage in

¹⁹⁰ Cassese, above note 20, 18; Dormann and Serravlo, above note 16, 16. *Contra* Kalshoven, above note 9, and Gasser, above note 9. Gasser notes that ‘it is hard to defend the position that all third party states are under a legal obligation to take action if humanitarian law is being seriously violated’ at 48. However, this comment was made in 1993 and Kalshoven’s analysis dates from 1999. It is clear that progress has since been made towards a fuller realisation of this obligation and its corresponding rights. Note also the Separate Opinion of Judge Kooijmans in the *Wall Advisory Opinion* [46]-[50].

¹⁹¹ Focarelli, above note 4, 170.

activities that are consistent with the notion of respecting and ensuring respect for the Geneva Conventions have an opportunity to prevent breaches of IHL.

In light of this understanding of Common Article 1 as a legal obligation which is defined by the exercise of good faith and the capacity of a state and its ability to influence a transgressor state, the thesis seeks to examine Australia's approach to respect and ensure respect with regards to weapons law. The chapters which follow in this thesis explore examples of how one state, Australia, is approaching the implementation of IHL. Common Article 1 requires that reasonable measures, within the context of their capacity and ability to influence, are undertaken by states to ensure respect for IHL. Australia is a state with considerable capacity and as such the argument is made that when and where it has influence, it must use this capacity to ensure respect. The next chapter, chapter three, specifically looks at the overarching obligations on states with respect to weapons law and how Australia acts in response to those obligations.

CHAPTER THREE: PROCESSES DESIGNED TO ENSURE AUSTRALIA COMPLIES WITH THE OBLIGATION TO RESPECT AND TO ENSURE RESPECT FOR IHL WITH RESPECT TO WEAPONS LAW

Chapter three considers the overarching concepts and processes that contribute to a country respecting and ensuring respect for IHL with regards to weapons law with particular reference to Australia. It answers the question what constitutes respecting and ensuring respect pursuant to Common Article 1 when regulating weapons for use in armed conflict? This chapter outlines Australia's record of adopting weapons law treaties, its implementation of the obligation pursuant to article 36 of AP I to review new weapons technologies in light of their compatibility with the rules of IHL, its approach to weapons law as evidenced in military training and military manuals and policy and the import and export control regimes in Australia on weapons and weapons development materials.

1. Introduction

Throughout this thesis different types of weapons are assessed as case studies to demonstrate Australia's approach to the obligation to respect and to ensure respect for IHL with respect to weapons law. There are, however, some overarching concepts and processes that contribute to respecting and ensuring respect for IHL from a weapons law perspective, that require consideration at the outset. In this chapter those processes will be explored. As mentioned in chapter two, some of these processes are specifically detailed in the Conventions and Protocols themselves, such as the obligation pursuant to Article 36 of AP I to review new weapons technologies in light of their compatibility with the rules of IHL. Others are implied by the Conventions and their Protocols and include the adoption of weapons law treaties which have found particular weapons to be contrary to humanitarian principles, the approach to weapons law as evidenced in military training and military manuals and policy, national import and export controls on weapons and weapons development materials and the criminalisation of offences relating to weapons law.

2. Australian view on Common Article 1

It has not been possible to ascertain what the Australian government's view of Common Article 1 is as such. It would appear that this is not a provision that has been considered by the Australian government specifically. The ADF, as the relevant part of the DOD, has noted that '[u]nder current doctrine Common Article 1 is not referenced as a specific obligation'

however the ADF ‘complies with its obligations under Common Article 1. This includes compliance with Article 36 of [AP I]. We note however that the obligation to ‘ensure respect’ extends beyond the ADF to encompass the Government of Australia’.¹

3. Weapons law treaties and Australia’s record on paper

As detailed in the introduction, Australia is a party to the Four Geneva Conventions by virtue of its signature of 4 January 1950 and its ratification on 14 October 1958.² Implementing legislation, the *Geneva Conventions Act 1957* (Cth), has been enacted. Australia is a party to AP I by virtue of its signature of 7 December 1978 and its ratification on 21 June 1991.³ Implementing legislation has also been enacted. Australia is a party to Additional Protocol III to the Geneva Conventions of 2005 by virtue of its signature of 8 March 2006 and its ratification on 15 July 2009.⁴ Again, implementing legislation has been enacted.

Australia is also a party to all major international weapons law treaties.⁵ As discussed further in chapter three, Australia signed the CCM on 3 December 2008 (the treaty was adopted in May 2008) and became a state party on 8 October 2012.⁶ As discussed in detail in chapter five, Australia signed the most recent international treaty relating to weapons (an arms control treaty), the Arms Trade Treaty, when it opened for signature on the 3 June 2013. Ratification processes were completed on 3 June 2014 and Australia was consequently a state party when the treaty entered into force on 24 December 2014.⁷

With regard to other significant treaties the details are set out below:

¹ Email COL PA Cumming to E Massingham, 12 January 2016 (on file with author).

² ICRC, *States Party to the Following International Humanitarian Law and Other Related Treaties as of 13-Apr-2015* (6 August 2015) ICRC <<https://www.icrc.org/IHL>>.

³ Ibid. The adoption of the Additional Protocols by Australia was contentious with at least one military officer making a very public case against ratification. In an article published in *The Australian* newspaper in July 1988 Brigadier PJ Greville wrote of the ratification of AP I ‘I believe its ratification would be very dangerous’: PJ Greville, ‘Protocols that spell disaster’, *The Australian* (Australia, 11 July 1988) 9 (on file with author).

⁴ ICRC, *States Party to the Following International Humanitarian Law and Other Related Treaties as of 13-Apr-2015* (6 August 2015) ICRC <<https://www.icrc.org/IHL>>.

⁵ Ibid.

⁶ Ibid.

⁷ ICRC, *Arms Trade Treaty, 2 April 2013 States Parties* <https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelect ed=630>.

Treaty	Details
<p><i>Declaration renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight</i> (St Petersburg, 11 December 1868)</p>	<p>Australia, despite becoming an independent nation at Federation on 1 January 1901, was represented, as part of the British Empire, by the United Kingdom at international conferences until after the First World War. The 1919 Treaty of Versailles marked Australia's first signature of an international treaty.⁸ However, this treaty is noted as being 'Applicable to Australia'.⁹</p>
<p><i>1899 and 1907 Hague Declarations concerning the likes of asphyxiating gases, expanding bullets and explosives from balloons</i></p>	<p>Applicable to Australia.¹⁰</p>
<p><i>Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and Warfare</i> (Geneva, 17 June 1925).</p>	<p>Instrument of accession deposited for Australia: 22 January 1930. Entered into force in Australia: 24 May 1930.¹¹</p>
<p><i>Treaty on the Non-Proliferation of Nuclear Weapons</i> (London, Moscow and Washington, 1 July 1968)</p>	<p>Entry into force for Australia on 23 January 1973.¹²</p>
<p><i>Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction</i> (London, Moscow and Washington, 10 April 1972)</p>	<p>Signed for Australia at London, Moscow and Washington on 10 April 1972. Instrument of ratification deposited for Australia at London, Moscow and Washington on 5 October 1977.¹³</p>

⁸ See further, David Donovan, 'Australia's last brick of nationhood', *The Drum* (7 December 2010). <<http://www.abc.net.au/news/2010-12-07/australia27slastbrickofnationhood/41892>>.

⁹ Australian Treaty Series 1901, No. 25 <http://www.austlii.edu.au/au/other/dfat/treaties/1901/125.html>.

¹⁰ Australian Treaty Series 1907, No. 7 <http://www.austlii.edu.au/au/other/dfat/treaties/1907/7.html>; Australian Treaty Series 1907, No. 8 <http://www.austlii.edu.au/au/other/dfat/treaties/1907/8.html>.

¹¹ Australian Treaty Series 1930, No. 6 <http://www.austlii.edu.au/au/other/dfat/treaties/ATS/1930/6.html>.

¹² Australian Treaty Series 1973, No. 3 <http://www.austlii.edu.au/au/other/dfat/treaties/1973/3.html>.

¹³ Australian Treaty Series 1977, No. 23 <http://www.austlii.edu.au/au/other/dfat/treaties/1977/23.html>.

<p><i>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, and Protocols I, II and III</i></p> <p><i>[Protocol I on Non-Detectable Fragments; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices; Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons]</i></p> <p>(Geneva, 10 October 1980)</p>	<p>The Convention was signed for Australia 8 April 1984.</p> <p>Instrument of ratification deposited for Australia 14 May 1983.</p> <p>On ratification Australia notified its consent to be bound by Protocols I, II and III.</p> <p>The Convention entered into force for Australia on 29 March 1984.¹⁴</p>
<p><i>Additional Protocol [Protocol IV on Blinding Laser Weapons] to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980</i></p> <p>(Vienna, 13 October 1995)</p>	<p>Notification of consent to be bound by the Protocol was deposited for Australia on 22 August 1997.</p> <p>The Protocol entered into force for Australia on 30 July 1998.¹⁵</p>
<p><i>Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices, as amended (Protocol II, as amended) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980</i></p> <p>(Geneva, 3 May 1996)</p>	<p>Notification of consent to be bound deposited for Australia 22 August 1997. The Protocol, as amended, entered into force for Australia and generally, as between the parties, 3 December 1998.¹⁶</p>

¹⁴ Australian Treaty Series 1984, No. 6 <http://www.austlii.edu.au/au/other/dfat/treaties/1984/6.html>.

¹⁵ Australian Treaty Series 1998, No. 8 <http://www.austlii.edu.au/au/other/dfat/treaties/1998/8.html>.

¹⁶ Australian Treaty Series 1998, No. 17 <http://www.austlii.edu.au/au/other/dfat/treaties/1998/17.html>.

<p><i>Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction</i> (Paris, 13 January 1993)</p>	<p>Signed for Australia 13 January 1993. Instrument of ratification deposited for Australia on 6 May 1994. The Convention entered into force for Australia and generally on 29 April 1997.¹⁷</p>
<p><i>Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction</i> (Oslo, 18 September 1997)</p>	<p>Signed for Australia 3 December 1997. Instrument of ratification deposited for Australia on 14 January 1999. The Convention entered into force for Australia on 1 July 1999.¹⁸</p>
<p><i>Protocol V on Explosive Remnants of War to the 1980 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</i> Geneva, 28 November 2003</p>	<p>Consent to be bound by Australia on 4 January 2007. Entry into force for Australia on 4 July 2007.¹⁹</p>

Australia is not a party to the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*.²⁰ Australia signed this Protocol on 21 December 2001 but has not ratified it.²¹ This failure to ratify will be addressed further in chapter five.

Given this comprehensive list, Australia has a good record of ratifying international instruments which regulate weapons. Effective national implementation of the obligations in these treaties is important to comply with the obligations contained therein but also with the

¹⁷ Australian Treaty Series 1997, No. 3 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/ATS/1997/3.html?stem=0&synonyms=0&query=chemical%20weapons>.

¹⁸ Australian Treaty Series 1999, No. 3 <http://www.austlii.edu.au/au/other/dfat/treaties/1999/3.html>.

¹⁹ Australian Treaty Series 2007, No. 14 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/ATS/2007/14.html?stem=0&synonyms=0&query=Explosive%20Remnants%20of%20War>.

²⁰ 31 May 2001, 2326 UNTS 208 (entered into force 3 June 2005.); adopted by GA resolution 55/255 of 31 May 2001.

²¹ United Nations Office on Drugs and Crime, *Status as at 26/09/2008* <<http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-firearmsprotocol.html>>.

obligation to respect and ensure respect for the Geneva Conventions. However, the processes for national implementation are rarely comprehensively detailed or specified in international legal frameworks²² and states often do not give them the attention that is necessary.²³ This is a concern with a number of weapons law treaties. For example, the Fifth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction identified the lack of effective national implementation measures as being an issue of concern for States Party to address.²⁴

4. Article 36 AP I weapons reviews

A key element of the “ensure respect” obligation in Common Article 1, in so far as it pertains to the approach of states to the use of weapons in armed conflict, can be found in Article 36 of AP I. Article 36 of AP I provides:

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.

This provision is closely linked to Article 35 of AP I, which provides that choice of means and methods states can employ in times of armed conflict are not unlimited – in particular such weapons must not cause superfluous injury or unnecessary suffering or widespread, long-term and severe damage to the natural environment.²⁵

This rule is binding on Australia as a party to the 1977 AP I.²⁶ Scholars have also argued that it constitutes a customary international law obligation binding on non-States Party to AP I.²⁷

²² T. Dunworth, R. Mathews and T. McCormack, 'National Implementation of the Biological Weapons Convention' (2006) 11 *Journal of Conflict and Security Law* 93, 95.

²³ See for example, Andreas Persbo and Angela Woodward, *National Measures to Implement WMD Treaties and Norms: the Need for International Standards and technical Assistance* (Weapons of Mass Destruction Commission, Stockholm, May 2005) 1.

²⁴ *Final Document*, BWC/CONF.V/17 (Geneva, 19 November–7 December 2001, 11–22 November 2002) [18(a)(i)]; T. Dunworth et al, above note 22, 94.

²⁵ AP I art 35, See also Y. Sandoz, C. Swinarski and B. Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC and Martinus Nijhoff, Geneva, 1987) 421-422.

²⁶ ICRC, *States Party to the Following International Humanitarian Law and Other Related Treaties as of 13-Apr-2015* (13 April 2015) ICRC <<https://www.icrc.org/IHL>>.

²⁷ See Wing Commander Duncan Blake and Lieutenant Colonel Joseph Imburgia, “Bloodless Weapons”? The need to conduct legal review of certain capabilities and the implications of defining them as “weapons”, *The*

It is a provision that is attracting more attention, at least from IHL scholars, in recent years in light of the challenges that technological developments such as cyber warfare, autonomous weapons, non-lethal weapons and nanotechnology are posing for IHL principles.²⁸ It is however, a provision that has not been well implemented by most states to date.²⁹ The parameters of Article 36 and its general application will be considered below, before turning to analyse the Australian application of the article.

4.1 Article 36 AP I in general terms

The Commentary to AP I notes that this provision was quite contentious with some states going so far as to make its inclusion a condition precedent to their acceptance of the treaty as a whole, while other states felt it an inappropriate clause in so far as it ‘seemed to imply disarmament’ – an issue outside the scope of the treaty negotiations.³⁰ The idea for the facilitation of compliance with Article 36 was originally that a Committee of States Party be established to consider the legality of the use of new weapons. However, this proposal did not gain the required two-thirds majority and was not incorporated into the Protocol.³¹

A predecessor of sorts to the Article 36 concept can be found in the St Petersburg Declaration:

[t]he Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvement which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.³²

Hays Parks also asserts that the good faith obligation with respect to treaties would have obliged States Party to the Hague Convention IV (and other treaties) to ensure that those

Air Force Law Review Vol 66 (2010) 163-166; William Boothby, *Weapons and the Law of Armed Conflict* (Oxford University Press, 2009) 341.

²⁸ See for example Alan Backstrom and Ian Henderson, ‘New capabilities in warfare: an overview of contemporary technological developments and the associated legal and engineering issues in Article 36 weapons reviews’, (2012) 886 *International Review of the Red Cross*, Vol 886, 483.

²⁹ ICRC, A Guide to the Legal Review of New Weapons, Means and Methods of Warfare (ICRC, January 2006) <http://www.icrc.org/eng/assets/files/other/icrc_002_0902.pdf> 5.

³⁰ Sandoz et al, above note 25, 422.

³¹ Ibid 422–423.

³² *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, St Petersburg, 1868.

military weapons and munitions used by the Party were compliant with the laws, and as such Article 36 codified an existing good faith obligation.³³

The Commentary to AP I notes that some states already had internal processes of this nature prior to the treaty negotiations.³⁴ Sweden and the United States were two countries that did. This is discussed further below.

The Commentary further notes:

[t]his obligation was defined by the Rapporteur of Committee III as follows:
The determination of legality required of States by this article is not intended to create a subjective standard [...]. Determination by any State that the employment of a weapon is prohibited or permitted is not binding internationally, but it is hoped that the obligation to make such determinations will ensure that means or methods of warfare will not be adopted without the issue of legality being explored with care. [...] A State is not required to foresee or analyse all possible misuses of a weapon, for almost any weapon can be misused in ways that would be prohibited.³⁵

Two further points made in the commentary include that states are not obliged to make their Article 36 findings public³⁶ and that the obligation concerns the normal use of the weapon (and not any possible misuse).³⁷ There is no agreed format for the conduct of Article 36 reviews³⁸ and although many suggest an independent and objective system of review would be the best approach, states are not interested in such an approach.³⁹

4.2 The application of Article 36 AP I

Over the years the ICRC has taken a number of measures in an attempt to encourage states to adopt formal systems for compliance with Article 36. The 27th International Conference of the Red Cross and Red Crescent in 1999 and the 28th Conference in 2003 both 'called on states to establish mechanisms and procedures to determine the conformity of weapons with

³³ W. Hays Parks, 'Conventional Weapons and Weapons Reviews' (2005) 8 *Yearbook of International Humanitarian Law* 55, 57.

³⁴ Sandoz et al, above note 25, 423.

³⁵ Cited in Ibid 424.

³⁶ Ibid.

³⁷ Ibid 427. See also Blake and Imburgia, above note 27, 168; Boothby, above note 27.

³⁸ See Boothby, above note 27, chapter 19 for a suggested approach to reviews.

³⁹ Ibid 344; Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP, 2004) 80.

international law'.⁴⁰ The 2006 publication, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*⁴¹, was designed to assist states to establish weapons review mechanisms. It looks at both the interpretation of Article 36 as well as providing some guidance for states as to the procedural issues which need to be considered. Lawand notes that:

The obligation to review the legality of new weapons implies at least two things. First, a state should have in place some form of permanent procedure to that effect, in other words a standing mechanism that can be automatically activated at any time that a state is developing or acquiring a new weapon. Second, for the authority responsible for developing or acquiring new weapons such a procedure should be made mandatory, by law or by administrative directive.

Other than these minimum procedural requirements, it is left to each state to decide what specific form its review mechanism will take.⁴² However, to date this method of regulation has proved somewhat lacking in effectiveness as only a handful of states have such mechanisms in place.⁴³

Guidance on the legal review of weapons is provided in the ICJ Advisory Opinion in the *Nuclear Weapons Case* which has been interpreted as relating to all weapons, not just nuclear weapons, in so far as it notes that in the absence of a specific prohibition on a particular weapon (either in treaty or customary law), the second step is to consider whether there is a general prohibition (again either in treaty or customary law) against the weapon.⁴⁴

Daoust, Copeland and Ishoey provide some guidance on the process for conducting a review, noting that the provision 'implies, as a first step in the review, an examination of the specific prohibitions found under international law to which the reviewing State is a party and which bans or restricts the use of a weapon or method of warfare'.⁴⁵ States must also consider any binding customary international law – specifically the principle of distinction, its concomitant

⁴⁰ Kathleen Lawand, 'Reviewing the legality of new weapons, mean and methods of warfare' (2006) 88(864) *International Review of the Red Cross*, 926. Note that the International Conference of the Red Cross and Red Crescent Movement is attended by representatives of the Governments of the States Party.

⁴¹ ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*, above note 29.

⁴² Lawand, above note 40, 927.

⁴³ ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*, above note 29, 5; See also Tim McCormack, *Report Commissioned by the Group of Government Experts of the States Parties to the Convention on Certain Conventional Weapons* (2006); Boothby, above note 27, 341.

⁴⁴ Bruce Oswald, 'The Australian Defence Force Approach to the Legal Review of Weapons', *Australian and New Zealand Society of International Law 2001 Proceedings Papers*, 63. Note the assessment in the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] I.C.J. Rep [53]-[63].

⁴⁵ I Daoust, R Copeland and R Ishoey, 'New Wars, new weapons? The obligation of States to assess the legality of means and methods of warfare' (2002) 846 *International Review of the Red Cross* 345, 349.

prohibition on indiscriminate attack and the prohibition on unnecessary suffering⁴⁶, and the obligation in Article 35(3) not to cause widespread, long-term and severe damage to the natural environment.⁴⁷ The fifth and final category for consideration, as articulated by Daoust, Copeland and Ishoey, is ‘the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience’, also known as the Martens Clause.⁴⁸ The application of the Martens Clause to new weapons technology was held in the Nuclear Weapons Advisory Opinion to have ‘continuing existence and applicability’ and which has ‘proved to be an effective means of addressing the rapid evolution of military technology’.⁴⁹

Considerations, they note, should include:

- The intended use of the weapon in various contexts
- Whether other means or methods of warfare could achieve the same military purpose
- The implications of the weapon’s proliferation.

An expert meeting organised by the ICRC in January 2001 to consider the legal review of weapons in light of the ICRC’s project on superfluous injury and unnecessary suffering noted that legal reviews needed to be both particularly rigorous and multidisciplinary especially when weapons injure by means other than explosives, projectile force or burns and cause unfamiliar effects and that the effects of weapons attributable to their design be taken into account in reviews.⁵⁰

Retired Royal Air Force legal officer Dr William Boothby has also undertaken to promote the case for Article 36 reviews. His book *Weapons and the Law of Armed Conflict* makes the case for Article 36 reviews and provides guidance on their conduct by states.⁵¹ Boothby’s approach adds a couple of additional considerations – although these go to practical

⁴⁶ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] I.C.J. Rep [78]; see also Daoust et al, above note 45, 350.

⁴⁷ Daoust et al, above note 45, 350.

⁴⁸ Ibid 351.

⁴⁹ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] I.C.J. Rep [78], [87]; see also Daoust et al, above note 45, 351.

⁵⁰ Daoust et al, above note 45, 353-4; Summary Report of the ICRC Expert Meeting, Switzerland (29-31 January 2001).

⁵¹ Boothby, above note 27, see particularly chapter 19.

considerations rather than lawful ones – such as future legal developments.⁵² An important part of the legal review of weapons, the consideration of whether a weapon causes superfluous injury or unnecessary suffering, was given particular attention by the ICRC's Superfluous Injury or Unnecessary Suffering Project, the SIrUS Project.⁵³

Another important consideration is the application of Article 36 weapons reviews to weapons, means or methods of warfare used in non-international armed conflict. Additional Protocol 1 applies in times of international armed conflict and not in non-international armed conflict, however, the customary legal review obligation arguably applies in both international and non-international armed conflict. Blake and Imburgia cite the ICTY in *Tadic* with the statement that 'what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife' in support of this argument.⁵⁴

In 1974 Sweden established the Delegation for IHL Monitoring of Arms Projects⁵⁵ to review all 'mainly anti-personnel⁵⁶' weapons to be used by Swedish armed forces. The Delegation, consisting of representatives from the legal, military, medical and arms technology fields meet three to four times annually.⁵⁷ Decisions are made by consensus.⁵⁸ The United States⁵⁹ Weapons Review Program was also established in 1974. Like the Swedish Delegation the Program was inspired by the Vietnam War. The Judge Advocate General of the relevant military department (or, if more than one military department is involved the department with primary responsibility) acquiring any weapon conducts the review using expertise obtained from medical, environment and engineering experts and in some cases specific further testing.⁶⁰ The Norwegian system for the legal review of weapons involves a Committee

⁵² Ibid 346.

⁵³ ICRC, *The SIrUS Project: Towards a Determination of Which Weapons Cause 'Superfluous Injury or Unnecessary Suffering'* (ICRC, 1997). See also Robin Coupland, 'Review of the legality of weapons: a new approach The SIrUS Project' (1999) *International Review of the Red Cross* 835.

⁵⁴ Blake and Imburgia, above note 27, at 167 citing ICTY *Tadic*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction para 119. 127.

⁵⁵ Legal Examination of Weapon Projects Act (Sweden); see also Marie Jacobsson, 'Modern Weaponry and Warfare: The Application of Article 36 of Additional Protocol 1 by Governments' in A. Helm (ed), *The Law of War in the 21st Century: Weaponry and the Use of Force* (2006) 183 at 185.

⁵⁶ Note that Daoust et al note from discussions with the Chair of the Delegation that 'mainly' is to be interpreted broadly, see Daoust et al, above note 45, at 355.

⁵⁷ Daoust et al, above note 45, at 355.

⁵⁸ Ibid.

⁵⁹ The United States is not a party to AP I.

⁶⁰ Daoust et al, above note 45, at 357.

chaired by the Legal Services Office of the Defence Command which, since 1999, has conducted reviews of all weapons used in the Norwegian Armed Forces.⁶¹ In the United Kingdom, the following statement about Article 36 was recently made to the parliament:

[t]here are [weapons...] in the UK armed forces inventory which were brought into service before the obligation to legally review against Article 36 [AP I ...] came into force. The obligation is not retrospective. Since 1999 all weapons and equipment entering service have been subject to a formal legal weapons review in accordance with Article 36.⁶²

4.3 The application of Article 36 AP I in Australia

The adoption of a formal process for conducting Article 36 reviews in Australia is a relatively recent development, dating only from 2005. It is also one that would appear only to extend to the new weapons aspect of Article 36 – rather than also to a consideration of new means and methods of warfare.⁶³ Then Deputy Director of International Law (Defence Legal, Canberra), noted in 2001 that the ADF was ‘currently in the process of drafting a Defence Instruction on ‘Legal Review of New Weapons’. ‘The draft Defence Instruction requires all actions by the ADF with respect to the study, development, acquisition, adoption of new weapons to be consistent with Australia’s international obligations.’⁶⁴ A ‘Defence Instruction (General)’ was issued pursuant to section 9A of the *Defence Act* 1903 on 2 June 2005 (applicable to all weapons developed, acquired, adapted or modified after 1 June 2005⁶⁵).

The Defence Instruction requires the Director-General ADF Legal Service ‘to review all proposed new weapons in accordance with this instruction to determine whether the new weapons or their intended use in combat are consistent with the obligations assumed by the Australian Government under all applicable treaties to which Australian is a party and with customary international law.’⁶⁶ The Defence Instruction notes Article 36 AP I as the basis for this requirement.⁶⁷ The requirement is noted as extending to ‘all new weapons to be studied, developed, acquired, adopted or modified by the ADF’.⁶⁸ As to weapons in use before this

⁶¹ Ibid 358.

⁶² Parliamentary Answer 7 December 2013, Armed Forces Minister, United Kingdom.

⁶³ DOD, Defence Instruction General 2005 (on file with author).

⁶⁴ Oswald, above note 44, 64.

⁶⁵ DOD, Defence Instruction General 2005, [5].

⁶⁶ Ibid [4].

⁶⁷ Ibid [1].

⁶⁸ Ibid [2].

time Blake and Imburgia note that the ‘customary international law requirement for a weapons legal review created a rebuttable presumption of legality of pre-existing weapons and munitions’.⁶⁹

Annex A to the Defence Instruction provides a form for the legal review of weapons, which in addition to weapon identification information includes the following questions for consideration:

- Intended use of the weapon
- Intended effect of the weapon on material and personnel
- Reason for acquiring the weapon
- Injuries that are likely to be caused by the normal use of the weapon
- Other weapons capable of fulfilling the same purposes as those envisaged for the weapon
- Other armed forces or agencies in Australia or overseas that have the weapon in their inventory or are considering introducing the weapon into service
- Evaluation of the weapon available from the armed forces of other countries or from other agencies in Australian or overseas.

The Directorate of Operations and Security Law (DOSL) is currently undertaking a process of reviewing the Defence Instruction. The Directorate of Operations and Security Law (DOSL) has advised the following in relation to their review:

‘DOSL is in the process of reviewing the Defence Instruction because it no longer accurately reflects how weapons reviews are conducted; as a result of lessons learnt and advances made over the last 10 years, the current process is more comprehensive than that described in the existing Defence Instruction. The experience of legal reviewers indicates that this policy may benefit from considering:

- reference to best practices from current reviews;
- formalising the involvement of legal officers earlier in the weapons development process

⁶⁹ Blake and Imburgia, above note 27, at 166-7.

- investigating whether use of appropriate legal and other subject matter experts would enhance the efficiency and quality of legal reviews;
- adding extra functionality and procedural control;
- whether the process could more effectively address the review of the means and methods of warfare and, if so, at what level; and
- referencing dissemination, training, standardisation and quality control mechanisms (such as accessibility and a search function of the database of reviews).⁷⁰

On balance it is clear that Australia has one of the more robust systems of weapons review for compatibility with the Geneva Conventions around the world and it is seeking to further improve this process. Through doing so, Australia is showing strong respect for IHL in relation to new weapons technology under consideration for possible ADF acquisition.

5. Australian approach to weapons law as evidenced in military training and Australian military manuals and policy

Teaching soldiers, sailors and airforce personnel about the rules of armed conflict is an obligation placed on all governments pursuant to the Geneva Conventions of 1949 and their Additional Protocols I and III.⁷¹ That is, as widely as possible, including to military personnel and medical personnel, States Party to the Conventions must disseminate the texts ‘so that the principles thereof may become known to the entire population’.⁷² Further, pursuant to AP I article 82, States Party are required to ‘ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to armed forces’.⁷³ These are clearly articulated provisions that go to the obligation to respect and ensure respect for IHL.

Formal training on the laws of armed conflict was introduced into the Australia Defence Force in February 1983.⁷⁴ This was specifically stated as being to meet the requirements in IHL including the Geneva Conventions.⁷⁵ Standard Laws of Armed Conflict presentations by

⁷⁰ Email COL PA Cumming to E Massingham, 12 January 2016 (on file with author).

⁷¹ GC I art 47; GC II art 48; GC III art 127; GC IV art 144; AP I art 83; AP II art 19.

⁷² Ibid.

⁷³ AP I art 82.

⁷⁴ ICRC, ‘Customary IHL Australia Practice Relating to Rule 142. Introduction of International Humanitarian Law Training within Armed Forces’ [VI].

⁷⁵ Ibid.

military legal officers note the prohibition on certain types of weapons and the principles of targeting law.⁷⁶

The ICRC's Customary Law Study has recorded significant information about the Australian Military's Law of Armed Conflict Manual, which dates from 2006, and the Australian Commanders' Guide, which dates from 1994. The information for this Study was provided to the ICRC by the Australian government via a report prepared by McCormack.⁷⁷ The following information is included, with regard rule 139 'Respect for International Humanitarian Law', which deals specifically with knowledge of IHL.

Australia's Commanders' Guide (1994) states that "Australia is responsible for ensuring that its military forces comply with LOAC" and that "all ADF members are responsible for ensuring that their conduct complies with the LOAC...

Australia's LOAC Manual (2006) states:...[T]he first step to enforcement of the LOAC is to ensure as wide a knowledge of its provisions as possible both within and outside the armed forces.⁷⁸

The ICRC also notes that Australia referenced its armed forces' service in East Timor and in the Solomon Islands as being 'distinguished by the respect for the principles of international humanitarian law'.⁷⁹

With regard to rule 142 'Instruction in International Humanitarian Law within Armed Forces', the study cites:

Australia's LOAC Manual (2006) [which] states:

13.2 All ADF members are responsible for ensuring that their conduct complies with LOAC. They are to be trained in its basic principles and avoid breaches of these laws.

...

Australia's Defence Training Manual (1994) states that one of the tasks of the legal adviser of the armed forces is to "supervise the organisation of instruction in subordinate units, and to ensure that the levels of understanding are obtained".

...

⁷⁶ See, eg. Squadron Leader Dale Hooper, 'The principles of IHL' (Speech delivered at Red Cross IHL Course for ADF, Brisbane, May 2014); Lieutenant Colonel Damian Copeland 'Exploring weapons law' (Speech delivered at Red Cross IHL Course for ADF, Brisbane, May 2014) (on file with author).

⁷⁷ Tim McCormack, 'An Australian perspective on the ICRC customary international humanitarian law study' in A. Helm (ed), *The Law of War in the 21st Century: Weaponry and the Use of Force* (2006) 81, 84-5.

⁷⁸ ICRC, 'Customary IHL Australia Practice Relating to Rule 139. Respect for International Humanitarian Law' [B III].

⁷⁹ *Ibid* [VI].

Australia's LOAC Manual (2006) states: "Military commanders of all Services and at all levels bear responsibility for ensuring that forces under their control comply with LOAC."

The 2006 ADF Publication Law of Armed Conflict is currently under review. A release date is yet to be confirmed. This publication requires updating for a number of reasons including the ADFs operational experience since 2006 and in light of trends in emerging technologies.⁸⁰

On the question of compliance with the laws of armed conflict DOSL has noted:

The ADF obligation to comply with LOAC is not conditional upon an enemy's compliance: unilateral compliance by the ADF is required. ADF members are open to prosecution for breaches of LOAC. Individual responsibility for compliance cannot be avoided and ignorance is not a justifiable excuse. ADF members will be held to account for any action that leads to a breach of LOAC, including where appropriate prosecution under the Defence Force Discipline Act 1982 (*Cth*). If such acts are committed, compliance with unlawful orders of a superior officer is not a justifiable excuse. If an order is ambiguous, clarification should be sought. If clarification is unavailable, any action taken must comply with LOAC. ADF members are obligated to report any breach of LOAC whether by ADF forces, coalition or allied forces as soon as practically possible.⁸¹

6. Import and export controls on weapons and weapons development materials

States should consider the legality of any weapons that they export in line with the obligation to respect and ensure respect for IHL.⁸² This is because, given the centrality of weapons to the conduct of armed conflict, it is important for the fulfillment of Australia's Common Article 1 obligations that Australia is not facilitating the use of inherently unlawful weapons by third states through its imports and exports. While there is no evidence that Australia specifically considers this with reference to Common Article 1, in implementing a number of other treaty obligations⁸³, and in the national interest, Australia has a number of controls on import and export. Australia also has shown some leadership in this area globally.

⁸⁰ Email COL PA Cumming to E Massingham, 12 January 2016 (on file with author).

⁸¹ Email COL PA Cumming to E Massingham, 12 January 2016 (on file with author).

⁸² Daoust et al, above note 45, 352.

⁸³ The requirement for import and export controls may also come directly from a variety of international treaty law obligations such as the Biological and Chemical Weapons Conventions. See for example Article three of the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* prohibits, by any State Party, the 'transfer to any recipient whatsoever ... [of] any of the agents, toxins, weapons, equipment or means of delivery' covered by that

In 1985, following the finding by the United Nations of the use of chemical weapons during the Iran-Iraq war, the Australian Government proposed an international meeting of nations interested in strengthening and harmonizing export controls.⁸⁴ Fifteen nations and the European Commission met in Brussels in June 1985 under the name the Australia Group. Today the group, which meets in Paris, includes over 40 nations as well as the European Union.⁸⁵ The Australia Group states its principal objective as being ‘to use licensing measures to ensure that exports of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment, do not contribute to the spread of [chemical and biological weapons]’.⁸⁶

Australia is also a member of a number of other frameworks aimed at harmonisation and restrictions on weapons related export controls. For example, by virtue of being a state party to the Chemical Weapons Convention, Australia is a member of the Organisation for the Prohibition of Chemical Weapons.⁸⁷ Since 1990 Australia has been a member of the Missile Technology Control Regime.⁸⁸ The Missile Technology Control Regime was an initiative of the Canadian, French, German, Italian, Japanese, United Kingdom and United States governments.⁸⁹ Established in 1987 the Regime’s members ‘share the goals of non-proliferation of unmanned delivery systems capable of delivering weapons of mass destruction’. The work of the Missile Technology Control Regime is around the coordination of national export licences to ensure that systems capable of delivering weapons of mass destruction are not exported.⁹⁰

Convention. That same article also prohibits any assistance or encouragement to others to manufacture said agents, toxins, weapons, equipment or means of delivery. For a discussion of this in the American context see Blake and Imburgia, above note 27, 197-200.

⁸⁴ Australia Group. *The origins of the Australia Group*, (2007) <<http://www.australiagroup.net/en/origins.html>>.

⁸⁵ Ibid.

⁸⁶ Ibid. The group maintains five export control lists: Chemical Weapons Precursors; Dual-use chemical manufacturing facilities and equipment and related technology and software; Dual-use biological equipment and related technology and software; Human and Animal Pathogens and Toxins; Plant pathogens.

⁸⁷ Organisation for the Prohibition of Chemical Weapons, *Member State - Australia* <<http://www.opcw.org/about-opcw/member-states/member-states-by-region/western-europe-and-other-states/member-states-australia/>>.

⁸⁸ Missile Technology Control Regime, *MTCR Partners* <<http://www.mtcr.info/english/partners.html>>.

⁸⁹ Missile Technology Control Regime, *The Missile Technology Control Regime* <<http://www.mtcr.info/english/index.html>>.

⁹⁰ Ibid.

Australia is a member of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. Australia is one of 41 participating member states of the Wassenaar Arrangement⁹¹ (discussed further in chapter five).

Australia is also a member of the Nuclear Suppliers Group.⁹² Participating states in the Nuclear Suppliers Group implement in their domestic setting the Nuclear Suppliers Group Guidelines. These Guidelines are complementary to other legal frameworks pertaining to nuclear weapons, such as the Nuclear Non-Proliferation Treaty, and require that transfers of the relevant goods and materials are only ever authorised if the transferring state is ‘satisfied that the transfer would not contribute to the proliferation of nuclear weapons’.⁹³

Domestically Australia has a number of measures, overseen by the Defence Export Control Office (DECO), to restrict supply and transfer of weapons and materials for weapons. The Australian Government notes that the Australian Customs Services works with the DOD to ensure that Australia complies with its international obligations in relation to the transfer of materials, equipment and technology which could contribute to the development of weapons.⁹⁴ DECO describes the government policy as being ‘to encourage the export of defence and dual-use goods where it is consistent with Australia's broad national interests’. It notes the export policy criteria as including considerations regarding international obligations, human rights, regional security, national security and foreign policy considerations.⁹⁵ A Standing Interdepartmental Committee on Defence Exports, consisting of representatives from the Departments of Defence, Prime Minister and Cabinet, Foreign Affairs and Trade, Attorney-General and Australian Customs and Border Protection Service also exists for the purpose of considering particularly sensitive export issues.⁹⁶

⁹¹ Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, *Frequently Asked Questions* <<http://www.wassenaar.org/faq/index.html>>.

⁹² Nuclear Suppliers Group, *Participants* <<http://www.nuclearsuppliersgroup.org/en/participants1>>.

⁹³ Nuclear Suppliers Group, *About the NSG* <<http://www.nuclearsuppliersgroup.org/en/about-us>>.

⁹⁴ Australian Government, *Export Controls for Defence and Strategic Goods*, <<http://www.border.gov.au/EnteringorleavingAustralia/Documents/Export%20Control%20for%20Defense%20strategic%20goods.pdf#search=export%20controls>>.

⁹⁵ DOD, *About the Defence Export Control Office*, <<http://www.defence.gov.au/DECO/AboutUs.asp>>; See also Explanatory Memorandum., Defence Controls Bill 2011.

⁹⁶ DOD, *Standing Interdepartmental Committee on Defence Exports* <<http://www.defence.gov.au/DECO/SIDCDE.asp>>.

The *Customs Act 1901* (Cth) provides the legal framework for goods whose importation and exportation to or from Australia is either restricted or prohibited.⁹⁷ As DECO notes, this includes allowing for ‘controls on the export of tangible defence and strategic dual-use goods and technologies’.⁹⁸ The Customs (Prohibited Exports) Regulations 1958 (Cth) set up the need for permits or licences for exporters of controlled goods. Regulation 13E provides for the possibility of written authorisation by the Minister of Defence for members of the ADF to grant licences or give permission to export from Australia goods which are listed in the Defence and Strategic Goods List. For some goods, customs officers are also given this power. The Defence and Strategic Goods List (dated November 1996, as amended) deals with both military goods (including both munitions and non-lethal military goods) (part 1) and dual use goods (part 2). Components, testing and production equipment and software and technology related to these goods are also controlled. The DECO website notes that it assesses around 4500 applications for export permits each year.⁹⁹

In 2012, measures to strengthen Australia’s defence exports controls were introduced in the form of the *Defence Trade Controls Act 2012* (Cth). As the explanatory memorandum to the Defence Trade Controls Bill 2011 notes, by 2011 Australia’s export control legislative regime dating from the early to mid 1990s required some amendments to ensure best practice with international standards was maintained.¹⁰⁰ The *Defence Trade Controls Act 2012* (Cth) had two purposes. The first was to fill identified gaps in the existing export control regime (gaps which had been identified for some time and the closing of which would prepare Australia to give effect to the Arms Trade Treaty¹⁰¹) namely relating to

- intangible transfer of technology;
- provision of services relating to defence and strategic goods and technology;
- brokering of supply of these goods, technology and related services; and

⁹⁷ See particularly Paragraph 112(2A)(aa) regarding Defence goods.

⁹⁸ DOD, *The Customs Act 1901* <<http://www.defence.gov.au/deco/CustomsAct.asp>>.

⁹⁹ Ibid.

¹⁰⁰ Explanatory Memorandum, Defence Trade Controls Bill 2011, 4-5. For example, regulation 13E was originally introduced into the *Regulations by the Customs (Prohibited Exports) Regulations Amendment 1987* (Cth) (Regulation 115 of 1987).

¹⁰¹ Explanatory Memorandum, Defence Trade Controls Bill 2011, 11. See further chapter six for a discussion of this.

- exportation of goods intended for a military end use that may prejudice Australia's security, defence or international relations.¹⁰²

The second was to implement the Treaty Between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation which was agreed to in 2007 to 'create a framework for two-way trade between Australia and the United States of America (US) in defence articles between "trusted communities" without the need for export licence'.¹⁰³ A subsequent Implementing Arrangement (IA) was finalised on 14 March 2008.¹⁰⁴ The Defence Trade Controls Amendment Bill 2015, which proposes a number of amendments to the *Defence Trade Control Act 2012* (Cth) is currently before parliament following public consultation processes in January 2015.¹⁰⁵ The Bill is effectively designed to deal with a number of practical and other concerns associated with implementing the *Defence Trade Control Act 2012* (Cth) which have arisen during the two year transition period built into that Act.¹⁰⁶ For completeness it is noted that the Customs (Prohibited Exports) Regulations 1958 also specifically includes a number of restrictions on exports of arms to particular countries including, as at March 2015, Iran, Eritrea, the Democratic Republic of Congo and Sudan.¹⁰⁷ The Regulations define arms or related material to include weapons, ammunition, military vehicles and equipment, paramilitary equipment and spare parts for weapons, ammunition and military vehicle and equipment.¹⁰⁸

As a general rule Australia prohibits the supply and export of goods and services that may be used to contribute to a weapons of mass destruction program through the administration of the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth).¹⁰⁹ However, if the view that any use of a weapon of mass destruction would violate IHL is accepted, of concern from a Common Article 1 perspective is section 13 of the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth). Section 13 provides that if a person wishes to supply or export goods or services that may be used in a weapons of mass

¹⁰² Explanatory Memorandum, Defence Trade Controls Bill 2011, 5.

¹⁰³ Explanatory Memorandum, Defence Trade Controls Bill 2011, 4.

¹⁰⁴ Explanatory Memorandum, Defence Trade Controls Bill 2011, 30.

¹⁰⁵ DOD, 'Public comment sought on Defence Trade Controls Amendment Bill 2015' (Media release, 17 December 2014).

¹⁰⁶ DOD, *Public presentation* <<http://www.defence.gov.au/deco/Master/docs/Consultation-Docs/Public%20---%20Consultation-Slides.pdf>>.

¹⁰⁷ *Customs (Prohibited Exports) Regulations 1958*, Regulation 13CK-CT.

¹⁰⁸ *Customs (Prohibited Exports) Regulations 1958*, Regulation 13E s 2(1).

¹⁰⁹ *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth) ss 9-12.

destruction program then that person may apply for a permit to do so. If the Minister 'is satisfied that the supply or export of the goods or the provision of services ... would not be contrary to Australia's international or treaty obligations or the national interest'¹¹⁰ the Minister may issue a permit. While Australia's domestic laws are therefore very broad (and indeed broader than required by virtue of Australia's international obligations), in that they cover any goods or services that may be used in a weapons of mass destruction program, the discretionary element means they are not absolute.

Some concern has been expressed by some interest groups about Australia's arms exports. The Medical Association for the Prevention of War (Australia) notes that Australia allows the purchase of restricted defence goods by a number of countries with concerning human rights records.¹¹¹ It is clear that Australia could benefit from considering Common Article 1 obligations in the import and export control legal frameworks it has established as a form of check and balance on the import and export decisions it makes. This is to ensure that such decisions do not help facilitate the failure by other states to respect and ensure respect for IHL.

7. Criminalisation of weapons law violations

In addition to robust legislation and comprehensive education about that legislation, effective weapons laws require the application of penalties for violations. It is therefore necessary to briefly outline the mechanisms in place which enable Australia to investigate and, where appropriate, prosecute violations of these laws. The Geneva Conventions and their Additional Protocols are implemented in Australia through the *Geneva Conventions Act 1957* (Cth) and the *Criminal Code 1995* (Cth), particularly as amended by the *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002*. These later two acts introduce the possibility of prosecutions in Australia for international crimes.¹¹² Chapter 8, Division 268 of the Criminal Code deals with Offences against

¹¹⁰ *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth) ss 13 (d).

¹¹¹ Medical Association for the Prevention of War, *Australia's arms industry* <<https://www.mapw.org.au/australian-issues/australias-arms-industry>>.

¹¹² Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25(4) *Sydney Law Review* 507. Note the assessment in section 5 that the previous Australian criminal laws have 'failed either to prompt persecutions or to gain convictions' and at section 8 '[n]o prosecutions of offences had been initiated under the *Geneva Conventions Act 1958* in relation to war crimes committed after 1945'. Note also the concerns of Tim McCormack that while '[a]ny alleged war crimes, crimes against humanity or acts of genocide committed anywhere in the world after 1 July 2002 (the

humanity, specifically genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the ICC.

Significant penalties of up to 25 years imprisonment¹¹³ apply to the weapons specific war crimes of:

- employing poison or poisoned weapons (Section 268.55)
- employing prohibited gases, liquids, materials or devices (268.56)
- employing prohibited bullets (268.57).

Similarly, employing lawful weapons in an unlawful manner, for example destruction and appropriation of property¹¹⁴, attacking civilians or civilian property¹¹⁵, attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission¹¹⁶, attacking undefended places¹¹⁷ are all criminalized through this legal framework.

Australia's record on bringing prosecutions for war crimes has not been a good one. A comprehensive discussion of this is beyond the scope of this thesis. However, repression of IHL violations are fundamental to the concept of respect for IHL and as such this topic is briefly addressed here. With the exception of some war crimes trials immediately post World War II, Australia has not successfully prosecuted any war criminals and in more recent times has demonstrated a concerning approach to the application of IHL in Australian criminal cases.¹¹⁸ In 2010 the Director of Military Prosecutions controversially (and ultimately, according to the military's chief judge advocate, incorrectly) charged Australian commando soldiers with manslaughter by negligence over an attack in Afghanistan which resulted in

commencement date of the legislation) can now be prosecuted in Australian courts', gaps remain in our pre 1 July 2002 legal framework: Tim McCormack, *Investigating and Prosecuting War Crimes and Crimes Against Humanity*, (2 June 2010, Human Rights Law Centre) <<http://hrlc.org.au/investigating-and-prosecuting-war-crimes-and-crimes-against-humanity/>> . See also T. McCormack, 'The contribution of the international criminal court to increasing respect for international humanitarian law' (2008) 27 *University of Tasmania Law Review* 22, 44-46.

¹¹³ *Criminal Code Act 1995* (Cth). Cf penalties for other war crimes in division 268 such as 17 years for outrages upon personal dignity and 15 years for pillaging.

¹¹⁴ *Ibid* s. 268.

¹¹⁵ *Ibid* ss. 268.35 and 36.

¹¹⁶ *Ibid* s. 268.37.

¹¹⁷ *Ibid* s. 268.39.

¹¹⁸ Georgina Fitzpatrick et al (eds), *Australia's War Crimes Trials 1945-1951* (Brill Nijhoff, 2016)

civilian casualties.¹¹⁹ Manslaughter, while a crime under domestic law, is not a concept known to the laws of armed conflict. If a war crime had been committed, then charges of that nature were appropriate. Manslaughter charges were not. As McCormack has articulated, ‘negligence has never been an acceptable fault element for the perpetration of a war crime’ and that he hopes we never again see such charges being laid without reference to IHL, the legal framework applicable in armed conflict.¹²⁰

Professor McCormack has also expressed, on a number of occasions, his frustration at failure by both sides of government to tackle the issue of war criminals living freely in Australia.¹²¹ Journalist Mark Aarons has also drawn attention to the issue of war criminals living in Australia with impunity.¹²² In December 1998 the *War Crimes Act 1945* (Cth) was amended to allow for prosecutions of World War II war criminals living in Australia. This came following the publication of a report looking at allegations that Nazi war criminals had been helped to settle in Australia by the Australian Government and international attention to the issue of war criminals.¹²³ A cabinet minute from 19 February 1987 detailing the government response to the Menzies report provided for the establishment of a Special Investigations Unit to look at possible prosecutions of war criminals in Australia.¹²⁴ Attorney-general Lionel Bowen told cabinet in March 1988 that the original number of suspected war criminals had gone from more than 70 to more than 450.¹²⁵ Ivan Polyukhovich was the first to be prosecuted under the laws, with proceedings taking place between 1990 and 1993. Ultimately

¹¹⁹ Lyn McDade, ‘Statement by the Director of Military Prosecutions: 12 February 2009 civilian casualty incident in Afghanistan’ (Media release, MSPA 458/10, 27 September 2010).

¹²⁰ Tim McCormack, ‘Commandos finally get justice’, *The Age* (online), 25 May 2011 <<http://www.theage.com.au/it-pro/commandos-finally-get-justice-20110524-1f2dl.html>>.

¹²¹ Mick Bunworth, Interview with Tim McCormack (Television interview, 29 May 2001); Tim McCormack, ‘Investigating and Prosecuting War Crimes and Crimes against Humanity’, (Human Rights Law Centre, 3 June 2010). See also Gideon Boas, ‘Australia left wanting when allegations of war crimes arise’ *Sydney Morning Herald* (online), 4 April 2011 <<http://www.smh.com.au/federal-politics/political-opinion/australia-left-wanting-when-allegations-of-war-crimes-arise-20110404-1cxe3.html>>.

¹²² Mark Aarons, *War Criminals Welcome: Australia, a Sanctuary for War Criminals Since 1945* (Black Inc, 2001)

¹²³ ACC Menzies, *Review of Material Relating to the Entry of Suspected War Criminals into Australia* (Australian Government Publishing Service, Canberra, 1987). See also Gillian Triggs, Australia’s War Crimes Trials: A moral necessity or legal minefield? (1987) *Melbourne University Law Review*, 382, 382-383; Unit failed to nail war criminals, *The Australian* (online), 2 January 2014 <<http://www.theaustralian.com.au/in-depth/cabinet-papers/unit-failed-to-nail-war-criminals/story-fnkuhyre-1226793357314>>.

¹²⁴ Cabinet Submission 4576 ‘Government response to Menzies’ Report - Decision 8958’. (Contents range 09 Feb 1987 - 19 Feb 1987, NAA: A14039, 4576).

¹²⁵ Damian Murphy, ‘Cabinet papers 1988-89: Nazi war crimes trials; rise of extreme racism’, *The Sydney Morning Herald* (online) 1 January 2015 <<http://www.smh.com.au/federal-politics/political-news/cabinet-papers-198889-nazi-war-crimes-trials-rise-of-extreme-racism-20141231-12atsu.html>> ; Unit failed to nail war criminals, *The Australian* (online), 2 January 2014 <<http://www.theaustralian.com.au/in-depth/cabinet-papers/unit-failed-to-nail-war-criminals/story-fnkuhyre-1226793357314>>.

he was acquitted of the 6 murders he stood trial for (other charges relating to the mass murder of 850 Jews from Serniki in Ukraine not being able to be substantiated). A lack of evidence and clear testimony being available, so long after the fact, made this trial very problematic.¹²⁶

These problems also plagued two subsequent trials, before the Special Investigations Unit was closed down, and more recently the government has shown a continued reluctance to prosecute war criminals living in Australia.¹²⁷

As such, while the legal frameworks exist, Australia does not have a good record of ensuring respect for IHL in the future by ensuring that those who violate it are brought to justice. If a Common Article 1 analysis was required in considering how best to approach the issue of war criminals living in Australia, Australia may be forced into a different approach. As Boas points out ‘we have a great anxiety about the resources involved in such prosecutions and an even greater anxiety that the Australian public does not really support prosecuting people who committed crimes — even war crimes — in other countries’.¹²⁸ This ‘anxiety’ means that Australia either does not live up to its obligations of prosecuting those who commit war crimes and/or it hampers other states in their efforts to do so. Australia is better resourced than most states to carry out these prosecutions and should be doing so pursuant to a range of obligations, including Common Article 1 and therefore making a valuable contribution to creating an international norm.

8. Conclusion

Common Article 1 requires that states implement the primary provisions of the Four Geneva Conventions and their Additional Protocols domestically. On paper, in terms of incorporating the provisions of IHL into Australian law, Australia has a strong record of treaty ratification

¹²⁶ See David Bevans, *A case to Answer: The story of Australia’s first European War Crimes Prosecution* (Wakefield Press, 1994).

¹²⁷ See Vasko Nasteovski, ‘The Australian experience of conducting war crimes trials’ in Petrovic, J (ed) *Accountability for Violations of International Humanitarian Law: Essays in Honour of Tim McCormack*, (Routledge, 2015) 214; Gideon Boas, ‘Australia left wanting when allegations of war crimes arise’ *Sydney Morning Herald* (April 4 2011) <<http://www.smh.com.au/federal-politics/political-opinion/australia-left-wanting-when-allegations-of-war-crimes-arise-20110404-1cxe3.html>> . Note however that in July 2015 Australian citizen Dragan Vasiljkovic was extradited from Australia to face war crimes charges in Croatia after he was refused leave to appeal to the high court. ‘Australian Dragan Vasiljkovic extradited to Croatia on war crimes charges’ *The Guardian* (online) 8 July 2015 <<http://www.theguardian.com/australia-news/2015/jul/08/captain-dragan-vasiljkovic-extradited-australia-croatia-war-crimes-charges>>.

¹²⁸ Gideon Boas, ‘Australia left wanting when allegations of war crimes arise’ *Sydney Morning Herald* (April 4 2011) <<http://www.smh.com.au/federal-politics/political-opinion/australia-left-wanting-when-allegations-of-war-crimes-arise-20110404-1cxe3.html>>

and domestic laws incorporating criminal obligations and export control obligations in particular. Australia also has a strong record with regard to review of weapons for compatibility with IHL. However, there are a number of instances identified in this chapter where consideration of Common Article 1 obligations in the implementation of these domestic laws would be of value and provide a source of further strength - in particular with regards to war crimes prosecutions and ministerial discretion around exports. In all these cases, requiring a Common Article 1 analysis or check would strengthen Australia's record in terms of compliance with IHL and therefore help contribute to global humanitarian security outcomes. As such it is clear that Australia could benefit from greater consideration of Common Article 1 as the overarching obligation by which all IHL related decisions are made. Doing so would not only ensure that Australia demonstrated consistency in its approach to IHL issues but would also be a valuable contribution to creating an international norm of IHL compliance. In this thesis, further analysis in this regard will be made in respect of four particular weapons law case studies.

CHAPTER FOUR: AUSTRALIA, CLUSTER MUNITIONS AND THE OBLIGATION TO RESPECT AND ENSURE RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

Chapter four provides an overview of the CCM¹ which was adopted in 2008 and grounded in the rules of IHL, in particular, the principle of distinction. It considers the approach taken by Australia to the negotiation of the CCM, and its implementation by Australia. It answers the questions: what approach has Australia taken to the regulation of cluster munitions by international law; and what conclusions can be reached from this evaluation regarding the approach of Australia to compliance with the obligation to respect and ensure respect pursuant to Common Article 1? It argues that at least most of the types of cluster munitions now prohibited by the Convention are those that are incompatible with IHL. As such Common Article 1 applies to states in respect of these weapons. It notes that Common Article 1 has not featured in Australia's approach to the treaty to date. The chapter raises particular issues with Australia's approach in light of the Common Article 1 obligation. It argues that Australia has undermined Common Article 1 in relation to cluster munitions by working to ensure that the CCM allows Australia to operate with other forces using cluster munitions, even though the use of such weapons would violate the principles of IHL.

1. What are cluster munitions?

A cluster munition is a weapon which consists of a casing which contains within it a number of submunitions. The submunitions are intended to scatter when the casing opens, and to explode on impact with the ground. The number of submunitions contained within the casing can be up to 600.² Cluster munitions are primarily deployed using either air power or artillery fire and are designed to cover a large area. They are often directed against large targets such as airfields, and against moving targets such as tanks or troops.³ Cluster munitions were first used during World War II.⁴

¹ *Convention on Cluster Munitions*, 30 May 2008, 48 ILM 357 (entered into force 1 August 2010) ('CCM') Preamble final paragraph.

² ICRC, *Cluster munitions: what are they and what is the problem?* (August 2010) <www.icrc.org/eng/assets/files/cluster-munitions-factsheet-2010.pdf>.

³ Bonnie Docherty, *The Time is Now: A Historical Argument for a Cluster Munitions Convention*, (2007) 20 *Harvard Human Rights Journal* 53, 61.

⁴ The Cluster Munition Coalition notes the use in 1943 by German and Soviet forces of SD-1 and SD-2 butterfly bombs: Cluster Munition Coalition, *A history of harm*, <<http://www.stopclustermunitions.org/the-problem/history-harm/>>; ICRC Mines-Arms Unit, *Explosive*

Cluster munitions have two design aspects that give rise to humanitarian concern. The first is the difficulty of limiting the dispersal of the submunitions to purely military objectives. Secondly, the submunitions do not always explode when intended and so, like landmines, they continue to pose a threat to the civilian population long after a conflict has ended. This will be discussed in more detail below at part 4 of this chapter.

The ICRC reports that '[c]redible estimates of the failure rates of these weapons in recent conflicts have varied from 10% to 40%'.⁵ Where they have been used, including in the last decade in Lebanon in 2006⁶, Georgia in 2008, Cambodia in 2011, Libya in 2014/5, Syria since 2012, Ukraine in 2014/5, Yemen and Sudan in 2015⁷, they have caused large numbers of civilian casualties. This has been both through deliberate targeting of civilians and through civilians being killed or wounded unintentionally – either as lawful or as unlawful collateral damage, or from civilians becoming the victims of explosive remnants of war (ERW)⁸. The death toll from cluster munitions up to 2006 was estimated at around 100,000 people.⁹ Handicap International Reported in 2006 that civilians comprised 98 percent of the casualties of cluster munitions.¹⁰ Some 26 countries, at least, remain affected by cluster munition ERW.¹¹ There are billions of submunitions that have not yet exploded.¹²

From 1 August 2010, the CCM prohibited the use, production, transfer and stockpiling of cluster munitions. The CCM has 91 States Party (as at the March 2015). The CCM defines cluster munitions in the following way:

Remnants of War: Study on Submunitions and other unexploded ordinance (August 2000), 10; Nout van Woudenberg, 'The long and winding road towards an instrument on cluster munitions' (2008) 12:3 *Journal of Conflict and Security Law* (2008) 447, 447.

⁵ ICRC, *Cluster munitions: what are they and what is the problem?*, above note 2.

⁶ BBC News, *UN denounces Israel Cluster bomb use* (30 August 2006)

<<http://news.bbc.co.uk/2/hi/5299938.stm>>.

⁷ Cluster Munition Coalition, *A timeline of cluster bomb use* (2015) <http://www.stopclustermunitions.org/en-gb/cluster-bombs/use-of-cluster-bombs/a-timeline-of-cluster-bomb-use.aspx>; See also at Henry Dowlan, 'Cluster Munitions' in Brooks et al (eds) *Ryans Ballistic Trauma* (Springer, 2011) 58-60.

⁸ See also S Cumberland, *Banning Cluster Munitions* (2009) 87(1) *Bulletin of the World Health Organisation*, 8.

⁹ Nout van Woudenberg, above note 4, 449. Handicap International have a slightly more conservative tally of at least 16,921 confirmed globally, through the end of 2010 and noting, as many casualties go unrecorded, an estimated global total of cluster munition casualties is estimated at between 20,000 and 54,000. Landmine and Cluster Munition Monitor, *Major Findings Cluster Munition Convention 2011 Report*, <http://www.the-monitor.org/index.php/publications/display?url=cmm/2011/CMM_Major_Findings_2011.html>.

¹⁰ Handicap International, *Fatal Footprint: The Global Human Impact of Cluster Munitions* (2006) 42.

¹¹ As at 1 July 2013, Landmine and Cluster Munition Monitor, *Contamination and Clearance* <http://www.the-monitor.org/index.php/publications/display?url=cmm/2013/CMM_Contamination_And_Clearance_2013.html>.

¹² M Hiznay, 'Operational and technical aspects of cluster munitions' (2006) 4 *Disarmament Forum*, 15.

“Cluster munition” means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:

- (a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
- (b) A munition or submunition designed to produce electrical or electronic effects;
- (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
 - (i) Each munition contains fewer than ten explosive submunitions;
 - (ii) Each explosive submunition weighs more than four kilograms;
 - (iii) Each explosive submunition is designed to detect and engage a single target object;
 - (iv) Each explosive submunition is equipped with an electronic self-destruction mechanism;
 - (v) Each explosive submunition is equipped with an electronic self-deactivating feature;¹³

3. History of cluster munitions in Australia

In April 2010, the DOD advised ‘[t]o the best of our knowledge, the ADF has not used cluster munitions as a weapon of war, and have never had operational stocks of the cluster munitions to use’.¹⁴ Australia had ‘limited numbers’ of Karinga¹⁵ cluster bombs in the 1970s and 1980s.¹⁶ Only 10-20 Karinga clusters were ever tested.¹⁷ In the 1970s and 1980s Australia also possessed some United States CBU-58 cluster bombs for the purpose of ‘base lining’ the Karinga munitions performance.¹⁸ Most Karingas and US CBU-58 cluster bombs were destroyed in the 1990s.¹⁹ It is unclear why Australia never used the Karinga or other cluster munitions. There is no evidence as to whether the reasons were related to

¹³ CCM, above note 1, art 2(2).

¹⁴ Mines Action Canada, *Cluster Munitions Monitor 2010 Report*, 122; See also in 2007 the DOD stated ‘[t]he ADF does not presently use or produce cluster munitions’ - DOD, Submission to Senate Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into the Cluster Munitions (Prohibition) Bill 2006*, 27 February 2007, 3; National Interest Analysis, *Convention on Cluster Munitions* [2009] ATNIA 5 (11 March 2009).

¹⁵ The Karinga was an experimental cluster bomb developed by the Australian Defence Science and Technology Organisation for employment by F111 strike aircraft. Australian War Memorial Collection, Cluster Bomb Karinga <<http://www.awm.gov.au/collection/REL/04840>>.

¹⁶ Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 22 June 2009, 12 (Mr Murry Perks); Mines Action Canada 2010, above note 14, 122.

¹⁷ Mines Action Canada, *Cluster Munitions Monitor 2011 Report*, 189.

¹⁸ Mines Action Canada 2010, above note 14, 122.

¹⁹ Mines Action Canada 2011, above note 17, 189.

humanitarian concerns or simply the fact that this type of weapon did not provide a military utility in the context of Australia's arsenal.

Australia retains 'representative samples of cluster munitions - most of them inert - solely for research and testing'.²⁰ Australia has two live cluster bombs of Soviet Union origin (which contain several hundred live submunitions), and which were collected on the battlefield in Afghanistan in 2001, and 13 inert cluster bombs and 2,320 inert submunitions which are employed at various ADF training establishments across Australia.²¹ One American Rockeye cluster bomb dispenser and some inert Rockeye munitions have also been noted to be held as samples.²²

Further, Australia has stated it does not intend to acquire an operational stockpile of cluster munitions.²³ Australia currently possesses some²⁴ SMArt 155 weapons which they go to some lengths to note are not cluster munitions within the definitional scope of the CCM (indeed the Convention was drafted to exclude such weapons). SMArt 155 weapons contain within them two submunitions.²⁵ SMArt 155 weapons are anti-tank artillery rounds. The DOD's October 2007 press release describes the weapons:

[t]he 'SMArt 155' artillery round is a sensor-fused precision munition ... for use against tanks and other armoured vehicles in all weather and terrain environments. Each SMArt 155 artillery shell delivers two sensor-fused projectiles.

The SMArt 155's capacity for autonomous target detection makes it very accurate against specific targets. ... As a result, it poses little risk to non-combatant civilians.

... If a target is not detected, the SMArt 155 has redundant mechanisms that will cause it to self-destruct, thus eliminating the threat to civilians from explosive remnants of war. ...

In addition to Australia's position on not acquiring or stockpiling its own cluster munitions, the Australian Government has stated it will not approve the stockpiling of cluster munitions

²⁰ Mines Action Canada 2010, above note 14, 122. Article 3(6) of the CCM allows the retention of 'a limited number' of munitions for the purpose of training in detection and counter-measures. See further Leonard Blazeby, 'The Convention on Cluster Munitions and its Domestic Implementation' (2009) 35:9 *Commonwealth Law Bulletin*, 721-726.

²¹ Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 22 June 2009, 12 (Mr Murry Perks), 12.

²² Mines Action Canada 2011, above note 17, 189.

²³ Mines Action Canada 2011, above note 17, 189; Commonwealth, *Government and Defence statement in response to Parliamentary Question on Notice*, Parl Paper No. 2616 (7 November 2006).

²⁴ Numbers are not disclosed. The contract value was noted as being \$14m. DOD (Cth), 'Defence purchases new anti-tank artillery round' (Media Release, CPA 346/07, 3 October 2007).

²⁵ These weapons fall outside the scope of the CCM as having less than 10 submunitions.

in Australia by foreign governments.²⁶ Then Parliamentary Secretary for Defence, Senator Feeney, stated that ‘[t]here are currently no foreign stockpiles of cluster munitions in Australia. As a matter of policy, the government has not and will not authorise such stockpiling’.²⁷

4. Cluster munitions and international humanitarian law

Any analysis of the compatibility of any weapons system with IHL requires consideration of the following four weapons law criteria²⁸:

- whether the weapon is specifically regulated by treaty law;
- whether the weapon inherently has indiscriminate effects²⁹;
- whether the weapon inherently causes unnecessary suffering or superfluous injury³⁰;
and
- whether the weapon inherently causes widespread, long-term and severe damage to the natural environment.³¹

4.1 Specific regulations in treaty law

In relation to cluster munitions, two treaties are relevant. The Convention on Conventional Weapons (CCW), Protocol V on ERW (which was adopted in 2003 and entered into force in 2006)³² and CCM (which was adopted in 2008 and entered into force in 2010)³³.

Protocol V on ERW began life at an expert meeting in 2000 where the ICRC made a call to States Party to the CCW to explore the idea of a new protocol on ERW. ‘The purpose was to

²⁶ Bob Carr, Stephen Smith, Mark Dreyfus, ‘Cluster Munitions’ (Joint Media Release, 1 April 2013).

²⁷ Commonwealth, *Parliamentary Debates*, Senate, 21 August 2006, 80 (Senator Feeney).

²⁸ Kathleen Lawand, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare* (ICRC, 2006), William Boothby, *Weapons and the Law of Armed Conflict* (Oxford University Press, 2009), 345-6: See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law – Volume 1: Rules*, (ICRC, 2005) (‘ICRC Customary Law Study’), rules 70 and 71 as well as rules 72-86.

²⁹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (‘AP I’) art 48 and 51(5).

³⁰ AP I art 35(2), see also ICRC Customary Law Study, above note 28, rule 70.

³¹ AP I art 35(3), see also ICRC Customary Law Study, above note 28, rule 45 establishing these principles as a rule in ‘international armed conflict, and arguably also in non-international armed conflict’.

³² *Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention)*, 28 November 2003, (entered into force 12 November 2006) (‘Protocol V CCW’).

³³ See also, for a summary of the key articles, Leonard Blazebly, above note 20.

reduce the threat posed by unexploded artillery shells, mortar shells, hand grenades, cluster munitions, bombs and similar weapons often found after the end of active hostilities’.³⁴ Australia ratified Protocol V in January 2007.³⁵ Protocol V does not regulate the use of cluster munitions in any way. However, it does require signatories to ensure that ‘[a]fter the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control’.³⁶

The CCM regulates the use of cluster munitions. Australia became a state party on 8 October 2012.³⁷ The treaty requires that Australia ‘never under any circumstances ... use cluster munitions, develop, produce, otherwise acquire, stockpile, retain or transfer ... cluster munitions...’ nor ‘assist, encourage or induce anyone to engage in any activity prohibited’ [to a Convention State Party].³⁸

The key obligations are to:

- ‘destroy or ensure the destruction of all cluster munitions...as soon as possible but not later than eight years after the entry into force of th[e] Convention for that State Party’³⁹;
- ‘clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control’ – generally within 10 years⁴⁰;
- provide assistance to cluster munitions victims - including rehabilitation and psychological care⁴¹; and

³⁴ ICRC, *Treaties and State Parties to Such Treaties*, <<http://www.icrc.org/ihl/INTRO/610>>.

³⁵ ICRC, *Listing of States Parties: Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention)*, <http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=610>.

³⁶ *Protocol V CCW* art 3(2).

³⁷ ICRC, *Listing of States Parties: Convention on Cluster Munitions*, <http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=620>.

³⁸ CCM, art 1.

³⁹ *Ibid* Art 3 (2).

⁴⁰ *Ibid* art 4 (1).

⁴¹ *Ibid* art 5.

- adopt national legislation (including penal sanctions) and other implementing measures.⁴²

States Party ‘in a position to do so’ are to provide technical, material and financial assistance, including assistance with the implementation of Article 5, to States Party affected by cluster munitions.⁴³ The CCM allows the retention or acquisition of a limited number of cluster munitions for training purposes including detection, clearance and destruction techniques, as well as for the development of cluster munition counter measures.⁴⁴

The First Review Conference to the CCM was held in Croatia from 7-11 September 2005.⁴⁵ The resultant Dubrovnik Declaration reaffirmed the commitment of States Party to fully implement their obligations under the Convention including those pertaining to stockpile destruction, survey, clearance, risk reduction education and those made to victims and survivors.⁴⁶ The Dubrovnik Declaration also noted the commitment to ‘ensure that cluster munitions remain a stigmatized weapon’.⁴⁷

The most contentious part of the CCM is the interoperability provision. Article 21 provides:

Relations with States not party to this Convention

1. Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.
2. Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article, of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.
3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.
4. Nothing in paragraph 3 of this Article shall authorise a State Party:

⁴² Ibid art 9.

⁴³ Ibid art 6.

⁴⁴ Ibid art 3 (6).

⁴⁵ UNDP, *Review Conference* < <http://www.clusterconvention.org/meetings/1rc/>>.

⁴⁶ *Draft 2015 Dubrovnik Declaration: Spectemur agendo (judged by our actions)*, CCM/CONF/2015/WP4, 1st Rev Con, Item 9 (30 July 2015).

⁴⁷ Ibid.

- (a) To develop, produce or otherwise acquire cluster munitions;
- (b) To itself stockpile or transfer cluster munitions;
- (c) To itself use cluster munitions; or
- (d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

This provision is concerned with ensuring that States Party, when working with counterparts from states not signatory to the CCM, will not be acting in violation of the Convention if those counterparts use cluster munitions in their operations. A fairly broad interpretation of this provision has been taken in some jurisdictions although the ICRC has expressed the view that domestic implementing legislation which would ‘permit the armed forces to be directly involved in the use, possession and transport of cluster munitions taking place in the context of military cooperation and operations’ is of increasing concern to the fulfilment of the objective ‘to put an end for all time to the suffering and casualties caused by cluster munitions’ and the universality of the Convention.⁴⁸

This clause lies at the heart of the issue regarding Australia’s conduct and its Common Article 1 obligation to respect and ensure respect for IHL as it creates a tension with the obligation to respect and ensure respect for IHL. Without subsection 3 Australia well may not have joined the Convention.⁴⁹ This will be discussed further below.

4.2 Indiscriminate effects

A weapon which has inherently indiscriminate effects, as opposed to one that can be used in an indiscriminate way, is unlawful. The principle of distinction between military and civilian objects is fundamental to IHL. Article 48 of AP I provides that:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁵⁰

⁴⁸ ICRC, *Convention on Cluster Munitions Interoperability and National Legislation The View of the International Committee of the Red Cross* (12 September 2012), <<http://www.icrc.org/eng/assets/files/2012/cluster-munitions-interoperability-icrc-2012-09-12.pdf>>.

⁴⁹ Naj Taylor, An inventory of Australian WikiLeaks cables relating to cluster munitions negotiations, *Crikey*, (28 November 2011), <<http://blogs.crikey.com.au/this-blog-harms/2011/11/28/an-inventory-of-australian-wikileaks-cables-relating-to-cluster-munitions/>>.

⁵⁰ AP I art 48.

The distinction principle forms a part of customary IHL as a norm applicable in both international and non-international armed conflicts.⁵¹

Two further concepts, found in Article 51(5) of AP I, are relevant to cluster munitions:

Among others, the following types of attacks are to be considered as indiscriminate:

1. an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects
2. an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

There are two clear schools of thought on the legality of cluster munitions under IHL principles. The first is that they are inherently unlawful by virtue of their indiscriminate nature because of their large footprint and their high failure rates leaving ERW on the ground for many years after their use.⁵² The second is that their use in certain circumstances, in particular for wide area military targets and moving military targets can be lawful provided their use complies with the law of targeting.⁵³

Boothby notes there is:

an important distinction between weapons that are indiscriminate by nature and those that have potentially indiscriminate effects. It is the former that breach the discrimination principle as it applies to the law of weaponry, in that they are not capable of discriminating use. ... Their lawful use, their misuse, or the failure to take appropriate action after their operational purpose has ended, may result in undesired casualties. That does not of itself render them as weapons that are inherently indiscriminate....⁵⁴

⁵¹ ICRC Customary Law Study, above note 28, rule 1. It is further described as a 'cardinal rule' of IHL in *Legality of the threat or use of nuclear weapons (Advisory Opinion)* [1996] ICJ Rep 257.

⁵² Virgil Wiebe, 'Footprints of Death: Cluster bombs and Indiscriminate Weapons under International Humanitarian Law' (2000), 22 *Michigan Journal of International Law* 85. For further discussion of these arguments see also Thomas J Herthel, 'On the Chopping Block: Cluster Munitions and the Law of War' (2001) 51 *Air Force Law Review*, 229, 249. Note that Herthel does not however, support the argument that cluster munitions are indiscriminate.

⁵³ See William Boothby, above note 28, 81-82; Meredith Hagger and Tim McCormack, 'Regulating the Use of Unmanned Combat Vehicles: Are General Principles of International Humanitarian Law Sufficient?' (2012) 21 (2) *Journal of Law, Information and Science*, 74, [4]. Herthel, above note 52, 264.

⁵⁴ Boothby, above note 28. 81.

The problem with the first approach is that it does not fully recognise the great number of different types of cluster munitions, which have varying numbers of submunitions with varying capacity for accuracy and varying failure rates. Human Rights Watch notes that 208 different types of cluster munitions exist.⁵⁵ Some of these weapons are ones which have very high failure rates, very high numbers of sub-munitions and no precision guidance. These weapons are inherently indiscriminate. However, other cluster munitions may have very low failure rates, small number of submunitions and/or precision guidance such that they can be used to achieve the neutralisation of a military objective in accordance with the principles of IHL.

The question of where the line is drawn between lawful and unlawful cluster munitions was therefore the subject of debate during the Oslo process. Concerted discussions of the global community have concluded that those weapons with more than ten explosive submunitions are prohibited and that, if there are fewer than ten explosive submunitions, they must have precision guidance and self-deactivation mechanisms in order to be lawful.⁵⁶ The fact that the States Party decided to frame the treaty in this way is not necessarily an indication of their views on where the line is drawn between the types of cluster munitions that breach the principles of IHL and those that don't. However, in light of the fact that this treaty was developed to address this specific humanitarian consequence, an inference can be drawn that this is at the very least a good indication of where this line is drawn. Further, even if this view is seen as too narrow, and arguments can be made that some cluster munitions falling outside of this definition are still able to comply with the principles of IHL, and could lawfully be used by non-state parties, the reality is that a great number of types of cluster munitions cannot comply with the principles of international law. It is on this basis that this chapter argues that supporting states in the use of inherently unlawful cluster munitions is in breach of the obligation to ensure respect for IHL.

4.3 Unnecessary suffering or superfluous injury

Article 35 (2) of AP I provides that '[i]t is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'. This provision is applicable in both international and non-international armed

⁵⁵ Human Rights Watch, 'Memorandum to CCW Delegates: A Global Overview of Explosive Submunitions', May 2002, <<http://www.hrw.org/legacy/backgrounder/arms/submunitions.pdf>>, 1.

⁵⁶ See CCM art 1(2)(2)(c).

conflict.⁵⁷ The rationale behind this rule was articulated in the preamble to the 1868 St Petersburg Declaration which notes that the ‘object [of disabling enemy combatants] would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable’.⁵⁸

A few key points can be made about this principle:

- the inclusion of both the phrases superfluous injury and unnecessary suffering reflect the fact that ‘both physically observable and psychological elements are included’⁵⁹;
- the rule is concerned with the objective nature of the weapon rather than the subjective intention of those employing the weapon⁶⁰;
- horrendous suffering is not necessarily unnecessary suffering⁶¹; and
- weapons the subject of specific treaty or customary rule which prohibits or restricts their use are not necessarily weapons which inherently cause superfluous injury or unnecessary suffering⁶² (ie. their use may have been regulated or restricted for other reasons).

Superfluous injury and unnecessary suffering are comparative and not absolute concepts and it is therefore necessary to ascertain the nature of the comparator. Boothby concludes that the ‘purpose for which the weapon is being employed’ must be the comparator. Boothby uses the ‘the nature and scale of the generic military advantage to be anticipated from the use of the weapon in the applications for which it is designed to be used’ as articulating this purpose when compared with ‘the pattern of injury and suffering associated with the normal, intended use of the weapon’ as the comparator.⁶³ There are some theoretical arguments in relation to

⁵⁷ ICRC Customary Law Study, above note 28, rule 70.

⁵⁸ William Boothby, above note 28, 55. Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar, 2013) 51-52.

⁵⁹ William Boothby, above note 28, 58-59.

⁶⁰ Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) 59.

⁶¹ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (Judgment)* [1996] ICJ Rep [13] (Judge Higgins).

⁶² William Boothby, above note 28, 60.

⁶³ William Boothby, above note 28, 63 citing WJ Fenrick, ‘The Conventional Weapons Convention: A modest but useful treaty’, (1990) 279 IRRC 498, 500; William Hays Parks, ‘Means and methods of warfare’, Symposium issued in Honour of Edward R Cummings (2006), 38 GW ILR 511, (fn 25); M Bothe, KJ Partsch, and WA Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) 200–1.

how this should be done but, in effect, the current weapon choice which will potentially be replaced by the new weapon is likely to be the comparator. If a weapon which is under review would cause greater injury or suffering than the weapons systems already available and used by the military, and if the weapon under review does not provide any additional military advantage to the attacking forces then the new weapon probably falls foul of the rule prohibiting superfluous injury and unnecessary suffering.⁶⁴

Applying this concept to cluster munitions the comparator is likely to be existing artillery rounds or airborne missiles. There is nothing in the nature of a cluster munition compared to these other types of explosives that causes any more or less injury or suffering than any other explosive rounds of the same size and explosive material.⁶⁵ Even the fact that one cluster munition will, in theory, cause hundreds of small explosions does not change this.

Cluster munition injuries are horrendous. For example:

[i]n 50% of cases the traumatic consequences are fatal. The damage done to the body by these weapons is not only caused by the explosion itself but also by the earth, bacteria, pieces of clothing and fragments of metal and plastic that find their way into the body tissue. Not only can they lead to the amputation of the limb(s) affected but they may also cause permanent damage to the hands, arms, genitalia, face, eyes and ears.⁶⁶

However, unlike the weapons this rule was originally codified to prohibit – bullets which explode within the body to cause great suffering through militarily unnecessary internal injury⁶⁷ – these munitions do not inherently cause unnecessary suffering in the sense of the blast impact itself. As Herthel notes, ‘whether cluster munitions cause superfluous injury or unnecessary suffering can only be determined on a case-by-case basis and in light of current military necessity’.⁶⁸

⁶⁴ William Boothby, above note 28, 346.

⁶⁵ See generally Herthel, above note 52, 257-259.

⁶⁶ Handicap International, *The impact of landmines and cluster munitions*, <http://www.handicap-international.org.uk/what_we_do/landmines_cluster_munitions/impact> ; see also that similar conclusions are found in a study conducted between 2006 and 2012 by the Faculty of Medical Sciences of the Lebanese University which looked at 350 victims of submunition explosions and the injuries included blast injuries with fragmentation or shrapnel penetrating the head, face, torso, abdomen, pelvis and/or extremities. When cluster submunition fragments become lodged in the body it can cause tissue damage and infectious complications: Fares et al, ‘Trauma-related infections due to cluster munitions’ (2013) 6(6) *Journal of Public Health* 482, 483.

⁶⁷ Crowe and Weston-Scheuber, above note 58, 51.

⁶⁸ Herthel, above note 52, 259.

4.4 Widespread, long-term, and severe damage to the natural environment

Weapons which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment are prohibited by Article 35(3) AP I.⁶⁹ Cluster munitions need to be considered here in two respects, their initial use, and the consequences of munitions which fail to detonate when intended. Clusters munitions themselves are not intended to cause damage to the natural environment. Rather they are intended to attack targets dispersed over a wide area and have a military utility against targets such as ‘soft-skinned vehicles, accumulations of troops and other military assets, and certain types of armour’.⁷⁰ Further, should all the munitions detonate when intended it could not be said that they may be expected to cause widespread, long-term and severe damage to the natural environment. If all the munitions detonate when intended, a cluster munition’s environmental effects are no different to other forms of explosive weapons. Their impacts, therefore, do not fit within the definition of Article 35(3) which requires widespread, long-term and severe damage.

However, the fact is that cluster munitions do not always work as intended. The life expectancy of a submunition in the soil can be significant. The submunitions dropped in Laos, for example, have a life expectancy of approximately 100 years.⁷¹ The UN Mine Action Service environment impact study from 2007 notes that removal operations significantly damage the environment, and long-term damage arises from destruction of flora, contamination of water systems, and damage to the natural habitats of wildlife.⁷²

Giving further weight to this argument, the ICRC describes Article 35(3) in terms of protection for the climate, ecosystems and the ‘balance of the natural living and environmental conditions’⁷³ and the deliberate modification of the environment.⁷⁴ Dowlen

⁶⁹ AP I art 35. Other provisions of AP I also protect the environment against attack, such as AP I art 55(1), however while art 35 is addressed solely to environmental protection, AP I art 55 is concerned with the ability of the civilian population to retain the use of the natural environment for their survival. Note AP 54, 55(1). Crowe and Weston-Scheuber, above note 58, 68; ICRC Customary Law Study, above note 28, 146.

⁷⁰ William Boothby, above note 28, 255.

⁷¹ Henry Dowlen, ‘Cluster Munitions’ in AJ Brookes et al (eds) *Ryan’s Ballistic Trauma* (Springer, 2011), 61.

⁷² United Nations Mine Action Service, *Safety & occupational health – Protection of the environment. International Mine Action Standard* (2007)

<http://www.mineactionstandards.org/fileadmin/user_upload/MAS/documents/imas-international-standards/english/series-10/IMAS-10-70-Ed1.pdf> ; *ibid*.

⁷³ Y Sandoz, C. Swinarski and B. Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC and Martinus Nijhoff, Geneva, 1987) [1444].

⁷⁴ *Ibid* [1451].

points out that ‘ERW degrade habitats by altering food chains, making conservation of protected areas difficult, and polluting the soil and water supplies.’⁷⁵

Again, whether cluster munitions violate this principle must therefore be considered on a case-by-case basis.

4.5 Cluster munitions and targeting law

Given that not all cluster munitions are not inherently unlawful, a few comments will be made about cluster munitions and targeting law to see whether their use in a particular situation is compatible with the rules of IHL more generally. This requires consideration of the principles of distinction and proportionality. For Australian use, this only needs consideration for munitions with fewer than 10 submunitions because Australia is precluded from using any munition with a greater number of submunitions by virtue of its CCM obligations. For interoperability a broader approach is necessary to take into account when Australian forces are operating with a non-State Party to the CCM.

The principle of distinction requires that in deciding to attack with cluster munitions only military objectives be the object of attack. This is possible with cluster munitions, provided they are correctly used in the circumstances prevailing at the time. Significantly, however, the International Criminal Tribunal for the former Yugoslavia, which had cause to consider the legality of the use of cluster munitions during attacks on Zagreb (Croatia) in May 1995 in the *Martić* judgment, held that, by using cluster munitions, the defendants evidenced an intention to target civilians.⁷⁶ In this case, cluster munitions were deliberately used in an area with a concentration of civilians in breach of the principle of distinction.

The principle of proportionality provides that it is prohibited to launch an attack that may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian property that would be excessive in relation to the concrete and direct military advantage anticipated.⁷⁷ This principle is also reflected in customary IHL for both international and non-

⁷⁵ Henry Dowlen, above note 71, 62. Although it is noted that concerns about cluster munition ERW are not considered as significant as for other ERW and that some argue that ERW can be protective of the environment against development.

⁷⁶ See further Virgil Wiebe, ‘For Whom the Little Bells Toll: Recent Judgments by International Tribunals on the Legality of Cluster Munitions’ (2007-8) 35 *Pepperdine Law Review*, 895, 898-9.

⁷⁷ AP I arts 51(5)(b) and 57(2)(a)(iii).

international armed conflict.⁷⁸ Cluster munitions require additional considerations to be taken into account when deciding if using them on a target is proportionate.

The question is whether, when a weapon is properly targeted against a military objective, the risk that munitions will fail to explode when intended and thereby create a potential danger to civilians is sufficient to render indiscriminate or disproportionate an attack which would not be otherwise so regarded... If there is known to be a serious risk that a significant percentage of the munitions or submunitions used against a target will not explode and will remain dangerous and those explosive remnants of war will cause civilian casualties, then the resulting risk to the civilian population is a factor which may have to be taken into account in applying the proportionality test.⁷⁹

In findings reflecting 33 state responses to a questionnaire on the applicability of IHL principles to ERW, compiled by McCormack for the Group of Governmental Experts of the States Party to the Convention on Certain Conventional Weapons, 97% of respondent states indicated the rule on proportionality was relevant to the use of cluster munitions that may result in ERW.⁸⁰

There is also the argument that cluster munitions cause damage to the natural environment so as to affect the ability of the civilian population to survive, through the rendering of vast tracts of land unusable for civilian purposes on account of the dangers of cluster munition ERW, in breach of Article 55 of AP I. That is, cluster submunitions which fail to function as designed and do not explode on impact, and which do not have a self-neutralisation mechanism, require costly, time consuming, specialist skills to remove them before land can be returned to civilian purposes including agriculture. Van Woudenberg notes that there are some differing opinions on whether the longer term and environmental consequences need to be taken into account in the proportionality equation.⁸¹ McCormack, as well as others including the ICRC, take the view that as the long-term consequences are foreseeable they should be considered by the Commander.⁸²

⁷⁸ ICRC Customary Law Study, above note 28, rule 14.

⁷⁹ Christopher Greenwood, *Legal Issues Regarding Explosive Remnants of War*, CCW/GGE/I/WP.10/ (22 May 2002); Van Woudenberg, above note 5, 461-2.

⁸⁰ Van Woudenberg, above note 4, 461.

⁸¹ *Ibid* 463.

⁸² Tim McCormack, *International Humanitarian Law Principles and Explosive Remnants of War*, CCW/GGC/XI/WG.1/WP.18. (15 August 2005).

4.6 Conclusion on legality of cluster munitions

It has been argued here that, while some cluster munitions could be used in such a way as to comply with IHL, most cluster munitions are inherently unlawful. As such, unrelated to the existence of the CCM, states have an obligation not to use those inherently unlawful cluster munitions, but also to ensure that other states do not use them. As we will now see, Australia, in approaching the CCM, specifically sought to ensure that other states could continue to use inherently unlawful weapons and it appears to be continuing to do so. As will be discussed further below, a clarification that would prevent Australia from facilitating the use of non-IHL compatible cluster munitions by other states would have been an appropriate approach for Australia to take in enacting their obligations under the CCM. On account of this omission, this chapter asserts that Australia is undermining its obligations under Common Article 1 in relation to cluster munitions.

5. Australia's approach to the preparatory steps to a ban on cluster munitions

The 2008 CCM was a culmination of various attempts dating from the 1960s to regulate the use of these weapons.⁸³ Sweden, leading Egypt, Mexico, Norway, Sudan, Switzerland and Yugoslavia, proposed in 1974, and then again in 1976, with the support of six additional nations, that the use of 'anti-personnel cluster warheads' be prohibited.⁸⁴ The issue of the humanitarian concern caused by cluster munitions and other ERW was, around this time, also under consideration from the UN. A report of the UN Environment Program on ERW that noted among other points that 'high explosives should be designed to have built in mechanisms that render the munition harmless in due course' was endorsed by the UN General Assembly in 1983.⁸⁵

Australia was not behind any of the early attempts by various groups of states to introduce a ban on cluster munitions. Herby and Nuiten note that an informal Australian paper presented

⁸³ Early attempts came in response to the use of the weapon in Indochina during the 1960s and 1970s: ICRC, *Submunitions and other unexploded ordinance: Explosive Remnants of War* (ICRC, Geneva, 2000) 29. Between 1954 and 1973 it is estimated that between six and seven million bombs (an unknown number of bomblets) were dropped on Laos.

⁸⁴ Peter Herby and Anna Nuiten, 'Explosive Remnants of War. Protecting Civilians through an Additional Protocol to the 1980 Convention on Certain Conventional Weapons' (2001) 841 *International Review of the Red Cross*, 195-205. See also van Woudenberg, above note 4, 468; Wiebe, above note 52, 154-5; Herthel above note 52, 250-2.

⁸⁵ Peter Herby and Anna Nuiten, above note 84, 195-205 citing UN Secretary General, *Report – Problem of Remnants of War*, UNGA/A/38/383 (19 October 1983).

at an ICRC expert meeting on certain weapon systems in May 1994 stated that submunitions could be used provided an attack complied with the law on targeting, and that a self-destruct mechanism on submunitions should be obligatory.⁸⁶

At the Second Review Conference of the CCW, a Group of Government Experts with a mandate on ERW was established. This group met in December 2001 and reached a consensus on a mandate to negotiate a new international instrument on ERW.⁸⁷ This led to the adoption of Protocol V on ERW in November 2003 with a focus on obligations to clear and facilitate the clearing of areas of ERW as ‘as soon as feasible’ and ‘after the cessation of active hostilities’.⁸⁸ Van Woudenberg notes that while the negotiation for Protocol V did not result in any consensus on regulating the use of weapons which produce ERW, ‘states did undertake to discuss this in the future’.⁸⁹ Australia ratified Protocol V to the CCW on 4 January 2007.⁹⁰

At the Third Review Conference of the CCW in November 2006 Norway and 24 other countries submitted a declaration calling for a ban on the use of cluster munitions within ‘concentrations of civilians’.⁹¹ Australia was not a part of this group. Agreement was not reached on this, but rather on the holding of a further discussion of experts in June 2007.⁹² Norway’s response to this was to take the process outside the CCW framework and convene a meeting in Oslo in February 2007 towards a cluster munitions ban. Forty-nine states attended this meeting. This did not include Australia. Initially, Australia resisted going outside CCW to the Oslo processes – interoperability as well as a preference for the consistency of the CCW approach being the primary reasons behind this.⁹³

⁸⁶ Ibid 195-205. The 1974 Conference was the Conference of Government Experts on Weapons That May Cause Unnecessary Suffering or Have Indiscriminate Effects and its follow up conference was held in 1976.

⁸⁷ Van Woudeberg, above note 4, 469; see also Corsi, J, Towards peace through legal innovation: The Process and the Promise of the 2008 Cluster Munitions Convention (2009) 22 *Harvard Human Rights Journal* 145, 148.

⁸⁸ *Protocol V CCW* art 3.

⁸⁹ Van Woudenberg, above note 4, 471-2.

⁹⁰ ICRC, *Listing of States Parties: Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention)*, above note 38.

⁹¹ Van Woudenberg, above note 4, 473.

⁹² At the June 2007 Group of Government Experts on the CCW meeting Germany proposed a 6th Protocol to the CCW which would cover cluster munitions, restrict their use ‘within or near populated areas’ and ban the use of ‘unreliable’ cluster munitions. The proposal did not get the necessary support: Van Woudenberg, above note 4, 474.

⁹³ John Borrie, *How the Cluster Munitions Ban Was Won: Oslo Treaty Negotiations Conclude in Dublin* (Acronym Institute for Disarmament Policy, 1 August 2008) <<http://www.acronym.org.uk/dd/dd88/88jb.htm>>.

The Oslo process committed the participating countries to:

1. Conclude by 2008 a legally binding international instrument that will:
 - (i) prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians, and
 - (ii) establish a framework for cooperation and assistance that ensures adequate provision of care and rehabilitation to survivors and their communities, clearance of contaminated areas, risk education and destruction of stockpiles of prohibited cluster munitions.
2. Consider taking steps at the national level to address these problems.
3. Continue to address the humanitarian challenges posed by cluster munitions within the framework of international humanitarian law and in all relevant fora.⁹⁴

The Oslo meeting was followed by conferences in Lima in May 2007 and in Vienna in December 2007 to discuss the intended convention. Australia attended these meetings. The Australian delegation was in favour of cluster munitions with a ‘self-destruct mechanism’ being excluded from consideration by the discussions⁹⁵ and joined with those pointing out that the desired outcome was not one of a total ban, but rather that restricted cluster munitions ‘that cause unacceptable harm to civilians’.⁹⁶

Australia remained engaged in the process as the CCM developed but Wikileaks cables from 2008 indicate Australia’s willingness to withdraw from the Cluster Munitions Convention negotiations if the Convention was to result in all cluster munitions being banned or if Australian concerns over interoperability were not adequately dealt with by the Convention.⁹⁷ A cable from the US Embassy Canberra, Australia, dated 26 November 2008 notes ‘Australian representatives informed United States counterparts that Australia will take a broad view of the activities permitted because of Article 21 of the CMC’ and noting ‘[t]he official interpretation concerning interoperability/combined operations is that the only prohibited action would be for embedded or third-party force Australian personnel to physically fire or drop cluster munitions’.⁹⁸

⁹⁴ *Oslo Conference on Cluster Munitions Declaration* (22-23 February 2007) <[http://www.regjeringen.no/upload/ud/vedlegg/oslo%20declaration%20\(final\)%2023%20february%202007.pdf](http://www.regjeringen.no/upload/ud/vedlegg/oslo%20declaration%20(final)%2023%20february%202007.pdf)>.

⁹⁵ Van Woudenberg, above note 4, 480.

⁹⁶ *Ibid* 481.

⁹⁷ Naj Taylor, An inventory of Australian WikiLeaks cables relating to cluster munitions negotiations, *Crikey*, (28 November 2011), <<http://blogs.crikey.com.au/this-blog-harms/2011/11/28/an-inventory-of-australian-wikileaks-cables-relating-to-cluster-munitions/>>.

⁹⁸ *Ibid*.

During the 2015 First Review Conference of the CCM, Australia, along with Canada and the United Kingdom, was reported to have been attempting to have the Dubrovnik Declaration wording weakened.⁹⁹ These efforts were not successful with the amendments being rejected by other States Party.¹⁰⁰

6. Australia's approach to the CCM negotiations and legislation

Australia's implementing legislation for the CCM entered into force on 1 April 2013.¹⁰¹ This was the culmination of a quite lengthy process, which commenced prior to the CCM actually being conceived. The Australian Democrats and Australian Greens in 2006 co-sponsored a Bill (the Cluster Munitions (Prohibition) Bill 2006) which would have prevented ADF members from deploying cluster munitions.¹⁰² The DOD, in addressing the Senate Standing Committee on Foreign Affairs, Defence and Trade, raised a number of concerns with the Bill including:

- that global efforts to conclude regulation were currently underway and should not be anticipated by this legislation¹⁰³;
- the Bill would potentially prevent the ADF from acquiring any advanced new generation sub-munition capability and the concern 'that the Bill would exclude Australia's potential to exploit new emergent technologies that would be *more capable, discriminating* and *reliable* than existing munitions'¹⁰⁴; and
- that the Bill would create operational concerns in contributing to Headquarters, calling in fire support and working with nations using cluster munitions.¹⁰⁵

⁹⁹ Cluster Munition Coalition, 'Closing Press release Dubrovnik Review Conference' (Press Release, 11 September 2005) <http://www.stopclustermunitions.org/en-gb/media/news/2015/closing-press-release-dubrovnik-reveiw-conference.aspx>; Human Rights Watch, 'Cluster Munitions Used in 5 Countries in 2015: But Treaty grows stronger as countries join, destroy stockpiles' (3 September 2015) <<https://www.hrw.org/news/2015/09/03/cluster-munitions-used-5-countries-2015>>.

¹⁰⁰ Ibid.

¹⁰¹ DFAT, *Convention on Cluster Munitions*, <http://www.dfat.gov.au/security/cluster_munitions.html>.

¹⁰² Senator Lyn Allison, leader of the Australian Democrats, introduced the Bill into the Australian Senate on 5 December 2006.

¹⁰³ DOD, Submission to Senate Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into the Cluster Munitions (Prohibition) Bill 2006*, 27 February 2007, 1-2.

¹⁰⁴ Ibid 3-4.

¹⁰⁵ Ibid 4-5.

The DOD noted ‘[i]f enacted, the Greens Bill will put Australia at a serious military disadvantage to our national interest’¹⁰⁶. The Senate Standing Committee on Foreign Affairs, Defence and Trade recommended that this Bill not be passed and that the ‘Government consider foreign legislation that has been enacted or is currently before foreign parliaments that relates to the use of cluster munitions with a view to introducing similar legislation that would be relevant to Australia's circumstances’.¹⁰⁷ The Bill was not passed.

Subsequent to the conclusion of the CCM and signature by Australia of that document on 3 December 2008 the process of ratification of the CCM commenced. The CCM was tabled before the Joint Standing Committee on Treaties on 13 May 2009 and a public hearing on the Convention was held on 15 and 22 June 2009 by the Joint Standing Committee on Treaties.¹⁰⁸ Concerns related to Article 21 on interoperability, as they had done through the negotiation process. Air Vice Marshall Brown stated before the Joint Standing Committee on Treaties:

The interoperability issue is most likely to become relevant if Australia becomes involved in a major conflict against conventional forces, particularly against armoured forces. That is the most likely circumstance under which our partners and allies would use cluster munitions. Cluster munitions were used by the United States and other nations in the initial conflicts in Afghanistan in 2001 and Iraq in 2003. Even taking this into account, this convention will allow Australia to continue to work effectively in a coalition during a major conflict. I think the simplest way to understand the interoperability provisions in the convention is that ADF personnel should [sic] not be the first or the last in the chain of command when cluster munitions are used. That is, ADF personnel must not be engaged in actually deploying the cluster munitions—an example I gave last time was that of a pilot actually dropping cluster munitions—nor should they be at the top of the chain of command with ultimate responsibility and exclusive control over the choice of using cluster munitions.¹⁰⁹

In August 2009 the Joint Standing Committee on Treaties recommended that ‘binding treaty action’ be taken to implement the CCM and that in doing so, regard be had to preventing inadvertent participation or assistance in the use of cluster munitions and preventing

¹⁰⁶ Ibid 6.

¹⁰⁷ Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Recommendations - Inquiry into the Cluster Munitions (Prohibition) Bill 2006* (31 May 2007) [5.58].

¹⁰⁸ See also undated letter from McLelland, Rudd and Smith to the Senate Standing Committee on Foreign Affairs, Defence and Trade Senator Mark Bishop <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/13may2009/hearings.htm>.

¹⁰⁹ Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 22 June 2009, 10 (Air Vice Marshall Brown).

investment in companies developing cluster munitions.¹¹⁰ The Government response to the Report of the Joint Standing Committee on Treaties was dated 13 May 2010. The Government view included that ‘the Convention does not prohibit inadvertent participation in the use, or assistance in the use, of cluster munitions’¹¹¹ prohibiting only use and assistance in the use of cluster munitions pursuant to Articles 1 and 21 of the Convention. The interoperability approach taken by the Government is that as long as the Australian military is not expressly requesting the use of cluster munitions where the choice of munitions is within Australia’s exclusive control¹¹² Australian personnel are not committing a crime through their involvement.

The subsequent Bill, the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, was introduced into the House of Representatives in October 2010. It was then referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee. The Bill attracted a number of submissions from individuals and organisations including those concerned with the interoperability provisions¹¹³. A public hearing on the Bill was held on 3 March 2011. The Bill also attracted a proposed amendment by the Australian Greens’ Senator Ludlum and a dissent view presented in Senator Ludlam’s capacity as a member of the Senate Foreign Affairs, Defence and Trade Legislation Committee.¹¹⁴ These processes did not result in any amendments to the Bill and it was passed on 21 August 2012 by the Senate with the support of the Government and Opposition of the time. The Second Reading Speech was however, not without debate. In the Senate, the Australia Greens labelled the Bill ‘deceptive, misguided and outright offensive’¹¹⁵ and noted the Bill had been drafted in such a way as to

¹¹⁰ Joint Standing Committee on Treaties, Parliament of Australia, *Report on the Review into treaties tabled on 12 March and 13 May 2009*, (2009) chapter 3, recommendations 2 and 3. See also undated letter from McLelland, Rudd and Smith to the Senate Standing Committee on Foreign Affairs, Defence and Trade <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/13may2009/hearings.htm>.

¹¹¹ Undated letter from McLelland, Rudd and Smith to the Senate Standing Committee on Foreign Affairs, Defence and Trade Senator Mark Bishop <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/13may2009/hearings.htm>, 2.

¹¹² Ibid 3.

¹¹³ For the full list of submission see <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed%20inquiries/2010-13/ccabcmp2010/submissions>.

¹¹⁴ *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010* (Cth).

¹¹⁵ Commonwealth, *Parliamentary Debates*, Senate, 21 August 2012, 73 (Senator Ludlum).

be ‘essentially in violation of the objectives of the convention itself’¹¹⁶. Senator Ludlum went on to quote former Prime Minister Fraser and former Chief of the Defence Force General Gration’s comments that the Bill ‘directly undermine[s] the spirit and intention of the convention’ and ‘goes well beyond [that required for interoperability]’ respectively.¹¹⁷ The Greens’ particular concerns were that the Bill allowed Australian military personnel to assist during an interoperability mission in which cluster munitions are being used (they just can’t pull the trigger) and that it did not expressly prohibit stockpiling cluster weapons on Australian soil or investment in companies which make these weapons.

The amendments contained in the Bill were introduced to the *Criminal Code Act 1995* (Cth) by the resulting *Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012* (Cth), effectively coming into force on 1 April 2013. Relevantly, the Act includes provisions on interoperability and stockpiling on Australia soil. Section 72.41 provides:

A person who is an Australian citizen, is a member of the Australian Defence Force or is performing services under a Commonwealth contract does not commit an offence against section 72.38 by doing an act if:

(a) the act is done in the course of military cooperation or operations with a foreign country that is not a party to the Convention on Cluster Munitions; and

(b) the act is not connected with the Commonwealth:

(i) using a cluster munition; or

(ii) developing, producing or otherwise acquiring a cluster munition; or

(iii) stockpiling or retaining a cluster munition; or

(iv) transferring a cluster munition; and

(c) the act does not consist of expressly requesting the use of a cluster munition in a case where the choice of munitions used is within the Commonwealth’s exclusive control.

Section 72.42 provides:

(1) Section 72.38 does not apply to the stockpiling, retention or transfer of a cluster munition that:

(a) is done by:

¹¹⁶ Ibid 76.

¹¹⁷ Ibid 73.

(i) a member of the armed forces of a foreign country that is not a party to the Convention on Cluster Munitions; or

(ii) a person who is connected with such forces as described in subsection (2) and is neither an Australian citizen nor a resident of Australia; and

(b) is done in connection with the use by those forces of any of the following in Australia in the course of military cooperation or operations with the Australian Defence Force:

(i) a base;

(ii) an aircraft of any part of those forces or an aircraft being commanded or piloted by a member of those forces in the course of his or her duties as such a member;

(iii) a ship of any part of those forces or a ship being operated or commanded by a member of those forces in the course of his or her duties as such a member.

(2) This subsection covers a person with any of the following connections with the armed forces of a foreign country that is not a party to the Convention on Cluster Munitions:

(a) the person is employed by, or in the service of, any of those forces;

(b) the person is serving with an organisation accompanying any of those forces;

(c) the person is attached to or accompanying those forces and is subject to the law of that country governing any of the armed forces of that country.

7. Australia, cluster munitions and the obligation to respect and ensure respect for international humanitarian law

Australia has engaged in a number of actions both prior to and after the formation of the CCM which demonstrates respect and ensuring respect for IHL with regards to cluster munitions. This includes the fact that Australia does not possess operational stocks of cluster munitions, has never used them as a weapon of war, does not intend to acquire them and only retains a limited number of cluster munitions for training purposes. That Australian military personnel are trained in the laws of armed conflict and that Australia conducts article 36 reviews on the acquisition of weapons and this includes weapons such as the Smart 155 munitions also respects IHL.

Further, Article 21 of the CCM requires Australia to ‘encourage States not party to this Convention to ratify, accept, approve or accede to this Convention’. Although, after the fact, this would include statements such as expressing support for the ratification of the CCM by

other nations. For example in 2010 then Foreign Minister Smith, issued a press release congratulating ‘the Government of the United Kingdom on the entry-into-force on 25 March of its legislation banning the use, production and stockpiling of cluster munitions’¹¹⁸.

A significant aspect of ensuring respect for international law, in so far as cluster munitions are concerned, relates to the obligation to ‘[a]fter the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control’¹¹⁹ and ‘clear and destroy, or ensure the clearance and destruction of, cluster munition remnant located in cluster munition contaminated areas’¹²⁰.

More directly Australia has obligations under Article 6 to provide technical, material and financial assistance, including assistance with the implementation of the Convention, to States Party affected by cluster munitions. As such, the approach of Australia to clearing cluster munition contamination is an important part of measures by Australia to ensure respect for Australia’s IHL obligations. In 2009, then Foreign Minister Smith, launched the Mine Action Strategy 2010-2014, which through the commitment of \$100 million over the five years, aims to achieve improved quality of life for victims of, and reduced number of deaths and injuries from, landmines, cluster munitions and other ERW as well as enhanced capacity of countries to manage their mine action programs.¹²¹ The Strategy notes that ‘Australia has been a committed donor to partner governments in 16 affected countries across the Asia–Pacific, the Middle East and Africa. We have contributed more than \$175 million to mine action over the past 12 years’¹²² including \$75 million through the aid program under the Mine Action Strategy 2005–10.¹²³ This action includes activities such as the Aus-AID (now DFAT) funded explosive ordinance training school in Palau that was opened in 2013.¹²⁴

¹¹⁸ Stephen Smith, ‘Australia welcomes UK legislation banning cluster munitions’ (Australian Government Media Release, Foreign Minister, 2010) <<http://aid.dfat.gov.au/MediaReleases/Pages/Australia-welcomes-UK-legislation-banning-cluster-munitions.aspx>>.

¹¹⁹ *Protocol V CCW* art 3 (2).

¹²⁰ CCM, art 4 (1).

¹²¹ DFAT, *Mine Action Strategy for the Australian aid program towards a world free from landmines, cluster munitions and other explosive remnants of war 2010–14*, (AusAID, 2009), 1.

¹²² *Ibid.*

¹²³ *Ibid* Ministerial Forward.

¹²⁴ DFAT, *Palau and AusAID announce new funding for removal of unexploded remnants of war* (Media release, 29 April 2013).

However, when viewed from the perspective of the obligation to ensure respect for IHL, the most significant aspect of the Australian approach to the Cluster Munitions Convention, is the efforts undertaken by Australia to ensure that another nation is not hampered in its desire to use cluster munitions, even if the use of those weapons is in violation of the principles of IHL. Australia has enacted domestic legislation, through the *Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012* (Cth) to implement its international obligations under the CCM. As has been outlined, the implementation of this legislation was not without controversy and that approach taken undermines Common Article 1, as well as the CCM. This implementation of the interoperability provisions in Article 21, through section 72.41 and the provisions in section 72.42, means that Australia can support the use of weapons by other states which do not comply with IHL principles and specifically permits the presence of cluster munitions on a military base, an aircraft or ship in Australian territory by foreign nationals on non-State Parties.¹²⁵ The effect of this is to allow countries, not party to the Convention, to use Australian soil to stockpile, retain or transfer cluster munitions. No distinction is made by Australia, in taking this approach, as to whether those weapons stockpiled, retained or transferred on Australian soil are lawful or inherently unlawful weapons. This is a significant failing. These provisions are not, in this author's view, demonstrative of respect for IHL because they directly violate Australia's obligations under Common Article 1 to respect and ensure respect for IHL. Further, the provisions undermine the Conventions' objective to rid all State Party Countries of cluster munitions and are contradictory, given the above statements by the Australian Government that they will not permit the stockpiling of cluster weapons on Australian soil.

Noam Shifrin writes:

The reason ... appears to be the unquestioning adherence to US military policy ... Australia wants to be able to fight with US forces wherever and whenever those who take such decisions think it in the national interest. They want as little impediment when doing so as possible. If that means allowing Australian officers to advance their careers by being seconded to headquarters run by US military personnel who may sometimes plan operations involving the use of cluster munitions or having Australian soldiers assist US military personnel transporting cluster munitions so be it.¹²⁶

¹²⁵ *Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012* (Cth) s 72.42.

¹²⁶ Noam Shifrin, 'Legislative cluster bomb' *The Drum* (online), 19 July 2011 <<http://www.abc.net.au/unleashed/2800864.html>>.

Throughout the process of negotiating the cluster munitions convention, Australia has gone to considerable efforts to assist another nation, specifically the United States, to not be hampered by the introduction of this legal framework. As recently as September 2015 Australia has again taken up the task of trying to assist other nations use cluster munitions.¹²⁷ In taking this approach Australia cannot be said to have lived up to its obligation to ensure respect for IHL. Australia, as a coalition partner with a number of other states in a number of military operations, has capacity and influence over its coalition partners in relation to cluster munitions use. This is because Australian policies can make it either harder or easier for third party states to use these weapons when operating with Australians. Australia has not sought to exercise this influence in accordance with its legal obligation under Common Article 1.

Had Australia considered Common Article 1 in its approach to Article 21 it could have worked to respect and ensure respect IHL by arguing for an amendment of Article 21. A clarification that Article 21 only applied in circumstances where the cluster munitions, being used by the non-State Party, were not the sort of cluster munitions that fell foul of compliance with principles of IHL, regardless of the Convention definition of cluster munitions, would have been appropriate. Instead, no reference is made in Article 21 to compliance with the principles of IHL. This allows Australia to assist the United States to deploy weapons which breach the rules of IHL and provides an example of Australia undermining Common Article 1.

8. Conclusion

This chapter has illustrated the approach that Australia has taken to the Cluster Munitions Convention. It would appear that Australia has not considered Common Article 1 obligations in its approach to the Cluster Munitions Convention and that, although Australia itself does not see the military utility in cluster munitions (having made a decision not to stock them even prior to global action to prohibit them), it puts great stock in ensuring that its allies, particularly the United States, can still deploy them.

¹²⁷ Cluster Munition Coalition, 'Closing Press release Dubrovnik Review Conference' (Press Release, 11 September 2005) <http://www.stopclustermunitions.org/en-gb/media/news/2015/closing-press-release-dubrovnik-reveiw-conference.aspx>; Human Rights Watch, 'Cluster Munitions Used in 5 Countries in 2015: But Treaty grows stronger as countries join, destroy stockpiles' (3 September 2015) <<https://www.hrw.org/news/2015/09/03/cluster-munitions-used-5-countries-2015>>.

Air Marshall Brown's comments that an Australian pilot must not actually be the one dropping the cluster munitions and 'nor should they be at the top of the chain of command with ultimate responsibility and exclusive control over the choice of using cluster munitions'¹²⁸ leaves a concerning amount of space for Australian involvement in the deployment of cluster munitions.

Giving consideration to Common Article 1, in this instance, would have required the Australian Government to consider whether such involvement by an Australian would be in breach of the requirement to ensure ADF personnel respect IHL. It would also have required consideration of whether such support for the United States and other allies using cluster munitions would be ensuring respect for IHL. The conclusion to this analysis would have required, at the very least, Australia to have advocated for the amendment of Article 21 to recognise that interoperability must mean that State Parties' military personnel could never operate with non-state parties' militaries when they are using the sorts of cluster munitions that fall foul of compliance with principles of IHL, regardless of the CCM definition of cluster munitions.

Whilst some cluster munitions may not be inherently unlawful weapons, there are very narrow circumstances in which targeting law under the Geneva Conventions would allow their use. The international community has agreed that their humanitarian consequences outweigh their military utility and prohibited them accordingly. Australia has agreed to this prohibition on their use and is bound by the customary obligation to respect and ensure respect for IHL. As such Australia should be doing more to encourage states not party to the Convention to join up. Australia should not be undermining Common Article 1, by enabling the use of these weapons by other states, as it is currently doing. In order to facilitate this, Australia should employ a Common Article 1 analysis in relation to its approach to cluster munitions.

¹²⁸ Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 22 June 2009, 10 (Air Vice Marshall Brown).

CHAPTER FIVE: AUSTRALIA, NUCLEAR WEAPONS AND THE OBLIGATION TO RESPECT AND ENSURE RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

Chapter five provides an overview of the failure of humanity to date, to eliminate nuclear weapons despite commitments outlined in the NPT. It notes the current international move towards a ban-treaty which would unequivocally prohibit the use of the nuclear weapons. The chapter adopts the view that the use of nuclear weapons, as they are understood today, can in no conceivable way comply with the principles of IHL and that, as such, states would be taking a clear opportunity to comply with the obligation in Common Article 1 through their positive inclusion in progress towards a legally binding instrument clearly prohibiting the use of nuclear weapons. It answers the questions what approach has Australia taken to the regulation of nuclear weapons by international law and what conclusions can be reached from this evaluation regarding the approach of Australia to compliance with the obligation to respect and ensure respect pursuant to Common Article 1? It argues that Australia is undermining efforts to unequivocally prohibit the use of nuclear weapons, in breach of its obligation to respect and ensure respect for IHL. Australia must reconsider its position on nuclear weapons in light of this obligation and, if it does so, it is well placed to use its capacity to influence other States towards a position of respecting IHL with respect to nuclear weapons.

1. Introduction

In March 2013 representatives of 127 governments met in Oslo, Norway, to discuss the humanitarian consequences of nuclear weapons.¹ The conference constituted the first ever meeting of governments to discuss the humanitarian consequences of these weapons. The agenda was a dialogue on the immediate and long term effects of nuclear detonation and whether there was any possibility of a viable response to such a calamity by emergency services and medical personnel.² In February 2013, in Nayarit, Mexico, 146 governments

¹ Norwegian Government, *Conference: Humanitarian Impact of Nuclear Weapons* (11 March 2013) <http://www.regjeringen.no/en/dep/ud/selected-topics/humanitarian-efforts/humimpact_2013.html?id=708603>.

² The key findings of the conference being that it is 'unlikely that any state or international body could address the immediate humanitarian emergency caused by a nuclear weapon detonation in an adequate manner and provide sufficient assistance to those affected. Moreover, it might not be possible to establish such capacities, even if it were attempted. The historical experience from the use and testing of nuclear weapons has demonstrated their devastating immediate and long-term effects. While political circumstances have changed, the destructive potential of nuclear weapons remains. The effects of a nuclear weapon detonation, irrespective of cause, will not be constrained by national borders, and will affect states and people in significant ways,

met to continue these discussions.³ The Chair's summary of that second conference made clear that not everyone was just discussing humanitarian consequences.⁴ Many were working towards a legally binding instrument to prohibit the use of nuclear weapons.

These developments, which also included a further follow up intergovernmental meeting in Vienna, Austria in December 2014,⁵ strongly urged on by the work of the International Red Cross and Red Crescent Movement⁶ and the International Campaign to Abolish Nuclear Weapons, demonstrate a growing interest in a campaign that has seen, and continues to see, many variants over the years aimed at the eradication of nuclear weapons.⁷ As at late 2015 this interest is demonstrated in the form of a Humanitarian Pledge⁸ for the prohibition and elimination of nuclear weapons, endorsed by 121 nations.⁹ The Humanitarian Pledge is now also the subject of a UN General Assembly resolution¹⁰ and an 'open-ended working group' will look at 'concrete effective legal measures ... to attain ... a world without nuclear weapons'¹¹, commencing in February 2016. As will be discussed later in this chapter, Australia is not on board with this initiative.

The horrors of Hiroshima and Nagasaki that led to this humanitarian need are well documented. Australian school children have these horrors described to them through images and words of the picture book of Hiroshima survivor and Sydney resident, Junko Morimoto:

regionally as well as globally.' Norwegian Government, *Chair's summary Humanitarian Impact of Nuclear Weapons* (5 March 2013) <https://www.regjeringen.no/en/aktuelt/nuclear_summary/id716343/>.

³ Mexican Government, *Nayarit Conference*

<http://mision.sre.gob.mx/oi/intranet/proyectos/index.php?id_proyecto=4&idioma=en>.

⁴ Ibid.

⁵ See further Vienna Conference of the Humanitarian Impact of Nuclear Weapons website at <http://www.bmeia.gv.at/en/european-foreign-policy/disarmament/weapons-of-mass-destruction/nuclear-weapons-and-nuclear-terrorism/vienna-conference-on-the-humanitarian-impact-of-nuclear-weapons/>.

⁶ In particular Resolution 1 of the 2011 Council of Delegates which appealed to all states 'to pursue in good faith and conclude with urgency and determination negotiations to prohibit the use of and completely eliminate nuclear weapons through a legally binding international agreement, based on existing commitments and international obligations'. ICRC *Council of Delegates 2011: Resolution 1* (26 November 2011)

<<http://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm>>.

⁷ For a discussion of some of these campaigns see Nina Eisenhardt and Tim Wright 'Generations of change: persuading post Cold-War kids that disarmament matters' (2010) 4 *Disarmament Forum* 15.

⁸ *Note verbale dated 24 August 2015 from the Permanent Mission of Austria addressed to the Secretary-General of the Conference on Disarmament transmitting the text of the humanitarian pledge supported by 114 Members of the United Nations*, CD/2039, (28 August 2015).

⁹ ICAN, *Humanitarian Pledge*, (5 November 2015) ICAN <<http://www.icanw.org/pledge/>>.

¹⁰ *Humanitarian pledge for the prohibition and elimination of nuclear weapons*, UN GA, 1st Comm, 70th sess, Agenda item 97(b) Doc A/C.1/70/L.38 (21 October 2015). 128 states voted in support of this resolution, 29 voted against the resolution and 18 abstained.

¹¹ UN GA Meetings Coverage, *On Recommendation of First Committee, General Assembly Adopts More than 50 Drafts, Including New One on 'Ethical Imperatives' for Nuclear Disarmament* 7 December 2015, <<http://www.un.org/press/en/2015/ga11735.doc.htm>>. 130 states voted in support of this resolution, 48 against the resolution and 8 abstained.

I saw a girl with skin hanging from her nails. There was a child, screaming, trying to wake up her dead mother. [...] I heard people screaming and moaning in pain, and there was a horrible smell of burnt skin. [...] I found the bones of many of my friends.¹²

The reflections of ICRC delegate in the Far East, Dr Marcel Junod, the first non-Japanese doctor to witness the aftermath of the dropping of the atomic bomb, on 6 August 1945, on Hiroshima have also been widely shared with the public:

We (...) witnessed a sight totally unlike anything we had ever seen before. The centre of the city was a sort of white patch, flattened and smooth like the palm of a hand. Nothing remained. The slightest trace of houses seemed to have disappeared. The white patch was about two kilometres in diameter. Around its edge was a red belt, marking the area where houses had burned, extending quite a long way further (...) covering almost all the rest of the city.¹³

The evidence presented by Tillman Ruff and Ira Helfand in recent international fora – including the Oslo, Nayarit and Vienna conferences – is very alarming. Helfrand reports on modelling that shows global temperature declines from a small scale nuclear war resulting in massive impacts on global food production and the collapse of ecosystems.¹⁴ Ruff reminds us that the 15kt highly enriched uranium bomb dropped on Hiroshima was ‘[b]y today’s standards...a “small” tactical-size weapon’ which ‘is estimated to cause up to 870,000 death in the first weeks’ in a densely populated city.¹⁵

The calls to prevent the use of nuclear weapons came soon after the weapons were dropped on Hiroshima and Nagasaki in August 1945. In a public statement on 5 September 1945 the ICRC called on states to take ‘all steps to reach an agreement on the prohibition of atomic weapons’ noting ‘[s]uch arms will not spare hospitals, prisoner of war camps and civilians. Their inevitable consequence is extermination, pure and simple.... [Their] effects, immediate and lasting, prevent access to the wounded and their treatment.’¹⁶ In the years since, many others have made the call that nuclear weapons must be eliminated - including the British and American Medical Associations and the World Health Organisation, noting there is no

¹² Junko Morimoto, *My Hiroshima* (Hachette Australia, 2014).

¹³ Statement by Jakob Kellenberger, President of the ICRC, to the Geneva Diplomatic Corps, (20 April 2010, Geneva).

¹⁴ Australian Red Cross, *nuclear weapons: a unique threat to humanity* (Australian Red Cross, 2011) 7-9.

¹⁵ *Ibid* 10.

¹⁶ Francois Bugnion, ‘The International Committee of the Red Cross and nuclear weapons: From Hiroshima to the dawn of the 21st century’ (2005) 87 (859) *International Review of the Red Cross* 511, 517.

possibility of an adequate medical response to the use of a nuclear weapon.¹⁷ While nuclear weapons have not been used again in conflict, they have been extensively tested – particularly in the Pacific – and many still suffer the health and environmental impacts of this.

The possession of nuclear weapons and the doctrine of nuclear deterrence have played incredibly significant roles in world history during the latter part of the 20th century. Nuclear weapons states have shown little inclination to eliminate them.¹⁸ However, Oslo, Nayarit and Vienna have shown growing support for the idea of a legally binding instrument to prohibit the use of nuclear weapons. This chapter will look at the existing legal frameworks pertaining to nuclear weapons and discuss the compatibility, or otherwise, of their continued existence with the obligations on states pursuant to Common Article 1 of the Geneva Conventions. The chapter adopts the view that the use of nuclear weapons, as they are understood today, can in no conceivable way comply with the principles of IHL and that as such, states would be taking a clear opportunity to comply with the obligation in Common Article 1 through their positive inclusion in progress towards a legally binding instrument clearly prohibiting the use of nuclear weapons. It argues that Australia is undermining efforts to prevent the use of nuclear weapons, in breach of its obligation to respect and ensure respect for IHL. Australia must reconsider its position on nuclear weapons in light of this obligation and, if it does so, it is well placed to use its capacity to influence others towards a position of respecting IHL with respect to nuclear weapons.

2. What are nuclear weapons?

The Oxford Dictionary of Physics defines nuclear weapons as '[w]eapons in which an explosion is caused by nuclear fission, nuclear fusion, or a combination of both'.¹⁹

Specifically it is noted:

In the fission bomb (atomic bomb or A-bomb) two subcritical masses ... of a fissile material (uranium-235 or plutonium-239) are brought together by a chemical

¹⁷ British Medical Association's Board of Science and Education, *The Medical Effects of Nuclear War* (John Wiley & Sons, Chichester, 1983) 117; Report of the Board of Trustees of the American Medical Association (1981) cited in IPPNW *Physicians and nuclear war* <<http://www.ippnw.org/physicians-for-prevention-nuclear-war.html>>.

¹⁸ Although efforts have been made to reduce stockpiles and South Africa gave them up prior to its signature to the NPT in July 1991. See generally Haralambos Athanasopoulos, *Nuclear Disarmament in International Law* (McFarland & Company, 2000) 133,151.

¹⁹ *A Dictionary of Physics* (Oxford University Press, 6th ed, 2009).

explosion to produce one supercritical mass. ... The fusion bomb (thermonuclear weapon, hydrogen bomb, or H-bomb) relies on a nuclear-fusion reaction, which becomes self-sustaining at a critical temperature.²⁰

The main way in which a nuclear weapon differs from a conventional weapon is that the magnitude of the explosion of a nuclear weapon is thousands of times greater than that caused by conventional weapons.²¹

In October 1939, economist Alexander Sachs and United States President Roosevelt met regarding a letter physicist, Albert Einstein, had written about the potential for the creation of extremely powerful bombs. The letter noted it was ‘probable ... that it may become possible to set up a nuclear chain reaction ... by which vast amounts of power ... could be generated’.²² This led to President Roosevelt setting up uranium research and the beginning of the American atomic bomb development – the Manhattan Project.²³ The Manhattan Project led to the testing of the first nuclear weapon at Almagordo Air Base, New Mexico (United States) on 16 July 1945. It was a 19kt bomb named ‘Trinity’.²⁴ ‘Fat Man’ and ‘Little Boy’, the weapons dropped on Hiroshima and Nagasaki, were developed by the Manhattan Project by the end of July 1945 and then United States President Truman, considering the use of such weapons as the only way to shorten the war, made the decision to authorise the use of the weapons.²⁵ The B-29 bomber ‘Enola Gay’ dropped ‘Little Boy’ over Hiroshima on 6 August 1945 and three days later, on 9 August 1945, another B-29 Bomber ‘Bock’s Car’ dropped ‘Fat Man’ on Nagasaki.²⁶

The devastating consequences of these weapons on these cities have been well documented in writing and in film. Photos of the cities before and after the bombing show destruction of a magnitude never before seen. Sixty per cent of Hiroshima was destroyed.²⁷ Thirty per cent of the population were killed and another 30 per cent injured.²⁸ The Hiroshima Red Cross

²⁰ Ibid.

²¹ Joseph M Siracusa, *Nuclear Weapons A very short introduction* (Oxford University Press, 2008) 5.

²² Einstein’s warning came from his knowledge that German physicists Hahn and Strassmann had split the uranium atom in December 1938. See further Athanasopulos, above note 18, 7.

²³ Siracusa, above note 21, 12-13.

²⁴ Ibid.

²⁵ Ibid 20-23.

²⁶ Ibid 23.

²⁷ Ibid.

²⁸ United States Government, *The United States Strategic Bombing Survey: The Effect of Atomic Bombs on Hiroshima and Nagasaki* (US Government Printing Office, Washington, 1946) 6.

Hospital²⁹ astonishingly remained standing, as did one other hospital, 'but there was such severe interior damage that neither was able to resume operation as a hospital for some time'.³⁰ Finding doctors and nurses was a huge challenge. For example, of 1,780 nurses 1,654 were killed or injured.³¹ Health effects were also ongoing due to radiation exposure. Five years later fatality numbers had risen to over 200,000 for Hiroshima and over 140,000 for Nagasaki.³² The Japanese Red Cross Society Hiroshima Atomic-bomb Hospital sees an average of 2,408 new atomic bomb survivors each year.³³

During the war years, Britain, Japan and Germany also had efforts underway to develop atomic weapons³⁴ and in the years after the war, a number of nations - initially the USSR and the United States - and later the United Kingdom and France, carried out a large number of tests.³⁵ There have been over 2,000 nuclear tests conducted to date.³⁶

'Puny and primitive',³⁷ the weapons dropped on Japan in 1945 are small by today's standards. A 'small' nuclear warhead by today's standards has the explosive yield of around 20 times the Hiroshima bomb.³⁸ Today the destructive force of the world's nuclear arsenal is equivalent to approximately 150,000 Hiroshima bombs.³⁹ About 22,000 nuclear weapons reportedly remain in our world today.⁴⁰

3. History of nuclear weapons in Australia

Australia does not possess and has never possessed nuclear weapons. However, nuclear weapons with yields of between 1 and 60 kilotons have been tested in Australia. These tests

²⁹ The Japanese Red Cross Society Hiroshima Atomic-bomb Hospital now stands on this site.

³⁰ *United States Strategic Bombing Survey*, above note 28, 6.

³¹ *Ibid.*

³² ICRC, 'The effects of nuclear weapons on human health' (2013) <<https://www.icrc.org/eng/assets/files/2013/4132-1-nuclear-weapons-human-health-2013.pdf>>.

³³ Japanese Red Cross Society, *Outline of Atomic-bomb survivors hospital division*, <http://www.hiroshima-med.jrc.or.jp/english/atomic_bomb.html>.

³⁴ Siracusa, above note 21, 14-16.

³⁵ Sir Philip Baxter, (1973) 'Nuclear Testing' 6(2) *Australian Journal of Forensic Sciences*, 89-95; Anonymous, (Jul 1995) 'Fifty years of nuclear testing' 25(6) *Arms Control Today*, 28.

³⁶ United Nations Office for Disarmament Affairs, *Nuclear weapons* <<http://www.un.org/disarmament/WMD/Nuclear/>>.

³⁷ Siracusa, above note 21, 23.

³⁸ Australian Red Cross, above note 14, 3.

³⁹ *Ibid.*

⁴⁰ United Nations Office for Disarmament Affairs, above note 36.

were carried out by the United Kingdom between 1952 and 1963. The first test was conducted in the Monte Bello Islands off the northern coast of Western Australia on 3 October 1952, with the Monte Bello Islands also being used for two explosions in May–June 1956. Others were conducted in South Australia, at Emu Field in October 1953 and near Maralinga in September–October 1956 and September–October 1957. Hundreds of minor trials, mostly involving components of nuclear weapons, took place at Emu Field and Maralinga between 1953 and 1963.⁴¹

The report of the Royal Commission into British Nuclear Tests in Australia notes that in September 1950 the British identified the Monte Bello Islands as a suitable test site for their developing nuclear program.⁴² This ‘top secret’ information was conveyed to Australian Prime Minister Menzies as a personal message from British Prime Minister Attlee on 16 September 1950.⁴³ Of Menzies’ immediate agreement to the proposal, the Royal Commission report notes ‘no evidence in the documents produced to Royal Commission which would indicate that he consulted any of his Cabinet colleagues’⁴⁴ and:

[i]n taking it upon himself to embrace British interests as being synonymous with those of Australia, and to expose his country and people to the risk of radioactive contamination, Menzies was merely acting according to his well-exposed Anglophilian sentiment. It was consistent with this approach when, as Prime Minister in 1939, he announced that as Britain was at war with Germany, Australia also was automatically at war with the same enemy.⁴⁵

In March 1951 the British proposed the use of the Monte Bello Islands for a test to be conducted in October 1952, noting that there was a possibility that agreement could still be reached with the Americans that Britain could use their test sites.⁴⁶ Britain sought Australian agreement and co-operation on logistical matters. The March 1951 note alerted Australia to the fact that the test would make the area uninhabitable for a period of three years due to contamination. The report goes on to describe this as a ‘considerable underestimation’.⁴⁷ An

⁴¹ JR McClelland, J Fitch and WJA Jonas (1985) *The report of the Royal Commission into British Nuclear Tests in Australia* (Australian Government Publishing Service, Canberra); Letters Patent issued on 16 July 1984 to the Commissioners by the Attorney General Lionel Bowen.

⁴² Ibid 10.

⁴³ Ibid.

⁴⁴ Ibid 11.

⁴⁵ Ibid.

⁴⁶ Ibid 13. Britain’s clear initial preference, given the ‘waste and duplication of effect’ was to reach a suitable agreement with the United States, however this did not eventuate.

⁴⁷ Ibid 12-14.

Australian election in May 1951 caused a short delay in responding to the British, however, upon re-election Menzies agreed to the test.⁴⁸ The project was later described by Howard Beale, Minister of Supply in the Menzies government in May 1955 as ‘a striking example of inter-Commonwealth co-operation ...to help the Motherland’.⁴⁹

Operation ‘Hurricane’ saw the first nuclear test in Australia, a weapon of approximately 25kt, conducted at 0800 hours on 3 October 1952. The explosion was eight and half feet below the waterline in a Royal Navy frigate. Australian support was considerable, and two Australian representatives attended the test as observers but no knowledge of weapon design or function was shared with Australia.⁵⁰ In September 1952, a request was made by the Director of the United Kingdom’s Atomic Energy Research Establishment to assess the feasibility of Emu Field in the Great Victorian Desert (South Australia) as a site for further land based tests following the Monte Bello test ‘Hurricane’.⁵¹ Australian agreement to this test site followed in December 1952. The explosions of 10kt and 8 kt respectively, occurred on 15 and 27 October 1953.⁵² Again no knowledge of weapon design or function was shared with Australia.⁵³

Agreement was reached in May 1955 on further testing in the Monte Bello Islands – this time two and a half times larger at 60kt. Two weapons – a 15kt weapon and a 60kt weapon were exploded on 16 May and 19 June 1956 respectively – on islands in the Monte Bello Islands.⁵⁴ For these tests Australia did set up an official Australian Atomic Weapons Test Safety Committee.⁵⁵ The final tests then took place at Maralinga in September–October 1956 and September–October 1957.⁵⁶

The idea of Australia acquiring nuclear weapons was regularly discussed in the 1950s and 1960s by government ministers and officials ‘primarily to offset our country’s limited

⁴⁸ Ibid 14.

⁴⁹ Ibid 15.

⁵⁰ Ibid 105-6.

⁵¹ Ibid 137.

⁵² Ibid 140.

⁵³ Ibid 139.

⁵⁴ Ibid 231-233.

⁵⁵ Ibid 231.

⁵⁶ Ibid 277, 351-2.

conventional capability and as a demonstration of Australia's growing international prestige'.⁵⁷

Thanks to the Royal Commission the effects on both Aboriginal people and service personnel involved in the testing has been well documented.⁵⁸ It is clear that long term health and environmental effects have been experienced by Australians as result of these tests. While the purpose of this chapter is not to focus on these effects, they are undoubtedly horrific and should be acknowledged.

The findings from the report of the Royal Commission into British Nuclear Tests in Australia, published in 1985, included that:

- 'The Monte Bello Islands were not an appropriate place for atomic tests owing to the prevailing weather patterns and the limited opportunities for safe firing'⁵⁹; and
- 'The decision to use the mainland for atomic tests was made without specific consideration by Australian scientists...Consideration was limited to the fact that Emu was a remote location.'⁶⁰

The general sentiment of the conclusions include the view that the Australian Prime Minister accepted the British proposals having been in receipt of very little information on the likely scale and consequences of the tests, and that the Australian public, Australian media and possibly the Australian Cabinet were given no opportunity to voice their opinion on the issues.⁶¹ The report recommended a clean-up of the sites, to be paid for by the British Government, and that the Australian government compensate those military and civilian personnel who were exposed during the testing, as well as, the traditional owners of the land on which the testing took place.⁶²

As British nuclear testing was coming to an end in Australia, another nuclear armed state, France, was beginning a series of tests in the Pacific. From 1966 to 1996 French nuclear

⁵⁷ Thom Woodroffe 'Australia must walk the walk on nuclear weapons' (11 October 2003) <<http://www.abc.net.au/news/2013-10-11/woodroffe-australia-must-walk-the-walk-on-nuclear-weapons/5016626>>.

⁵⁸ JR McClelland et al, above note 41.

⁵⁹ Ibid 109.

⁶⁰ Ibid Conclusion 9.

⁶¹ See particularly Ibid Conclusions 1-8.

⁶² Ibid 614-615. Report recommendations 1-7.

testing in Polynesia included at least 42 atmospheric tests and 141 underground tests.⁶³ That these tests have had profound and serious health and environmental consequences for Polynesians must also be acknowledged.⁶⁴ It is clear that, by this time, the Australian attitude to nuclear testing had changed considerably from Menzies' immediate agreement to British testing in Australia. 'In April 1963, the Australian Government conveyed to the French Government its deep regret at the decision which the French Government was then on the point of taking, namely, to move its nuclear testing to the Pacific area'.⁶⁵ The French expressed surprise at the anti-nuclear testing sentiment newly adopted by Australia, which Australia attributed to increased scientific knowledge of the inability to predict effects of radioactivity and the recent test-ban treaty developments.⁶⁶

Diplomatic communications in the late 1960s and early 1970s between Australia and France noted Australia's protest to the tests and in particular the concern 'amongst the peoples of the area'.⁶⁷ Efforts in April 1973 to have French and Australian scientists 'discuss and attempt to resolve problems of scientific evaluation of the dangers of radio-active fall-out from French nuclear tests in the Pacific'⁶⁸ failed. In May 1973 Australia and New Zealand instituted proceedings in the ICJ asking for cessation of the tests. The judgments of December 20, 1974 were in effect 'no-judgment judgments', the issue having been resolved by France having announced its intention to cease tests.⁶⁹

Australian public opinion also voiced its strong opposition to nuclear weapons on different occasions. In the early 1980s 350,000 Australians turned out in support of nuclear disarmament demonstrations.⁷⁰ In protest to the 1995 French nuclear tests resuming in the Pacific, the Roland Garros club flag was flown at the 1996 Australian Open Tennis

⁶³ M Hamel-Green 'Nuclear Denouement in the Pacific: French Testing, The Rarotonga Treaty and the NFIP Movement' in S Alomes and M Provis (eds) *French Worlds Pacific Worlds French Nuclear Testing in Australia's Backyard* (Institute for the Study of French Australian Relations, 1998) 11.

⁶⁴ Office of the Chief Scientist, Department of the Prime Minister and Cabinet, 'The impact of nuclear testing at Mururoa and Fangataufa' (Paper presented at South Pacific Environment Ministers' Meeting, Brisbane, August 1995)

⁶⁵ *Nuclear Tests (Australia v France) (Application Instituting Proceedings)* [1973] ICJ Rep 6.

⁶⁶ *Ibid.*

⁶⁷ *Ibid* 8.

⁶⁸ *Ibid* 12.

⁶⁹ *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253.

⁷⁰ Lawrence Wittner, 'Where is the nuclear abolition movement today' (2010) 4 *Disarmament Forum* 7.

Championships instead of the French Flag.⁷¹ More recently Australian Red Cross, a significant player in the current push of the International Red Cross Red Crescent Movement's work to encourage states to work towards a legally binding instrument to prohibit the use of nuclear weapons, noted a social reach of over 1 million to its Make Nuclear Weapons the Target Campaign.⁷²

Australia has vast reserves of uranium⁷³ and in 2013 was the world's third largest producer of uranium, all of which was exported.⁷⁴ As such, the issue of uranium mining and export by Australia is also a factor of influence in Australia's nuclear policy. Although Australian uranium was mined before 1977, the industry grew significantly at that time.⁷⁵ Clarke has argued that former Prime Minister Malcolm Fraser's 1977 decision to expand the uranium industry in Australia had a significant 'international dimension', specially one of establishing Australia's influence but also of supporting American interests.⁷⁶ Fraser framed the Australian approach to uranium export (at least in so far as the United States was interested in that approach) as being one that was a part of the NPT responsibilities in combating the proliferation of nuclear weapons.

Prime Minister Fraser established Australia's nuclear safeguards policy which included not selling uranium to states who had not signed the NPT and ensuring that the International Atomic Energy Association safeguards would apply to the material for the full life of the material.⁷⁷

The export of Australian uranium will decrease the risks of further proliferation of nuclear weapons and will support and strengthen the Nuclear Non-Proliferation Treaty. It will help to make a safer world. The advent of Australia as a major supplier of uranium will make certain that Australia's voice on this most vital problem of

⁷¹ S Almoes 'Middle Class Radicalism, the Monroe Doctrine and Media Frenzy? Australian Opposition to French Testing' in S Alomes and M Provis (eds) *French Worlds Pacific Worlds French Nuclear Testing in Australia's Backyard* (Institute for the Study of French Australian Relations, 1988) 65.

⁷² Australian Red Cross, *Should the use of nuclear weapons be banned?* <<http://targetnuclearweapons.org.au/>>.

⁷³ 31 % of the world's total. World Nuclear Association, *Australia's uranium* (April 2015) <<http://www.world-nuclear.org/info/Country-Profiles/Countries-A-F/Australia/>>.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Michael Clarke, 'The Fraser Government's "Uranium Decision" and the Foundations of Australian Non-Proliferation Policy: A Reappraisal' (2012) 58(2) *Australian Journal of Politics & History* 221, 222 and particularly 228-9. Clarke notes that other commentators have viewed the decision only in domestic policy terms.

⁷⁷ Ibid 228.

international affairs — nuclear weapons proliferation — will be heard and will be heard with effect.⁷⁸

This approach remained the cornerstone of Australia's uranium export policy until 2007 when the government of then Prime Minister John Howard authorised the sale of uranium to non NPT state India.⁷⁹ Today the policy is that Australian only sells uranium to 'countries with which Australia has a nuclear cooperation agreement, to make sure that countries are committed to peaceful use of nuclear energy'.⁸⁰

4. Nuclear weapons and international law

In 1946 plans were afoot in New York for the legal prohibition of nuclear weapons and the establishment of the UN Atomic Energy Commission designed only to ensure control of atomic energy for peaceful purposes.⁸¹ UN General Assembly Resolution 1, adopted on 24 January 1946, called for the 'elimination from national armament of atomic weapons and of all other major weapons adaptable to mass destruction'.⁸² Later that year an American plan banning atomic weapons was adopted by the General Assembly but deemed unacceptable to the Soviet Union. A subsequent Soviet plan, which would have also seen the prohibition on nuclear weapons, was deemed unacceptable by the United States.⁸³

In the years that have followed this failure to agree on disarmament plans, a clear legal prohibition on the use of nuclear weapons in international law has continued to plague international law and international relations. Processes to reduce nuclear weapons stocks have been ongoing⁸⁴, however, there remains strong opposition to any ban on nuclear weapons from some quarters, and around 22,000 nuclear warheads are in existence today. Further, promises continue to not be kept. At the first special session on disarmament of the

⁷⁸ Ibid 230 citing Commonwealth Parliamentary Debates (House), 25 August 1997, 647.

⁷⁹ Tony Abbott and Shri Narendra Modi, 'Joint Statement on State Visit of Prime Minister of Australia to India' (Joint Statement, 9 September 2014) [6].

⁸⁰ Australian Government, *Australia's Uranium Industry* (June 2012) Department of Resources, Energy and Tourism <<http://www.industry.gov.au/resource/Documents/Mining/uranium/Uranium-Industry-factsheet.pdf>>.

⁸¹ Athanasopoulos, above note 18, 11.

⁸² *Establishment of a Commission to deal with the Problems Raised by the Discovery of Atomic Energy*, UNGA 1st Comm, 17th mtg, (24 January 1946).

⁸³ Athanasopoulos, above note 18, 10-13.

⁸⁴ The START (Strategic Arms Reduction Treaty) processes between the United States and Russia being the most significant of these.

UN General Assembly in 1978 all countries agreed on the goal of the elimination of nuclear weapons through a comprehensive disarmament programme.⁸⁵

Today there are three main pillars to the approach of international law to nuclear weapons: the NPT (including regional agreements); proposals for a specific legally binding instrument to prohibit the use of nuclear weapons; and IHL. The decision of the ICJ in its 1996 Advisory Opinion on the legality of the threat or use of nuclear weapons adds a further layer of complexity to the IHL analysis.⁸⁶

Particularly significant to this discussion is the reference in the Chair's summary at the Second Intergovernmental Meeting on the Humanitarian Impacts of Nuclear Weapons in Mexico, that the move towards a legally binding instrument prohibiting nuclear weapon use is 'consistent with our obligations under international law, including those derived from the NPT as well as from Common Article 1 to the Geneva Conventions.'⁸⁷ Even in the absence of a clear ban, if the use of nuclear weapons would be a breach of the Geneva Conventions (as is argued here), then supporting their continued existence would be in violation of the obligation to respect and ensure respect for the Geneva Conventions. This thesis adopts the view that the use of nuclear weapons, as they are understood today, can in no conceivable way comply with the principles of IHL (see further below) and that as such states would be taking a clear opportunity to comply with the obligation in Common Article 1 through their positive inclusion in progress towards a legally binding instrument clearly prohibiting the use of nuclear weapons.

The NPT, some proposals for a specific legally binding instrument to prohibit the use of nuclear weapons, the ICJ Advisory Opinion and IHL principles will now be discussed.

⁸⁵ Miguel Bosch 'The Non-Proliferation Treaty and Its Future' in L Boisson de Chazournes and Philippe Sands (eds) *International Law, the International Court of Justice and Nuclear Weapons* (1999) (Cambridge University Press) 381.

⁸⁶ The Court noted that 'the most directly relevant applicable law governing the question of [the legality of nuclear weapons], is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict'. *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] I.C.J. Rep [34].

⁸⁷ Juan Manuel Gomez Robledo, 'Chair's Summary' (Speech delivered at the Second Conference on the humanitarian impact of nuclear weapons, Nayarit, Mexico, 14 February 2014).

4.1 Nuclear Non-Proliferation Treaty

The NPT was concluded in 1968 and entered into force on 5 March 1970.⁸⁸ In essence the basis of the treaty was the restriction of nuclear weapon states to those in possession of them at the time of the treaty negotiations – United States, USSR, United Kingdom, China and France. In exchange these states were to provide assistance with the development of peaceful nuclear technology by the non-nuclear weapons states. The treaty came about against the backdrop of a climate of fear of the horizontal proliferation of nuclear weapons, but also in circumstances where a proposal by the USSR to destroy all atomic weapons had not got any traction.⁸⁹ Under the NPT nuclear weapon states undertook not to help non-nuclear weapons states to acquire nuclear weapons⁹⁰ and non-nuclear weapon states agreed not to manufacture or pursue nuclear weapons.⁹¹ The NPT was originally intended to be an interim measure⁹² (for 25 years) with disarmament as the ultimate goal.⁹³ On 11 May 1995, the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons determined that the Treaty should continue in force indefinitely. Commentators have noted that making the treaty indefinite was not in-keeping with the original intention of the treaty for which disarmament and a nuclear-free world was the ultimate goal and ‘squandered a unique opportunity to advance the course of nuclear disarmament’.⁹⁴

Importantly, for this discussion Article VI of the NPT provides:

[e]ach of the parties to this treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

It is also noted that the preamble recalled:

⁸⁸ *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) .

⁸⁹ Bosch, above note 85, 377. See also Athanapoulos, above note 18, at 11, who notes that Truman rejected proposals to regulate to prevent a nuclear arms race stating that the United States would stay ahead if the Soviets did build an atomic bomb.

⁹⁰ NPT Art I.

⁹¹ NPT Art II.

⁹² NPT Art X (2).

⁹³ NPT Art VI, see also comments of Bosch, above note 85, at 377.

⁹⁴ Bosch, above note 85, at 379.

the determination expressed by the Parties to the 1963 Treaty banning nuclear weapons tests in the atmosphere, in outer space and under water in its Preamble to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end.

Almost all nations are party to the NPT. Those who are not include four nuclear weapons states – India, Pakistan, Israel and North Korea⁹⁵ and the world's newest state South Sudan. Australia became a party on 23 January 1973.⁹⁶

In 1996 the Article VI provision was interpreted by the ICJ in the Nuclear Weapons Advisory Opinion (see further below) as meaning that there 'exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.'⁹⁷ Many have commented that this obligation, as expressed by the ICJ, 'goes beyond a mere obligation of conduct... [to] actually involve and obligation of result, i.e., to *conclude* those negotiations'.⁹⁸

In 1995, the year that the NPT was due to expire, the United States and other nuclear weapon states pressed for Principles and Objectives for Nuclear Non-Proliferation and Disarmament. The Principles and Objectives set forth measures for implementation of the Article VI disarmament obligation. They included negotiation of a Comprehensive Test Ban Treaty and the determined pursuit by the nuclear weapon states of 'systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons.'⁹⁹

On 1 May 2000, the five nuclear powers expressed strong support for the NPT and for the full realization and implementation of Article VI. In their statement, they reaffirmed the necessity of an effective international, 'convention banning the production of fissile material for nuclear weapons or other nuclear explosive devices'.¹⁰⁰ It is therefore difficult to argue that the nuclear powers do not understand that Article VI binds them, and the whole

⁹⁵ North Korea withdrew from the treaty in January 2003, however there is some controversy over the legality of that withdrawal.

⁹⁶ UN Office of Disarmament Affairs, *Treaty on the Non-Proliferation of Nuclear Weapons* <<http://disarmament.un.org/treaties/t/npt>>.

⁹⁷ It has been said that this does not expressly specifically require each nuclear weapons-possessing state party to disarm and that the ICJ put the obligation higher than Article IV – creating a two twofold obligation to pursue and to conclude negotiations, which may not exist in Article IV. Strong views are put both for the argument that concluding a treaty is mandatory and for the argument that it is not.

⁹⁸ Bosch, above note 85, at 375.

⁹⁹ Principles and Objectives for Nuclear Non-Proliferation and Disarmament, art 4(c).

¹⁰⁰ Text of the Statement by the delegations of France, China, Russia, the U.K. and the U.S. released at the NPT Review Conference at the U.N, (1 May 2000) <<http://usinfo.state.gov/topical/pol/arms/stories/00050104.htm>>.

international community, to create a convention that bans nuclear proliferation and mandates nuclear disarmament.

This understanding was restated at the 2010 NPT Review Conference. ‘The unequivocal undertaking of the nuclear-weapon states to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all state parties are committed under article VI’.¹⁰¹ Further, the 2010 NPT Review Conference ‘expresse[d] its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all states at all times to comply with applicable international law, including international humanitarian law’.¹⁰²

After so many years of unsuccessfully asking the nuclear weapons states to fulfill the commitment under Article VI, a significant number of the non-nuclear weapons states have decided to pursue their agenda through a different mechanism. The 2015 NPT Review Conference took place from 27 April – 22 May 2015 in New York. The meeting ended without a consensus on the substantive part of the Final document.¹⁰³ At this conference, the Austrian government, on the back of the December 2014 Vienna Intergovernmental Meeting on the Humanitarian Impacts of Nuclear Weapons (and earlier Oslo and Nayarit meetings), put forward the Humanitarian Pledge, supported by (at that time) 107 states, expressing a commitment ‘to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons’.¹⁰⁴ As such, while the NPT has proven unlikely to ever achieve compliance with Article VI, a ban-treaty (see below) is likely to be the focus of discussions in the near future.

¹⁰¹ *2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, Final Document, Vol 1 (New York, 2010) 19.

¹⁰² *Ibid.*

¹⁰³ UN, ‘2015 NPT Review Conference’ <<http://www.un.org/en/conf/npt/2015/>>.

¹⁰⁴ Humanitarian Pledge <http://www.icanw.org/wp-content/uploads/2015/03/HINW14vienna_Pledge_Document.pdf>.

4.2 Frameworks to ban nuclear weapons

Whilst the NPT does not regulate the use of nuclear weapons, it sets up a framework for the adoption of regional nuclear weapon free zone treaties. A number of these treaties have been concluded, in Latin America, the South Pacific, Southeast Asia, Central Asia and Africa.¹⁰⁵ These regional treaties expressly prohibit use, as well as possession, testing, manufacture and acquisition, of nuclear weapons in the territories in which they apply. A number of subject matter specific treaties also prohibit the use of nuclear weapons in certain places. For example, the Antarctic, Outer Space and Seabed treaties¹⁰⁶ all include prohibitions on the use of nuclear weapons among their articles.

There have also been a number of ban treaty initiatives put forward.¹⁰⁷ For example, the Model Nuclear Weapons Convention put to the UN General Assembly in December 2007 by the governments of Costa Rica and Malaysia. This was the result of a process beginning in April 1997 when the Lawyers' Committee on Nuclear Policy, International Association of Lawyers Against Nuclear Arms, International Physicians for the Prevention of Nuclear War and International Network of Engineers and Scientists Against Proliferation jointly released a drafted Model Nuclear Weapons Convention. The UN General Assembly resolution calling for a Nuclear Weapons Convention is entitled *Follow-up on the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*. It was first adopted in December 2007 and is revisited annually. One hundred and twenty seven countries voted yes, 27 abstained and 27 voted against.¹⁰⁸

The most notable of these initiatives is the Humanitarian Pledge. As noted above, this initiative began with the historic meeting in Oslo, in March 2013, when representatives of 127 governments met to discuss the humanitarian consequences of nuclear weapons¹⁰⁹, and

¹⁰⁵ See, eg, *Treaty of Tlatelolco* (Latin American and Caribbean), *Treaty of Rarotonga* (South Pacific), *Treaty of Semipalatinsk* (Central Asia), *Treaty of Bangkok* (Southeast Asia) and *Treaty of Pelindaba* (Africa).

¹⁰⁶ See, eg, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*; *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof*.

¹⁰⁷ See generally, Parliamentarians for Nuclear Nonproliferation and Disarmament, *Parliamentary Resolutions Supporting a Nuclear Weapons Convention* (August 2011) <http://www.abolitionforum.org/site/wp-content/uploads/2011/08/NWC_parliamentary_resolutions.pdf>.

¹⁰⁸ UNGA, 62nd sess, Agenda Item 98 (w), UN Doc A/RES/62/39 (5 December 2007).

¹⁰⁹ Norwegian Government, *Conference: Humanitarian Impact of Nuclear Weapons* (11 March 2013) <http://www.regjeringen.no/en/dep/ud/selected-topics/humanitarian-efforts/humimpact_2013.html?id=708603>.

the February 2013 meeting in Nayarit, of 146 governments continuing these discussions.¹¹⁰ Whilst initially very focused on presenting the factual landscape around the humanitarian consequences of nuclear weapons, in Mexico, the discussion became more focused on a ‘commitment of States and civil society to reach new international standards and norms, through a legally binding instrument’.¹¹¹ In particular at the Mexico meeting in early 2014, the Meeting’s Chair, Juan Manuel Gomez Robledo, Deputy Minister of Foreign Affairs of Mexico, concluded that:

the Nayarit Conference has shown that time has come to initiate a diplomatic process conducive to [achieve a world without nuclear weapons]. ... this process should comprise a specific timeframe, ... and a clear and substantive framework, making the humanitarian impact of nuclear weapons the essence of disarmament efforts.¹¹²

The approach articulated by the Chair of the Mexico meetings was in line with the view that ‘in the past, weapons have been eliminated after they have been outlawed’.¹¹³ This process then included a further follow up intergovernmental meeting in Vienna, Austria in December 2014. The Vienna meeting gave rise to the Humanitarian Pledge for the prohibition and elimination of nuclear weapons. The Pledge calls for states to ‘identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons’¹¹⁴ and in 2015 has seen significant attention directed to it by states.

That the time really had come for action on this issue was made clear in New York when the 2015 NPT Review Conference failed. Non-nuclear weapons states had, in the months leading up to the 2015 NPT, been considering the Humanitarian Pledge. These developments continued to be strongly pushed by a number of states and by civil society. The failure of the 2015 NPT Review Conference has now given a clear platform to pursue this agenda. Hanson

¹¹⁰ Mexican Government, *Nayarit Conference*
<http://mision.sre.gob.mx/oi/intranet/proyectos/index.php?id_proyecto=4&idioma=en>.

¹¹¹ Ibid.

¹¹² Juan Manuel Gomez Robledo, ‘Chair’s Summary’ (Speech delivered at the Second Conference on the humanitarian impact of nuclear weapons, Nayarit, Mexico, 14 February 2014).

¹¹³ Ibid.

¹¹⁴ *Note verbale dated 24 August 2015 from the Permanent Mission of Austria addressed to the Secretary-General of the Conference on Disarmament transmitting the text of the humanitarian pledge supported by 114 Members of the United Nations*, CD/2039, (28 August 2015).

notes ‘the failed conference now liberates the world to seek safety from nuclear annihilation by other, more promising means. This was the real achievement in New York last month’.¹¹⁵

As at late 2015 the Humanitarian Pledge for the prohibition and elimination of nuclear weapons, has been endorsed by 121 nations¹¹⁶ (not including Australia). The Humanitarian Pledge was also the subject of a UN General Assembly resolution in October 2015, and is on the agenda for the 71st session of the UN General Assembly First Committee in 2016.¹¹⁷

A ban treaty is now almost inevitable and the open-ended working group will commence their work towards this in February 2016. However, the likelihood of it including any nuclear weapons states, at least in its early years, is almost zero. As such there will be many questions over its relevance and effectiveness. Hanson notes that this argument misunderstands the objective of the ban-treaty. The role of the ban-treaty would be to ‘fill the legal gap that currently exists’ and increase the ‘sense that no “civilized” states would use them’.¹¹⁸ ‘In time, and with growing adherence, this ban is likely to be taken seriously by nuclear weapons states and their allies’.¹¹⁹

Australia’s approach to the NPT and the ban-treaty will be discussed further below.

4.3 Nuclear weapons advisory opinion¹²⁰

Unanimously, the ICJ has found that:

[a] threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.¹²¹

¹¹⁵ Marianne Hanson, ‘The failed effort to ban the ultimate weapon of mass destruction’ *The Conversation* (online), 8 June 2015. See also: Denise Garcia, ‘Humanitarian security regimes’ (2015) 91 (1) *International Affairs* 55. Garcia discusses the significance of the stigmatization of particular weapons, including landmines, through a number of treaty processes.

¹¹⁶ ICAN, *Humanitarian Pledge*, (5 November 2015) ICAN <<http://www.icanw.org/pledge/>>.

¹¹⁷ *Humanitarian pledge for the prohibition and elimination of nuclear weapons*, UN GA, 1st Comm, 70th sess, Agenda item 97(b) Doc A/C.1/70/L.38 (21 October 2015). 128 states voted in support of this resolution, 29 voted against the resolution and 18 abstained.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Legality of the threat or use of nuclear weapons (Advisory Opinion)* [1996] ICJ Rep 226.

¹²¹ *Ibid* [105].

However, by seven votes to seven, by the President's casting vote, the ICJ found that:

[i]t follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.¹²²

These findings have been very unhelpful to the many who have sought to interpret them in the years that have followed this decision. The ICJ was asked to consider 'is the threat or use of nuclear weapons in any circumstance permitted under international law?'¹²³ In doing so they primarily had reference to the law on the use of force and IHL.¹²⁴ In answering this question, the Court concluded that there was no treaty law which specifically and universally prohibited the use of nuclear weapons.¹²⁵ The Court further noted that the emergence of a customary rule specifically prohibiting such use was hampered by the continuing tension between, on the one hand, the non-use of the weapons by states since 1945 and on the other, states strongly adhering to the practice of deterrence.¹²⁶ Ultimately, the Court felt unable to rule out the legality of the use of nuclear weapons in an extreme circumstance of self-defence, in which the very survival of a state is at stake, because the principle of proportionality in the law of self-defence may allow such use. The Court further held that any such use must be in conformity with IHL.¹²⁷ However, following a very brief analysis of distinction and unnecessary suffering principles (the Court having earlier dismissed arguments based on protection of the environment from widespread, long-term and severe

¹²² Ibid.

¹²³ 'Request for Advisory Opinion' *Legality of the threat or use of nuclear weapons (Advisory Opinion)* [1996] ICJ Rep (6 January 1995).

¹²⁴ *Legality of the threat or use of nuclear weapons (Advisory Opinion)* [1996] ICJ Rep 226. [34]. See also [87] for confirmation the principles and rules of international humanitarian law apply to nuclear weapons. It is noted that each of the nuclear weapons states have made a reservation to their being a Geneva Conventions State Party to the effect that the Conventions do not have any effect on and do not regulate or prohibit the use of nuclear weapons.

¹²⁵ Ibid [52].

¹²⁶ Ibid [73].

¹²⁷ Ibid [42].

damage¹²⁸) the Court held use of nuclear weapons would ‘generally be contrary to the rules of international law applicable to armed conflict’¹²⁹.

One problem with this reasoning is, as has been pointed out by many, that it conflated the law on the use of force in international law and the law on the use of force during times of armed conflict.¹³⁰ That is, in finding that, because it may be possible under self-defence law to use a nuclear weapon, nuclear weapons cannot always be contrary to IHL, the Court failed to separate their consideration of IHL principles and view the legal finding regarding self-defence as entirely irrelevant to the IHL analysis.

In light of other Statements by the Court, including that ‘the destructive power of nuclear weapons cannot be contained in either space or time...[and] would be a serious danger to future generations’¹³¹, and ‘their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come’¹³² it seems difficult to imagine how the use of such a weapon could ever meet this requirement of compliance with IHL. As such, whilst nuclear weapons could comply with the principle of proportionality under the law of self-defence, it is very arguable that it may still not be able to comply with IHL and the Court really did not undertake this latter analysis. Indeed, reading the relevant paragraph, paragraph 78, demonstrates that while the principles were noted, they were not applied in any manner.¹³³ Judge Higgins in her dissenting opinion specifically makes this point.

[a]t no point in its Opinion does the Court engage in the task that is surely at the heart of the question asked: the systematic application of the relevant law to the use of threat of nuclear weapons...An essential step in the judicial process - that of legal reasoning - has been omitted.¹³⁴

¹²⁸ Erroneously because this provision should not have been viewed as an environmental protection provision but rather this provision is concerned with the protection of the necessities of life of the civilian population.

¹²⁹ *Legality of the threat or use of nuclear weapons (Advisory Opinion)* [1996] ICJ Rep 226, 266.

¹³⁰ Tim McCormack, ‘A *Non Liquet* on Nuclear Weapons: The ICJ Avoids the Application of General Principles of International Humanitarian Law’ (1997) 316 *International Review of the Red Cross* 76. See also McCormack re the word ‘generally’ in the ICJ finding. Louise Doswald-Beck, ‘International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons’ (1997) 316 *International Review of the Red Cross* 35.

¹³¹ *Legality of the threat or use of nuclear weapons (Advisory Opinion)* [1996] ICJ Rep 226, [35].

¹³² *Ibid* [36].

¹³³ *Ibid* [78]. See also McCormack, above note 130.

¹³⁴ Dissenting Opinion of Judge Higgins, *Legality of the threat or use of nuclear weapons (Advisory Opinion)* [1996] ICJ Rep. 583, 584.

Before turning to undertake this analysis, it is worth noting that, despite the findings of the Court, many of the judges who did engage in the legal reasoning in their separate opinions clearly suggest that nuclear weapons are not in any way compatible with IHL. Judge Ferrari Bravo for example held:

all the rules produced over the last 50 years, particularly with regard to the humanitarian law of armed conflict, are irreconcilable with the technological development of the construction of nuclear weapons. Can one, for example, imagine that just as humanitarian law, an essential and increasingly significant part of the international law of warfare and (of late) of peace as well, is bringing into being a whole series of principles for the protection of the civilian population or the environment, that same international law should continue to accommodate the lawfulness of, for example, the use of the neutron bomb, which leaves the environment intact, albeit with the "slight" drawback that the people living in it are wiped out! If that is the case, it matters little whether a rule specific to the neutron bomb can be found, since it becomes *automatically* unlawful as being quite out of keeping with the majority of the rules of international law.¹³⁵

The Declaration of the President, who made the casting vote, is particularly supportive of this approach:

10. There are some who will inevitably interpret operative paragraph 2 E as contemplating the possibility of States using nuclear weapons in exceptional circumstances. For my part, and in the light of the foregoing, I feel obliged in all honesty to construe that paragraph differently, a fact which has enabled me to support the text. My reasons are set out below.

...

20. Nuclear weapons can be expected - in the present state of scientific development at least - to cause indiscriminate victims among combatants and non-combatants alike, as well as unnecessary suffering among both categories. *By its very nature the nuclear weapon, a blind weapon, therefore has a destabilizing effect on humanitarian law, the law of discrimination which regulates discernment in the use of weapons. Nuclear weapons, the ultimate evil, destabilize humanitarian law which is the law of the lesser evil. The existence of nuclear weapons is therefore a major challenge to the very existence of humanitarian law, not to mention their long-term harmful effects on the human environment, in respecting which the right to life may be exercised. Until scientists are able to develop a "clean" nuclear weapon which would distinguish between combatants and non-combatants, nuclear weapons will clearly have indiscriminate effects and constitute an absolute challenge to humanitarian law. Atomic warfare and humanitarian law therefore appear to be mutually exclusive, the*

¹³⁵ Declaration of Judge Ferrari Bravo, *Legality of the threat or use of nuclear weapons (Advisory Opinion)* [1996] ICJ Rep. 285.

*existence of the one automatically implying the non-existence of the other.*¹³⁶
(emphasis added)

Judge Herczegh noted:

[t]he fundamental principles of international humanitarian law, rightly emphasized in the reasons of the Advisory Opinion, categorically and unequivocally prohibit the use of weapons of mass destruction, including nuclear weapons. International humanitarian law does not recognize any exceptions to these principles.¹³⁷

4.4 The Geneva Conventions and nuclear weapons

As discussed in chapter four, the rules of IHL prohibit the use of weapons that have the following characteristics:

- have indiscriminate effects;¹³⁸
- cause superfluous injury or unnecessary suffering;¹³⁹ or
- are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment¹⁴⁰.

Indiscriminate effects

As noted in chapter four, the principle of distinction, between military and civilian objects, fundamental to IHL, is articulated by Article 48 of AP I.¹⁴¹ A weapon which has inherently indiscriminate effects, as opposed to one that can be used in an indiscriminate way, is unlawful. This principle forms a part of customary IHL as a norm applicable in both international and non-international armed conflicts.¹⁴² Nuclear weapons are inherently indiscriminate. Their design feature, and indeed reason for existence, is, as was noted earlier,

¹³⁶ Declaration of President Bedjaoui, *Legality of the threat or use of nuclear weapons (Advisory Opinion)* [1996] ICJ Rep. 270, 272-273.

¹³⁷ Declaration of Judge Herczegh, *Legality of the threat or use of nuclear weapons (Advisory Opinion)* [1996] ICJ Rep. 275.

¹³⁸ AP I art 51.

¹³⁹ AP I art 35 (2).

¹⁴⁰ AP I art 35 (3).

¹⁴¹ AP I art 48. In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

¹⁴² Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules* (ICRC and Cambridge University Press, Geneva, 2005) (hereafter 'ICRC Customary Law Study') 3.

to have a magnitude to their explosion thousands of times greater than that caused by conventional weapons.¹⁴³ The United States Strategic Bombing Survey of the Effects of the Atomic Bomb on Hiroshima and Nagasaki,¹⁴⁴ which provides an assessment of the impact of a ‘small’ nuclear weapon by today’s standards, provides conclusive evidence of this, in so far as, their effects cannot be contained in space and time. Although, this was a case of the weapons being directed against civilians, even if the weapons were directed only at a very remote military location, because of the inability to contain the radioactive fallout material which is highly likely to extend across international boundaries and impact on precipitation and contaminate soil, they will have impacts which continue for generations and which cannot distinguish between military and civilians.¹⁴⁵

It has been suggested that strategic or tactical nuclear weapons could be used in a discriminate manner. A non-strategic nuclear weapon – or battlefield or tactical – nuclear weapon is one that is intended to be used for an isolated purpose. These weapons would be about a third of the size of the Hiroshima bomb.¹⁴⁶ It is really not clear at what stage in development these so called tactical nuclear weapons are. However, the Federation of American scientists note that the reality is that other conventional weapons could inflict comparable military consequences without radiation and as such would make them redundant.¹⁴⁷ A 2004 United States Department of Defence and Department of Energy study is noted by Nasu as raising ‘serious doubts as to whether [a lower-yield nuclear weapons capable of penetrating deeply buried facilities without causing excessive collateral damage] could penetrate deep enough to contain the nuclear explosion and the radiation it would consequently produce’.¹⁴⁸

On this point the ICRC has noted:

¹⁴³ Siracusa, above note 21, 5.

¹⁴⁴ *United States Strategic Bombing Survey*, above note 28.

¹⁴⁵ Some modelling is starting to be conducted to demonstrate these effects. See for example, although not set in a particularly remote location, Matthew McKinzie, ‘Calculating the Effects of a Nuclear Explosion at a European Military Base’ (Paper presented at Vienna Conference on the Humanitarian Impact of Nuclear Weapons, Vienna, 8 December 2014). Note also Australian Red Cross, above note 14, 7-9.

¹⁴⁶ Federation of American Scientists, *New Nuclear Weapons and Bunker Busters* <http://fas.org/programs/ssp/nukes/new_nuclear_weapons/newwpnsbnkrbstrs.html>.

¹⁴⁷ *Ibid.*

¹⁴⁸ Hitoshi Nasu, ‘Nanotechnology and the Law of armed Conflict’ in Hitoshi Nasu and Robert McLaughlin (eds), *New Technologies and the Law of Armed Conflict* (TMC Asser press, 2014), 143, 148.

[s]ome have argued that low-yield nuclear weapons could be compatible with IHL. While the use of low-yield nuclear weapons in a remote area, such as against troops in a desert or against a fleet at sea, may not have immediate effects on civilians, there would remain significant concerns, not just about the eventual spread of radiation to civilian areas, but also the radiological contamination of the environment and the impact of radiation on combatants. In other words, even the use of a nuclear weapon far from civilian settlements would raise questions of compatibility with IHL rules.¹⁴⁹

Unnecessary suffering or superfluous injury

Article 35 (2) of AP I provides that it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. This provision is held to be applicable in both international and non-international armed conflict.¹⁵⁰

There can be no serious argument about whether nuclear weapons cause superfluous injury and unnecessary suffering. The ICJ noted that horrendous suffering is not necessarily unnecessary suffering.¹⁵¹ However, as Boothby notes, these are comparative concepts¹⁵² and it is therefore necessary to ascertain the nature of the comparator. Effects of the weapon clearly included massive numbers of immediate deaths (from the explosion and from collapse of buildings and flying debris) and also some 20-30% of the population experiencing burn injuries.¹⁵³ The radiation diseases, including blood cancers, which continue to cause unnecessary suffering to the Japanese population and those victims of nuclear testing put this weapon in a class of its own. The US concluded in 1946 that the radiation negatively affected reproduction and '[o]f women in various stages of pregnancy who were within 3,000 feet of ground zero, all known cases have had miscarriages'.¹⁵⁴ Causing intergenerational health effects constitutes suffering which is unnecessary – and this applies equally to civilians and to military personnel (whom the prohibition on unnecessary suffering is intended to protect). This is because conventional weapons could also achieve the military objective, without

¹⁴⁹ Helen Durham, 'The use of nuclear weapons and international humanitarian law' (Paper presented at Vienna Conference on the Humanitarian Impact of Nuclear Weapons, Vienna, 9 December 2014).

¹⁵⁰ ICRC Customary Law Study Rule 70.

¹⁵¹ Dissent of Justice Higgins, *Legality of the threat or use of nuclear weapons (Advisory Opinion)* [1996] ICJ Rep. 585.

¹⁵² William Boothby, *Weapons and the Law of Armed Conflict* (Oxford University Press, 2009), 63 citing WJ Fenrick, 'The Conventional Weapons Convention: A modest but useful treaty', (1990) 279 *International Review of the Red Cross* 498, 500; William Hays Parks, 'Means and methods of warfare: Symposium issued in Honour of Edward R Cummings (2006), 38 *George Washington International Law Review* 511.

¹⁵³ United States Strategic Bombing Survey, above note 28, 15.

¹⁵⁴ *Ibid* 19.

causing intergenerational suffering. Comprehensive health information about the effects of radiation, including its disproportionate effects on women and children are now known such that the unnecessary suffering is clearly identifiable.¹⁵⁵

Widespread, long-term, and severe damage to the natural environment

Weapons which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment are prohibited by Article 35(3) AP I.¹⁵⁶ This Article, coupled with Article 55 of AP I¹⁵⁷, makes it clear that this concept is about ensuring that the civilian population is able to continue to use its environment to provide for the necessities of life. Recent studies have shown alarming consequences for the environment, global climate, rainfall, temperatures and food production from modelling of a ‘small scale’ nuclear war.¹⁵⁸ The ability for the civilian population to use the environment to provide for the necessities of life is compromised by nuclear fallout for generations and as such these weapons fall foul of this principle.

Conclusion on the international humanitarian law analysis

In 2011 the Red Cross Movement concluded that ‘it finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of IHL, in particular the rules of distinction, precaution and proportionality’.¹⁵⁹ This statement can be put more unequivocally today. In 2015, in the light of the extensive evidence presented in Oslo, Nayarit and Mexico on all aspects of health, environmental, climate, and emergency response capacity, and in light of more up to date information on tactical nuclear weapons that was not before the ICJ, it is no longer possible to maintain the argument that these weapons could be lawful in any circumstances under IHL.

¹⁵⁵ See for example, Mary Olsen, *War of Human Consequences: Health Consequences of the use of nuclear weapons* ((Paper presented at Vienna Conference on the Humanitarian Impact of Nuclear Weapons, Vienna, 8 December 2014) citing U.S. National Academy of Science, ‘Biological Effects of Ionizing Radiation (BEIR VII Phase 2)’ (2006).

¹⁵⁶ AP I art. 35.

¹⁵⁷ Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

¹⁵⁸ See generally Australian Red Cross, above note 14, 7-9.

¹⁵⁹ Council of Delegates of the International Red Cross and Red Crescent Movement, Resolution 1 (26 November 2011).

5. Australia's approach to the steps to regulate nuclear weapons

As we have seen Australia was very quick to support Britain's efforts to develop nuclear weapons with Prime Minister Menzies allowing British nuclear testing to take place on Australian soil and in some respects, given the current reliance on the United States' nuclear weapons for security (see further below), what little has changed is that the support is no longer to Britain but rather the United States.

However, even before this acceptance of British testing had occurred, Australians had been concerned about the 'immediate and widespread destruction' the bomb could cause. Then Chief Justice Latham of the High Court of Australia wrote to the Secretary General of the Australian Red Cross in 1945, which was then considering its approach to the forthcoming conference to negotiate the Geneva Conventions, and noted:

[i]t may be that a defence against the bomb will be discovered by scientists, but if one aeroplane gets through with one bomb a whole city may be destroyed. Something must be done to control the use of this new form of destruction, or to prevent its use, unless mankind is in the future to be upon continual alert - living always under the imminent fear of immediate and widespread destruction. This matter can be handled only upon the political plane, and it is important that the Red Cross should preserve its non-political character. It appears to me, however, that the issue before humanity is so great and so vital that it would be proper for the Red Cross to prepare an address to the Governments of the world, impressing upon them the necessity, in the interest of humanity, of arriving at an agreement which will either prevent or control the use of the atomic bomb for purposes of destruction.¹⁶⁰

Clarke asserts that Australia's signature of the NPT in February 1970 was done 'somewhat reluctantly' as then Prime Minister John Gorton believed that Australia required nuclear weapons for its regional security.¹⁶¹ Hubbard labels the approach as one of ambivalence.¹⁶²

Australia's part in the story of UN and Western efforts since 1968 to halt the spread of nuclear weapons can be understood from three distinct perspectives: its defence and security alliance with the US, its regional and wider status within the international community, and its own reluctance to renounce the option of acquiring an independent nuclear deterrent force.¹⁶³

¹⁶⁰ Letter Latham CJ to Dr Morris dated 2 November 1945, (extract on file with author).

¹⁶¹ Clarke, above note 76, 223.

¹⁶² Christopher Hubbard, 'From Ambivalence to Influence: Australia and the Negotiation of the 1968 Nuclear Non-Proliferation Treaty', (2004) 50 (4) *Australian Journal of Politics and History* 526.

¹⁶³ *Ibid* 528.

Ratification in 1973 took place under the then Prime Minister Gough Whitlam who supported the NPT, but also supported the economic benefits from uranium mining as well as the cause of advancing Aboriginal Land Rights.¹⁶⁴ Upon signature of the NPT in 1970 Australia lodged a fairly lengthy declaration which, among other things, indicated a desire to be ‘assured that there [was] a sufficient degree of support for the Treaty’. The declaration ‘attache[d] weight to the statements by the Governments of the [US], [UK] and the Soviet Union declaring their intention to seek immediate Security Council action to provide help to any non-nuclear weapons state party to the Treaty that is subject to aggression or the threat of aggression with nuclear weapons’.¹⁶⁵ This declaration was noted on 29 August 1985 to no longer accurately reflect Australia's position and was not intended to have any further application after Australia's ratification of the NPT on 23 January 1973.¹⁶⁶ Australia signed an atomic energy safeguard in July 1974 with the International Atomic Energy Agency.¹⁶⁷

With respect to the Rarotonga Nuclear-Free Zone Treaty (1985), Australia chaired the treaty negotiations and ‘explicitly opposed controls over land-based dumping, presumably because of the wish to retain its own options for dumping associated with Australian uranium mining and nuclear industry’.¹⁶⁸ Australia has come under criticism for putting its nuclear power and uranium mining interests ahead of comprehensive efforts to assist the region in the wake of nuclear tests. The regional Waigani Convention on Hazardous Wastes, signed at the Australian-chaired 1995 South Pacific Forum, as France was conducting its highly controversial final nuclear tests in the Pacific, does not include radioactive wastes. Hamel-Green asserts Australian negotiators ‘bear much of the responsibility for this omission’.¹⁶⁹

By 1996, Australia was advocating strongly against the compatibility of nuclear weapons and IHL. In oral submissions¹⁷⁰ before the ICJ, Gavan Griffith QC and The Hon. Gareth Evans QC put that ‘Australia's position on these questions is that customary international law has

¹⁶⁴ Clarke, above note 76, 224.

¹⁶⁵ UN Office of Disarmament Affairs, *Australia: signature of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)* <<http://disarmament.un.org/treaties/a/npt/australia/sig/london>>.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Nuclear Non-Proliferation (Safeguards) Act 1987 (Cth)* s.4.

¹⁶⁸ M Hamel-Green ‘Nuclear Denouncement in the Pacific: French Testing, The Rarotonga Treaty and the NFIP Movement’ in S Alomes and M Provis (eds) *French Worlds Pacific Worlds French Nuclear Testing in Australia's Backyard* (1998) (Institute for the Study of French Australian Relations) 17.

¹⁶⁹ *Ibid* 19.

¹⁷⁰ Written submissions were also relied on and the argument was made in both against the ICJ giving an advisory opinion. See Oral submissions of Australia, *Nuclear Weapons Advisory Opinion* [30 October 1995] ICJ Pleadings 30-33 (Gavan Griffith).

now developed to the stage where the threat or use of nuclear weapons would be contrary *per se* to international law'.¹⁷¹ Evans made very clear arguments as to why nuclear weapons were illegal under international law, specifically focusing on IHL. He noted:

nuclear weapons are by their nature illegal under customary international law, by virtue of fundamental general principles of humanity. It is illegal not only to use or threaten use of nuclear weapons, but to acquire, develop, test, or possess them. The right of States to self-defence cannot be invoked to justify such actions.¹⁷²

The current ADF policy is contained in the 2013 Defence White Paper and with regards to nuclear weapons notes (although it is noted that this document was released under the former Australian government¹⁷³):

... as long as nuclear weapons exist, we rely on the nuclear forces of the United States to deter nuclear attack on Australia. Australia is confident in the continuing viability of extended nuclear deterrence under the Alliance, while strongly supporting on-going efforts towards global nuclear disarmament.¹⁷⁴

The Policy also notes that Australia's key strategic interests in South Asia include nuclear non-proliferation and the maintenance of peace between the nuclear armed India and Pakistan.¹⁷⁵

Under successive governments, Australian defence policy has 'acknowledged the value to Australia of the protection afforded by extended nuclear deterrence under the US alliance'.¹⁷⁶ However, the 2009 Defence White Paper noted deterrence as a policy that would continue *within the timeframe* of that white paper¹⁷⁷ and that stable nuclear deterrence would be a feature of the international system *for the foreseeable future* such that extended deterrence would continue to be viable,¹⁷⁸ indicating that this position was not a permanent one. Indeed the Rudd/Gillard Government gave a number of indications of a commitment to a nuclear free world. The International Campaign to Abolish Nuclear Weapons cite responses from

¹⁷¹ Ibid 30.

¹⁷² Oral submissions of Australia, *Nuclear Weapons Advisory Opinion* [30 October 1995] ICJ Pleadings 36 (Gareth Evans).

¹⁷³ The 2013 Defence White Paper was released on 3 May 2013 by the Prime Minister, Julia Gillard, and Minister for Defence, Stephen Smith.

¹⁷⁴ Australian Government DOD, *Defence White Paper 2013* (Commonwealth of Australia, 2013) ('Defence White Paper 2013'), 29.

¹⁷⁵ Ibid 13.

¹⁷⁶ Ibid 50.

¹⁷⁷ Australian Government, *Defending Australia in the Asia Pacific Century: Force 2030 Defence White Paper* (2009) 32.

¹⁷⁸ Ibid 39.

former Prime Minister Rudd to the Canberra Press Club on 15 November 2007 as stating that, if elected, Australia would drive the international agenda for a nuclear weapons convention.¹⁷⁹ In 2008, jointly with the Japanese Government, Australia established the International Commission on Nuclear Non-Proliferation and Disarmament. Further, in a parliamentary motion which received cross-party support, on 21 March 2012 Prime Minister Gillard affirmed support for the goal of a world free of nuclear weapons.¹⁸⁰ These public statements of commitment, however, were not supported by action.

At the UNGA First Committee, Australia has, in October 2013¹⁸¹, October 2014¹⁸² and October 2015¹⁸³, led a group of states in putting forward statements which couch Australia's commitment to a nuclear free world as a balance between security interests and humanitarian arguments for their abolition. Australia maintains that the NPT is the 'cornerstone for progress towards total nuclear disarmament'¹⁸⁴ and that 'general and complete disarmament under strict and effective international control will have to be negotiated to underpin a world without nuclear weapons'.¹⁸⁵

The International Campaign to Abolish Nuclear Weapons reported that Australia refused the request of New Zealand to join with 125 other nations in support of their statements in 2013 and 2014 which were more unequivocal on the humanitarian arguments for abolition. It was noted that 'Australia's specific objection was to a sentence declaring that it is in the interest of humanity that nuclear weapons are never used again, "under any circumstances" – which Australia believed "cut across" its reliance on the use of US nuclear weapons on its behalf.'¹⁸⁶ This view of Australia as 'spoiler' State is held by a number of non-governmental and activist organisations. Australia has been labelled a 'Nuclear Weasel State' by activist group

¹⁷⁹ ICAN, *Government positions on a nuclear-weapons convention* (August 2010) 6.

¹⁸⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, (21 March 2012) 3685, (Julia Gillard) (Tony Abbott).

¹⁸¹ Australian Mission to the United Nations, *Joint Statement on the humanitarian consequences of nuclear weapons*, UNGA68 1st Comm, (21 October 2013) (Peter Woolcott).

¹⁸² Australian Mission to the United Nations, *Joint Statement on the humanitarian consequences of nuclear weapons*, UNGA69 1st Comm, (20 October 2014) (John Quinn).

¹⁸³ Australian Mission to the United Nations, *Joint Statement on the humanitarian consequences of nuclear weapons*, UNGA70 1st Comm, (21 October 2014) (John Quinn).

¹⁸⁴ *Ibid.*

¹⁸⁵ Australian Mission to the United Nations, *Joint Statement on the humanitarian consequences of nuclear weapons*, UNGA69 1st Comm, (20 October 2014) (John Quinn).

¹⁸⁶ ICAN Australia, 'Briefing Paper Undermining disarmament: the Australian way' (March 2014) <<http://www.icanw.org/wp-content/uploads/2014/03/UnderminingDisarmament-March2014.pdf>>.

Wildfire. ‘Weasels’ are non-nuclear weapon states which rely on alliances with nuclear powers and the doctrine of deterrence. Wildfire view them as undermining disarmament processes while claiming to support humanitarian arguments for their abolition.¹⁸⁷

Australia attended the Oslo, Nayarit and Vienna Meetings. Freedom of Information materials released following requests from the International Campaign to Abolish Nuclear Weapons reveal differences of opinion between civil society and the Australian government on this issue and in particular, Australia’s approach being, that effective disarmament is needed to achieve the elimination of nuclear weapons rather than a legally binding instrument prohibiting their use.¹⁸⁸

Australian Foreign Minister Julie Bishop, on the eve of the Mexico conference on the humanitarian consequence of nuclear weapons, put the Australian position. She said that the push for a ban on nuclear weapons was ‘emotionally appealing, but the reality is that disarmament cannot be imposed this way. Just pushing for a ban would divert attention from the sustained, practical steps needed for *effective* disarmament’.¹⁸⁹

That disarmament must come first is a position which Australia has maintained, including at the 2015 NPT Review Conference where, in delivering a joint-statement on the humanitarian consequences of nuclear weapons, Australia again reiterated its view that the NPT ‘is the cornerstone for progress towards total disarmament’.¹⁹⁰ The most recent round of information obtained through a Freedom on Information request on this issue, notes Australia as being concerned about emergence of the Austrian pledge and does not want to see it ‘become synonymous with a nuclear weapons ban treaty’.¹⁹¹ The documents reveal that ‘it is in the very interest of the survival of humanity that nuclear weapons are never used again, *under*

¹⁸⁷ Wildfire, ‘Nuclear Weasel State’ <<http://www.wildfire-v.org/Weasel.jpg>>.

¹⁸⁸ ‘Materials produced in response to Freedom on Information requests reference No 13/19834 (20 February 2014) and 13/9152 (26 August 2013) and No 14/51652 (16 February 2015)’ <<http://www.dfat.gov.au/foi/disclosure-log.html#documents>>.

¹⁸⁹ Julie Bishop, ‘The humanitarian consequences of nuclear weapons’ (Op-ed, 14 February 2014).

¹⁹⁰ HE Gillian Bird, *Joint Statement on the humanitarian consequences of nuclear weapons*, 9th Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, (30 April 2015).

¹⁹¹ ‘Materials produced in response to Freedom on Information requests reference No 15/28540 (7 September 2015)’ <<http://www.dfat.gov.au/foi/disclosure-log.html#documents>>, See particularly 22, 30, 111. See also Ben Doherty, ‘Australia resists nuclear disarmament push because it relies on US deterrent’ *The Guardian* (online), 16 September 2015 <<http://www.theguardian.com/world/2015/sep/16/australia-isolated-in-its-hesitation-to-sign-treaty-banning-nuclear-weapons>>; Tim Wright, *Documents reveal Australia is ‘worried’ about ‘growing momentum’ towards nuclear weapon ban*, (15 September 2015) International Campaign to Abolish Nuclear Weapons <<http://www.icanw.org/campaign-news/foi-documents-reveal-australia-is-worried-about-growing-momentum-towards-nuclear-ban/>>.

any circumstances' is 'a phrase that Australia cannot accept'.¹⁹² Australia abstained from the vote on the establishment of the open-ended working group on effective legal measures towards a world without nuclear weapons 'in the face of unresolved and substantive differences with the mandate and rules of procedure'.¹⁹³

6. Australia, nuclear weapons and the obligation to respect and ensure respect for IHL

Australia has consistently adopted an approach to nuclear weapons that is strongly influenced by other states. This is today characterised by the Australian doctrine of reliance on the United States nuclear umbrella. This doctrine has been ridiculed by many commentators on account of there being no agreement between the United States and Australia to that effect.¹⁹⁴

Before the ICJ in 1995 Australia argued strongly that nuclear weapons were not compatible with IHL. While Australia supported 'the principle of stable nuclear deterrence pending complete nuclear disarmament', Australia stated multiple times that such 'stable deterrence can only be accepted as an interim or transitional condition'.¹⁹⁵ Given the failure of nuclear weapons states to bring about that disarmament in the 20 years that has followed, it seems timely for Australia to reconsider its approach and a Common Article 1 analysis is a positive vehicle through which Australia could change its positioning.

While it remains the case that there is no clearly articulated unequivocal prohibition on the use of nuclear weapons in international law, it is clear the move towards one is gaining momentum. States seeking to demonstrate respect and ensuring respect for the Geneva Conventions are at the forefront of this momentum. Further, the Advisory Opinion decision is approaching 20 years old. Before the ICJ Australia noted:

[b]ut the question whether the use or threat of nuclear weapons was illegal in the 1940s, or even in the 1980s, is not of particular significance for present purposes. Even if the use or threat of nuclear weapons was not *per se* inconsistent with

¹⁹² 'Materials produced in response to Freedom of Information requests reference No 15/28540 (7 September 2015)' <<http://www.dfat.gov.au/foi/disclosure-log.html#documents>>, 37.

¹⁹³ Ian McConville, *Australian [Explanation of Vote] for the "Taking forward multilateral nuclear disarmament negotiations" resolution*, (5 November 2015) <http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com15/eov/L13_Australia.pdf>.

¹⁹⁴ Richard Tanter, 'Absurd, obscene and reckless - American nuclear weapons in defence of Australia (2013) 42 *Dissent (Australia)*; Malcolm Fraser, *Dangerous Allies* (Melbourne University Publishing, 2014).

¹⁹⁵ Oral submissions of Australia, *Nuclear Weapons Advisory Opinion* [30 October 1995] ICJ Pleadings 36 (Gareth Evans). 54.

elementary considerations of humanity and the dictates of public conscience in the past, this does not determine whether it is *per se* inconsistent with those principles today.¹⁹⁶

The ICJ's finding is adopted with the caveat 'in view of the current state of international law, and of the elements of fact at its disposal'. In light of the facts now available, as presented in Oslo, Nayarit and Vienna, which have made so clear the effects on human health (both immediate and intergenerational) and climate which would result from a nuclear detonation, and the inability of the emergency responders to assist, it is no longer possible to foresee any use of nuclear weapons being compatible with IHL. As such, regardless of the existence of a ban treaty in the future, or any other similar developments, or indeed any view on the viability or otherwise of nuclear deterrence, the continued existence of nuclear weapons is an affront to Common Article 1.

Australia must look to Common Article 1 of the Geneva Conventions as a source of a strong argument for supporting the humanitarian initiative towards a clear and specific legally binding prohibition on nuclear weapons. It has been said that Australia has a reputation in this space for talking the talk but not walking the walk when it comes to a real commitment to a nuclear free world.¹⁹⁷ By considering the nuclear weapons issue through the Common Article 1 lens, Australia will be persuaded from its current approach. For example, while Australia's direct influence on US nuclear policy is not necessarily significant, Australia has significant capacity in respect of this topic. Australia can easily amend its policy of nuclear deterrence. Taken as one of a number of states currently reliant on US nuclear deterrence such a move could be influential in relation to persuading other states to take the same approach. That would constitute taking a measure in support of Common Article 1 obligations and would be for the benefit of Australia's international relations, and for humanity.

¹⁹⁶ Ibid 40.

¹⁹⁷ Woodrooffe, above note 57. Although more recently it is being strongly critiqued for not even talking the talk. See, eg, Tim Wright, *Documents reveal Australia is 'worried' about 'growing momentum' towards nuclear weapon ban*, (15 September 2015) International Campaign to Abolish Nuclear Weapons <<http://www.icanw.org/campaign-news/foi-documents-reveal-australia-is-worried-about-growing-momentum-towards-nuclear-ban/>>.

7. Conclusion

This chapter has illustrated the failings of international law to deal with humanity's greatest threat - nuclear detonation¹⁹⁸ and Australia's role in undermining efforts to move the international legal landscape forward from its 75 year stalemate. The potential opportunity for Common Article 1 of the Geneva Conventions to be a strong ally in the quest for a clear and specific prohibition on the use of nuclear weapons is clear. In light of the new evidence about the incompatibility of nuclear weapons with IHL all states, including Australia, have an obligation to respect and ensure respect for the Geneva Conventions by recognizing the existing illegality of their use under IHL, supporting the proposal for a clear and specific prohibition on the use of nuclear weapons.

Australia, as a state that has undertaken a number of measures to undermine this route now has a role to play in reversing its stance. Nobel laureate Desmond Tutu, ahead of the Nayarit Intergovernmental Conference on the Humanitarian Impacts of Nuclear Weapons, noted:

[w]hy should these weapons, whose effects are the most grievous of all, remain the only weapons of mass destruction not expressly prohibited under international law?

By stigmatizing the bomb -- as well as those who possess it -- we can build tremendous pressure for disarmament.¹⁹⁹

Australia is undermining efforts to stigmatise nuclear weapons and therefore Australia is in breach of its obligation to respect and ensure respect for IHL. Australia must reconsider its position on nuclear weapons. In order to facilitate this Australia should employ a Common Article 1 analysis in relation to its approach to nuclear weapons. Further, if Australia does so, it is well placed to use its capacity to influence others towards a position of respecting IHL with respect to nuclear weapons.

¹⁹⁸ Anders Sandberg, 'The five biggest threats to human existence' *The Conversation* (online), 29 May 2014, < <http://theconversation.com/the-five-biggest-threats-to-human-existence-27053>> ; Larry Schwartz, '10 of the Biggest Threats to Human Existence' *Alternet* (online), 26 July 2014, < <http://www.alternet.org/10-biggest-threats-human-existence>>; Oliver Duggan, 'Nuclear Weapons, disease and inequality: What poses the greatest threat to humanity?' *The Telegraph* (online), 22 October 2014, < <http://www.telegraph.co.uk/news/worldnews/11179747/Nuclear-weapons-disease-and-inequality-What-poses-the-greatest-threat-to-humanity.html>>.

¹⁹⁹ Desmond Tutu, 'Desmond Tutu: imagine world without nuclear weapons' *CNN online*, 13 February 2014 < http://edition.cnn.com/2014/02/13/opinion/nuclear-weapons-desmond-tutu/index.html?hpt=hp_c5>.

CHAPTER SIX: AUSTRALIA, THE ARMS TRADE TREATY AND THE OBLIGATION TO RESPECT AND ENSURE RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

Chapter six provides an overview of the newest international instrument regulating weapons, namely the ATT, and its development. It considers the approach taken by Australia to the negotiation of the ATT and its implementation by Australia. It answers the questions what approach has Australia taken to the regulation of small arms and light weapons by international law and what conclusions can be reached from this evaluation regarding the approach of Australia to compliance with the obligation to respect and ensure respect pursuant to Common Article 1? It notes that Common Article 1 has not featured in Australia's approach to the treaty to date, but that the treaty itself includes provisions (in Articles 6(3) and 7) which have strong links to Common Article 1. The real work with the ATT begins now, in the early years of implementing the treaty. Australia has taken a leading role in the negotiation and promotion of the treaty to date. Australia also has significant capacity to assist other states to ensure respect for IHL. The ATT should be a vehicle for Australia doing so.

1. Introduction

The ATT came into force on 24 December 2014.¹ It was hailed by Ban Ki-moon as 'a victory for the world's people' and 'a powerful tool in our efforts to prevent grave human rights abuses or violations of international humanitarian law'.² The ATT was adopted by the UN General Assembly on 2 April 2013³, having been agreed, without consensus, on 27 March 2013 in New York.⁴ One hundred and fifty four states, including Australia, supported the text. Twenty-three nations abstained from voting. Iran, Syria and the Democratic People's Republic of Korea voted against it.⁵ Australia was among the States Party at commencement,

¹ *Arms Trade Treaty*, opened for signature 3 June 2013, (entered into force 24 December 2014).

² United Nations Office for Disarmament Affairs, *The Arms Trade* <<https://www.un.org/disarmament/convarms/ArmsTrade/>>.

³ *Resolution adopted by the General Assembly 67/234. The Arms Trade Treaty B*, UNGA, 67th sess, 71st plenary mtg, Agenda item 94, A/RES/67/234B (11 June 2013).

⁴ Peter Woolcott, *Presidents Non Paper, 27 March 2013, United Nations Final Conference on the Arms Trade Treaty New York, 18-28 March* (28 March 2013) <[http://www.un.org/disarmament/ATT/docs/Presidents_Non_Paper_of_27_March_2013_\(ATT_Final_Conference\).pdf](http://www.un.org/disarmament/ATT/docs/Presidents_Non_Paper_of_27_March_2013_(ATT_Final_Conference).pdf)>.

⁵ United Nations, 'Overwhelming Majority of States in General Assembly Say 'Yes' to Arms Trade Treaty to Stave off Irresponsible Transfer that Perpetuate Conflict, Human Suffering' (United Nations Meetings Coverage and Press Releases, 2 April 2013) <<http://www.un.org/press/en/2013/ga11354.doc.htm>>.

having lodged an instrument of ratification on 3 June 2014.⁶ The ATT regulates the ‘export, import, transfer, trans-shipment and brokering’ of the weapon categories set out therein, which include small arms and light weapons and key military hardware such as battle tanks, combat aircraft and warships.⁷ The first meeting of States Party was held in Mexico in August 2015.⁸ The initial reports from countries, on their implementation of the ATT, are due for submission in December 2015.⁹

Australia has played a number of significant roles internationally in the development of the ATT, including as President of the March 2013 ATT Conference in New York, which led to the final text of the treaty and its adoption by the UN, and as co-author of early resolutions before the General Assembly which led the international community on the path towards the ATT. Australia has expressed strong support for the ATT process.

Australia’s commitment to the treaty process is driven by humanitarian, security and trade considerations, in addition to a desire to develop an international instrument that will deter the destabilizing impact on security and development of illicit transfer of arms.¹⁰

2. Weapons that are regulated by the ATT and the operation of the ATT

The object of the ATT is articulated as being to ‘establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms’ and to ‘prevent and eradicate the illicit trade in conventional arms’.¹¹ Reducing human suffering, increasing peace and security and confidence building among states are listed as the reasons for the treaty’s existence.¹²

Article 2(1) of the ATT provides that the ATT applies to:

⁶ Australian Government, *Arms Trade Treaty Ratification Event: “Approaching entry into force”* (3 June 2014) Australian United Nations Security Council 2013-2014 <<http://australia-unscc.gov.au/2014/06/arms-trade-treaty-ratification-event-approaching-entry-into-force/>>.

⁷ ATT art 2.

⁸ United Nations Office for Disarmament Affairs, *First Meeting of States Parties to the Arms Trade Treaty*, <http://www.un.org/disarmament/ATT/csp1/>. Australia’s opening statement to the meeting dated 24 August 2015 is available at <<http://www.thearmstradetreaty.org/images/Australia.pdf>>.

⁹ United Nations Office for Disarmament Affairs, *The Arms Trade Treaty*, <<http://www.un.org/disarmament/ATT/>>.

¹⁰ *Compilation of views on the elements of an arms trade treaty*, UN GA, A/CONF.217/2 (10 May 2012) <http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.217/2&Lang=E>, 7.

¹¹ ATT art 1.

¹² ATT art 1.

all conventional arms within the following categories:

- (a) Battle tanks;
- (b) Armoured combat vehicles;
- (c) Large-calibre artillery systems;
- (d) Combat aircraft;
- (e) Attack helicopters;
- (f) Warships;
- (g) Missiles and missile launchers; and
- (h) Small arms and light weapons.

The ATT regulates the ‘export, import, transfer, trans-shipment and brokering’ of the weapons within these categories where that ‘international movement’ takes the weapons out of the ownership of the first State Party.¹³ It also covers ammunition/munitions and parts and components for the aforementioned weapons.¹⁴

Transfers of the weapons regulated by the ATT shall not be authorised by a State Party if doing so would violate obligations under UN measures (eg. arms embargoes) or other international obligations (eg. illicit trafficking) or if the State Party has knowledge that the arms ‘would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions [], attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party’.¹⁵ Additionally, States, prior to authorising a transfer must consider whether there is an overriding risk of the arms being used to undermine peace and security or to commit or facilitate serious violations of IHL, international human rights law, international terrorism or transnational organised crime.¹⁶ Specific mention is made in Article 7(4) that States Party ‘shall take into account the risk’ of the arms being ‘used to commit or facilitate serious acts of gender based violence or serious acts of violence against women and children’. If such an overriding risk exists, then the transfer must not take place.¹⁷

There are a number of obligations set out under the treaty on States Party to assist other States Party with the implementation of the ATT, including the sharing of information with one another to prevent breaches of the treaty (including the diversion of arms)¹⁸ and in

¹³ ATT arts 2(2), 2(3).

¹⁴ ATT arts 3, 4.

¹⁵ ATT art 6.

¹⁶ ATT art 7.

¹⁷ ATT art 7(3).

¹⁸ See ATT art 11(4).

particular, the provisions of Article 15 ‘International Cooperation’ and Article 16 ‘International Assistance’. Record keeping and reporting obligations are also important to the treaty. Article 12 provides that each State Party maintain records of exports or authorisation of exports of arms covered by the treaty. The treaty is not prescriptive as to how this is done¹⁹ and indeed specifically notes that the records shall be maintained ‘pursuant to its national laws and regulations’. There is no obligation to maintain records of imports, although Article 12(2) ‘encourages’ State Party to do so.

3. The ATT and international humanitarian law

The nature of the ATT means that it is not an IHL treaty²⁰, with an arms control²¹ element like the Ottawa Landmines Convention²² or the Cluster Munitions Convention which was discussed in chapter three.²³ The ATT is a much broader arms control instrument which is designed to assist in the implementation of not only IHL but also other legal frameworks including domestic laws, international human rights law and international law on the use of force. Further, the Preamble to the text specifically mentions the ‘need to prevent and eradicate the illicit trade in conventional arms and prevent their diversion’ in the context of terrorism.²⁴

¹⁹ See also ATT art 12(3) as to suggested content of the records and art 12(4) as to the requirement to keep such records for 10 years.

²⁰ International humanitarian law is concerned with regulating the use of particular means and methods of warfare in times of armed conflict, in order to protect those not or no longer taking part in the fighting and to minimize suffering.

²¹ Note the distinction between international humanitarian law treaties and arms control regimes as articulated by Robert Mathews and Tim McCormack ‘The Relationship between International Humanitarian Law and Arms Control’ in Tim McCormack and Helen Durham (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Kluwer Law International, 1999) 66. See also Robert Mathews and Tim McCormack, ‘The influence of humanitarian principles in the negotiation of arms control treaties’, (1999) 834 *International Review of the Red Cross* 331-352.

²² *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, opened for signature 3 December 1997, 2056 UNTS 241 (entered into force 1 March 1999).

²³ Until 1977 weapons law issues traditionally fell under the Hague Law source of IHL law which (as distinct from the Law of Geneva which deals with the protection of victims of war) however, AP I clearly covers weapons law in some detail. During the period leading up to the negotiations of the 1977 Additional Protocols to the Geneva Conventions there were different views among states as to which framework would be the most appropriate for considering specific weapons prohibitions. That these discussions took place indicate that it was by no means *a fait accompli* that IHL and arms control law must be considered completely separate regimes. See Francois Bugnion, ‘Droit de Geneve et droit de La Haye’ (English abstract) (2001) 844 *International Review of the Red Cross*; Ashley Roach, ‘Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?’ (1984) 105 *Military Law Review* 3, 9-10.

²⁴ ATT preamble.

While many weapons law treaties have both the purpose of prohibiting the use of a weapon, and prohibiting its manufacture, acquisition, transfer and sale, the ATT is designed only to place restrictions on the circumstances in which transfers of conventional weapons are allowed. This is because the weapons regulated by the ATT are not weapons which inherently breach the principles of the Geneva Conventions regarding the legality of the use of weapons.²⁵ These weapons are not weapons which are inherently indiscriminate. These weapons have the ability to comply with the provisions of IHL. Specifically, these are weapons that can be employed in such a way as to avoid indiscriminate effects, unnecessary suffering or superfluous injury and widespread, long-term, and severe damage to the natural environment. As such, the analysis provided in other chapters of this thesis regarding the weapons' compatibility with IHL, is not relevant here.

However, it is important to note that while not all of the prohibitions on the transfer of these weapons stem from the potential for IHL violations, many do. It is therefore important to include attitudes towards the ATT in this thesis, as a way of approaching an analysis of the obligation to respect and ensure respect for the Geneva Conventions in Common Article 1. In particular, the prohibitions on arms transfers in Article 6 of the treaty note that knowledge of these armaments being used in the 'commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes', have significance from an IHL perspective. Whilst it could be argued that there may be situations of crimes against humanity that do not constitute violations of IHL²⁶, many crimes against humanity will also constitute war crimes and/or serious violations of IHL²⁷. As such, there is a very significant focus in the prohibitions reflected in IHL principles and the approach that Australia has taken to the ATT is highly relevant to an analysis of the approach Australia takes to the obligation to respect and ensure respect for the Geneva Conventions in Common Article 1.

²⁵ Cf for example landmines and chemical and biological weapons.

²⁶ The attacks on America on September 11, 2001, for example, were discussed in this light.

²⁷ The ICRC has expressed the view that the terms serious violations of IHL and war crimes are 'interchangeable' and are encompassed by grave breaches of the Geneva Conventions and AP I, article 8 of the Rome Statute of the ICC and other war crimes pursuant to customary international law. ICRC, 'What are "serious violation of international humanitarian law"? Explanatory Note' <<https://www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>>.

4. History of attempts to regulate the global arms trade

Stone notes that the notion of limiting arms exports for the purposes of the peace and security of other states is a 'modern' concept and that traditionally arm exports were limited not by formal prohibitions, but for national interest reasons, namely to 'keep valuable munitions available'.²⁸ The Treaty of Washington, signed in 1871, between the United States and the United Kingdom, and dealing with, among other items, compensation for damage done to the Union during the American Civil War by the privately British built and crewed Alabama vessel, is an apt starting point for a discussion of attempts to regulate interstate arms trade. The positions put by the British made it very clear that they did not believe there to be any international law obligations on states with regard private arms exports.²⁹ (This was a position dating back to 1660.³⁰) The British agreed to be bound in future dealings with the United States by the Treaty of Washington's requirement that 'a neutral government is bound [to exercise] due diligence to prevent the fitting out, arming or equipping' of vessels intended to make war against states with which it is at peace'³¹ (without prejudice to its view that this was not a principle of international law). Subsequent international legal frameworks, including the Hague Conventions and Declarations of 1899 and 1907, confirmed the principle that private trade in arms was not for states to concern themselves with.³²

The idea that states may have obligations with regards to the activities of private enterprise is a feature of the post World War I world, on account of both the 'public revulsion against arms manufacturers and traders' and the licensing on all exports brought about during wartime rationing.³³ On 10 September 1919 the Convention for the Control of the Trade in Arms and Ammunition was signed at St-Germain-en-Laye in Paris.³⁴ The Convention introduced restrictions on exporting any arms that were not licensed exports. It was set up in such a way as to effectively be not about arms reduction, but about restricting arms being transferred to Africa and the Middle East.³⁵ The Convention, despite being signed by all

²⁸ David Stone, 'Imperialism and Sovereignty: The League of Nations' Drive to Control the Global Arms Trade' (2000) 35(2) *Journal of Contemporary History* 213, 214.

²⁹ *Ibid* 214-215.

³⁰ *Ibid*.

³¹ *Ibid*.

³² *Ibid* 216-7.

³³ *Ibid* 217.

³⁴ 'Convention for the Control of the Trade in Arms and Ammunition, and Protocol' (1921) 15(4) *The American Journal of International Law*, 297-313.

³⁵ Stone, above note 28, 217.

major arms-producers came to be ratified by very few nations and the failure of the United States, in particular, to ratify the Convention became its undoing.³⁶ An Arms Traffic Conference held in 1925 was slated to give rise to an alternative to the St Germain-en-Laye Convention.³⁷ Concerns regarding sovereignty and state security were among those voiced in the deliberations³⁸ and again the reluctance of States to ratify the Arms Traffic Convention led to its failure.

The importance of arms regulation was also a subject of the Covenant of the League of Nations. Article 8 of the Covenant of the League of Nations noted the ‘reduction of national armaments’ as one of its objectives and sought to avoid the ‘evil effects’ of private sector manufacture of ‘munitions and implements of war’.³⁹ Article 23 entrusted ‘the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest’. Whilst the League of Nations did not ultimately achieve its objectives, Stone notes that ‘it would be a mistake to see the League’s record on arms trade a complete failure’ as, ‘in setting standards by which international behaviour might be judged, it achieved an unjustifiably forgotten success’.⁴⁰ Stone points to the League assembling significant data on the global arms trade, paving the way for future work and bringing about the acceptance of peacetime licensing on arms exports, to illustrate this point.⁴¹

The UN Charter also included scope to deal with the proliferation of arms. Article 47 notes that the ‘regulation of armaments’ is a topic that the Military Staff Committee (comprised of a military representative from each of the permanent five members of the Security Council) of the UN will advise the Security Council on.⁴² However, although the aftermath of its creation saw a focus on international human rights regulations, the easy availability of weapons so often responsible for violations of these rights was not addressed.

³⁶ Ibid 217- 221.

³⁷ ‘Convention for the Supervision of Trade in Arms and War Munitions’ (1926) 20(1) *The American Journal of International Law*, 151-154.

³⁸ Stone, above note 28, 222-227.

³⁹ *Covenant of the League of Nations*, 28 April 1919.

⁴⁰ Stone, above note 28, 230.

⁴¹ Ibid.

⁴² *Charter of the United Nations* art 47(2).

In 1986 the ICJ observed ‘in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception’.⁴³ Global efforts to seek to more comprehensively address the proliferation of conventional arms really began in 1991, although they experienced a number of stumbling blocks through to 2006, when the process that resulted in the ATT commenced.

The UN Register of Conventional Arms was established in 1991. Today it notes the building of confidence between states, with a view to the prevention of conflict, through transparency in the accumulation of armaments, as its mandate.⁴⁴ Through the process of a series of Groups of Governmental Experts the scope of the Register has been expanded over the years. The categories of armaments to be comprehensively reported on annually, reflect those now listed in the ATT.⁴⁵ The only exception is that reporting on the transfer of small arms and light weapons is optional under the Register. Small arms and light weapons were added to the Register in 2003.⁴⁶ The Register reports that it has received reports from more than 170 countries during its existence and that the ‘vast majority of official transfers are captured in the register’.⁴⁷ Through analysing the reports of both the importer and exporter countries the systems includes a built in ‘verification mechanism’.⁴⁸ However, not all countries report every year and reports are subject to national interpretation.⁴⁹

In 1991, cognisant of the contribution of the global arms trade to human rights violations, the United States called on the permanent five Security Council members to discuss arms trade guidelines.⁵⁰ These discussions ended in 1992 due to a lack of agreement between member

⁴³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, (Judgment) [1986] ICJ Rep, 14. Although note the exceptions discussed by Drummond and Cassimatis, including the findings of the Nicaragua case itself. Catherine E Drummond and Anthony E Cassimatis, ‘Weapons smuggling’ in Neil Boister and Robert J Curries (eds) *Routledge Handbook on Transnational Criminal Law* (Routledge, Oxon, 2013) 252-253.

⁴⁴ United Nations, *The Global Reported Arms Trade The UN Register of Conventional Arms* (2013) <<http://www.un-register.org/Background/Index.aspx>> .

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Peter Woolcott, ‘The Arms Trade Treaty’, *United Nations Audiovisual Library of International Law* http://legal.un.org/avl/pdf/ha/att/att_e.pdf.

states.⁵¹ Amnesty International attributes the realisation that Iraq's invasion of Kuwait had been aided by arms supplied by all five UN Security Council Permanent Members as a catalyst for global action in regulation of the global arms trade.⁵² This was followed by the genocide in Rwanda, the conflict in the former Yugoslavia and a surge of global interest in protecting populations from mass atrocities.

The European Union was the first to take any concerted action in relation to arms transfer controls. In November 1993, through the Organisation for Security and Cooperation in Europe, a voluntary set of principles on arms exports was introduced.⁵³ In the years that followed, Amnesty International, joined by others including Nobel Peace Laureates and members of the NGO community made concerted efforts towards mobilising political interest in the topic of global arms trade restrictions.⁵⁴ On 5 June 1998, at Brussels, a voluntary European Union Code of Conduct on Arms Exports was adopted.⁵⁵ Compliance with the code required details of licence refusals to be circulated to other states through diplomatic channels.⁵⁶ (This document was built on in December 2008 by the European Union Common Position.⁵⁷)

Another arrangement developing around this time was the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. The Wassenaar Arrangement became operational in 1996 following an agreement in The Hague regarding multilateral cooperation on harmonizing export controls.⁵⁸ Today the Wassenaar

⁵¹ Ibid.

⁵² Amnesty International, *The long journey towards an Arms Trade Treaty* (5 June 2013) <<http://www.amnesty.org/en/news/long-journey-towards-arms-trade-treaty-2013-03-27>>.

⁵³ Organization for Security and Co-operation in Europe, *Principles government Conventional Arms Transfers* (25 November 1993) <<http://www.osce.org/fsc/42313>> .

⁵⁴ [Amnesty](#), above note 52.

⁵⁵ European Union The Council, *European Union code of Conduct on arms Exports* (5 June 1998) <<http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>>.

⁵⁶ Ibid operative provision 3.

⁵⁷ European External Action Service, *Arms Export Control* <http://www.eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/index_en.htm>.

⁵⁸ Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, *Frequently Asked Questions* <<http://www.wassenaar.org/faq/index.html>>.

Arrangement has 41 participating states.⁵⁹ Australia is a member of the Wassenaar Arrangement.⁶⁰

In 1999 the ICRC brought the issue of arms availability to the attention of the international community in a publication entitled ‘Arms availability and the situation of civilians in armed conflict: a study presented by the ICRC’. The publication noted ‘weapons are increasingly falling into the hands of all types of fighters, including children, unconstrained by IHL’.⁶¹ Amnesty International led further civil society pushes including putting together a draft International Code of Conduct for arms transfers, which was initially promoted to European Union member states. In November 2000, having gained the support of Nobel Peace Prize winner and former Costa Rican President Oscar Arias, Amnesty and their supporters, through Costa Rica’s UN Mission, circulated a draft Code of Conduct on international arms transfers. This was subsequently revised into a document known as the 2001 Framework Convention on International Arms Transfers. Over the years that followed, Amnesty and a number of non-governmental organisations, high profile personalities and supporters, gained an increasing amount of government support for their agenda.⁶²

In the early 2000s, the UN General Assembly had also turned its mind to the issue of small arms and light weapons in a number of resolutions and in 2001 agreed to the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.⁶³ The most recent review conference on this Programme of Action was held in September 2012.⁶⁴ The Programme of Action looked at a number of different methods of achieving goals including stronger national laws and systems for controlling the spread of these weapons within jurisdictions, criminalisation of acts related to the manufacture, possession and stockpiling of these weapons, as well as national and international infrastructure and frameworks for preventing the export, import and transfer of these

⁵⁹ Ibid.

⁶⁰ Australian Government DOD, *International Export Control Regimes and treaties, Defence Export Control Office* <<http://www.defence.gov.au/deco/Regimes.asp>>.

⁶¹ ICRC, *Arms availability and the situation of civilians in armed conflict* (Study, No. 0734, ICRC, 1999) 1.

⁶² Amnesty, above note 52.

⁶³ *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, A/CONF.192/15 (July 2001) <<http://www.un.org/events/smallarms2006/pdf/N0150720.pdf>>.

⁶⁴ *Programme of Action on small arms and light weapons Review Conference 2012* <<http://www.poa-iss.org/RevCon2/>>.

weapons.⁶⁵ The Programme of Action led, among other initiatives, to the International Tracing Instrument.⁶⁶ This instrument, while not binding, introduced detail regarding measures such as methods for marking small arms and light weapons, and for implementing tracing systems. Record-keeping and international cooperation⁶⁷ measures were also included as ways states could take to help prevent misuse of small arms and light weapons.

The issues relating to arms transfers stayed quite prominently in the international discourse during the early 2000s. At the 2003 International Conference of the Red Cross and Red Crescent (a conference attended by the ICRC, the International Federation of the Red Cross and Red Crescent Movement, all National Red Cross and Red Crescent societies and government representatives from States Party to the Geneva Conventions) Final Goal 2.3 (adopted by consensus) notes that:

States should make respect for international humanitarian law one of the fundamental criteria on which arms transfer decisions are assessed. They are encouraged to incorporate such criteria into national laws or policies and into regional and global norms on arms transfers.⁶⁸

Further, during this period a number of regional frameworks, in addition to the European Union Code, were developed including the 2004 Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, the 2005 Central American Integration System Code of Conduct on the Transfer of Arms, Ammunition, Explosives and Other Related Material and the 2006 Economic Community of West African States Convention on Small Arms and Light Weapons.

Further, in 2005 the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the UN Convention against Transnational Organized Crime (Firearms Protocol)⁶⁹ came into force. The UN Convention against Transnational Organized Crime was an initiative concluded in Italy in December

⁶⁵ Ibid.

⁶⁶ *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, GA Res 60/81 (8 December 2005) 2005; *Report of the Open-ended Working Group to Negotiate an International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, UN Doc A/60/88 (27 June 2005).

⁶⁷ Ibid parts III – V.

⁶⁸ 28th International Conference of the Red Cross and Red Crescent, Agenda for Humanitarian Action Final Goal 2.3.

⁶⁹ *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*, 31 May 2001, 2326 UNTS 208 (entered into force 3 June 2005.)

2000 to help provide a globalised response to organised crime⁷⁰ and included protocols pertaining to the trafficking in persons and the smuggling of migrants.⁷¹ At that time, the committee working on the firearms aspect of the Convention, was not ready to proceed to the adoption of a protocol.⁷² The Firearms Protocol was subsequently adopted by General Assembly resolution 55/255 of 31 May 2001 ‘to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition’.⁷³ The focus of this treaty, however, was illicit transfers of weapons. The humanitarian consequences of the lawful trade in conventional arms remained to be addressed.

The process towards the ATT began in 2006 with the General Assembly establishing a group of government experts to report on ‘the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms’.⁷⁴ This group’s report led to the General Assembly establishing an Open-ended Working Group towards an ATT. This working group began meeting in 2009 and was established to look at ‘common international standards for the import, export and transfer of conventional arms’.⁷⁵

On 2 December 2009, pursuant to General Assembly Resolution 64/48, a UN Conference on the ATT was planned for 2012. The Resolution providing for the conference noted the conference was to ‘meet for four consecutive weeks in 2012 to elaborate a legally binding

⁷⁰ See forward of Kofi Annan. United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2004)

<<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>> iii-iv.

⁷¹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003); *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004).

⁷² *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, 55th sess, Agenda Item 105, UN Doc A/RES/55/25 (15 November 2000) art 4.

⁷³ *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*, 31 May 2001, 2326 UNTS 208 (entered into force 3 June 2005) art 2.

⁷⁴ *Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*, GA Res 61/89, 61st sess, Agenda Item 90, UN Doc A/RES/61/89 (6 December 2006).

⁷⁵ *Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*, GA Res 63/240, 63rd sess, Agenda Item 89, UN Doc A/RES/63/240 (8 January 2009).

instrument on the highest possible common international standards for the transfer of conventional arms'.⁷⁶

Substantive and procedural Preparatory Committee sessions were planned for, and conducted in 2010, 2011 and 2012. From 2-27 July 2012 a Diplomatic Conference was held in New York. This Conference did not result in agreement on a treaty text. Its legacy became the President's comprehensive draft treaty text⁷⁷ which formed the basis for ongoing negotiations. The ATT was subsequently agreed to in March 2013, following a further Diplomatic Conference from 18-28 March 2013 in New York.⁷⁸ It entered into force on 24 December 2014 and Mexico hosted the First Conference of States Party in August 2015.⁷⁹

5. Australia's approach to the preparatory steps to an arms trade treaty

Little detail of Australia's contribution to early negotiations towards an arms trade treaty is available. However, Australia was in attendance at early discussions on this issue. For example, the Honourable George Foster Pearce, Minister of Defence, is listed as attending the 1921 negotiations for the Convention for the Control of the Trade in Arms and Ammunition, and Protocol.⁸⁰

More recently, as noted in chapter three, Australia has taken a proactive stance on a number of arms control issues including the establishment of the Australian Group in 1985 concerning the spread of chemical and biological weapons. Relevant to the conventional arms discussion, Australia was a founding member of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.⁸¹ Australia has held a number of leadership roles in the Wassenaar Arrangement.⁸² Australia acted as one of the

⁷⁶ *The arms trade treaty*, GA Res 64/48, 64th sess, Agenda Item 96 (z), UN Doc A/RES/64/48 (12 January 2009) art 4.

⁷⁷ *Draft of the Arms Trade Treaty*, A/CONF.217/CRP.1 (1 August 2012).

⁷⁸ As established by GA Res 67/234A (24 December 2012).

⁷⁹ Pursuant to Article 17 of the ATT within 12 months of the treaty entering into force a Conference of States Parties was to be convened. Ministry of Foreign Affairs, 'The preparatory process for the first conference of state parties to the arms trade treaty begins in Mexico' (Press Release 385, 8 September 2014) <http://www.sre.gob.mx/en/index.php/archived-press-releases/2710-the-preparatory-process-for-the-first-conference-of-states-parties-to-the-arms-trade-treaty-begins-in-mexico/>.

⁸⁰ 'Convention for the Control of the Trade in Arms and Ammunition, and Protocol' (1921) 15(4) *The American Journal of International Law*, 297-313.

⁸¹ *The Wassenaar Arrangement Export Controls for Conventional Arms and Dual-Use Goods and Technologies Final Declaration* (The Hague, 19 December 1995) http://www.wassenaar.org/public_documents/declaration.html.

⁸² 'Public Statement 2005 Plenary Meeting of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies' in *Wassenaar Arrangement on Export Controls for Conventional*

Vice-Presidents of the Bureau of the July 2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects Conference.⁸³

Australia signed the Firearms Protocol on 21 December 2001.⁸⁴

Australia has expressed that it is 'genuinely delighted' that it co-authored the 2006 General Assembly resolution 61/89 'Towards an Arms Trade Treaty' (which eventually led to the ATT).⁸⁵ As noted earlier, this resolution established a Group of Government Experts charged with examining the feasibility, scope and parameters of an arms trade treaty. Australia was represented in the group by Washington based, DFAT Special Advisor Mr. Bryce Hutchesson.⁸⁶ Australia, along with many other countries, submitted to UN Office for Disarmament Affairs a document entitled Towards an Arms Trade Treaty: Australia's response to the UN Secretary General (UNGA A/Res/61/89).⁸⁷ In that 2007 document, Australia supported a 'legally binding, multilateral treaty' which retained 'the right of all States to manufacture, transfer, import and export, and retain conventional arms for legitimate security and self-defence'.⁸⁸ Australia also considered 'international assistance, whether bilateral or multilateral, to countries which request such assistance, to be a crucial element for such a treaty to have a practical effect'⁸⁹.

Arms and Dual-Use Goods and Technologies Basic Documents (Complied January 2015) available at: [http://www.wassenaar.org/publicdocuments/2015/WA-DOC%20\(15\)%20SEC%20001%20-%20Basic%20Documents%202015%20-%20January.pdf](http://www.wassenaar.org/publicdocuments/2015/WA-DOC%20(15)%20SEC%20001%20-%20Basic%20Documents%202015%20-%20January.pdf)>, 112; Public Statement 2006 Plenary Meeting of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies in Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies Basic Documents (Complied January 2015) available at: [http://www.wassenaar.org/publicdocuments/2015/WA-DOC%20\(15\)%20SEC%20001%20-%20Basic%20Documents%202015%20-%20January.pdf](http://www.wassenaar.org/publicdocuments/2015/WA-DOC%20(15)%20SEC%20001%20-%20Basic%20Documents%202015%20-%20January.pdf)>, 113 and 125.

⁸³ Ibid 4.

⁸⁴ United Nations Office on Drugs and Crime, *Status as at 26/09/2008*

<<http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-firearmsprotocol.html>>.

⁸⁵ G Quinlan, *Adoption of the Arms Trade Treaty*, Australia United Nations Security Council 2013-2014

<<https://australia-unscc.gov.au/2013/04/adoption-of-the-arms-trade-treaty/>>. Garcia notes that Australia was part of a core group led by the United Kingdom in championing the ATT and bringing it to the General Assembly in 2006: Denise Garcia, 'Global Norms on Arms: The significance of the Arms Trade Treaty for Global Security in World Politics', (2014) 5 (4) *Global Policy* 425, 428.

⁸⁶ Note by the Secretary General, *Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*, 63rd session, Provisional Agenda Item 91, UN Doc A/63/334 (26 August 2008) [5].

⁸⁷ Secretary General, *Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*, 62nd sess, Provisional Agenda Item 100 (aa), UN Doc A/62/278 (Part II) (17 August 2007).

⁸⁸ Ibid 12.

⁸⁹ Ibid 13.

In a 2007 Analysis of State's Views on an arms trade treaty prepared by UN Institute for Disarmament Research⁹⁰, Australia was noted as supporting the inclusion of manufacturing technology for the weapons in the parameters of an arms trade treaty, as well as allowing for flexible definitions in the weapons descriptions to account for future technological developments.⁹¹ Australia is also noted as supporting an annexed list of weapons or categories of weapons to an arms trade treaty.⁹² Australia supported the inclusion of re-export in any proposed treaty.⁹³ Australia was of the view that the treaty should not cover transfers within a state, but that private end-use should be covered.⁹⁴ Australia supported the prevention of a destabilising accumulation of conventional weapons being among the criteria required to be considered for authorising transfers.⁹⁵

In 2009, the concept enshrined in the 2006 General Assembly resolution 61/89 'Towards an Arms Trade Treaty' was further progressed through an Open-Ended Working Group process. Australia was a co-author of UN General Assembly Resolution 64/48. This resolution established the timelines for the ATT negotiations, which included preparatory meetings in 2010 and 2011 and the final ATT conference to take place in July 2012.⁹⁶ Australia was an active participant in the preparatory process for the conference, including as a Friend of the Chair. The DFAT has noted that Australia has 'funded workshops on the proposed treaty in the Pacific (Feb 2012), Africa (May 2012) and Caribbean (July 2010, Feb 2011 and May 2012), focused at encouraging the widest engagement in the ATT negotiations'.⁹⁷ Ambassador Peter Woolcott, Australia's Ambassador to the UN in Geneva was appointed President of the March 2013 Conference which would ultimately negotiate the final text, which was then adopted on 27 March 2013. Australia sent a large delegation to the

⁹⁰ Sarah Parker, 'Analysis of State's Views on an Arms Trade Treaty', UN Institute for Disarmament Research, (2007) <<http://undir.org/files/publications/pdfs/analysis-of-states-views-on-an-arms-trade-treaty-332.pdf>>.

⁹¹ Ibid 6.

⁹² Ibid. Note that Australia is not a party to the Firearms Protocol. The difficulty of ratifying this Protocol for Australia includes the highly prescriptive nature of the Protocol. The practical challenges this Protocol posed for Australia were highly influential factors in Australia's approach to the negotiation of the ATT (discussed below).

⁹³ Ibid 8.

⁹⁴ Ibid 9.

⁹⁵ Ibid.

⁹⁶ *Compilation of views on the elements of an arms trade treaty*, A/CONF.217/2 (10 May 2012) available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.217/2&Lang=E; See also DFAT, *Small arms and light weapons*, <https://www.dfat.gov.au/security/small_arms.html> .

⁹⁷ DFAT, *Small arms and light weapons*, <https://www.dfat.gov.au/security/small_arms.html> .

conference, consisting of 19 representatives (including representatives from civil society).⁹⁸ The approach taken by Ambassador Woolcott to his Presidency was described by a DFAT staffer as being categorised by '[w]ide consultation, openness, transparency, focused debate, high tempo, clear timetable, opportunity to consult with capitals'.⁹⁹

Australia approached the ATT negotiations from an arms control perspective from the outset with the Arms Control and Counter-Proliferation Branch of DFAT leading the delegation. This made sense because, from even before the preparatory committee was formed, the decision had been taken by the working group to approach the issue from an arms control perspective.¹⁰⁰ Significantly, the Australian delegation also involved personnel from Australia's Defence Export Control Office and from Customs.

During the lead up to and during the negotiations leading to the ATT, the Australian Government, through DFAT, engaged in broad consultation across government departments¹⁰¹ and with civil society organizations.¹⁰²

During these negotiations Australia maintained a strong interest in ensuring that the treaty approached the categorisation and classification of prohibited weapons, materials and components from the perspective of not being prescriptive. The need for Australia to be able to practically implement the treaty in domestic law, as well as the desire to create a treaty with as few loopholes as possible, saw Australia seek an approach which was inclusive, and

⁹⁸ *List of participants*, A/CONF.217/2013/INF2 (11 April 2013): available at <http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.217/2013/INF/2>.

⁹⁹ Lachlan Scully, 'Arms Trade Treaty An Insiders Perspective' (Paper presented at Australian National University, 2013) (on file with author).

¹⁰⁰ Tackling the issues of the proliferation of small arms globally could have taken a number of different paths. For example, as discussed above, the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects outlined a number of approaches, including criminalisation of transfers and other acts. The view clearly taken by GA resolution 61/89 "Towards an Arms Trade Treaty and followed through in the Open Ended Working Group and ultimately the ATT was that arms control was the most appropriate framework to pursue.

¹⁰¹ Including the DOD, Attorney-General's Department, AusAID and the Australian Customs and Border Protection Service. See further National Interest Analysis Arms Trade Treaty [2013] ATNIA 19 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/ATNIA/2013/19.html?stem=0&synonyms=0&query=arms%20trade%20treaty> at para 46.

¹⁰² Including humanitarian, security, sporting and industry interests, including: Oxfam; Amnesty International; Small Arms Survey; International Action Network on Small Arms; Act for Peace; ICRC; WiSH; Paradox FX; Caritas; Sporting Shooters' Association of Australia; Pistol Australia; National Rifle Association of Australia; National Firearm Dealers; and the Medical Association for Prevention of War. See further National Interest Analysis Arms Trade Treaty [2013] ATNIA 19 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/ATNIA/2013/19.html?stem=0&synonyms=0&query=arms%20trade%20treaty> at para 46.

would cover new weapons technologies and variations on existing ones. Australia, as a consequence of its dualist approach to international law, has experienced practical difficulties with the implementation domestically of some highly prescriptive treaties such as the Arms Trafficking Protocol and was keen to ensure that this was not also to be a feature of the ATT.

The regulation of small arms and light weapons was also one of the topics that Australia chose to use its 2013-2014 term as a non-permanent member on the UN Security Council to draw attention to. Resolution 2117 of 2013¹⁰³ was adopted on 26 September 2013 following a process led and initiated by Australia.¹⁰⁴ This Resolution is much broader than just considering the impacts of small arms and light weapons in an armed conflict context - referring also to concerns such as organised crime, trafficking and human rights violations, however, clearly sets out the impact of the proliferation of small arms and light weapons in fuelling conflict and destabilising post conflict peace-building.¹⁰⁵ As Drummond and Cassimatis point out, this Resolution, in linking the ATT and earlier initiatives including the Firearms Protocol, Programme of Action and International Tracing Instrument, recognized the links between ‘enhanced regulation of lawful arms transfers and the eradication of illicit transfers’.¹⁰⁶

6. Australia’s approach to the domestic legislation implementing the ATT

The ATT was tabled in the Commonwealth Parliament on 12 December 2013.¹⁰⁷ The Parliament of the Commonwealth of Australia Joint Standing Committee on Treaties invited public submissions on the treaty and held public hearings on the treaty on 3 March 2014.¹⁰⁸ This process was comparatively quick as public submissions on treaties are often open for a period of many months. It would appear that no public submissions on the treaty were made.¹⁰⁹ The only people who appeared at the Public Hearings were representatives of

¹⁰³ SC Res 2117, UN SCOR, 7036th mtg, UN Doc S/RES/2117 (26 September 2013).

¹⁰⁴ UN, *Arms Trade Treaty Ratification Event: “Approaching Entry Into Force”* (Statement by HE Mr Gary Quinlan, Ambassador and Permanent Representative of Australia 3 June 2014) <<https://australia-unscc.gov.au/2014/06/arms-trade-treaty-ratification-event-approaching-entry-into-force/>>; see also Julie Bishop, ‘Australia concludes UN Security Council term’ (Media release, 31 December 2014) <http://foreignminister.gov.au/releases/Pages/2014/jb_mr_141231.aspx>.

¹⁰⁵ SC Res 2117, UN SCOR, 7036th mtg, UN Doc S/RES/2117 (26 September 2013).

¹⁰⁶ Catherine E Drummond and Anthony E Cassimatis, ‘Weapons smuggling’ in Neil Boister and Robert J Curries (eds) *Routledge Handbook on Transnational Criminal Law* (Routledge, Oxon, 2013) 248-249.

¹⁰⁷ Joint Standing Committee on Treaties, Parliament of Australia, *Review into Treaties tabled on 11 and 12 December 2013, 20 January 2014 and referred on 15 January 2014 (Report 138)* (26 March 2014).

¹⁰⁸ Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 3 March 2014.

¹⁰⁹ Parliament of Australia, *Submissions – Treaties tabled on 11 December 2013*, <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaties_tabled_11_December_2013>.

DFAT, the Attorney-General's Department, and DECO.¹¹⁰ Again, this is very surprising given the strong interest in the treaty, particularly from humanitarian organisations, and is perhaps reflective of the speed at which this process was advanced. One explanation for the speed of this process was to ensure that Australia was one of the founding 50 nations that would bring the treaty into force.¹¹¹

The Report of the Parliament of the Commonwealth of Australia Joint Standing Committee on Treaties report of March 2014 notes:

- Australia's support since 2006 for the process leading to the ATT¹¹² and engagement in the UN processes;¹¹³
- The treaty's role as 'the beginning of the process' towards 'common global standards' with regard the trade in conventional arms;¹¹⁴
- The potential for better controls on illicit arms transfers to 'serve national and international security interests';¹¹⁵
- The key obligations in the treaty¹¹⁶; and
- The practicalities around implementation in Australia, including that no new legislation is required to meet the obligations in the treaty.¹¹⁷

The Committee noted its support for the ATT and recommended that binding treaty action be taken.¹¹⁸ The Committee also noted that it was keen to see Australia continue its leadership role in the implementation of the treaty.¹¹⁹

[3/Submissions](#)>. The public submissions listed on this page relate to other treaties also tabled on 11 December 2013.

¹¹⁰ Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 3 March 2014.

¹¹¹ ATT Art 22 provides that the 'Treaty shall enter into force ninety days following the date of deposit of the fiftieth instrument of ratification, acceptance or approval with the Depository'.

¹¹² Joint Standing Committee on Treaties, Parliament of Australia, *Review into Treaties tabled on 11 and 12 December 2013, 20 January 2014 and referred on 15 January 2014 (Report 138)* (26 March 2014) [3.4].

¹¹³ Ibid [3.5-3.8].

¹¹⁴ Ibid [3.10] and [3.12].

¹¹⁵ Ibid 3.13.

¹¹⁶ Ibid 3.19-3.43.

¹¹⁷ Ibid 3.44.

¹¹⁸ Ibid 28 - Recommendation 2.

¹¹⁹ Ibid 3.55.

Significantly, the National Interest Analysis, which was conducted on the treaty prior to it being tabled in parliament, and Report 138 concluded that:

36. No new legislation is required to give effect to the Treaty in Australia. The legislative framework established by the *Customs Act 1901*, the Defence and Strategic Goods List and the Customs (Prohibited Exports) Regulations (1958) already meets Australia's obligations under the Treaty.

37. Some new administrative procedures may be required to comply with Australia's obligations under Article 12 of the Treaty for record keeping and Article 13 for reporting.¹²⁰

That the implementation of the ATT into Australian legislation required no legislative amendment is perhaps surprising and requires some discussion. Two points explain this. The first is that, in setting an international common standard for arms control of conventional arms, the ATT takes a position that almost all countries can agree on, and can practically implement, rather than adopting a gold standard. Australia has long had a high standard of import and export control with regards arms, as evidenced by its proactive membership of arrangements such as the Wassenaar Arrangement and existing domestic legislation and institutions such as the DECO. The introduction of the ATT standards were largely standards already being met by Australia. This was the subject of a question to Ms Gabrielle Burrell, Assistant Secretary, DECO before the Committee on 3 March 2014. Ms Burrell noted that the:

existing export control regime will require little adjustment to comply with the Treaty requirements. Current reporting requirements for the UN Register of Conventional Arms will fulfil the reporting requirements under the Treaty and an updated IT system is expected to streamline the process.¹²¹

Further, in 2011 and 2012 some amendments were made to Australia's import and export controls and arms brokering laws in anticipation of an international arms trade treaty framework. As noted in chapter three, the Defence Trade Controls Act 2012 (Cth), was passed to, among other things, make some amendments to Australia's customs regulations (which dated from the mid 1990s) in order to ensure best practice and that compliance with

¹²⁰ National Interest Analysis Arms Trade Treaty [2013] ATNIA 19; Joint Standing Committee on Treaties, Parliament of Australia, *Review into Treaties tabled on 11 and 12 December 2013, 20 January 2014 and referred on 15 January 2014 (Report 138)* (26 March 2014).

¹²¹ National Interest Analysis Arms Trade Treaty [2013] ATNIA 19 citing Ms Gabrielle Burrell, Assistant Secretary, Defence Export Control Office, Strategic Policy Division, DOD, *Committee Hansard*, Canberra, 3 March 2014, 15–16.

best international standards was maintained.¹²² The explanatory memorandum to the Defence Trade Controls Bill 2011 specifically notes that:

[e]liminating these gaps will align Australia with the accepted best practice of current export control regimes to which Australia is a member. It will also prepare Australia to give effect to the United Nations Arms Trade Treaty, which it is anticipated will be negotiated in 2012.¹²³

Given this set of circumstances, it is less surprising that the NIA found that there was no need for further legislative change.¹²⁴

Questions from the Committee were also put in relation to the costs of the ATT. It was noted that Australia had committed significant funding to regional implementation of the ATT, including \$1million through the UN Trust Facility Supporting Cooperation on Arms Regulations.¹²⁵

7. Implementing the ATT in Australia in light of Common Article 1

Articles 6(3) and 7 of the ATT has strong links to Common Article 1 in the sense that States Party, such as Australia, have obligations as exporting states. As such, through effectively implementing Article 6(3) and 7 states are helping to ensure respect by other states by denying those other states access to weapons that would be used to violate IHL. Indeed, IHL was considered as an obvious inclusion in the ATT by many states by virtue of Common Article 1 obligation.¹²⁶

However, as has been made clear, Common Article 1 is not a clear point of reference for the Australian government when approaching legal negotiations on specific weapons law treaties. This was perhaps particularly so with regard the ATT due to the fact that the negotiations were not approached by Australia, and indeed by the international community, as pertaining

¹²² Explanatory Memorandum, Defence Trade Controls Bill 2011, 4.

¹²³ Ibid.

¹²⁴ Rachel Stohl who was a consultant for the United Nations on the Arms Trade Treaty process notes that it is also the case for the United States that the existing comprehensive export system would not need amending. Rachel Stohl, 'Tell the Truth About the Arms Treaty', *New York Times* (online), 11 April 2013) <<http://www.nytimes.com/2013/04/12/opinion/tell-the-truth-about-the-arms-trade-treaty.html?ref=opinion&r=1>>.

¹²⁵ Joint Standing Committee on Treaties, Parliament of Australia, *Review into Treaties tabled on 11 and 12 December 2013, 20 January 2014 and referred on 15 January 2014 (Report 138)* (26 March 2014) [3.46].

¹²⁶ Knut Dormann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations' *International Review of the Red Cross First View Articles* (CUP, 30 January 2015), 27.

to an IHL instrument but rather to an arms control regime. That said, the proliferation of small arms in a society contributes to the likelihood of IHL violations. This is a conclusion reached by many, including the ICRC, which makes this finding ‘on the basis of its experience from conflict and post-conflict situations around the world’.¹²⁷ As such, in seeking to respect and ensure respect for IHL, one method of doing so must be in taking steps to restrict this proliferation.

More specifically, Australia does not appear to have turned its mind to the obligation in Common Article 1 with regards to the ATT. In a number of statements putting forward Australia’s views regarding the development of the ATT, Australia has specifically noted UN Charter obligations as well as humanitarian reasons for the treaty¹²⁸, however, other than references made to non-interference with existing international obligations, there is no evidence that the ATT is seen by Australia in light of this obligation.

That said, the ATT is a legal framework well supported by Australia, and Australia championed a number of measures aimed at making the treaty as robust as possible. Australia has displayed and continues to display evidence of assisting other states in the lead up to the treaty negotiation and in the implementation of the treaty including through the commitment of funding to assist in the regional implementation of the ATT.¹²⁹

The ATT, while not posing any significant legislative challenges for states like Australia, introduces some burdens on the legal systems of less well developed states, in order to ensure compliance. As has been pointed out ‘[t]he implications of ratifying the ATT will be enormous for under-staffed and technically decrepit states’.¹³⁰ In this context Australia can play a strong role in supporting other states to ensure respect and ensure respect for IHL.

¹²⁷ ICRC, *Unregulated arms availability, small arms & light weapons, and the UN process* (26 May 2009) <<https://www.icrc.org/eng/resources/documents/misc/small-arms-paper-250506.htm#a3>>.

¹²⁸ See for example *Compilation of views on the elements of an arms trade treaty*, A/CONF.217/2 (10 May 2012) <http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.217/2&Lang=E>.

¹²⁹ Australia has committed financial resources to regional implementation of the ATT. ‘In 2012, Australia and Germany initiated a multi-donor assistance fund to help less developed countries ratify and implement the Treaty, and the United Nations Trust Facility Supporting Cooperation in Arms Regulation (UNSCAR) was launched in 2013. Australia has committed a total of AUD 2 million to the Facility.’ UN Security Council 2013-2014, *Arms Trade Treaty* <<http://australia-UNSCAR.gov.au/australia-and-the-un/current-issues/arms-trade-treaty/>>.

¹³⁰ Ben Coetzee, ‘Making the Arms Trade Treaty work in practice is the real challenge for Africa’, *Institute for Security Studies* (3 April 2013) <<http://www.issfrica.org/iss-today/making-the-arms-trade-treaty-work-in-practice-is-the-real-challenge-for-africa>>.

Australia cites the tensions on Guadalcanal in the Solomon Islands between 1999 and 2003, and its response aimed at ‘getting guns out the community’,¹³¹ as one, close to our shores, example of the threat small arms and light weapons pose. The Australian led Regional Assistance Mission to Solomon Islands saw more than 400 firearms come into the hands of the Mission during a three week amnesty period.¹³² Again, while not couched in Common Article 1 terms, this is an action, in relation to small arms and light weapons, which helped ensure respect for humanitarian principles, if not IHL.

8. Conclusion

This chapter has illustrated that Australia has taken a proactive approach to helping bring about the ATT but that Australia appears to have done so without reference to the already existing Common Article 1 obligation. However, because the Common Article 1 obligation lies beneath the IHL obligations the subject of the ATT and Australia has supported the ATT process, Australia has effectively been a champion for Common Article 1 in respect of this important development.

John Tilemann, formerly of DFAT, led the Australian delegation for the ATT negotiations and notes that Australia is ‘ATT compliant. Australia’s interest is in how the ATT can now enhance our regional security and humanitarian objectives’.¹³³ In this light, helping to implement the ATT is an excellent example of an action by Australia in support of the obligation to not only respect but also to ensure respect for the Geneva Conventions.

The ATT will face many challenges on the way to implementation. By framing the ATT as a necessity for respecting and ensuring respect for IHL, states can provide gravitas to the efforts to bring about effective implementation of this treaty. The real work with the ATT begins now, in the early years of implementing the treaty. Australia has taken a leading role in the treaty to date. Australia has significant capacity to assist other States to ensure respect for IHL. The ATT should be a vehicle for Australia doing so.

¹³¹ The Hon Julie Bishop MP, *Small Arms: The impact of the illicit transfer, destabilising accumulation and misuse of small arms and light weapons on international peace and security*, (26 September 2013) Australian United Nations Security Council 2013-2014 <<https://australia-unscc.gov.au/2013/09/high-level-meeting-small-arms-the-impact-of-the-illicit-transfer-destabilising-accumulation-and-misuse-of-small-arms-and-light-weapons-on-international-peace-and-security/>>.

¹³² Ibid.

¹³³ John Tilemann, *Australia must push for regional adoption of the Arms Trade Treaty* (21 January 2015) The Interpreter <<http://www.lowyinterpreter.org/author/John%20Tilemann.aspx>>.

CHAPTER SEVEN: AUSTRALIA, NEW WEAPONS TECHNOLOGIES AND THE OBLIGATION TO RESPECT AND ENSURE RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

Chapter seven provides an overview of the new weapons technologies which are currently attracting attention from an IHL perspective. It considers the approach taken by IHL scholars to each of these weapons concluding that the principles of IHL clearly apply to them, and it is imperative that the principles of IHL are not compromised in the adoption of any new rules pertaining to their use. It answers the questions what approach has Australia taken to the regulation of these weapons and what conclusions can be reached from this evaluation regarding the approach of Australia to compliance with the obligation to respect and ensure respect pursuant to Common Article 1? It notes Australia has released relatively little by way of guidance as to its thinking on new weapons technologies, although Australian researchers have shown great interest in this area. The chapter urges Australia to consider Common Article 1 obligations to respect and ensure respect for IHL in relation to these weapons and the development of legal frameworks around them going forward. By promoting the ability of existing IHL principles to apply to new weapons technology, and promoting compliance with Article 36 of AP I weapons review obligations, Australia can achieve this.

1. Introduction

There is significant interest in Australian military and academic circles in new weapons technology and the challenges they pose for the principles of IHL. Australian researchers have recently released a book on *New Technologies and the Law of Armed Conflict*.¹ When Australia hosted the launch of the ICRC's New Technologies and Warfare issue of the *International Review of the Red Cross* journal comment was made about the high proportion of Australian contributing authors to the publication.² The topic is also the subject of much media interest.³

¹ Hitoshi Nasu and Rob McLaughlin (eds), *New Technologies and the Law of Armed Conflict* (TMC Asser Press, 2014).

² Alan Backstrom, Ian Henderson, Hitoshi Nasu and Eve Massingham in 'New Technologies and warfare' (2012) 94 (886) *International Review of the Red Cross*. Launch held in Canberra on 19 November 2013 <<https://www.icrc.org/eng/resources/documents/event/2013/australia-04-11-new-technologies-panel-discussion.htm>>.

³ See, eg, Dylan Welch, 'Australia inches closer to getting killer drones' *The Sydney Morning Herald* (online) 31 May 2012 <<http://www.smh.com.au/technology/sci-tech/australia-inches-closer-to-getting-killer-drones-20120530-1zjej.html>>; David Sanger, 'Hoping to instill fear, US announces new strategy for cyber warfare'

New weapons technologies have always been emerging and to date the principles of IHL, both modern and pre-dating the First Geneva Convention in 1864, have been able to be applied to them. Fidler has noted that there is a ‘remarkable consistency between age old moral principles and the modern rules of international law’.⁴ Further, in some cases specific new legal frameworks have been developed to make clear the prohibitions or restrictions on their use. Blinding laser weapons are widely regarded as having been quite unique in IHL with their humanitarian consequences being of such concern to the international community that they were banned prior to their use.⁵

However, emerging new weapons technologies may raise some new challenges for IHL that earlier technological developments have not. Autonomous weapons systems, unmanned aerial vehicles, cyber warfare, nanotechnology and non-lethal weapons comprise the key new weapons technologies being discussed in the defence and international law communities to date. Some new weapons technologies may of course always be science fiction and some may gather little support from states for the existence of new rules to regulate their use. Copeland puts forward the view that the greater the strategic effect of a weapon the less likely the weapon is to be regulated by a specific legal framework.⁶ However, it is clear that States need to be thinking about the IHL implications of their development.

This chapter will assess the legality of various autonomous weapons systems, unmanned aerial vehicles, cyber warfare, nanotechnology and non-lethal weapons. It will then consider the approach that Australia has taken to date in the developing discourse around the legality of these weapons. The chapter urges Australia to consider Common Article 1 obligations to respect and ensure respect for IHL in relation to these weapons and the development of legal frameworks around them. Australia can achieve this by promoting both the ability of existing IHL principles to apply to new weapons technology and compliance with Article 36 of AP I weapons review obligations.

Brisbane Times (online) 24 April 2015, <www.brisbanetimes.com.au/world/hoping-to-instill-fear-us-announces-new-strategy-for-cyber-warfare-20150424-1mse2r>.

⁴ David Fidler, ‘Non-lethal weapons and international law: three perspectives on the future’ (2001) 17(3) *Medicine, Conflict and Survival*, 194, 195.

⁵ *Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol IV, entitled Protocol on Blinding Laser Weapons)*, opened for signature 13 October 1995, 35 ILM 1218 (entered into force 30 July 1998).

⁶ Damian Copeland, ‘Legal Review of New Technology Weapons’ in Hitoshi Nasu and Robert McLaughlin (eds), above note 1, 52.

2. New weapons technologies and international humanitarian law

An analysis of the legality of new weapons technology from an IHL perspective involves a number of challenges. That a number of developments leading to new weapons technology also have very significant non-military application, that is the technology is dual-use, is also relevant to the discussion. While the principles of IHL, and in particular Article 36 of AP I, can be applied, the uncertainty surrounding aspects of these weapons does pose some challenges.⁷

As has been noted in earlier chapters, any analysis of the compatibility of any weapons system with IHL requires consideration of the following four weapons law criteria⁸:

- a. whether the weapon is specifically regulated by treaty law
- b. whether the weapon inherently has indiscriminate effects⁹
- c. whether the weapon inherently causes unnecessary suffering or superfluous injury¹⁰
- d. whether the weapon inherently causes widespread, long-term and severe damage to the natural environment.¹¹

These questions will now be considered for various autonomous weapons systems including unmanned platforms such as drones, cyber warfare, nanotechnology and non-lethal weapons. First, whether the weapon is specifically regulated by treaty law will be considered. Second, issues b-d will be considered under the heading Article 36 criteria by way of application of existing IHL to each of these weapons.

⁷ Ibid 53.

⁸ Kathleen Lawand, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare* (ICRC, 2006), William Boothby, *Weapons and the Law of Armed Conflict* (Oxford University Press, 2009), 345-6: See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law – Volume 1: Rules* (ICRC, 2005) (hereinafter ICRC Customary Law Study), rules 70 and 71 as well as rules 72-86.

⁹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (hereinafter AP I), Art 48 and 51(5).

¹⁰ AP I Art 35(2), see also ICRC Customary Law Study, above note 8, rule 70.

¹¹ AP I Art 35(3), see also ICRC Customary Law Study, above note 8, rule 45 establishing this principle as a rule in ‘international armed conflict, and arguably also in non-international armed conflict’.

2.1 Specific regulations in treaty law

There are currently no international norms specifically concerning the use, in times of armed conflict, of autonomy as a method of warfare, unmanned aerial vehicles, cyber warfare, nanotechnology or ‘non-lethal’ weapons. However, a number of projects are in existence to add clarity to the regulation of new technologies in warfare and the UN has given consideration to a number of these topics.

2.1.1 *Autonomy as a method of warfare – autonomous weapons*

Automated weapons have long existed. These types of weapons include anti-vehicle mines which are activated by the weight of a military vehicle, rather than by a trigger pulled by a soldier. However, weapons systems are now being designed which have increased levels of autonomy – although fully autonomous fighting robots do not yet exist.¹² For example, the ICRC note that ‘[w]eapons systems with significant autonomy in the ‘critical functions’ of selecting and attacking targets are already in use’.¹³ However, ‘[a]utonomous weapon systems that are highly sophisticated and programmed to independently determine their own actions, make complex decisions and adapt to their environment...do not yet exist’.¹⁴

These weapon systems are often referred to as autonomous weapons, lethal autonomous weapons or ‘killer robots’ by some. The ICRC defines autonomous weapons as ‘weapons that can independently select and attack targets, ie. with autonomy in the ‘critical functions’ of acquiring, tracking, selecting and attacking targets’.¹⁵ The United States military uses the definition of weapons that ‘once activated, can select and engage targets without further [human] intervention by a human operator’.¹⁶ There is currently no international legal framework specifically dealing with these weapons – neither those currently possible nor

¹² ICRC, *Expert Meeting: Autonomous weapon systems: technical, military, legal and humanitarian aspects* (November 2014), 7 <<https://www.icrc.org/en/document/report-icrc-meeting-autonomous-weapon-systems-26-28-march-2014#.VOFBQxscS70>>. Note also Chris Jenks description of ‘autonomy as a spectrum of integrated human and machine capabilities’ rather than something being either autonomous or not. ICRC, Interview with Professor Chris Jenks on autonomous weapons (Canberra, 10 July 2015) <<https://www.icrc.org/en/document/australia-qa-professor-chris-jenks>>.

¹³ ICRC, *Expert Meeting: Autonomous weapon systems: technical, military, legal and humanitarian aspects* (November 2014), 7 <<https://www.icrc.org/en/document/report-icrc-meeting-autonomous-weapon-systems-26-28-march-2014#.VOFBQxscS70>>.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Cited by Jeffrey Thurnher, ‘Examining Autonomous Weapons Systems from a Law of Armed Conflict Perspective’ in Hitoshi Nasu and Robert McLaughlin (eds), above note 1, 213, 214.

future technologies. The ICRC is calling for States to consider the legal implications of the use of this technology, as well as the ethical ones.¹⁷

The ICRC organised an expert meeting on these issues in March 2014¹⁸. It noted that views regarding the way forward in terms of legal regulation are varied with some advocating a complete ban on autonomous weapons and others insisting the current IHL framework is sufficient.¹⁹ In April 2013, UN Special Rapporteur on extrajudicial, summary or arbitrary executions Christof Heyns called for States to:

implement national moratoria on at least the testing, production, assembly, transfer, acquisition, deployment and use of [lethal autonomous robots] until such time as an internationally agreed upon framework on the future of [lethal autonomous robots] has been established.²⁰

Since this time a consideration of lethal autonomous weapons has been occurring under the auspices of the States Party to the UN Convention of Conventional Weapons (CCW) following the Human Rights Report *Losing Humanity: The Case against Killer Robots* published in 2012²¹. CCW informal meetings of experts on lethal autonomous weapons took place in Geneva in April 2015 and in May 2014.²² These meetings have included presentations from technical and legal experts but have not yet formed any clear conclusions as to the way forward.

There is still a great deal of uncertainty as to what is scientifically possible when it comes to automation. Schmitt, in discussing autonomous weapons, notes that states are not likely to act

¹⁷ ICRC, 'Frequently Asked Questions: Autonomous weapons: States must address major humanitarian, ethical challenges (2 Feb 2013) <<https://www.icrc.org/eng/resources/documents/faq/q-a-a-autonomous-weapons.htm>>.

¹⁸ ICRC, *Expert Meeting: Autonomous weapon systems: technical, military, legal and humanitarian aspects* (November 2014), 7 <<https://www.icrc.org/en/document/report-icrc-meeting-autonomous-weapon-systems-26-28-march-2014#.VOFBQxscS70>>..

¹⁹ ICRC, 'Autonomous weapons: ICRC addresses meeting of experts' (Statement, 13 May 2014) <<https://www.icrc.org/eng/resources/documents/statement/2014/05-13-autonomous-weapons-statement.htm>>.

²⁰ *Report of the special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Human Rights Council, 23rd sess, Agenda Item 3, UN Doc A/HRC/23/47 (9 April 2013) 21.

²¹ Human Rights Watch, *Losing Humanity: The Case against Killer Robots* (2012) <<http://www.hrw.org/reports/2012/11/19/losing-humanity>>; See United Nations Office at Geneva, *Background – Lethal Autonomous Weapons* <[http://www.unog.ch/80256EE600585943/\(httpPages\)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument)>.

²² United Nations Office at Geneva, *LAWS 2014 Meeting of Experts*, <[http://www.unog.ch/80256EE600585943/\(httpPages\)/6CE049BE22EC75A2C1257C8D00513E26?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/6CE049BE22EC75A2C1257C8D00513E26?OpenDocument)>.

on any regulation of them ‘until both their potential for unintended human consequence and their combat potential are better understood’.²³

2.1.2 *Unmanned aerial vehicles*

One type of weapon that has attracted specific attention is that of remotely piloted aircraft, also known as unmanned aerial vehicles or drones, both in the context of their use in armed conflict as well as their use in domestic law enforcement. Again, while not the subject of their own specific legal framework it is clear that the principles of IHL apply to drones and that their application must be on a case by case basis. On 28 March 2014, the UN Human Rights Council adopted resolution 25/22 ‘Ensuring use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including international human rights and humanitarian law’.²⁴ This resolution specifically mentions the need for the use of remotely piloted aircraft or armed drones to comply with IHL obligations of precaution, distinction and proportionality.²⁵

Earlier, on 13 September 2013, UN Special Rapporteur Christof Heyns delivered a report to the General Assembly focused on the use of lethal force through armed drones.²⁶ On 18 September 2013, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, released an interim report on his study of drone strikes and targeted killings²⁷ to be debated by the General Assembly along with the Heyns report. Emmerson released the final version of his report by way of devoting a part of his third annual report to the Human Rights Council to the issue of

²³ Michael Schmitt, *Essays on law and war in the fault lines* (TM Asser Press, 2012).

²⁴ Adopted by a vote (27 in favour, 6 against, 14 abstentions). *Ensuring use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including international human rights and humanitarian law*, UN Human Rights Council, 55th mtg, (28 March 2014). Australia does not hold a seat on the UN Human Rights Council and has never done so, although is currently bidding for election in 2017. See Matthew Knott and Sarah Whyte, ‘Australia press for Human Rights Council seat despite UN criticism’ *The Sydney Morning Herald* (online), 12 October 2014 <<http://www.smh.com.au/federal-politics/political-news/australia-presses-for-human-rights-council-seat-despite-un-criticism-20141011-114rmo.html>>.

²⁵ *Ensuring use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including international human rights and humanitarian law*, UN Human Rights Council, 25th sess, Agenda Item 3, A/HRC/25/L.32 (24 March 2014), 2.

²⁶ Christof Heyns, Special Rapporteur, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UNGA, 68th ses, Agenda Item 69 (b), UN Doc A/68/382 (13 September 2013).

²⁷ Ben Emmerson, Special Rapporteur, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UNGA, 68th sess, Agenda Item 69(b), UN Doc A/68/389 (18 September 2013).

‘Civilian impact of remotely piloted aircraft’.²⁸ Emerson’s report identified a large number of unanswered legal questions²⁹ that States would need to consider if a treaty framework was to be considered.

2.1.3 Cyber warfare

Russia was an early advocate of greater regulation of cyberspace, raising the issue with the UN General Assembly First Committee in 1998.³⁰ However, legal issues concerning cyberspace issues are much broader than legal issues concerning cyber warfare and indeed most of the discussion around cyber effects to date concerns cyber security not in the context of an armed conflict. While some states accept the applicability of IHL to cyber warfare, this is not a view articulated by all states.³¹ Cyber warfare is not currently addressed by any treaty provisions. Further, there is little by way of state cyber practice or *opinio juris* from which to establish provisions of customary international law given how new this method of warfare is.³²

The Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual)³³ was put together by an International Group of Experts at the invitation of the NATO Cooperative Cyber Defence Centre of Excellence. It is the primary source of discussion currently before the international community regarding the application of IHL to cyber warfare. Australian Army member Colonel Penny Cumming, was one of nine legal experts in the International Group of Experts³⁴ and Royal Australian Air Force member Group Captain Ian Henderson, was a peer reviewer in the process.³⁵

²⁸ Ben Emmerson, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Human Rights Council, 25th sess, Agenda item 3 A/HRC/25/59 (11 March 2014).

²⁹ *Ibid* 18-19.

³⁰ Cordula Droege, ‘Get off my cloud: cyber warfare, international humanitarian law, and the protection of civilians’ (2012) 94 (886) *International Review of the Red Cross* 53, 535. UNODA, *Developments in the field of information and telecommunications in the context of international security*, <<http://www.un.org/disarmament/topics/informationsecurity/>>.

³¹ Droege, above note 30, 536-7.

³² M Schmitt (ed) ‘Tallinn Manual on the International Law Applicable to Cyber Warfare’ (Cambridge University Press, 2013) 5 (hereinafter Tallinn Manual).

³³ *Ibid*.

³⁴ *Ibid* xi.

³⁵ *Ibid* xii.

The Tallinn Manual deals with both *jus ad bellum* and *jus in bello* issues and seeks to identify ‘the law currently governing cyber conflicts’.³⁶ It asserts that the general principles of international law are applicable to cyberspace³⁷ and specifically that the ‘cyber operations executed in the context of an armed conflict are subject to the law of armed conflict’.³⁸ While it provides helpful guidance it remains the opinion of a group of experts rather than constituting a binding legal framework.

2.1.4 Nanotechnology

In technical terms nanotechnology is ‘the manipulation of matter on the atomic and molecular level in the size range of 1-100nm (1nm = 10⁻⁹ m) in one or more external dimensions’.³⁹ It is essentially about using science to make weapons and other types of military equipment more fit for purpose be that stronger, lighter, more accurate or more heat resistant.⁴⁰

Nanotechnology for military application is not specifically regulated by its own treaty at this stage (and it being so is seen as unlikely⁴¹) however, many of the weapons that nanotechnology may improve are already regulated by the various weapons law treaties.⁴² In particular the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC)⁴³ and the CWC have potential application to many types of nanotechnology.⁴⁴

³⁶ Ibid 5.

³⁷ Ibid 13.

³⁸ Rule 20, Ibid 75.

³⁹ Hitoshi Nasu, ‘Nanotechnology and the Law of armed Conflict’ in Hitoshi Nasu and Robert McLaughlin (eds), above note 1, 143, 144.

⁴⁰ See further Hitoshi Nasu, ‘Nanotechnology and challenges to international humanitarian law: a preliminary legal assessment’ (2012) 94 (886) *International Review of the Red Cross* 653, 656-657.

⁴¹ Ibid 656-659 citing Jim Whitman, ‘The arms control challenges of nanotechnology’ (2011) 32(1) *Contemporary Security Policy* 99-115. See also, Hitoshi Nasu and Thomas Faunce, ‘Nanotechnology and the International Law of Weaponry: Towards International Regulation of Nano-Weaponry: Towards International Regulation of Nano-Weapons’ (2010) 20(1) *Journal of Law, Information and Science*, 23.

⁴² See further, Evan J. Wallach, ‘A Tiny Problem with Huge Implications - Nanotech Agents as Enablers or Substitutes for Banned Chemical Weapons: Is a New Treaty Needed?’, (2009) 33 *Fordham International Law Journal*, 858.

⁴³ *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, better known as the Biological Weapons Convention (BWC)*, opened for signature on 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975).

⁴⁴ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, opened for signature on 13 January 1993, 32 ILM 800 (entered into force 29 April 1997).

Nanotechnology has not yet been the subject of any particular international discussions by States⁴⁵ in the same way as drones, cyber warfare and autonomous weapons have. Nasu and Faunce note this is a concern because it is leading to the developments being used in an experimental manner and without appropriate scrutiny and creating ‘an urgent need for regulating nanotechnology’.⁴⁶ They further note that the scientific uncertainty and military sensitivity make it very unlikely that States would consider a treaty dealing specifically with nano-weapons.⁴⁷

2.1.5 *Non-lethal weapons*

Non-lethal weapons are those weapons which are designed to incapacitate rather than to kill. The North Atlantic Treaty Organisation (NATO) defines non-lethal weapons as those ‘weapons which are explicitly designed and developed to incapacitate or repel personnel, with a low probability of fatality or permanent injury, or to disable equipment, with minimum undesired damage or impact on the environment’.⁴⁸ Some non-lethal weapons technologies are dealt with by existing IHL treaties and other legal frameworks. Some representative prohibitions include the BWC and CWC. The latter provides for the prohibition on any chemical which, through its chemical action on life processes, can cause death, temporary incapacitation or permanent harm to humans or animals. The protocols to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects⁴⁹ also deal with a number of potential non-lethal weapons technologies such as non-detectable fragments, mines and booby-traps, and blinding laser weapons.

However, ‘[n]on-lethal is a relative term. All weapons... create some primary or secondary risk of death or permanent injury.’⁵⁰ Concerns about the use of non-lethal weapons in military operations as opposed to civilian policing operations have been expressed.⁵¹

⁴⁵ Wallach, above note 42, 952-5 notes some of the academic discussion on this point.

⁴⁶ Nasu and Faunce, above note 41, [6].

⁴⁷ Ibid.

⁴⁸ NATO Policy on Non-lethal Weapons, <<http://www.nato.int/docu/pr/1999/p991013e.htm>>.

⁴⁹ 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 (with Protocols I, II and III), opened for signature on 10 October 1980, 1342 UNTS 7 (entered into force 2 December 1983).

⁵⁰ Neil Davison, *Non-lethal weapons* (Palgrave MacMillan, 2009), 1.

2.2 Article 36 criteria

As we have already seen, the principle of distinction between military and civilian objects is fundamental to IHL.⁵² A weapon which has inherently indiscriminate effects, as opposed to one that can be used in an indiscriminate way, is unlawful *per se*. The distinction principle forms a part of customary IHL as a norm applicable in both international and non-international armed conflicts.⁵³ All new weapons technologies must have their compatibility with this principle assessed.

Further, Article 35 (2) of Additional Protocol 1 provides that it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. This provision is applicable in both international and non-international armed conflict.⁵⁴ Weapons which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment are prohibited by Article 35(3) AP 1.⁵⁵

2.2.1 Autonomous weapons

There are a number of challenges presented by autonomous weapons to the principles of IHL but particularly to the principle of distinction. There may be many circumstances where they can distinguish between targets⁵⁶ and indeed it has been argued that they may make this determination in a superior fashion to humans.⁵⁷ However, by their very nature, they effectively involve the programming of computers to make the determination as to whether an intended target is military or civilian. Whether it will be possible to program computers

⁵¹ Stephen Coleman, 'Discrimination and non-lethal weapons: issues for the future military', in David Lovell (ed.), *Protecting Civilians during Violent Conflict* (Ashgate, 2012). See also, Eve Massingham, 'Conflict without casualties...a note of caution: non-lethal weapons and international humanitarian law (2012) 94 (886) *International Review of the Red Cross*, 673.

⁵² AP I art 48.

⁵³ ICRC Customary Law Study, above note 8, rule 1.

⁵⁴ ICRC Customary Law Study, above note 8, rule 70.

⁵⁵ AP I art 35.

⁵⁶ For a good account of what is currently possible with this technology see Alan Backstrom and Ian Henderson, 'New capabilities in warfare: an overview of contemporary technological developments and the associated legal and engineering issues in Article 36 weapons reviews' (2012) 94 (886) *International Review of the Red Cross* 483, 488-499. See also Hin-Yan Liu, 'Categorization and legality of autonomous and remote weapons systems' 2012) 94 (886) *International Review of the Red Cross*, 627. Note also the caution against the dehumanization of warfare argued in Noel E Sharkey, 'The inevitability of autonomous robot warfare' (2012) 94 (886) *International Review of the Red Cross*, 787.

⁵⁷ ICRC, Interview with Chris Jenks, above note 12. Contra Sharkey, above note 56, 795.

appropriately to make these determinations in accordance with IHL is still somewhat unclear. Further, there are conflicting views about whether this could and should⁵⁸ ever be lawful in the case of fully autonomous weapons or ‘killer robots’.⁵⁹ A further question is that of who is responsible for the war crime committed if the computer gets it wrong? These questions remain the subject of intense debate.⁶⁰

There is nothing about autonomous weapons that would inherently make these weapons have any greater impacts on suffering or on the environment than that expected of the munition which they are deploying. As such the issue with autonomous weapons primarily relates to the rules against indiscriminate attacks and their ability to comply with those rules and on subsequent analysis their ability to comply with the rules of targeting, including the proportionality rule.⁶¹

2.2.2 *Unmanned aerial vehicles*

Unmanned aerial vehicles have been noted by both the UN Special Rapporteur on extrajudicial, summary or arbitrary executions and by the ICRC as not being inherently unlawful.⁶² Because these unmanned aerial vehicles are remotely operated, while they contain a level of autonomy, they are distinct from autonomous weapons because the decision making regarding targeting is retained by the human operator. As such, it is the human who is applying the principle of distinction (and the principle of proportionality) in the targeting decisions. The fact that the operators of unmanned aerial vehicles are so far removed from the battlefield means that questions have arisen in the IHL community over the attribution of responsibility. The fact that the operator of the unmanned aerial vehicle is so far

⁵⁸ This being an ethical question rather than a legal one. See further Sharkey, above note 56. ICRC, Interview with Chris Jenks, above note 12 notes the legal questions are ‘relatively straight forward. The ethical and moral issues...are far broader.’

⁵⁹ Sharkey above note 56; Christof Heyns, Special Rapporteur, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UNGA, 68th ses, Agenda Item 69 (b), UN Doc A/68/382 (13 September 2013), [13].

⁶⁰ See, eg. Thurnher, above note 16, 213; Sharkey, above note 56. Liu, above note 56, 641-3; ICRC, Interview with Chris Jenks, above note 12.

⁶¹ See, eg. Thurnher, above note 16, 225-6, 221-222; Stuart Casey-Maslen, ‘Pandora’s box? Drone strikes under jus ad bellum, jus in bello, and international human rights law’ (2012) 94 (886) *International Review of the Red Cross* 597, 612-3.

⁶² Christof Heyns, Special Rapporteur, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UNGA, 68th ses, Agenda Item 69 (b), UN Doc A/68/382 (13 September 2013); ICRC, *Ensuring the use of drones in accordance with international law : Statement to the Human Rights Council*, 27th sess, (22 September 2014).

removed from the battlefield has been understood, by many states and organisations, as not effecting the determination of criminal liability for any breaches of IHL.⁶³

Concerns have been raised about the potential psychological impacts of unmanned aerial vehicles being constantly in the vicinity of civilian populations.⁶⁴

2.2.3 *Cyber attacks*

The application of IHL principles to cyber space is particularly challenging because cyber technology is premised on two concepts directly contradictory to the premise of IHL itself. First, in cyber space one is often intended to have anonymity, while in armed conflict one is required to show one's hand. The identification of the attacker may be challenging. Second, in cyber space there will not necessarily be easily identifiable physical effects. In armed conflict traditional attacks cause highly visible physical destruction.⁶⁵

Significant questions also include the definition of a cyber attack, and whether IHL applies to the situation in so far as it concerns the question of the existence of an armed conflict or not.⁶⁶

The Tallinn Manual rules note the clear application of the intransgressible principle of distinction⁶⁷. The Tallinn Manual rule 42 concludes that it would only be in 'rare cases' that cyber means and methods of warfare would be in violation of the rule against unnecessary suffering and superfluous injury.⁶⁸ The Tallinn Manual also notes the application of the rule regarding the protection of the natural environment.⁶⁹

The dual use nature of cyberspace and the potential for both military and civilian impacts from a cyber attack is perhaps the area of most concern in the discussions. Cyber warfare has significant potential to have far reaching consequences should an attack hit vital

⁶³ ICRC, Interview with Peter Maurer: The use of armed drones must comply with laws (10 May 2013) <<https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>>.

⁶⁴ Ibid.

⁶⁵ Droege, above note 30, 541.

⁶⁶ The Tallinn Manual rule 30 defines a cyber attack as 'a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction of objects' during either an international or non-international armed conflict. Tallinn Manual, above note 32, 106.

⁶⁷ Rule 31, Ibid 110-112. An example of a breach is given as emailing an enemy population urging capitulation (at 112).

⁶⁸ Ibid 144.

⁶⁹ Rule 83, Ibid 231.

infrastructure, including that containing dangerous forces.⁷⁰ Droege notes a proposal to expand the definition list, found in Article 56 of AP I, of works and installations containing dangerous forces to include cyber infrastructure, such as servers upon which civilians rely.⁷¹

2.2.4 *Nanotechnology*

Nanotechnology is in its early days in terms of development and application for military use. Many of these efforts are directed at force protection. However, weapons enhancement is also a part of this research and while the enhancement of weapons may be valuable in increasing their ability to discriminate between combatants and civilians and to render enemy combatants inactive, enhanced weapons may also have the result of causing superfluous injury or unnecessary suffering. Nanotechnology also has potential to impact on the environment through the manipulation of nano particles.⁷² Nasu notes that the health and environmental effects of nanotechnology remain the subject of much scientific uncertainty.⁷³ Nasu also argues that nanotechnology raises a few questions about the underlying principles of IHL including the prohibition which dates back to the 1868 St Petersburg Declaration on not using particles less than 400 grammes and on the prohibition against using gases because nano-explosives may reduce suffering and collateral damage when compared with larger more conventional weapons.⁷⁴

2.2.5 *Non-lethal weapons*

Non-lethal weapons is a broad category of weapons and as such it is difficult to apply Article 36 criteria to them as a whole. However, a significant concern with non-lethal weapons is their ability to comply with the principle of superfluous injury or unnecessary suffering.⁷⁵ The issues with non-lethal weapons is that when they do not work as intended, or when the ‘victim’ has a particular tendency that means they are particularly susceptible to the effects of the weapon they may cause superfluous injury or unnecessary suffering.

⁷⁰ Article 56 of AP I provides special protection for ‘works and installations containing dangerous’, namely ‘dams, dykes and nuclear electrical generating stations’.

⁷¹ Droege, above note 30, 577.

⁷² Nasu and Faunce, above note 41, [6].

⁷³ Nasu, *International Review of the Red Cross*, above note 40, 663.

⁷⁴ Ibid 662-3. Hitoshi Nasu, ‘Nanotechnology and the Law of Armed Conflict’ in Hitoshi Nasu and Robert McLaughlin (eds), above note 1, 150-151.

⁷⁵ See Massingham, above note 51, 676-677.

Non-lethal weapons pose a raft of legal, ethical and practical queries. ‘Non-lethal is a relative term. All weapons ... create some primary or secondary risk of death or permanent injury.’⁷⁶ As with any weapon system there is the potential for it to be abused.⁷⁷

2.2.6 Conclusion on the application of international humanitarian law principles to new weapons technologies

A significant issue with these technologies is the unpredictability of their effects at this stage. Questions arise over how much control humans will retain over the decision making conducted by weapons with increasing levels of autonomy. Questions arise over the nature of an attack - be it in relation to cyber warfare or nano-technology. Questions arise over perceptions of unnecessary suffering from nanotechnology and non-lethal weaponry.

The development of new weapons technologies may pose some challenges in terms of the application of the principles of IHL. What is imperative is that these principles continue to be applied to new weapons technologies and not compromised just because the technology may not fit neatly into the conceptions States, militaries and international humanitarian lawyers have about rules. The rules were designed to be adaptable to a range of technological development in weaponry and have application to all of those technologies discussed in this chapter. In order to respect and ensure respect for IHL it is imperative that Article 36 weapons review processes are applied to these weapons and that States ensure that IHL underpins their thinking about these weapons.

3. Australian perspectives on new weapons technologies

The ‘Implications of Technology Development for the ADF’ is one aspect of the strategic discussion in the current Australian Defence White Paper.⁷⁸ The White Paper identifies ‘the fields of biological sciences, materials, nanotechnology, computing and sensing, and simulation’ as being likely to have ‘[s]ignificant technological advances with defence

⁷⁶ Davison, above note 50, 1.

⁷⁷ See further Massingham, above note 51, 673.

⁷⁸ Australian Government DOD, *Defence White Paper 2013* (Commonwealth of Australia, 2013), 19. (‘Defence White Paper 2013’).

applications’.⁷⁹ In particular it identifies for further discussion and development ‘unmanned air, maritime and land platforms’ and cyber applications.⁸⁰

Australia has noted the ability of existing legal frameworks to address new weapons technologies in international fora. For example, in the Australian statement to the 2013 Convention on Certain Conventional Weapons meeting of States Party, Australia notes ‘the CCW needs to continue to demonstrate its relevance as a key instrument of IHL that can remain responsive to advancements in weapons technology’.⁸¹ Further, in negotiation the Arms Trade Treaty (dealt with in chapter six) Australia took the view that ‘[c]are must be taken to ensure that emerging technologies can be covered as far as possible without requiring constant amendment of the treaty text’.⁸²

The Australian Article 36 review process (as discussed in chapter three) would apply to new-weapons technologies in the same way it applies to lethal weapons. Given the sensitive nature of disclosures of information relating to new-weapons technologies it is highly unlikely that the DOD would release Article 36 reviews for new weapons technologies, and there is no requirement to do so.⁸³ To date, Australia has addressed the specific new weapons technologies in the following ways.

3.1 Autonomous weapons

Australia has not as yet released any specific policy on its approach to autonomous weapons.⁸⁴ The 2013 Defence White Paper noted:

⁷⁹ Ibid.

⁸⁰ Ibid 19-21.

⁸¹ *Convention on Certain Conventional Weapons Meeting of High Contracting Parties General Exchange of Views* (Statement by Mr Ian McConville, Chargé, Australian Permanent Mission to the United Nations in Geneva, 14 November 2013) .

⁸² Australian Government Pledge, Follow-up to the 28th International Conference of the Red Cross and Red Crescent
<https://www.icrc.org/applic/P128e.nsf/va_IBA/10C6CE85F57FA22BC125739A0035EE46?openDocument§ion=>>.

⁸³ Y. Sandoz, C. Swinarski and B. Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC and Martinus Nijhoff, Geneva, 1987), 424.

⁸⁴ Some thought has also been given to autonomous weapons development in specific jurisdictions. The US and UK both have national policies on autonomous weapons systems that are publically available. ICRC, *Expert Meeting: Autonomous weapon systems: technical, military, legal and humanitarian aspects* (November 2014), 7 <<https://www.icrc.org/en/document/report-icrc-meeting-autonomous-weapon-systems-26-28-march-2014#.VOFBOxscS70>>; Sean Welsh, ‘Machines with guns: debating the future of autonomous weapons systems’ *The Conversation* (online) (13 April 2015) <<https://theconversation.com/machines-with-guns-debating-the-future-of-autonomous-weapons-systems-39795>>.

[s]emi-autonomous unmanned systems able to engage in both self-protection and offensive action are under development internationally. Although there are significant challenges in making these systems viable and operationally useful, it is possible that they will be deployed by defence forces in the mid-2020s. Domestic and international legal and policy considerations will be important factors associated with their employment. We will need to understand the increasing opportunities and risks arising from the use of greater autonomy in intelligence, surveillance and reconnaissance and electronic attack, including in the early stages of strike operations.⁸⁵

Australia attended the 2014 CCW Informal Meeting of Experts on Lethal Autonomous Weapon Systems (LAWS) meeting and made a statement for the general debate on 13 May 2014.⁸⁶ Australia noted its full support for Article 36 reviews for any new weapons, means or method of warfare and its particular interest in a definition of lethal autonomous weapons identifying its ‘key distinguishing aspects’.

Australia stated its position as:

[c]onsistent with Australia’s approach to other emerging technologies, like in the cyber context, Lethal Autonomous Weapon Systems, if they are to be used, should only be used in accordance with existing international law. How international law, including the use of force, international humanitarian law and international human rights law, applies to Lethal Autonomous Weapon Systems will need to be addressed as the technology continues to develop.⁸⁷

Australia noted its support for ‘further informal exploratory discussion’ on autonomous weapons within the framework of the CCW.⁸⁸ Australia did not make any official statements or present any papers at the 2015 Meeting of Experts on LAWS.⁸⁹

3.2 Unmanned aerial vehicles

Australia has been particularly focused on unmanned platforms in recent times. With regard to unmanned air, maritime and land platforms, the 2013 Defence White Paper notes:

⁸⁵ Defence White Paper 2013, [2.81].

⁸⁶ United Nations Office at Geneva, *CCW Informal Meeting of Experts on Lethal Autonomous Weapon Systems (LAWS) Australian Statement for the General Debate* (13 May 2014) <[http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/026EC9EABF74393BC1257CE4004326A4/\\$file/Australia_MX_LAWS_GeneralDebate_2014.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/026EC9EABF74393BC1257CE4004326A4/$file/Australia_MX_LAWS_GeneralDebate_2014.pdf)>.

⁸⁷ Ibid.

⁸⁸ *Convention on Certain Conventional Weapons Meeting of High Contracting Parties General Exchange of Views* (Statement by Australia, 13 November 2014).

⁸⁹ United Nations Office at Geneva, *2015 Meeting of Experts on LAWS*, <[http://www.unog.ch/80256ee600585943.nsf/\(httpPages\)/6ce049be22ec75a2c1257c8d00513e26?OpenDocument&ExpandSection=2%2C1#_Section2](http://www.unog.ch/80256ee600585943.nsf/(httpPages)/6ce049be22ec75a2c1257c8d00513e26?OpenDocument&ExpandSection=2%2C1#_Section2)>.

[t]he importance of unmanned air, maritime and land platforms to future ADF operations and the future force needs further investigation. These platforms, particularly unmanned aircraft, are proliferating not only among national defence forces around the world, but also civil organisations and non-state actors. With stealth and the ability to loiter for extended periods, these systems have advantages for intelligence, surveillance and reconnaissance, including in support of Australia's border security needs. Armed unmanned systems will be available in greater variety and sophistication in years to come.⁹⁰

In 2014 the Senate Standing Committee on Foreign Affairs Defence and Trade referred to the Foreign Affairs, Defence and Trade References Committee for inquiry and report the topic of the potential use by the ADF of unmanned air, maritime and island platforms.⁹¹ Submissions were received from 25 individuals and organisations and public hearings were held in April and May 2015 in Canberra.⁹² The Committee's report was released in June 2015 and defined unmanned platforms as 'all complex remotely operated devices and their associated communication and control systems'.⁹³ The Committee's report recommends the use by Australia of unmanned platforms as 'well suited to Australia's defence and strategic circumstances'⁹⁴ and notes:

[t]he introduction of armed unmanned platforms will need to address the law of armed conflict and international humanitarian law in the context of managing fundamental inputs to capability (such as training and doctrine).⁹⁵

The Australia Defence Force has put on record that military personnel, not civilians, would be responsible for operating the unmanned platforms.⁹⁶

3.3 Cyber warfare

The 2000 Defence White Paper⁹⁷ saw Australia first note the 'new security challenge of cyber-attacks'.⁹⁸ Then Prime Minister John Howard established the E-Security Initiative in

⁹⁰ Defence White Paper 2013, [2.80].

⁹¹ Senate Standing Committee on Foreign Affairs, Defence and Trade, (28 October 2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Defence_Unmanned_Platform>.

⁹² Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The potential use of unmanned air, maritime and land platforms by the Australian Defence Force* (25 June 2015), 1.

⁹³ Ibid 5.

⁹⁴ Ibid 63.

⁹⁵ Ibid 66.

⁹⁶ Evidence to Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, Canberra, 14 April 2015, 49 (Air Vice Marshal Davies).

⁹⁷ Australian Government DOD, *Defence 2000: Our Future Defence Force* (Commonwealth of Australia, 2000).

2001 which brought together the Australian Security Intelligence Organisation (ASIO), Defence Signals Directorate (DSD, now known as the Australian Signals Directorate—ASD), the Australian Federal Police (AFP) and the Attorney-General’s Department (AGD) to work together to combat cyber threats.⁹⁹ Howard’s successor, Prime Minister Kevin Rudd introduced a review of Australia’s e-security¹⁰⁰ and the 2009 Defence White Paper, issued by the Rudd Government, Minister’s Preface noted that ‘[c]yber warfare has emerged as a serious threat to critical infrastructure’.¹⁰¹ The 2009 Defence White Paper specifically noted a need for the ADF of 2030 ‘to be a more potent force in certain areas ...[including] cyber warfare’.¹⁰² The Paper introduced ‘a major enhancement of Defence’s cyber warfare capability’¹⁰³ and the establishment of a Cyber Security Operations Centre.¹⁰⁴ In 2009 a Cyber Security Strategy was also released.¹⁰⁵

Concerns about cyber attacks have only continued to grow.¹⁰⁶ Australia notes that ‘a range of existing international legal principles may be applicable to the use of cyberspace, including the principles of sovereign equality of states and the prohibition on the use of force and acts of aggression, as well as IHL.’¹⁰⁷ The 2013 Defence White Paper 2013 notes ‘[c]yber security continues to be a serious and pressing national security challenge.’¹⁰⁸ Further, the 2013 Defence White Paper notes:

Australia works within the framework of its traditional defence and intelligence and broader national security relationships to counter cyber threats. More broadly,

⁹⁸ Nicole Brangwin, *Cyber Security*, (Commonwealth of Australia)

<http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/Cyber>.

⁹⁹ Ibid.

¹⁰⁰ See further Attorney General (Cth), ‘Government bolsters e-security by engaging private sector’ (Joint Media Release, 19 December 2008).

¹⁰¹ Australian Government, *Defending Australia in the Asia Pacific Century: Force 2030* (Commonwealth of Australia, 2009), 9.

¹⁰² Ibid 13.

¹⁰³ Ibid 83.

¹⁰⁴ This Centre is now known as the Australian Cyber Security Centre. See further DOD, *Information Security...it’s your move*, <<http://www.asd.gov.au/infosec/csoc.htm>> and Defence White Paper 2013, 21.

¹⁰⁵ Australian Government, *Cyber Security Strategy* (Commonwealth of Australia, 2009).

¹⁰⁶ See also Christopher Joyce, ‘Australia developing offensive cyber capabilities’ *Financial Review* (online), 6 May 2013.

<http://www.afr.com/p/technology/australia_developing_offensive_cyber_f071ogW8tcmoWGszPZL7tI>:

Brangwin, above note 98. Note the caution from Tobias Feakin and Benjamin Schreer, ‘Australia and ‘cyberwar’: time for a measured debate’ *The Strategist* (online), 11 Mar 2004,

<<http://www.aspistrategist.org.au/australia-and-cyberwar-time-for-a-measured-debate/>>.

¹⁰⁷ *Report of the Secretary General on Developments in the field of information and telecommunication in the context of international security*, UNGA, 66th sess, Agenda Item 93, UN Doc A/66/152, (12 July 2011), 6.

¹⁰⁸ Defence White Paper 2013, 20. The 2013 Defence White Paper notes that in 2011 Australia and the US agreed that the ANZUS Treaty applied to cyber attacks.

Australia believes that the existing framework of international law, including the UN Charter and international humanitarian law, applies to cyberspace. Australia is participating in international efforts to achieve a common understanding of these laws.¹⁰⁹

Commentators have more recently noted that although to date official public information about Australia's approach to cyber warfare has been framed in the sense of defending Australia's interests against cyber attack, Australia is also investing in the development of offensive capabilities in the cyber space.¹¹⁰ Dorling notes that the Australian Defence Doctrine Publication 3.13 – Information Activities¹¹¹ refers to 'new offensive capabilities, which were not discussed in the Australian government's 2013 Defence white paper, [which] have been developed by the top secret Australian Signals Directorate with support from the Defence Science and Technology Organisation'.¹¹²

3.4 Nanotechnology

Apart from the 2013 White Paper identifying nanotechnology as being likely to have '[s]ignificant technological advances with defence applications'¹¹³, Australia has not put anything on the record with regard to its approach to nanotechnology.

3.5 Non-lethal weapons

Adaptive Campaigning 09 – Army's Future Land Operating Concept,¹¹⁴ a document released by then Chief of Army David Morrison, makes clear that Army's role is one of an executor of lethal force¹¹⁵, and one which is being challenged by the 'trends of the diffusion of lethality...'.¹¹⁶ However, non-lethal capacity is also discussed. The document defines 'Non-Lethal Capabilities' according to the NATO definition. Specifically, a 'weapon that is

¹⁰⁹ Ibid.

¹¹⁰ Joyce, above note 106; Philip Dorling, 'ADF to embrace cyber warfare in future military operations' *The Sydney Morning Herald* (online), 5 May 2014 <<http://www.smh.com.au/federal-politics/political-news/adf-to-embrace-cyber-warfare-in-future-military-operations-20140505-zr4ws.html>> .

¹¹¹ DOD, *Australian Defence Doctrine Publication 3.13 – Operation Series Information Activities Edition 3* (Commonwealth of Australia, 6 November 2013) <<http://www.defence.gov.au/FOI/Decisions/DisclosureLog201314.asp>>.

¹¹² Dorling, above note 110.

¹¹³ Defence White Paper 2013, 19.

¹¹⁴ Australian Army Headquarters 'Army's Future Land Operating Concept' (Australian Army, September 2009) <http://www.army.gov.au/~/_media/Files/Our%20future/DARA%20Publications/ACFLOC_2012%20main.pdf>.

¹¹⁵ Ibid 64.

¹¹⁶ Ibid iii. This concept is articulated further at 17 where it is noted that '[h]igh levels of lethality are no longer restricted to nation states and regular armed forces'.

explicitly designed and primarily employed to incapacitate or repel persons or to disable equipment, while minimising fatalities, permanent injury and damage to property and the environment (NATO)'.¹¹⁷ The document identifies the possibility of a:

[I]and Force needing to conduct sustained close combat against a lethal enemy 'among the people'. Consequently, Land Forces deployed on any operation will need to have access to an appropriate array of lethal and non-lethal capabilities, be protected, equipped and structured to operate and survive in potentially lethal environments, while concurrently maintaining the potential to perform diverse humanitarian, counterinsurgency and peace support tasks.¹¹⁸

4. Why Australia should consider Common Article 1 as it continues to play a role in these discussions around new weapons technologies

In chapter two of this thesis, it was argued that all states have an obligation pursuant to Common Article 1 to respect and ensure respect for IHL. It was argued in chapter three that Australia, as a middle power with a great deal of credibility in the weapons law space historically, must take on this obligation to the best of its ability. Throughout this thesis it has been noted that Australia has either ignored (ATT) or sought to undermine (cluster munitions and nuclear weapons) its obligation to respect and ensure respect for IHL in its approach to weapons law.

Australia has played a significant role in a number of historical weapons law processes and more recently as President of the ATT conference. Australia has been a strong supporter of Article 36 (as discussed in chapter three) and has been involved in projects addressing new weapons technologies like the Tallinn Manual. As the discussions around new weapons technologies develop, this thesis urges Australia to take up the challenge of being mindful of the Common Article 1 obligation. This is particularly so because of the challenges that some of these new weapons technologies pose to traditional understandings of warfare. By being a strong advocate for the rule against indiscriminate effects, the rule against superfluous injury or unnecessary suffering and the rule against causing widespread, long-term and severe damage to the natural environment, Australia can continue to play this leadership role in this space.

¹¹⁷ Ibid xiii.

¹¹⁸ Ibid 6.

5. Conclusion

New weapons technologies pose some questions which have yet to be decided by the international community as to how their use can ensure compliance with the rules of IHL. It may be that the development of some of these technologies results in specific treaties or agreements that clearly articulate the application of IHL principles to their use. In the meantime, the study of each category of weapons considered here, demonstrates the value and significance of Article 36 of AP I. This analysis highlights how important compliance with this provision is to ensuring that states comply with their obligations under IHL.

Australia has publicly noted the applicability of existing IHL principles to new weapons technology in the form of cyber warfare and lethal autonomous weapons systems. Australia has also shown itself to have a relatively robust approach to Article 36. As such, it is through promoting the ability of existing IHL principles to apply to new weapons technology and promoting Article 36 that Australia can demonstrate compliance with its Common Article 1 obligations to respect and ensure respect for IHL in the weapons law field going forward.

CHAPTER EIGHT: CONCLUSION

In this chapter the analysis in chapters two to seven is drawn on to demonstrate the nature of the obligation to respect and ensure respect pursuant to Common Article 1 and how the approach Australia has taken to the regulation of weapons by international law either ignores or undermines the scope of this obligation. The conclusion details the answers which have been determined to the research questions. Recommendations for further work as well as limitations of the research are also outlined. The thesis proposes that Australia give greater consideration to Common Article 1 when approaching weapons law, so as not to breach its obligation under Common Article 1 and to remain a nation with credibility and influence in relation to IHL.

1. The research questions of the thesis

The first research question involved a review of the case law and literature on the meaning of the obligation to respect and ensure respect for IHL pursuant to Common Article 1. While limited in number, academic contributions, such as those by Kalshoven and Focarrelli, as well as the ICRC, through the Commentaries to the Geneva Conventions and various articles by ICRC staff, have given consideration to Common Article 1. The literature reflects a solid contribution by the ICRC to reading Common Article 1 as a clear legal obligation. The practice of States and the jurisprudence also show that a legal obligation arises from Common Article 1.

The second research question involved the drawing of a conclusion regarding the meaning of the nature and value of the obligation to respect and ensure respect for IHL pursuant to Common Article 1. The answer to this question was found in the evolutionary process that Common Article 1 has undergone. The findings demonstrate that despite some uncertainty surrounding the meaning of Common Article 1 over the years, today it is understood as constituting a legal obligation to respect and ensure respect for IHL. As was noted in chapter two, the obligation is not an obligation for states to take any set measures or specific steps in relation to violations of the Geneva Conventions by other states or non-state actors, but rather to act in good faith and to take those measures required by due diligence and which are within their capacity and influence.

The third and fourth research questions involved a consideration of the approach taken by Australia in recent history to weapons law negotiations. This also included determining the level of deference given by Australia to the obligation to respect and ensure respect for IHL in the weapons law context. The answer is that Australia does not appear to have given consideration to Common Article 1 in its approach to any of the weapons law negotiations discussed herein.

By way of brief summary it was seen that:

- Australia has not considered Common Article 1 obligations in its approach to the Cluster Munitions Convention and, although Australia itself does not see the military utility in cluster munitions (having made a decision not to stock them even prior to global action to prohibit them), it puts great stock in ensuring that its allies, particularly the United States, can still deploy them. Throughout the process of negotiating the CCM, Australia went to considerable efforts to assist another nation, specifically the United States, to not be hampered by the introduction of this legal framework. In taking this approach, Australia cannot be said to have lived up to its obligation to ensure respect for IHL. Whilst cluster munitions may not be inherently unlawful weapons, there are very narrow circumstances in which targeting law under the Geneva Conventions would allow their use and in any event the international community has agreed that their humanitarian consequences outweigh their military utility and prohibited them accordingly. Australia has agreed to this prohibition on their use and is bound by the customary obligation to respect and ensure respect for IHL and as such, now should be doing more to encourage States not party to the Convention to join up to it, and should not be enabling the use of these weapons by other states as it is currently doing.
- Nuclear weapons are not in any way compatible with the Geneva Conventions and thus an obligation based on Common Article 1 applies to Australia to take steps to ensure respect for IHL by supporting banning nuclear weapons. In 2015, in the light of the extensive evidence presented in Oslo, Nayarit and Mexico on all aspects of health, environmental, climate, and emergency response capacity, and in light of more up to date information on tactical nuclear weapons that was not before the ICJ, it is no longer possible to maintain the argument that these weapons could be lawful in any circumstances under IHL. Australia is

undermining efforts to prevent the use of nuclear weapons and as such in breach of its obligation to respect and ensure respect for IHL. Australia must reconsider its position on nuclear weapons in light of this obligation and, if it does so, it is well placed to use its capacity to influence others towards a position of respecting IHL with respect to nuclear weapons.

- Australia has taken a leading role in the ATT treaty to date. Australia has displayed and continues to display evidence of assisting other states in the lead up to the treaty negotiation and in the implementation of the treaty including through the commitment of funding to assist in the regional implementation of the ATT. However, Australia does not appear to have turned its mind to the obligation in Common Article 1 with regards to the ATT. Helping to implement the ATT is an excellent example of an action by Australia in support of the obligation to not only respect but also to ensure respect for the Geneva Conventions, even if not done in these terms. Australia also has significant capacity to assist other states to ensure respect for IHL. The Arms Trade Treaty should be a vehicle for Australia doing so.
- Australia has publicly noted the applicability of existing IHL principles to new weapons technology in the form of cyber warfare and lethal autonomous weapons systems. Australia has also shown itself to have a relatively robust approach to Article 36 of AP I weapons reviews. As such, it is through promoting the ability of existing IHL principles to apply to new weapons technology and promoting Article 36 that Australia can demonstrate compliance with its Common Article 1 obligations to respect and ensure respect for IHL in the weapons law space going forward. New weapons technologies pose some questions which have yet to be decided by the international community as to how their use can ensure compliance with the rules of IHL. The study of each category of weapons considered here demonstrates the value and significance of Article 36. By being a strong advocate for the rule against indiscriminate effects, the rule against superfluous injury or unnecessary suffering and the rule against causing widespread, long-term and severe damage to the natural environment, Australia can continue to play this leadership role in this space.

The final research question was what conclusions can be reached from this evaluation regarding the approach of Australia to compliance with the obligation to respect and ensure respect pursuant to Common Article 1? Throughout this thesis it has been noted that Australia has either ignored or sought to undermine its obligation to respect and ensure respect for IHL in its approach to weapons law. Although the approach taken by Australia has sometimes been one that is reflective of good practice (for example under the ATT), the lack of consistency in Australia's approach is problematic.

2. Significant findings from the work

The first implication of this body of work is the finding as to the growing use of Common Article 1 as a reference point for states, courts, international organisations and the UN to seek to improve humanitarian security outcomes. Nation States that engage in activities that are consistent with the notion of respecting and ensuring respect for the Geneva Conventions have an opportunity to prevent breaches of IHL. There are a number of actions that States, such as Australia, can, and indeed do, take to respect and ensure respect, by those within its control and influence, for IHL.

The second implication of this body of work is the finding that Australia does not use Common Article 1 as a reference point for its approach to IHL. The four case studies presented in this thesis have provided evidence that suggests that Australia does not consider its obligation to respect and ensure respect for the Geneva Conventions in its approach to regulating the use of weapons in armed conflict. Australia, like many states, has a mixed record when it comes to an analysis on implementing this obligation, and as has been noted, it is difficult to reconcile some of the approaches taken by Australia which appear to undermine IHL, with the rhetoric about concern for humanitarian consequences. This is particularly notable in respect of the approach taken by Australia, outlined above, in respect of cluster munitions and nuclear weapons, where deference to United States interests is difficult to dispute.

The third implication of this body of work is the finding that approaching weapons law through a prism of Common Article 1 can demonstrate a variety of actions that States can, and indeed do, take to respect and ensure respect for IHL. By being party to all major international weapons law treaties, conducting Article 36 weapons review processes and placing emphasis on training for its military personnel in relation to weapons and targeting

law, a State can cover the basic requirements of respect for IHL in relation to weapons law. However, it is clear that much more can be done and, in the case of states with the capacity to influence, much more must be done.

The final implication of this body of work is the finding that Australia should promote Common Article 1. While Australia does not appear to evaluate its approach to weapons law in light of its Common Article 1 obligations, Australia has demonstrated that it takes certain weapons law related obligations very seriously – both from the perspective of national-interest and of being a good international citizen. Australia, as a middle power with a great deal of credibility in the weapons law space historically, must take on this obligation to the best of its ability. Adopting a Common Article 1 analysis system for all weapons law issues will ensure Australia takes a consistent and principled approach going forward. It will also ensure that Australia is contributing to the creation of an international norm of effective IHL compliance.

This work builds on the developing recognition of Common Article 1 as a clear legal obligation and proposes its application by Australia in the weapons law context. There is a range of ways that a State may endeavor to bring States which are not respecting, or ensuring that their armed forces respect the Geneva Conventions, back to an attitude of respect for them. Similarly, there is no clear one way to implement international obligations in a domestic context. There are a range of factors, including the nature of the national legal system, that effect the process of national implementation. There are actions that can be taken, or omitted to be taken, which mean that a state falls short of its implementation obligations. However, as the processes for national implementation are rarely comprehensively detailed or specified in international legal frameworks,¹ an analysis of this nature must be conducted on a case by case basis.

Actions which would constitute simple and effective support for Common Article 1 would include continuing strong support for the ICRC strengthening compliance project. Australia could also potentially request to convene a meeting of States Party on Article 7 of AP I on the topic of Common Article 1. With regards to weapons, Australia has done this in a number of ways, albeit without reference to Common Article 1, including the provision of financial

¹ T. Dunworth, R. Mathews and T. McCormack, 'National Implementation of the Biological Weapons Convention' (2006) 11 *Journal of Conflict and Security Law* 93, 95, 115.

resources to various countries to assist them in implementing weapons law treaties and in the provision of personnel, such as in the Regional Assistance Mission to Solomon Islands operation.

The argument put in this thesis is that the Australian government should give greater consideration to its obligations under Common Article 1 of the Geneva Conventions. Australia should specifically consider Common Article 1 when entering into any weapons law treaty discussion or discharging any weapons law related obligation. Doing so would have a highly positive effect on Australia's approach to implementing international law obligations, as Australia would be seen as a leader in this field. Australia would be able to adopt a consistent and principled approach and would be making a valuable contribution to creating an international norm around effective IHL compliance.

This thesis, in taking a case by case approach to the implementation into the Australian legal system, can, from a practical perspective, be of some value to DFAT, the ADF and the Commonwealth Attorney-General's Department in demonstrating the significance and potential value of considering Common Article 1 obligations.

3. Limitations of the research

This study is of course just one small contribution to the broad field of weapons law and the even broader field of IHL. While it fills gaps in the literature regarding Common Article 1 and Australia's approach to weapons law and to Common Article 1, it by no means answers all of the potential questions regarding these topics. The thesis has only had scope to deal with four weapons law case studies. The reasons those particular case studies were chosen were set out in the introduction. However, other weapons case studies may be of interest. For example, a more historical analysis of Australia's approach to earlier weapons law treaties could also be of some value and may be the subject of future work.

A significant practical limitation to the research is that much information regarding the approach of the Australian government is simply not publicly available nor was it able to be provided to the candidate, for national security reasons, when requests were made to the DOD or the Attorney-General's Department.

A further limitation is that, without scientific and technical expertise in relation to the weapons technologies (in particular the new weapons technologies) the candidate is relying on descriptions by others of the capabilities and functionality of these weapons.

4. Recommendations for future work

This study has looked at the way in which one country has approached one aspect of a seminal provision of IHL. It would be worthwhile to take a broader approach and look at questions such as how Australia has approached IHL dissemination in light of its Common Article 1 obligations or to look in more detail at the question raised in chapter three regarding how Australia has approached the investigation and prosecution of war crimes in light of Common Article 1 obligations. Other topics with significant bearing on Common Article 1 include the provisions of IHL which deal with detainees – including both civilian detainees and prisoners of war – and could involve a consideration of Australia’s handing over of detainees to other forces within the International Security Assistance Force command structure or to the Afghan National Army, Australian diplomatic efforts in relation to David Hicks and Mamdouh Habib, and interoperability and Australian involvement with facilities such as Abu Ghraib. It would also be interesting and significant to have an opportunity and the scope to consider how other nations have approached Common Article 1, both in relation to weapons law and more broadly.

5. Final observations

Unfortunately, given humanity’s proclivity for fighting, armed conflict remains a common state of existence and short of its elimination, restrictions on its conduct for humanitarian reasons remain the best solution. IHL is a legal framework that seeks to draw a delicate balance between two vastly different concepts, military necessity and humanity. The idea of this balance is not to prevent suffering in times of war. It is to limit that suffering to what is necessary to achieve the military objective. The destruction of military assets and personnel has been accepted as a legitimate end and the availability of weapons to achieve this end must therefore also be accepted.

The weapons discussed here, those which have humanitarian security implications, are prohibited and regulated for humanitarian reasons in a way that is compatible with military necessity. Those weapons which are prohibited, or around which discussions about their prohibition are ongoing, are weapons whose military utility has been shown to be limited and

humanitarian arguments against their use clear. Complying with the obligation to respect and ensure respect for IHL does not prevent the achievement of those actions which are militarily necessary.

As Dormann and Serralvo note:

Further State practice and academic research is still needed to elucidate the scope of this international legal obligation. Yet, it is clear that greater acknowledgement of Common Article 1 obligations, and the equivalent under customary international law, can help improve respect for IHL. In a world ravaged by armed conflict, and with non-compliance amongst the most critical contemporary challenges to IHL, the importance of this duty should not be underestimated. Third States, thanks to their (often) more neutral stance, are in a privileged position to ensure that IHL rules are universally respected.²

Australia is not doing all it can to comply with the obligation to respect and ensure respect for IHL. Indeed, it would appear that it is not even giving this seminal provision any consideration. In taking that approach Australia has both undermined Common Article 1 in its approach (cluster munitions and nuclear weapons prohibitions) and ignored Common Article 1 in its approach (the ATT and new weapons technologies). Australia needs to lift its standards in its approach to and implementation of weapons law issues pertaining to armed conflict. There is much more to be done before Australia can be said to have a consistent and principled approach and, in doing so, be making a valuable contribution to the creation of an international norm around effective IHL compliance.

² Dormann and Serralvo, 'The obligation to prevent violations of international humanitarian law' on *Intercross blog* (24 September 2015) <<http://intercrossblog.icrc.org/blog/3ok4ejdgxggz8nwmj7yencivh46ji0#sthash.WeAunmE.dpbs=>>.