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# AUSTRALIAN JOURNAL of PEACE STUDIES

## Volume 3, 2008

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EDITORIAL

Obama’s World: Is There New Hope for Peace and Disarmament?

The Beginning of a New Era

In June 2007, when we published the last edition of the Australian Journal of Peace Studies, John Howard was still the prime minister of Australia and it was not yet known who would become the 44th president of the United States. Eighteen months later, Mr Howard’s days seem distant, and George W. Bush will soon vacate the White House. But the two leaders’ legacy will live on for some time. Violent conflicts in Afghanistan and Iraq continue with no end in sight, having already claimed perhaps more than a million lives. There is, however, much hope that things will change for the better under new leadership both here and in America.

Before last year’s election, Kevin Rudd promised that if he won government Australia would play a greater role in multilateral affairs than it had under his predecessor. More recently, US president-elect Barack Obama, whose campaign for the top job was built around a message of ‘hope’ and ‘change’, has expressed an intention to restore his country’s role as a force for good in the world, and even to work for nuclear weapons abolition.¹ A new era is clearly dawning. In coming years, we will see a shift in the global order perhaps as dramatic as that which took place at the end of the two world wars and the Cold War.

¹ For analysis of Barack Obama’s commitment on nuclear disarmament, see Helen Caldicott and Tim Wright, ‘This Is Obama’s Chance to Leave the World a Lasting Legacy’, Canberra Times (Canberra), 12 December 2008.
In this editorial, we briefly describe the ‘year in peace’. For Australia, it began with a momentous and long overdue apology to the Stolen Generations: recognition by our government of past wrongs, and a commitment to reconciliation for the future. Millions of Australians, Aboriginal and non-Aboriginal alike, watched the apology across the nation and were moved by it. It was a nation-shaping moment. If there was one disappointment, it was that we did not have a single Aboriginal person represented in the parliament that day to take part in the historic occasion.

Then, in June, the last of Australia’s combat troops were withdrawn from Iraq. Withdrawal had been a key pre-election commitment of the Australian Labor Party, one which distinguished it from the Coalition government of John Howard. Australia’s support for the 2003 invasion of Iraq was perhaps the greatest foreign policy mistake of any government in our nation’s history. The human cost of the occupation met and sometimes exceeded the predictions of its opponents, while lining the pockets of war profiteers around the world, including in Australia.

The same month in which our troops came home, the prime minister made a historic visit to the Hiroshima Peace Memorial — the first western leader to have done so — and established an international commission aimed at abolishing the worst weapons of terror, nuclear weapons. The commission held its first meeting in Sydney in October. In recognition of the importance of its work, we have featured nuclear disarmament prominently in this edition of the journal. Associate Professor Tilman Ruff points out that our credibility as a disarmament ambassador is compromised by the fact we sell uranium to nuclear-armed nations and seek protection from the US nuclear umbrella. In this respect, Mr Rudd seems to be weighed down by the continuing habits and assumptions of previous regimes.

And just this month in Oslo, Australia along with almost a hundred other countries signed up to a new treaty banning cluster munitions, those despicable weapons which, like landmines, often kill children both during and long after battle. Dr Mark Zirnsak, who was involved in the treaty-negotiating process, outlines what the treaty seeks to achieve, and former Democrats leader Lyn Allison describes the obstructionist role that the Australian government played in the process. Both Mr Howard and Mr Rudd lobbied for gaping loopholes to be inserted into the draft text that will, for example, allow Australia to use US cluster bombs if America does not join the treaty.

The government disappointed us also by refusing to support a ceasefire in Afghanistan on 21 September for the International Day of Peace — even though it
had the backing of NATO, the Afghan government and, believe it or not, the Taliban. Thankfully, it succeeded in spite of the Australian government. Australia must work next year for a peace day ceasefire in all conflict zones where it has troops. This is a simple but important initiative for which the Peace Organisation of Australia has long campaigned. It has the potential to allow aid workers to access areas ordinarily off limits, refugees can be reunited with family members across borders, and it might even lead to a lasting peace. World Vision chief executive Tim Costello, the winner of our Australian Peace Prize this year, would no doubt attest to the benefits of even temporary ceasefires. Upon accepting the prize in Melbourne, he remarked:

Promoting peace is a vital part of the war against poverty. Violent conflict severely hampers efforts to feed, educate and provide health services to the world’s poor. It is both a cause and symptom of deprivation and misery. Dozens of countries are today at war with themselves or each other. Every bullet fired in rage is a setback in the larger war against poverty. Without peace, we cannot have sustainable development.

Sadly, this year, like most, the good news has been largely overshadowed by the bad: outbreaks of conflict in South Ossetia and the Democratic Republic of Congo, as well as a massive terrorist attack in Mumbai claiming 170 lives. Every day, scores of people continue to lose their lives to wars in Afghanistan, Iraq, the Sudan and more than a dozen lesser known or forgotten conflict zones. This year, world military expenditure continued to rise to a staggering $A2234 billion, a figure which dwarves the amount we spent globally on poverty alleviation ($A157 billion).

Next year must be different. The election of Barack Obama to the American presidency has generated much hope among those of us preferring diplomacy over armed conflict. It is clear that the tides have now turned for the better, but we must not become complacent. Each of us must continue to work as hard as ever for peace and disarmament if we are to ensure that the new governments here and in the United States take full advantage of unique opportunities and do not squander them.
The Articles in This Edition

The articles in this edition of the Australian Journal of Peace Studies show a wide variety of peace activism occurring at many levels. On a local community level, Lesley Pruitt writes of the way that music and dance can help to build cultures of peace among youth in Australia. Two of our articles focus on Africa, home to most of the world’s armed conflicts and trouble spots today. Throughout the year, the Democratic Republic of Congo, the Sudan, Somalia and Zimbabwe have all made international headlines for the wrong reasons.

Ted Nielsen argues in his article is that ongoing African conflicts such as that in northern Uganda do not present a dilemma of peace versus justice, as is often said to be the case, but rather we can and must have both. Jessie Smith reminds us in her piece of the continuing use of child soldiers in many conflicts, and argues that they must be given protection as refugees. Finally, Lucas Robson looks at America’s failure to implement the Convention against Torture. While we welcome the promise by president-elect Barack Obama to close the US military facility at Guantánamo Bay in Cuba, we are deeply troubled by his denial that torture has ever occurred there. This has provided something of a reality check for those of us with high hopes of a transformative Obama presidency.

Dr Aron Paul & Tim Wright
Melbourne, December 2008
L to R: Australian Peace Prize winner Tim Costello, POA patron Lyn Allison and POA president Tim Wright.
From Hiroshima and Nagasaki towards a World without Nuclear Weapons

Assoc. Prof. Tilman Ruff*

Introduction

On the morning of Wednesday 6 August 1945, many people in Hiroshima were relieved when only a single plane high in the sky passed over the city after the air raid siren sounded, and got on with going to school or work or other plans for the day. Soon after, there exploded a single simple gun-type design nuclear weapon, equivalent to 15,000 tons of TNT, made of highly enriched uranium, not requiring prior testing, and though small by nuclear standards, still the most accessible and preferred weapon for today’s non-state terrorists. City records show at least 118,681 people died immediately — vaporised, incinerated, irradiated, crushed, burned, blasted — in their city which was transformed in minutes into a sea of fires and utter devastation. Another 78,000 were injured, many of whom subsequently died often agonising deaths without the most basic of medical care and relief for their suffering.

Three days later, an implosion design bomb made of plutonium-239 was detonated, equivalent in blast to 21,000 tons of TNT, over the city of Nagasaki. Seventy-three thousand, eight hundred and eighty-four people died, and 74,909 were

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injured. These first two tactical-size nuclear weapons killed 260,000 people. And rates of cancer in the remaining hibakusha are still increasing. These appalling terrorist crimes against humanity were not needed to end the war, were carried out largely with an eye to then-ally Russia, and like any use of nuclear weapons, could not be justified.

I am pleased that Prime Minister Kevin Rudd visited Hiroshima in June, the first Australian prime minister to do so, and announced the creation of the International Commission on Nuclear Non-proliferation and Disarmament, co-chaired by former Australian foreign minister Gareth Evans and former Japanese environment and foreign minister Yoriko Kawaguchi. Mr Rudd’s entry in the Hiroshima Peace Memorial Park visitors’ book read:

Let the world resolve afresh, from the ashes of this city, to work together for the common mission of peace for this Asia–Pacific century, and for a world where nuclear weapons are no more.

On 6 and 9 August each year, we gather to join with people all over the world to remember and honour these victims, and to commit and reaffirm that together we can and must ensure that those two nuclear bombs are the last to ever explode on planet Earth. Most people know the obvious truths that as long as anyone has nuclear weapons, others will seek them, the danger that they will be used is real and in fact growing, and that any such use would be a global catastrophe. Last year the Bulletin of the Atomic Scientists, including 18 Nobel laureates, moved the hands of the Doomsday Clock forward to five minutes to midnight, stating: ‘Not since the first atomic bombs were dropped on Hiroshima and Nagasaki has the world faced such perilous choices.’

Recently, state-of-the-art atmospheric models have been applied to evaluate the consequences of a regional nuclear war involving 100 Hiroshima-size bombs — just 0.03 per cent of the explosive power in the world’s arsenals — and within the capacity of eight nuclear-armed states including Israel, India and Pakistan. Apart

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1 See Kevin Rudd, ‘Building a Better World Together’ (Speech at Kyoto University, Kyoto, 9 June 2008); ‘International Commission on Nuclear Non-Proliferation and Disarmament’ (Press Release, 9 July 2008).


3 Owen B Toon et al, Atmospheric Effects and Societal Consequences of Regional Scale Nuclear Conflicts and Acts of Individual Nuclear Terrorism (2007); Alan Robock et al, Climatic Consequences of Regional Nuclear
from immediate incinerating devastation and radioactive fallout killing tens of millions of people, global climatic consequences would be unexpectedly severe and persist for 10 years. Cooling, with killing frosts and shortened growing seasons, rainfall decline, monsoon failure, and substantial increases in ultraviolet radiation, would combine to slash global food production. Globally one billion people could starve. Preventing any use of nuclear weapons is clearly of paramount and urgent security concern for every inhabitant on the planet. And that means eradicating them.

**Why Abolition Is Possible**

There is no doubt that nuclear weapons can be abolished. Other weapons have been banned through comprehensive treaties: dum dum bullets, chemical and biological weapons, landmines and recently cluster munitions. There is a significant base of nuclear disarmament and arms control agreements on which to build, especially the strategic arms reduction treaties and intermediate-range nuclear forces treaty. Several countries have divested themselves of nuclear weapons — South Africa, Belarus, Kazakhstan and Ukraine — and others have abandoned nuclear weapons programs. Nuclear-weapon-free zone treaties cover extensive regions including most of the southern hemisphere, and 113 countries have signed them.

Verification of nuclear disarmament is easier than for chemical weapons. Achieving nuclear weapons abolition is a legal obligation on all countries, affirmed unanimously by the International Court of Justice.\(^4\) The overwhelming majority of the world’s people want their governments to negotiate to eliminate nuclear weapons globally. Nuclear weapons abolition has been seriously discussed at the highest political levels. President Reagan’s unwillingness to give up missile defence was the only thing that stood between he and General Secretary Gorbachev agreeing in Reykjavik in 1986 to eliminate their nuclear weapons. One hundred and twenty-seven governments, including China, India, Pakistan and North Korea, voted at the United Nations last year in support of commencement of negotiations on a nuclear

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\(^4\) Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 225, [105].
weapons convention.\textsuperscript{5} And we have drafted a model nuclear weapons convention which lays out how abolition can be accomplished.\textsuperscript{6}

Over the next few years, with the end of the Bush presidency and growing recognition of the need to get on with abolishing nuclear weapons, we have the best prospects for serious progress on disarmament for decades. There are no insurmountable technical obstacles to abolishing nuclear weapons. The obstacles are primarily political and cultural. This is fundamentally a moral issue: are we willing to be part of threatening tens of millions of fellow inhabitants and our planet itself? Not in our name — not ever.

Those of us alive now, whether we like it or not, are called to deal with huge global challenges which no previous human generation has had to confront. We can destroy our planet’s ability to support the richness of life, whether quickly through nuclear weapons, or more slowly through climate change. In the \textit{Lord of the Rings}, Gandalf said to Frodo deep in the mines of Moria: ‘We cannot choose our time; only what we do with the time that we are given.’ Because we are in global terms privileged, we are each called on to be part of the solutions and not aggravate the problems.

\textbf{Australia’s Role}

The Australian government’s stated commitment to nuclear weapons abolition and the commission it has launched are welcome and deserve support. But there is much more that we should do to walk the talk with courage and integrity. We should make it very clear that there can only be one acceptable and sustainable standard for all, and that is zero nuclear weapons. We should repudiate cowering under a nuclear umbrella which undermines everyone’s security, including our own. We should denuclearise our military alliances to ensure that we do not provide facilities or personnel for any possible use of nuclear weapons. We should withdraw from participation in missile defence, which is destabilising and technically unfeasible and fuels vertical proliferation.

\textsuperscript{5} \textit{General and Complete Disarmament: Follow-Up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons}, UN GAOR, 1\textsuperscript{st} Comm, 62\textsuperscript{nd} sess, UN Doc A/C.1/62/L.36 (2007).

Uranium mining should be phased out. In the meantime, Australia should work to reduce sharply the proliferation dangers inherent in the nuclear fuel chain by supporting multilateral control of uranium enrichment and stopping the reprocessing of spent nuclear fuel to extract plutonium. This means not participating in the US Global Nuclear Energy Partnership. We should not export uranium to states with nuclear weapons. We should work to end the use of, secure and lock up existing stocks of fissile materials. Our government should also work with other governments and civil society to open negotiations on a nuclear weapons convention.

The horrors of Hiroshima and Nagasaki remind us why getting rid of nuclear weapons is so essential and the only way to properly honour the victims.
L to R: Assoc. Prof. Tilman Ruff, chair of ICAN in Australia; Cr Jenny Farrar, convenor of Mayors for Peace in Australia; Tim Wright, president of POA, at the 2008 Non-Proliferation Treaty meeting in Geneva, Switzerland.
They Drop Beats, Not Bombs: Music and Dance in Youth Peace-Building

Lesley Pruitt*

Introduction

This article focuses on how young people can use music and dance for peace-building. It utilises the framework of positive peace so it is concerned with much more than the absence of war or direct violence.¹ Positive peace is a peace with justice, including gender justice. It involves an assurance of fair ‘social, economic and political arrangements’² and the preservation of human rights.³ Peace-building from this perspective seeks ‘to prevent, reduce, transform, and help people recover from violence in all forms, even structural violence that has not yet led to massive civil unrest’.⁴ As Elisabeth Porter suggests, it requires a broad process of

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¹ David Barash (ed), Approaches to Peace: A Reader in Peace Studies (2000) 129.
³ The 14th Dalai Lama, Nobel Lecture (Oslo, 11 December 1989).

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creating a societal environment to promote ‘peace through development and aid, human rights education, and the restoration of community life’.5

To accomplish such goals ‘it is necessary to understand the culture in which people are embedded’; positive peace can be ‘conceptualized as working in a bottom-up rather than a top-down fashion ... to ultimately change general cultural norms about dealing with violence’.6 While UN peace-building is generally focused on formal processes such as implementing peace agreements and staging high-level interventions, the organisation has recognised that these are not all that will be required for achieving sustainable positive peace. This is evidenced by the UN General Assembly’s goal of creating a culture of peace, as per their 1998 adoption of Resolution 52/13.

The focus of this study is on the role young people might play in advancing positive peace. To date, little attention has been paid in the literature to peace-building and youth,7 although involving youth in peace-building reflects key UN goals, including prioritising young people in peace processes and viewing them as budding citizens and subjects of rights instead of as victims and causes of concern.8 Yet, by defining peace-building in formal terms, the UN neglects a range of important peace-building activities, including those most likely to be undertaken by youth,9 who cannot always access formal modes of participation. In this context it is interesting to consider how an activity widely undertaken by young people — music and dance — might also be engaged with peace-building.

But why music, and why now? Over the last few decades, there has been a significant growth and globalisation of the music industry. Consequently, there is now a wider variety of music accessible to more people than at any time in the history

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9 Porter, above n 5, 256.
of the world. 10 However, despite scholars suggesting that music occupies ‘a central place in the adolescent social system’, 11 there has been little investigation in the academic literature of the particular impact of this trend on young people, who are major consumers of music.

There has also been limited analysis of the relationship between youth, music and politics. Some authors have discussed the role of music in new social movements, 12 but there has been almost no research investigating the ways that disenfranchised groups, including young people, might use music to challenge or confirm existing arrangements of power. According to Michel Foucault, modern power is deployed by a number of means including via the production of ‘normal’ social identities, such as male and female; it will also be deployed via discourses about culture and political community. This includes the ways ‘we make connections, the network of meanings and values, and of friendship and interests, that hold us together … the ways we tell each other our stories, how we create our sense of ourselves, how we remember who we are, how we imagine what we want to become’. 13 However, music also has a non-discursive capacity: to engage human emotion, including mass emotion. It can ‘rouse people and inspire action’, but it can also be used ‘to call men and women to war’. 14

In this paper I am interested to explore whether and how youth participation in musical activities might contribute to the advancement of positive peace. What follows is a report on a research project conducted with one youth peace-building group in a major Australian metropolitan area that uses music and dance as a central part of its program. This includes hip-hop workshops in break dance, crump dance, singing and rapping/MC-ing. My project involved participant observation of the program, which included participating in group games and activities, observing skills sessions and crew meetings, assisting with cleaning, food preparation, and other necessary tasks, and interacting regularly with participants and leaders. It also

encompassed semi-structured interviews with 10 participants and three arts workers involved in the program. The participants ranged in age from 13 to 21 years.

They came from diverse cultural backgrounds, including immigrants from Samoan, Maori, Tongan, Sudanese, Liberian, Fijian and Slovenian backgrounds, as well as young people whose families have lived in Australia for several generations. Participants came from an assortment of socio-economic backgrounds, with parental occupations ranging from factory worker to island resort owner. Both young men and women attended, although a male majority was present throughout the program. The workers were also mostly very young, ranging in age from 18 to 25, and many were former participants in the program.

Several key themes emerged from the participant observations and interviews conducted for this research. Of particular importance were three themes associated with dialogue, identity and space. These are addressed in the next three sections.

Alternative Modes of Engaging in Dialogue

When questioned about what makes music and dance useful tools for peace-building, many of the young people interviewed for this research identified the importance of music and dance in providing alternative modes of expression, which can play a vital role in dealing with conflict. Too often our traditional frameworks for expression are clouded by our deeply ingrained, typically antagonistic responses to conflict, which may continue to lead us down the same tired and frustrating paths that have allowed enduring conflict to worsen in the first place. By offering creative alternatives, music and dance may lead to new and effective mechanisms for resolving or transforming conflict in ways that may not have been seen had we relied on traditional modes alone. This is not only important for the youths directly involved in the music-making; it is also particularly useful for conveying their message in a way that encourages the development of a culture of peace by engaging people ‘in the outside world’, who, through their role as audience members, may see these artistic endeavours and thus become inspired to contemplation or action themselves. At the same time, interviewees noted that participation in these activities helped them practise and improve their skills in traditional dialogic engagement, leaving them well placed to use all the tools in their now better stocked peace-building toolbox.
These prospects are particularly important for young people, as music and dance are an integral part of youth culture. Moreover, while most youths may not have the training or interest required for engaging in more formal, traditional modes of political peace-building, many young people have years of experience in music-making, so employing such resources is useful in acknowledging and building on the skills young people already have that can be applied to their work as peacemakers. Music and dance can contribute to the cause of peace-building by serving a vital role in offering relevant alternative modes of dialogue and communication, which can also supplement and encourage more traditional ways of exchanging ideas with young people participating in the music-making as well as with people of all ages in the wider public that consume the product as audience members.

The key thing here is that young people reported seeing music and dance as creative, different ways to engage in dialogue. This is in contrast to more traditional, limited definitions of dialogue as speech or purely linguistic exchanges. Examining these experiences suggests a need for a broader understanding of what may be understood as ineffable dialogue.

Engaging through these alternative modes also enables these young people to ‘explain’ themselves with confidence, as this is a mode of dialogue that is not predicated on typical notions of intelligence. There is a de-emphasis on the rationalistic, academic modes of intelligence and a shift to the kind of emotional intelligence that these young people, whatever their formal training or lack thereof, know they possess and can deploy well. While they may often feel they do not have the words to say what they want in order to be understood, they are able to creatively convey their message through these alternative means in a way that is effective and equally, if not more, descriptive. To that end, some reported the following:

Like through your music you express a story, so ... as well through dances you can express it and they pick up the story and understand what you’re telling them ... if you’re telling them your story then they’ll understand it.

[L]ike it’s better, better than talking ... you feel ... more comfortable. Like a lot of people have different talents and stuff and ... It’s a different way of creating dialogue ... [L]ike for me I’ve had this fear of like public speaking ... I sing it, it’s much more, easier and you can just embrace the music and just be in that moment and ... just express yourself freely.

One particularly relevant aspect of this deployment of unconventional forms of dialogue when looking at prospects for peace-building is that it can serve as an
alternative mode of dispute resolution through offering non-violent means for addressing conflict. This may be especially important for young people like those attending the project, who live in some of the most violent communities in their region. For example, one young woman pointed out how dance and music could provide alternatives to getting into a physical altercation:

Uh, for dance you can just express your anger in your body and for singing you can express your anger in writing a song or writing a rap.

Some of the young people involved in the crumping program expressed how their participation in this dance style in particular had equipped them with alternative ways of responding to conflict:

Like, um, when they get in my face, I like crump ... until they like the relationship is of respect, respect you and not fight or something.

[I]t’s been good for me ’cause like ... and for others ’cause ... crumping’s like replacing fight, so yeah, that’s why I like it ’cause it just replaces the bad stuff.

I guess the crumping does help [because] I remember once the boys just saying yeah that they used to fight, but now they just solve their problems by crumping ... Battle each other ... But you don’t actually have to fight, yeah.

The last comment above, from a crumping instructor, points to the need for considerations of gender that will be discussed in my broader thesis and require serious attention in the field of youth peace-building. It seems that while typical hegemonic norms of masculinity may be ‘proven’ through skill in battle, young men involved in the crumping project have decided to enter a new battle arena, one where their skills are proved through dance-offs rather than through bloody boxing matches. While in other arenas boys may gain respect through being the best fighter, here they do so by being dancers with amazing command of technical skills, which facilitates building better relationships based on this respect. This is particularly interesting, because rather than respect accorded on the basis of physical strength, it is understood in this case to be attainable through means that may be more inclusive for certain groups of young people, including smaller girls and boys. However, it should be noted that while this may be a prospect, in this case it has not been a reality yet, as no girls took part in the crumping stream of the workshops. Interviews revealed that several were interested in doing so, but did not feel the group was open to them as
young women. This issue clearly must be addressed if such projects are to be truly inclusive and pursue positive peace that includes gender justice.

While acknowledging the importance of music and dance as alternative modes of expression, the crew leader also noted the importance of more traditional modes of dialogue at times, and stated that the leaders had tried to facilitate this. In fact, several young people indicated that participation in the project had actually helped them develop their verbal skills and ability to engage in spoken dialogue. One participant mentioned benefits from the opportunity in the workshops for practising English, which was a second language for many participants, and two arts workers reported learning about ‘talking things out’ before resorting to violence.

Such comments suggest that through engaging in this project associated with alternative modes of dialogue, participants also actually gained skills at communicating their feelings and ideas through talking. Indeed, when asked ‘Do you feel being involved in this project will make it easier for you to be formally involved in peace-building in the future?’ all interviewees responded that it would. In response to queries of how this would facilitate their involvement, some pointed directly to the skills they had learned that would enable them to talk to others more easily:

Yeah it’s helped me a lot ‘cause I’ve been able to talk to people and to dance together.

Yeah, it’s helped me, helped me with group work, um, and socially, talking to other people.

Um, yeah, I would say yes to that because it, it helps me to have more confidence to be able to talk to others and get along with others and understand, ah, how people think so I don’t have to be so uncomfortable around other people and same with them around me.

Interestingly, when asked how the workshops may have prepared them for future involvement in peace-building, the only participants who mentioned improved talking abilities were young white males born in Australia. While I cannot extrapolate some major point from this, it does point to the need for further study on young people’s understandings of what peace-building is or should be.

Meanwhile, interviewees suggested that music and dance can be used to bring together previously segregated communities. As discussed later, many of the young people came along because they wanted to take part in music and dance workshops, and through doing so they came to interact with and know young people
from groups they had previously seen in a negative light and thus avoided. In this way, hip-hop, which plays a key role in youth culture, can be seen as bringing these young people together, and the workshop activities thus may be understood as opportunities for dialogue based on respect of difference as well as an alternative conception of commonality. Likewise, youth respondents regularly mentioned the special capacity of music and dance for engaging a broader audience than workshop participants alone, partly based on a reported understanding of music and dance as a universal language. Indeed, interviewees expressed that music and dance are modes of communication that can be expressed and understood even across traditional linguistic barriers. Moreover, interviewees mentioned the usefulness of music and dance due to the lack of a fixed set of rules based on linguistics, culture or religion. From these understandings, these young people see music and dance as a mode of cross-cultural discourse that provides the kind of meaningful engagement required to build more peaceful societies.

I think the dancing and singing is the best way to show to the world what’s your message ... It’s easier to do than if you talk with somebody. If you talk with somebody that doesn’t, I don’t know, doesn’t respect you or something, he won’t listen, but if you getting crazy and start dancing and singing he will start listening ... It just, it just, music and dance just got something inside it that like bring you there ... it’s ... trying to get your message across ... it doesn’t matter what religion ... No matter what you are, how you do, whatever, you can do dance and singing.

[M]usic and dance are ways to express yourself without having anyone trying to, you know, ‘that’s wrong’ or ‘you can’t say that’ or ‘you can’t dance like that’. It’s just your own free will to do whatever in everything ... Yeah I think there’s a lot that music and dance has to offer to engage the, the general people that aren’t involved in the ... project. Um, I think that, um, everyone has that creative side of them and that they, yeah, everyone can connect with music and dance.

I find that it’s easy because people love music ... I mean if you kind of measure that with just running a peace-building workshop without music, I’m not sure if the general public would be actually interested in ... like if you’re gonna create a 10-page document ... from the peace-building workshop ... weighing that with our product, like our video clip ... more likely to be drawn to the music.
This perceived ability to use music and dance to engage the outside world does not end at the last workshop for the program. When asked whether they would continue to use the skills they had gained at the workshops to make peace, the youths involved offered several responses indicating that they would show the artistic skills they had gained, use their improved speech abilities to talk about what they had learned, promote the growth of the project by inviting others along, and use the knowledge of peace practice they had gained to try to spread peace in a wider context. At the same time, concerns emerge about the inclusiveness of such work for girls and other groups of young people who may not feel welcome in the space. In short, music and dance in this case were seen as a drawcard to effectively engage in a new and creative form of dialogue and as a sustainable way to grow this sort of engagement more broadly. However, enacting these prospects in a sustainable way will require serious critical engagement in the pursuit of positive peace.

**Shifting Identities, Becoming Peacemakers**

The second key theme identified in the interviews was identity. It appears that participation in music and dance activities offers opportunities for (re)producing and revising identities, both of individuals and groups, and of self and others. Participants in this project reported seeing themselves as more confident, peaceful, open, communicative, engaged, and able to see and seize opportunities. At the same time they told of seeing others in a new light that often contrasted with previously held negative stereotypes based on race, culture and gender. These challenges to previous understandings are important, but further inquiry is needed on how these new understandings are upheld over time. Finally, the youths often expressed a desire to be seen differently, and reported that seeing a difference in the way they were viewed by others had a large impact on their self-identities.

When asked the question ‘How, if at all, has being part of [the project] changed the way you see yourself?’ nearly all respondents indicated that participation had changed the way they see themselves in some way. While responses were varied, several key sub-themes emerged, with young people reporting they felt more peaceful, confident, aware of their own capabilities and, in one case, healed. In these ways, participation in music and dance challenged these young people’s preconceived identities and broadened their understandings to expose them to new identities. Two
youth participants and one arts worker were exceptions, stating that no change had occurred to them, but all the other interviewees indicated awareness that it had.

Interviewees said they could see themselves as more peaceful and less prone to violence since taking part in the project. This is undoubtedly important for peace-building prospects.

Ah, it’s changed a lot ... I used to be sort of like, I’m not saying mental, I’m saying mental but more like aggro ... But now I’m more like just calmed down a bit.

Yeah man ... ’Cause I just as I say I used to get into a lot of trouble and then I be like chasing that person or ... And I always come here and I now not do anything, just be friends with them. Like at school crumping and that.

Respondents also noted an increased self-confidence. This can be important to building peace by encouraging increased participation by youth, particularly those who belong to other marginalised groups. Likewise, some young people reported their work in this project had helped them become aware of their own capabilities. Such a change may aid them in engaging in peace-building work across difference more frequently in the future.

Like I’m, like I said, I’ve got more confidence and that, like things are better now, like I’m not so shamed. Like if you’d’ve talked to me before this ... I wouldn’t’ve been talking. Like I’d be too scared.

Yeah, it did. I guess it just all comes down to self, self-confidence and that ... Back then I really had, I didn’t really have that much confidence ... But now you know just it’s kinda ... like, you know they don’t matter, you know, it’s just like kinda like a thing for self-help, make yourself beyond that.

It’s made me aware that I’m able to do more than I thought I could actually to start off with. At first I didn’t know half the people here and now I get along with almost everyone here. And when I started here I barely could do a thing, and now I’m doing things I haven’t done before.

Finally, healing is also often considered an important aspect of peace-building, and one young woman’s explanation of her journey of personal healing through music and dance was particularly touching and inspiring. While she previously lacked self-respect, which led her to self-harm, by participating in dance programs she had gained a sense of worth, seen herself anew, and discontinued these harmful practices:
I respect myself more ... I used to not respect myself ... I used to cut myself. 'Cause I wasn't respect myself. I used to, I don't know, close myself in and never talk with nobody, that was probably the problem ... But now ... I think it was stupid ... Now I just respect myself and others. It's true ... Umm, umm, every single day when I'm here actually I'm getting new and new and new confidence, every single day.

All of these shifts in self-identity can play an important role in peace-building work by youth. At the same time, when asked, interviewees also reported that interacting with people from different backgrounds had changed their views in a variety of ways. Through their work in music and dance, participants had come to reject previously held stereotypes and xenophobic understandings and transform their own cultural strictures. This rejection of hegemonic attitudes offered prospects for greater moves towards understanding and equality, and a forum was created for engagement with strangers. Two major themes emerged: (1) the new selves they had created were able to create new visions of others and engage with them as such, and (2) these new identities they assigned to others were in contrast to previously held negative stereotypes. The statements below illustrate these points.

Yeah it changed heaps ... 'Cause I’ve never had like say African friends or like white friends. So it’s, for me it’s like you gotta keep with your own background. But coming here it’s like you can just be whoever you wanna be. Like you can be friends with this person, you can be friends with them. It doesn’t matter what other people say.

Um, well, as I said before, I had stereotypes, that’s all gone, and I just look at everyone else just like how I look at myself. So you know just like normal person, no one’s higher than, no one’s above no one, just chill, lay back, have a chat with them.

Yeah. Definitely. Like Africans they’re just people now, they’re normal. I’m not scared of them anymore ... They’re just other people.

Notably, the three white males I interviewed all reported that their involvement had not changed the way they see others. These boys were all involved in the break-dancing group, which was made up entirely of white youths, so they did not regularly interact with young people from other cultural groups in the same way as participants in the other streams. It is also interesting that girls and young people of colour reported awareness of and critical engagement with their own stereotypes, but the white boys denied any such experience. Again, this is not a broad enough study to extrapolate a grand argument from this, but it does draw attention to the need to look
at understandings across racial and cultural differences when researching youth peace-building.

Additionally, interviewees noted that their self-images were greatly impacted by the views of others. For one thing, many were aware that young people are often viewed negatively by society, and they wished to change this impression. Others provided narratives of how their self-confidence levels were raised through having people believe in them; and from there, youths expressed a sense of pride in changing the ways others viewed them.

Respondents had a sense of teenagers being belittled in society, rejected this as indicative of their character, and sought to counter these views through their actions in this peace-building project. Through this work, they wanted to redefine the stereotypes they felt had been universally applied to their age group by various older people in positions of power seeking to focus on what is ‘wrong’ with young people and manage these supposedly obvious problems through disciplining them to fit into accepted adult patterns of behaviour. Indeed, these young people saw their modes of engagement in creating peace as relevant, valuable and effective, whether adults see them as mature or not.

Uh, well, for me it was, for me it was like an opportunity to get out there and show them what I had. And what I wanna become. And show them that it’s not just crime that kids do, kids can also be good you know, like sometimes they’re just always saying, ah, teenagers are just like, just bad, but there’s other sides to us.

If people can see that teenagers can start off as complete strangers and in the end become good mates I guess it can show that if teenagers can do it why can’t adults.

Interviewees also reported gaining inspiration through the confidence of others. One important element in looking at these reports is that leaders in this case are peers rather than adult leaders who assert a hierarchical position of dominance. This work is for youth by youth, which gives these young people a level of ownership of the project. Likewise, they report seeing themselves and other young people as important and thus value each other’s opinions, as expressed in the following excerpts:

Uh, well, it allows people to get along, to be able to help each other and basically show each other what we can do. It does bring people closer
together because they can basically show each other and impress each other on what they can do.

Yeah, like, um, before I perform ... there's always someone that I talk to ... you know, somebody at [the project] ... will be like, 'What do you mean, brother? Go up and kill it!' ... Then I'm like, 'Oh yeah.' You know, I just get all amped up and shit like, you know, I'm gonna do it, I'm gonna do it. It's always like I just have this reassurance and it's really reassurance for some reason. And now I'm just kinda trying to give that to myself, you know what I mean ... you have self-confidence but also you need someone to amp you up ... Like a help-you-up thing.

Likewise, several interviewees also reported a sense of pride in successfully changing the negative images other people held of them:

Yeah, uh, yeah like I guess, I guess, it's both, because they look at me like a different person. Because I guess before I had like a chip on my shoulder type thing, you know ... I mean ... I was an arsehole back then. But then I was just like changed a lot and I also tell about, you know, tell people about that and I'm like, man, I'm changed ... But I've just changed so much when I came here and I think people noticed that a lot. They're like, 'Whoa, you've changed, man! Like coming here done changed your ego.'

Yeah ... It, uh, it will help me by showing other people that I have the courage to take care of the group and stuff like that.

Yeah ... taught me not to be so ashamed, like to be more out there now ... And like I'm doing that now and everyone's saying like, 'Oh, you're different, you're better now ... You're not so hiding, you're not hiding anymore.'

Identity is undoubtedly a key issue in peace-building. What is interesting here is that it seems clear from this study that music can play a major role in advancing identity shifts for young people, both of themselves and of others. This may be related to the centrality of music in youth culture, but in any case these responses suggest the need for further study on this important topic.

Making Space for Building Peace?

Finally, the third key topic identified from the interviews was space. It appears that the physical location where workshops and performances are held became a site for creating a different kind of space, one where imagined prospects for more peaceful
communities could become a dream and a reality. Indeed, providing such a physical location may be the first step towards creating those non-material spaces that are also needed. At the same time, comments from participants themselves confirmed this suggestion. Indeed, interviewees’ responses indicated that the physical location where workshops and performances are held became a site for creating a different kind of space, one where imagined prospects for more peaceful communities could become a dream and a reality. Further study is thus needed on an important question in this context: how do you ‘make space’ in more areas of life, that is, outside this one material space?

At the basic level, workshops involving peace-building through music and dance require a material space where participants can freely engage in these activities. After all, such projects require some physical place that allows room for bodily movement and, more importantly, freedom to produce ‘noise’ that would not necessarily be allowed in many public spaces. There is also an importance in the material aspect of having a substantive place in which these young people feel they have the room to come together in ways that would not necessarily be seen as possible in the wider community. In this way, the location, through its role in making space to create common ground, is important, not only as a necessity for engaging in art forms that require room to develop, but also for its theoretical ability to become a new sort of space that can be expanded to allow notions of wider inclusivity in surrounding places. It also provides a centre participants can return to and one from which they can reach out to those in the surrounding areas.

Indeed, the young people participating and facilitating express the desire to grow the project as much as possible, including taking it to an international level with more participants and more artistic creation. Through their musical productions, could the young people here be reflecting the sound of the ‘hood, but also creating it in a new and positive way? One of the arts workers recalled her time as a participant, expressing how it was important for young people to have this space to just be:

I was drawn to this space because, um, just as a teenager, you know, you go through firsts and pressure and all that kind of stuff and you just wanna kinda find a space where you can kind of vent out … when I first came to the workshops I felt like, wow, you know, what’s this all about? I came to realise that it’s, you know, there’s just a space where you can just vent out … share your stories, um, do what you want.
Another young arts worker pointed out how the space may also serve as a physical refuge for young people living in violence-ridden communities:

[The project is] held ... where there tends to be ... a lot of violence around in that community, so you just, having that safe space within that community for kids to come and hang out and just do whatever, and like yeah, they can, you know, go out into the community and not be afraid.

While the material space is important, it is not more important than what is occurring there. Instead, it is an integral enabling factor. The response one participant provided about whether the program had made him feel empowered lends itself well to the notion that there is a larger importance to the site beyond merely serving as a place to do music and dance. It is a place where something much more is occurring:

After school all of my friends are going home and I won’t going, I’m coming to [the project] and they walking and I saying for [the project] and they, like, ‘Why you going there?’ They don’t really know what happen here, they think I’m just coming to crump at this. But it’s not what’s happening, you know?

The crew leader explained how her experiences had taught her something similar:

When I first came to the workshops I thought it was just about music, but ... when I kind of mingled with ... a lot of the diverse cultures that were there ... like building an understanding of why I was there ... I came to realise that it was, like, us coming to the space was about coming, coming there, finding a safe space, um, where we can safely meet and just create positive change through music.

Many of the interviewees reported a desire to have a permanent site for the program. This is likely based on their desire for a space for coming together, as public spaces are becoming less accessible to young people,\(^\text{15}\) and the creation of this different kind of place means not only can young people come and hang out, but they can also interact with youths from other cultural backgrounds in a way that would pose more difficulties for them at certain other venues. This is important for peace-building, as positive peace is not just about people leaving each other alone, as in negative peace, but rather actually being able to come together and share in one place. In fact, in one arts worker’s description of peace, her first key point was that peace is

\(^{15}\) Anita Harris, *Future Girl* (2004).
‘people coming together and getting along … in one space’. She reported that over time her understanding had expanded to see this potential for building peace as the key purpose of the space and the programs. Several respondents expressed a shared vision in this regard, explaining how the site was a different kind of space for young people to come together, not just physically in the same space, but also to have significant interaction with one another:

Ah, like, well it’s, it’s not like other places where you just go and you don’t really know anybody there like the kids and everyone. It’s like yeah it just has the activities I want.

Yeah … ‘Cause you can’t just like talk to people from the same country like, you gotta know someone else here, you know? … Talk to them, know them, really befriend them. That’s how we make friends and peace here.

Part of the importance of this physical space as a place for youths to meet across difference relates to the identity issues I addressed earlier — young people report feeling this place becomes a different kind of space, one where they can become something different themselves:

coming here it’s like you can just be whoever you wanna be. Like you can be friends with this person, you can be friends with them. It doesn’t matter what other people say … It’s just, we’re just a family and that’s what matters the most.

With this explanation, the girl expressing it gives a glimpse of the complex inter-relationship between the previously discussed themes of dialogue and identity with the concept of space. While social conformity and related exclusions may be reinforced through typical discourse or dialogue, this space where music and dance are utilised as modes of communication offers room to change. Moreover, having this space where young people are supported and encouraged rather than chastised and judged is important, as creating this kind of safe space may actually make room for the shifts in identity previously discussed. As two young men explained:

Here it’s a lot better ‘cause you don’t get in trouble, you get to be different.

It was pretty hard for me … where any school I started I’d just fight … So like it was really hard, it was just the school sees you a different way and it’s just kinda you’re not welcome here anymore type of thing … So then you have to move.
On the whole, in a variety of ways space emerges as an important concept when looking at these young people’s experiences of peace-building through music and dance. It has the material aspect of giving them a safe place to just ‘be’, it provides opportunities for creation and transformation through serving as a new and unfamiliar locale, and it holds the potential to be expanded materially and conceptually.

**Challenges and Limitations of the Program**

As previously indicated, many participants reported feeling positive about the program. However, from my observation and interviews, there were also a number of unresolved challenges and limitations. For one thing, some participants noted problems associated with its finite nature. One young woman’s response shows an awareness of the space’s enabling function in allowing interactions that do not often take place in the outside community and shows her sadness that this space could not be permanently accessed:

> I also learned that you get, like, you become a family here. And it’s hard like when it comes to the end ’cause you don’t really see them anymore … But yeah.

Moreover, while the space is important for allowing identity shifts, this is not an easy fix for ensuring the space for identity transformation that enables consistently non-violent responses. As the crew leader notes, challenges remain. While the space may give participants room for seeing themselves differently, this is not a quick fix that can resolve all violent conflict in the community, or even for the young people involved in the project. As she noted, a couple of the participants missed the final performance for the workshops series because they had got in a fight in the neighbourhood and been arrested. She recalled that when she asked one of the young men involved what happened, he replied:

> It’s so different, um, when you’re not at, in your, when you’re not at the space. Um, I’m a different person when I’m in this space, but when I leave it’s so hard for me to try and contain myself or just, um, be that person that I am in this space.

Realising this, the crew leader noted that the young arts workers directing the project are working to find new ways to address these issues by offering the young people support outside the hours and location of the typical workshops. This
awareness of challenges is a major first step to adapting the program to meet the diverse needs of young people in the community.

Other challenges and limitations are also evident. When asked, all the youth respondents reported that anyone would feel comfortable coming to participate in the space. However, based on participant observation and discussions with the crew members, it is worth noting that more critical engagement may be required for program planners, as those who have continued coming to the workshops may not necessarily be the best placed to explain why some other youths or groups of youths have stopped or never started.

Gender is a particularly relevant aspect for exploration, as noted earlier in this article. Researchers on youth peace-building need to critically engage with programs to ask whether young women are being included and how they are being served. As Shelley Anderson says, researchers need to be asking urgent questions about how peace movements might propose alternatives for girls, empowering them and listening to them in order ‘to work together to create a better world for everyone’.16

Moreover, based on observing many interactions in which young male participants made derogatory comments and jokes about others being ‘gay’, I suggest that practitioners planning peace projects also need to take into account the possible need for sensitivity training around issues of sexuality. The crew leader in this case reported that they had done so in a previous project run by the company, because two young women who openly identified as lesbians were participating, and she overheard some other young people there making insensitive comments. This shows that the issue has been considered before and was met with a response. However, taking this reactive approach of only adopting such initiatives when certain leaders observe exclusive behaviours should be rejected in favour of a more proactive approach to attempting to prevent such exclusions from the beginning.

Conclusion

Despite these challenges, it is clear that this music and dance program made a significant contribution to the peace-building capacities of the young people involved. Respondents noted the possibilities for deploying music and dance as alternative modes of engaging in dialogue and thus resolving conflict. They also discussed how participation in these artistic forums aided in the construction of new identities for themselves and others; and space emerged as an important factor intricately related to identity and dialogue. While the workshops were limited to certain geographic and temporal boundaries, interviewees reported a strong belief that this space could be expanded throughout their communities and to create other places that enable these sorts of changes. Many reported a desire to increase numbers of participation in the workshops where they are currently held or take them out to other locations in the wider community. Such aspirations reflect these young people’s convictions about the ability of the workshops to create lasting, widespread change.

Further analysis obviously should be applied to these issues before presenting last findings, but at present the three key themes of dialogue, identity and space light the way towards further fields of consideration. Conducting this preliminary analysis of research data has been useful in framing plans for further study, as it has shone light on some additional areas for exploration and provided a training ground for this type of data collection. For now, though, this research serves the worthwhile role of offering scholarly attention, however brief, to the work young people are doing as active agents of change for building peace, and in my future research I will seek to contribute to greater understanding and engagement in this field.
ICAN Australia director and peace educator Jessica Morrison teaches children about pacifism at a toy gun burial in Melbourne organised by the Peace Organisation of Australia to mark the International Day of Peace.
The International Criminal Court and the ‘Peace versus Justice’ Dichotomy

Ted Nielsen

Introduction

The understanding of peace and justice as fundamentally juxtaposed has dominated the debate on the International Criminal Court’s (ICC) involvement in Uganda.¹ It is commonly argued that there is a trade-off between the two where peace has to be sacrificed in favour of justice or vice versa. However, this perception is grounded on a very narrow understanding of peace and justice. A shift in focus from ‘negative peace’ to ‘positive peace’, and from justice for the sake of retribution to justice for the sake of victims, renders the ‘peace versus justice’ dilemma obsolete and paves the way for a more appropriate approach to the issue of transitional justice.

The ICC is the latest manifestation of an increasingly acknowledged understanding that certain human rights trump state sovereignty. It was established in 2002 as a permanent international tribunal designed to prosecute individuals for genocide, crimes against humanity and war crimes. To date, 108 states have ratified the Court’s constitutive instrument, the Rome Statute, effectively giving it the

authority, under certain circumstances, to intervene in state affairs when it is believed that the perpetrators of these crimes are going unpunished.

The ICC can only prosecute crimes committed after the Rome Statute came into force. For this reason, the ICC prosecutor Luis Moreno-Ocampo has found himself engaged in countries where conflict is still ongoing or barely concluded. Currently, the prosecutor is involved in Uganda, the Democratic Republic of Congo, the Central African Republic and Sudan — countries that are all embroiled in severe internal conflict. Implementing criminal justice during conflict and, in some cases, parallel to peace processes has proven a difficult task for the prosecutor, especially in Uganda.

The indictment of several leaders of the Ugandan rebel group the Lord’s Resistance Army (LRA) has complicated efforts to negotiate an end to the 21-year-long conflict between the rebels and the Ugandan government. The rebel leaders’ unwillingness to finalise a peace deal unless given protection from the ICC and the prosecutors’ subsequent refusal to drop indictments have contributed to the collapse of what has been called ‘the best opportunity for peace that northern Uganda has had since the war began’.2

The situation has sparked a debate between proponents of ‘peace’, who argue that the ICC indictments have to be dropped in favour of peace negotiations, and proponents of ‘justice’, who argue that international justice must prevail in order to end impunity and deter future crimes. The underlying driving force of this ‘peace versus justice’ debate is a view that the two concepts are fundamentally opposed and that one has to be sacrificed in favour of the other. Furthermore, in the debate peace is understood merely as the absence of war and equated with peace negotiations, whilst justice is understood as punishment, represented by the ICC prosecutions.

The ‘peace versus justice’ dichotomy is not unique to discussions on the situation in Uganda; it tends to dominate mainstream debates on transitional justice. It is therefore imperative that we investigate the merits of this framework. The ICC will increasingly be confronted with this dilemma, which is largely a misconception. By broadening the narrow conceptions of peace and justice in this debate, I will attempt to show that the two are reconcilable and that a ‘trade-off’ is not necessary. Through this, I do not intend to present a solution to the problem of transitional justice or the Ugandan case specifically. Rather, my intention is to present a

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framework for approaching the issue that considers the needs of victims, promotes sustainable peace and reduces impunity.

The Ugandan case will be used as a point of reference throughout this discussion to illustrate the argument put forward. First I provide a brief outline of the ‘peace versus justice’ framework as applied to the ICC’s involvement in Uganda. Then I deconstruct this framework by reinterpreting the concepts of peace and justice. The final section applies the findings from the preceding section to the situation in Uganda and provides a brief discussion of its implications on transitional justice in the future.

‘Peace versus Justice’ in Uganda

Northern Uganda has been the arena of a violent conflict between the LRA and the government for more than two decades. The LRA is a rebel group led by Joseph Kony, a self-proclaimed ‘spirit medium’ who claims to be guided by God. In its campaign against the government, the LRA has abducted over 20,000 children and forced them to be soldiers or sexual slaves. The Acholi people, Kony’s own ethnic group, has borne the brunt of the LRA’s atrocities which, in addition to the abduction of their children, have involved rape, the severing of limbs and the killing of innocent people. However, atrocities have not been one-sided: the Ugandan armed forces are also suspected to have committed crimes that fall under the jurisdiction of the ICC.5

After several unsuccessful attempts to negotiate peace deals in the 1990s and an effort to get the rebel leaders to lay down their weapons by offering them amnesty, the Ugandan government decided in 2003 to refer the case to the ICC. By mid-2005 the Court had issued arrest warrants for five of the LRA rebel leaders, including Kony. Shortly thereafter, serious peace talks — believed to be the most promising to that

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6 There are several theories as to why the Ugandan government decided to involve the ICC. It was arguably a method employed to increase their leverage over the LRA rather than out of concern for human rights, as the government has refused to cooperate with the Court if its own military comes under investigation. For discussion on this, see Matthew Happold, ‘The International Criminal Court and the Lord’s Resistance Army’ (2007) 8(1) Melbourne Journal of International Law 159.
date — commenced. The LRA leadership made it clear from the start of negotiations that a peace deal would be contingent upon their gaining immunity from prosecution by the ICC. The fear of being arrested was evident at the negotiations in Juba, Sudan, as none of the leaders was physically present: they negotiated demands over a satellite phone through a mediator.8

In mid-2006 the Ugandan government, seeing a possible end to the conflict, took a more accommodating approach that favoured alternative accountability mechanisms rather than the retributive justice of the ICC prosecutions. Many of the Acholi people, who had suffered the most at the hands of the LRA, supported this approach. They favoured the mato oput and other traditional rituals that focus on reconciliation, forgiveness and integration as an alternative to the ICC.9 There was increased pressure from non-governmental organisations, scholars and aid workers on Moreno-Ocampo to drop the indictments in order for the peace process to proceed. The prosecutor made it clear that the indictments issued by the Court would ‘remain in effect and have to be executed’.10 Unfortunately, the Juba process collapsed earlier this year and the peace negotiations are currently in a deadlock, arguably due in part to the ICC indictments.

As the Court is bound to operate in conflict-ridden environments, the prosecutor will increasingly be facing situations where the pursuit of international justice is at odds with peace efforts and processes of national reconciliation. This has spurred a debate on peace and justice, and what priorities should guide the prosecutor. A recent commentator has framed the problem as being for the

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7 Some have argued that it was the ICC indictments that brought the LRA to the negotiation table: see, eg, Michael Otim and Marieke Wierda, ‘Justice at Juba: International Obligations and Local Demands’ in Nicholas Waddell and Phil Clark Waddell (eds), Courting Conflict?: Justice, Peace and the ICC in Africa (2008). Others have called this mere speculation and indicated that other factors motivated the LRA to negotiate: see, eg, Chris Dolan, ‘Imposed Justice and the Need for Sustainable Peace in Uganda’ (Speech delivered to the AMANI Forum ‘Training in Transitional Justice for Parliamentarians, Entebbe, 18 July 2008).


prosecutor to determine ‘which is more important, peace or justice’. Similarly, two other commentators have described the issue at hand to be:

whether the important but uncertain prospect of deterring future perpetrators and reducing future conflicts takes precedence over more certain benefits of an immediate end to an ongoing conflict.

These views demonstrate the framework in which the ‘peace versus justice’ debate takes place. It is a framework where justice is treated as synonymous with ICC prosecutions and negotiations are treated as the embodiment of peace. Most of all, the ‘peace versus justice’ debate treats the two as essentially incompatible, to the point where the promotion of one would be at the expense of the other.

**Widening the Perspective**

The perspective outlined above is not unique to discussions on the ICC and its operations. In fact, Chandra Sriram has pointed out that recent debates on transitional justice tend to ‘dissolve into simple oppositions of peace and justice, without taking account of the rich range of choices that regimes face’. The question that needs to be asked is how useful the ‘peace versus justice’ dichotomy is in understanding the dynamics of the two, and the situations in which they are assumed to be conflicting. This dichotomy hinges on a rather narrow conceptualisation of peace, where it is equated to the mere absence of direct or physical violence. Even though this conception of peace dominates international relations, it has failed to be satisfactory for some. Scholars within the discipline of peace studies, pioneered by Johan Galtung, have challenged this view and offered a more inclusive interpretation of peace.

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12 Grono and O’Brien, above n 8, 18.
Peace Reinterpreted

Galtung moved from the strictly negative understanding of peace, which views conflict as primary and peace as a construct, by defining peace as the absence of what he called ‘structural violence’. ‘Structural violence’ is not actor-generated, but originates in the structures and institutions in social, political and economic life. It hinders us from ‘realising our potential’ and meeting our basic needs.\(^\text{14}\) For example, structures that produce inequality and the unequal distribution of power, such as racism, aggressive capitalism and sexism, can be regarded as structural violence. Galtung therefore makes a distinction between ‘negative peace’, meaning the absence of physical violence, and ‘positive peace’, which in addition to ensuring physical security also requires the absence of ‘structural violence’.\(^\text{15}\)

Despite its very broad definition, ‘positive peace’ has clear benefits compared with the reductionist interpretation of peace dominating the ‘peace versus justice’ debate. A positivist approach would be concerned with building a durable and sustainable peace by addressing the underlying causes of violence rather than treating negotiations as the only cog in the peace process. Attempts at sustainable peace begin long before negotiations and continue after their conclusion, recognising that the process is just as important as the outcome. Graeme Simpson has argued that the current obsession with peace negotiations ‘undermines attempts to address the deeper underpinnings of violence or to anticipate some of the fault lines for its potential re-emergence’.\(^\text{16}\)

Justice Reinterpreted

Just as the current debate has equated peace with negotiations, justice has been equated with ICC prosecutions. This narrow understanding fails to recognise that the retributive justice of the ICC is only one among many available accountability mechanisms. The pursuit of justice in the form of prosecutions has become an end in itself, and it fails to consider whom justice is for. Many of the victims of the LRA’s atrocities in northern Uganda, especially the Acholi, have expressed their support for

\(^{15}\) Ibid 183.
\(^{16}\) Graeme Simpson, ‘One among Many: The ICC as a Tool of Justice during Transition’ in Waddell and Clark (eds), above n 7, 74–5.
the use of traditional accountability mechanisms in lieu of criminal prosecutions. The strong focus on reintegration, forgiveness and reconciliation puts the restorative justice of *mato oput* in stark contrast with the ICC’s focus on punishment and imprisonment. That is not to say that the only type of justice worth pursuing would be in a traditional form — that would be yet another misleading polarisation. A more productive and rewarding interpretation of justice would be to recognise that it is ultimately owed to the victims of heinous crimes.

Thus, justice cannot be done when imposed against what is believed to be in the best interests of the victims. For justice to be done in a way that supports victims, builds sustainable peace and reduces impunity, the process must be owned by its main beneficiaries. This does not exclude retributive or restorative justice but demands a negotiation over which accountability mechanisms to employ.

In the end the two concepts are not at odds at all, as reconciliation with the past is an important step for victims to ‘realise their potential’, which makes justice done in the best interests of the victims a precondition for ‘positive peace’. It can be concluded that it is the reductionist understanding of peace and justice that fuels the misperception of incompatibility. A deeper analysis of the two concepts has shown that the proper application of justice can aid efforts of peace-building rather than compromise them.

**Lessons for the Future of Transitional Justice**

By shifting the focus from negative to positive peace and from justice for the sake of retribution to justice for the sake of the victims, we render the ‘peace versus justice’ dilemma obsolete and pave the way for a more appropriate approach to the issue of transitional justice. As the two concepts are closely interrelated and depend on each other, the way forward when dealing with conflicts in transition is not to determine which is more important — peace or justice — but rather to apply a process where the appropriate measures are negotiated and compromises made. The process should be owned by the victims.

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17 Tim Allen, ‘Ritual (Ab)use?: Problems with Traditional Justice in Northern Uganda’ in Waddell and Clark (eds), above n 7, 47–9.
19 Dolan, above n 7.
The application of these ideas in Uganda requires a proper understanding of the needs of the victims of the crimes in question. However, victim communities are not homogenous in their views and, as the structures and processes that shape their needs and expectations continually change, their perception of peace and justice is subject to a certain fluidity. Surveys conducted in northern Uganda have shown that the prospect of peace had a significant impact on the preferred justice mechanisms in victim communities. With an increased knowledge of the ICC and a possible end to the conflict in 2007, people tended to support traditional ‘soft’ accountability methods over ‘hard’ penal action.²⁰ Moreover, Acholi representatives have throughout the peace process expressed their preference for an end to the conflict rather than the punishment of Kony and his accomplices. Local leader Milton Munu explained:

If you count all the loss over twenty years it can’t account to the same as these five indicted men, so really we don’t care what happens to them. We just want peace.²¹

It seems that when ravaged by war and violence it would be natural to seek an end to the conflict before one seeks justice. Yet, as the prospect of peace grows, perceptions of justice might change as people try to reconcile with their past. This has led some proponents of ‘positive peace’ to argue that peace, in its negative sense, is necessary for justice to be done. However, it should be made clear that it is merely a matter of sequencing and that ‘sequencing should be distinguished from prioritization’.²²

**Practical Implications**

It is highly unlikely that the ICC would embrace any of the findings presented in this discussion. While it has been pointed out that the *Rome Statute* provides the prosecutor with the option to withhold investigations or prosecutions if it is believed to be in the ‘interest of justice’ having taken into account the gravity of the crime in

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²⁰ Otim and Wierda, above n 7, 26.
question and the interests of the victims,\textsuperscript{23} this is still just a matter of interpretation. In an internal policy paper on ‘the interest of justice’, the office of the prosecutor has recognised the importance of peace processes but pointed out that ‘the broader matter of peace and security is not the responsibility of the Prosecutor’.\textsuperscript{24} Nevertheless, the Court’s aspiration to be impartial and apolitical disregards the fact that it has jurisdiction over nationals of states with conflicting moral and legal values and does little to resolve the diversity in conceptions of justice.\textsuperscript{25} Still, the ICC’s need for political legitimacy, as a new controversial institution met with scepticism by some states, requires it to display strength through the exercise of its powers, which necessitates prosecutions. Paradoxically, it is quite possible that realpolitik will be the central motivator for the prosecutor to pursue indictments in the face of a political reality to which he claims to be impartial.

**Conclusion**

The purpose of this discussion has not been to find a solution to the ICC’s encounter with what is commonly presented as the ‘peace versus justice’ dichotomy. Rather the purpose has been to debunk the perception of peace and justice as being in conflict with each other. Narrow interpretations of the two concepts have not only fuelled this misperception, but they have also created an unsatisfactory framework for debate on transitional justice that will fail to produce productive conclusions. It has been argued in this article that a wider understanding of peace and justice not only reveals the interdependency of the two, but it also facilitates a sustainable peace in the best interests of those who are the victims of conflict. While this approach is bound to have little impact on the actions of the ICC, one can hope that activists, governments and the academic community will recognise the logical and pragmatic reasons for avoiding a narrow conceptualisation of peace and justice in the future.


\textsuperscript{25} Blumenson, above n 18, 853.
Life on a Sandbank: Child Soldiers in International Refugee Law

Jessie Smith*

Introduction

‘It’s like living on a sandbank — we don’t know when we’re going to submerge.’

The involvement of children in modern armed conflict raises difficult questions for international law. Some states consider the protection of children’s rights to be at odds with their imperative to ‘defend the realm’. Child soldiers challenge the conventional boundaries of humanitarian law and notions of criminal responsibility, especially in relation to war crimes and crimes against humanity. The use of child combatants also raises issues in refugee law, where the children often straddle the divide between ‘persecutor’ and ‘persecuted’. With an increased effort to end the impunity of those responsible for recruiting child soldiers,

* This article flows from the author’s experience in a West African refugee camp. In this particular settlement, thousands of former child soldiers were living in limbo, denied refugee status, often with no alternative but to support themselves through the sex or drug trade. They were highly vulnerable to re-recruitment for other regional conflicts, and lived with a constant disillusionment that both the local community and ‘international community’ regarded them as perpetrators, rather than victims. I would like to extend my sincere thanks to Dr Michelle Foster, who was a constant inspiration as my lecturer for Refugee Law at the University of Melbourne; to Tim Rogan, who helped edit the article in transit from Heathrow to Singapore — your comments were insightful and very helpful; and finally to the child soldiers in the ‘Gap’ at Buduburam Refugee Camp in Ghana, who shared their stories and pain. This article is for Georgi, in hope one day you find asylum.

1 Safiatu, former girl soldier at the Buduram Refugee Camp, Ghana, in 2007.
it should follow that some degree of protection is extended to former child soldiers through the Refugee Convention. This would acknowledge that the children have suffered persecution and face a significant risk of persecution in the future. However, the application of the Refugee Convention to former child soldiers in common law countries has been piecemeal at best.

This article examines how common law courts give effect to international refugee law in relation to child soldiers. The first part looks at the involvement of child soldiers in modern conflict and how international instruments regulate this. The second part assesses whether child soldiers constitute ‘a particular social group’ for the purposes of the Refugee Convention, and argues that tribunals and superior courts often make errors in both fact and law in determining refugee status for applicants who were formerly child soldiers. The third part examines the application of the exclusion clause of the Refugee Convention in child soldier cases, comparing the approaches taken in Australia, Canada and the United States. It then considers how the principle of aut dedere aut judicare — ‘the duty to extradite or prosecute’ — may encourage refugee-receiving states to take responsibility for former child soldiers in the interests of justice and rehabilitation.

**The Idea of ‘Child Soldier’**

‘Children make the best and the bravest ... Don’t overlook them.’

The involvement of children in armed conflict is not new; children have long been used as the fodder of war. At any given time, around 300,000 children are embroiled in violent conflict worldwide, and the use of children as soldiers is not limited to Africa. Although recent reports indicate that the number of conflicts involving

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3 A Liberian militia leader quoted in Peter Singer, Children at War (2005) 87.
6 Countries where children have been used as soldiers in the past four years include Afghanistan, Burundi, the Central African Republic, Chad, Colombia, Cote d’Ivoire, the Democratic Republic of Congo, India, Indonesia, Iraq, Israel and the Occupied Palestinian Territory, Myanmar, Nepal, the Philippines, Somalia, Sri Lanka, the Sudan, Thailand and Uganda: Coalition to Stop the Use of Child
children has decreased since 2004, this is owing to an overall decrease in the number of active hostilities rather than international cooperation to end the recruitment of child soldiers.7

The reasons for using children in conflict are complex and varied. According to Guy Goodwin-Gill and Ilene Cohn, these may include a need to fill the ranks, a desire to perpetuate institutionalised discrimination against certain ethnicities, ideological vigour, and increasingly a conviction that children are malleable enough to make the fiercest of fighters.8 One report has noted that ‘victims and witnesses often said they feared the children more than the adults because the child combatants had not developed an understanding of the value of life’.9

Methods of traumatising children into submission are varied, ranging from fostering a dependency on the group to disengaging children from the violence they witness and perpetrate.10 The first phase of initiation can include anything from making children watch violent videos to forcing them to kill their parents or other detainees. Religion, voodoo and magic are also central to indoctrination, and children have been forced to drink blood and feast on human organs. Such practices imbue them with a belief that they are indestructible, and can have bizarre consequences, as Stephen Ellis has observed in relation to the National Patriotic Front of Liberia (NPFL):

Many of the men wore wedding gowns, wigs, dresses, commencement gowns from high schools, and several forms of ‘voodoo regalia’ … They believed that any person who wore talismans and tattoos, and strictly adhered to the laws of not eating pumpkin, having sex, touching lime and taking a bath, could not be killed by enemy fire.11

7 Ibid.
8 Cohn and Goodwin-Gill, above n 4, 167.
9 Singer, above n 3, 83.
10 Ibid 72.
Who Is a Child Soldier?

Garca Machel has defined a child soldier as ‘any child — boy or girl — under the age of 18 who is compulsorily, forcibly or voluntarily recruited or used in hostilities by armed forces, paramilitaries, civil defence units or other armed groups’. This definition is contested and should be considered in light of different threads of international law relating to children. In the context of refugee law, the meaning of ‘child soldier’ may be critical to establishing a claim. Issues of age, agency and the status of the armed group can all be relevant.

Generally, boy and girl soldiers perform different roles, but sometimes these overlap. Boys as young as seven have been known to take on combat roles, but depending on their age and strength they might instead be used by armed forces as porters and cooks. Girls are most often used for domestic work and sexual slavery, and may be forced to marry soldiers. At times, they have been considered the most vulnerable class of child soldier, yet too often they are not assisted by disarmament, demobilisation and reintegration programs. This is largely because the experience of girls in war is not considered as grave as the experience of boys. Many girl soldiers are dismissed as merely being the wives of soldiers or ‘attendants’. Adjudicators must be aware that former girl soldiers are often subject to subtler yet no less harmful forms of persecution than their male counterparts.

Age is an important consideration in refugee claims by former child soldiers. It can either position the claimant as a victim of persecution and crimes under international law, or it can position the claimant as a perpetrator of crimes under international law. The question of age is often complicated in situations where conflict is protracted. The 1989 Convention on the Rights of the Child defines a child as a person who is under 18, but it acknowledges that the ‘age of majority’ may be attained earlier. In any society, what may be considered the age of majority will

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12 Machel, above n 5.
14 Singer, above n 3, 58.
15 For example, in Liberia the civil war ebbed and flowed for 14 years.
16 Opened for signature 20 November 1989, 1577 UNTS 44, 28 ILM 1457, art 1 (entered into force 2 September 1990). The age 18 is included in other international instruments dealing with children, such as the African Charter on the Rights and Welfare of the Child, art 2, OAU Doc CAB/LEG/24.9/49 (entered into force 29 November 1999), which has been ratified by 43 of the 53 African states.
depend on not only legal but also cultural and religious norms. In addition, states often accord different mantles of responsibility to young adults, such as the right to vote, marry, drive a vehicle, pay tax and perform military service. It has often been said that the right to vote is a good benchmark for determining adulthood, as it declares someone mature enough to undertake civic responsibility. Ilene Cohn has said that it ‘seems wrong to condemn the un-enfranchised to die as a consequence of political decisions over which they can exercise no influence’. However, there is no direct relationship between voting age and the age that children will be considered ‘adults’ for military service.

There is growing legal authority that the recruitment of children under 15 for military service is a war crime under customary international law. For those recruited between 15 and 18, the case is less clear, and their ability to seek relief will depend on the status of the armed group with which they operate. The additional protocols to the Geneva Conventions are a good starting point for assessing the ‘age of majority’ for children in armed conflict. Each prohibits the recruitment of children under 15 into direct hostility.

Protocol I, dealing with international conflict, uses qualified language: states need only take all feasible measures ‘in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces’. This perhaps reflects the pressures of state sovereignty, allowing child volunteers to involve themselves in less direct ways. Protocol II, dealing with conflict of a non-international character, provides a stricter test, proscribing parties from using children under 15 whether their participation is direct or indirect. Neither of the protocols actually defines the concept of ‘child’, raising the question whether youth who have been recruited

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17 Cohn and Goodwin-Gill, above n 4, 7.
18 Ibid.
19 Ibid 8.
20 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3, art 77(2) (entered into force 7 December 1978).
between the ages of 15 and 18 are still considered children and thus deserving of other rights flowing from this status.22

Other sources of law are also potentially relevant, including human rights treaties. Although article 1 of the Convention on the Rights of the Child defines ‘child’ as someone under 18, article 38(2) concerning the recruitment of children seems to adopt the less arduous test of Protocol I to the Geneva Convention.23 This is curious as the enlistment of children into the military is certainly contrary to article 3 concerning the best interests of the child and article 6 on the right to life and survival. The travaux préparatoires of the convention show that the drafting of article 38(2) was highly contentious. In the 1986 working group, states such as the United Kingdom, Canada and Bangladesh argued for the explicit qualification of the definition of ‘children’ for the purposes of military service; others such as Venezuela pushed for the minimum age to be raised to 18.24 In the 1987 working group, Switzerland criticised the adopted text, arguing that the protection should be at least the level already provided by the additional protocols to the Geneva Convention.25

There have been recent moves in human rights law and labour law to raise the age to 18. The most important of these has been the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.26 The regular forces of a state party are prohibited from using children under 18 in direct hostilities and from compulsorily recruiting them, and there is a blanket prohibition on the recruitment of children under 18 into the irregular armed forces of a state party. International criminal law also attaches individual responsibility to the crime of recruiting child soldiers, but only for children recruited under 15 years of age. In Prosecutor v Samuel Hinga Norman,27 the appeal chamber found that the

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23 A number of states objected to this definition and entered formal reservations. These included Andorra, Argentina, Austria, Colombia, Ecuador, Germany, the Netherlands, Spain and Uruguay.
25 Ibid 508. Note that art 41 of the adopted convention text arguably guarantees that other humanitarian law instruments, such as Protocol II for non-international conflicts, are to continue to operate. However, the conflict might not meet the threshold requirements under art 1 of Protocol II.
27 Case No SCSL–2004–14–AR729(E), Appeals Chamber, Special Court for Sierra Leone, Decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004.
criminalisation of child recruitment had crystallised as a customary principle of international law.

Both government and non-government groups use child soldiers. Governments have much greater leeway because of the notion of state sovereignty. This has profound implications in the refugee context, as children recruited by government forces or fearing reprisal from the government often face additional challenges when claiming asylum.\(^28\) However, the current indictments of former Liberian president Charles Taylor and former Sierra Leonean vice-minister for defence Hinga Norman indicate that government leaders cannot enjoy impunity for using children under the age of 15 as soldiers.

Questions of ‘agency’ are also often considered in the determination of individual culpability and are particularly relevant in refugee claims.\(^29\) The analysis varies significantly between jurisdictions. It is clear that context is fundamental. The factors which push children into armed conflict include ‘poverty, education and employment, family and friends, politics and ideology, specific features of adolescence and culture and tradition’.\(^30\) Decision-makers should be cautious when approaching questions of agency, and conscious of the many pressures of survival that face children in times of war or hardship.

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\(^{28}\) Escape from government conscription is usually seen as evasion of national service. Refugee status will not normally be granted to conscientious objectors. See, eg, *Mehenni v Minister for Immigration and Multicultural Affairs* (1999) 164 ALR 192. However, it may be granted if the penalty for desertion is unusually harsh and to those fleeing military regimes that commit gross human rights abuses: see *Sepet and Bulbul v Secretary of State for the Home Department* [2004] AC 15 (per Lord Bingham).

\(^{29}\) See Australian Refugee Review Tribunal Reference No N96/12101 [1996] RRTA 3349. The tribunal considered a number of factors, including the claimant’s forced recruitment into the National Patriotic Front of Liberia, his inability to escape, and that he had deliberately shot poorly during ‘riots’ so as to lessen the harm to victims. Cf *Penate v Canada (Minister of Employment and Immigration)* [1994] 2 FC 79, where a Salvadoran army commander, who was ‘voluntarily’ enlisted at age 13 into the Salvadoran army by his uncle, was held to have control over his decisions. In this case, the Court found that the ‘voluntary’ nature of his enlistment, his progression to the rank of corporal, and his failure to dissociate despite the apparent atrocities committed by the army pointed to his individual responsibility.

Child Soldiers as Refugees

This part of the article assesses whether former child soldiers constitute ‘a particular social group’ under article 1A of the Refugee Convention. A refugee is someone with a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.

A narrow construction of this definition has sometimes led to grave injustice.31 In cases involving former child soldiers, courts must keep the protective objects of the Refugee Convention at front of mind. The following analysis draws on published cases from the United Kingdom, the United States and Australia dealing with child soldiers, as well as publications of the United Nations High Commissioner for Refugees (UNHCR) and other academic writings.32

Well-Founded Fear

In order to prove refugee status, applicants must show that they fear persecution and that the fear is well founded. The task of decision-makers is usually to ‘attempt to prophesy’ the potential harm the applicant might face if returned to his or her country of origin.33 The idea of ‘fear’ connotes the ‘mental or emotional state’34 of the individual and how he or she appreciates the persecution. The UNHCR Handbook

31 Kirby J of the High Court of Australia has argued that, as the definition is a ‘compound conception’, it would be a mistake to overly isolate each element. Each part must be interpreted with the object and purpose of the convention in mind so that an overly strict analysis does not defeat the protective aspirations of the treaty: Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1, 109. ‘A broad approach is what is needed, rather than a narrow linguistic approach’: R v Secretary of State for the Home Department; Ex Parte Adan [1999] 1 AC 293, 305 (per Lord Lloyd of Berwick).

32 Superior courts have approved the use of UNHCR materials as an assistant to developing policy: see Minister for Immigration and A v QAAH [2006] 231 CLR 1, 76 (per Kirby J); INA v Cardoza-Fonseca 480 US 421, 439; R v Secretary of State for the Home Department; Ex Parte Adan [2001] 2 AC 477 (per Lord Woolf).


34 Re Minister for Immigration and Multicultural Affairs and Another; Ex Parte Miah [2001] 206 CLR 57, 62 (per Gaudron J).
places great weight on the role of ‘fear’ in refugee determinations, but the Michigan Guidelines take issue with this, pointing out that the UNHCR’s approach could result in the exclusion of ‘at-risk applicants who are not in fact subjectively fearful, or whose subjective fear is not identified as such by the decision-maker’. This is especially so in cases involving children, who may not be able to express anxiety, and those who have suffered trauma. As child soldiers are often emotionally stunted and severely traumatised, ‘fear’ should be construed as a forward-looking expectation of risk.

Child soldiers have reason to fear many things, and the expectation of risk can relate to both conflict and post-conflict situations. Decisions usually hinge on the ‘objective’ assessment of risk and the appropriate standard of proof. A finding that the applicant does not satisfy the ‘well-founded’ threshold will allow a state to refouler, or return, the claimant. Thus it is essential that adjudicators have a clear understanding of what is happening in the state of origin. In terms of child soldiers, some decision-makers are either not alert to specific types of harm faced by this group or lazy in gathering the required evidence. They might also apply an evidentiary threshold that is too high.

The UNHCR Handbook provides that, as long as claimants can establish the prospect of persecution ‘to a reasonable degree’, then the fear should be considered well founded. There now seems to be a thread of consensus among decision-makers that a ‘percentage’ approach is inappropriate. The inquiry is only whether risk of persecution can exist. In Australia, the relevant standard of proof is the ‘real chance’ test from the High Court case of Chan Yee Kin v Minister for Immigration and Ethnic Affairs, according to which fear can be well-founded even if persecution is unlikely to occur. However, ‘far-fetched’ possibilities should be excluded.

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38 This low standard of proof is consistent with the UNHCR Handbook’s emphasis on subjective elements and its position that the applicant’s statements are of greater weight than ‘a judgment of the situation prevailing in [the] country of origin’: [42].
40 McHugh J at 448.
Child soldiers may fear persecution by their former rebel faction or other irregular forces, by the government and its army, or by the civilian population. They may fear punishment for desertion or attacks against an opposition fighter, or they may fear re-recruitment. These issues were discussed in the Australian Refugee Review Tribunal decision of N96/12101, in which it was found that there was a ‘real chance’ that the claimant could face punishment from the National Patriotic Front in Liberia or other fighting factions because of an imputed political opinion. In this sense, he could face punishment for desertion or reprisal as an opposition fighter. In addition, the tribunal found that although forced re-conscription in itself does not satisfy the nexus to imputed political opinion — that is, he is not being recruited because of his political opinion — any attempt to dissent or escape would certainly incur a punishment for a political opinion imputed to him by these acts.

The tribunal is to be commended in this case for its recognition that these forms of harm can exist and do harm child soldiers independent of the ‘general chaos’ of war. This finding is in line with the reasoning in Chan, for although it may be unlikely that the claimant would come before the soldiers of his old battalion, the risk of persecution was certainly well founded. The adjudicator concluded that, considering the totality of the circumstances in his country of origin, the risk of persecution was far from fanciful.

In the US case of Lukwago v Ashcroft, the claimant was abducted at age 15 by the brutal Lord’s Resistance Army in northern Uganda and suffered significant harm. He argued that he faced a real risk of persecution from the Ugandan government and from the Lord’s Resistance Army. On appeal, there was a brief discussion of the standard of proof for ‘well-foundedness’ proposed by the US Supreme Court in INS v Cardoza-Fonseca. In that case, the Court had found that the

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41 Similarly, ‘A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation’: Minister for Immigration and Ethnic Affairs v Guo Wei Rong (1997) 191 CLR 559, 15.
45 In this case the claimant was fleeing Charles Taylor’s National Patriotic Front of Liberia.
46 In regions such as West Africa, cross-border re-recruitment of former child soldiers is rife.
47 This accumulative approach is approved by the UNHCR Handbook at [52].
48 329 F 3rd 157 (3rd Cir 2003).
translation of the Refugee Convention into domestic law had produced two standards of proof: one for the granting of asylum\(^{50}\) and another for the withholding of deportation, with the latter being higher.\(^{51}\) Justice Stevens rejected the argument that ‘well-founded fear’ was equal to ‘a clear probability of persecution’:

There is simply no room in the United Nations’ definition for concluding that because an applicant only has a 10 per cent chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening.\(^{52}\)

He concluded that as long as an objective situation was established by the evidence, ‘it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility’. This is arguably a low threshold.

However, a higher threshold is required when challenging questions of fact.\(^{53}\) Findings about ‘persecution’ and a ‘well-founded fear of persecution’ are considered questions of fact. The courts must use the ‘deferential substantial evidence standard’.\(^{54}\) ‘Substantial’ means ‘more than a mere scintilla’.\(^{55}\) In Lukwago, the Court interpreted this standard to be one of reasonable probability. Probability — rather than the asylum test of ‘possibility’ — suggests something that is ‘likely’ to happen as opposed to ‘capable’ of happening. In relation to persecution by the Lord’s Resistance Army, the Court in Lukwago overturned the finding that the claimant had no greater risk than any other member of the Ugandan population. It concluded, based on testimony and reports by Human Rights Watch, that as a ‘former child soldier’ the claimant could be targeted by the Lord’s Resistance Army.

However, the Court found that his other claim — that he was at risk of persecution by the Ugandan government — did not meet the higher evidence standard. This is curious, as the kinds of harms anticipated were of the same severity. Conflicting evidence was mounted as to whether the government was continuing to charge former child soldiers with treason, to subject them to torture and to use them

\(^{50}\) Immigration and Nationality Act 1952 §101(a)(42)(A).


\(^{52}\) Stephens J at 440.

\(^{53}\) This is preferable to the Australian approach, where refugee claimants can only seek judicial review for jurisdictional error.

\(^{54}\) Abdille v Ashcroft 242 F 3rd 477, 483–4 (3rd Cir 2001).

\(^{55}\) Senathirajah v INS 157 F 3rd 210, 216 (3rd Cir 1998).
to clear landmines. The tribunal concluded that persecution was ‘unlikely’ and therefore the appeal standard had not been satisfied. This was based largely on evidence of an ‘official amnesty’. The Court gave considerable weight to two sources of evidence: an outdated Amnesty International report and the opinion of the US embassy in Kampala. This was despite the fact that more recent reports had been published by Human Rights Watch and expert witnesses had argued that the fragile amnesty had not trickled down to lower ranks of government soldiers.56

It must also be kept in mind that the term ‘government’ refers not only to high-level political figures, but also to any agent, police officer or foot soldier that the government is responsible for. As such, the scope for persecution by the government is vast. Decision-makers must acknowledge that, in a state of civil or post-civil war, child soldiers are often stigmatised as the enemy and blamed as the cause of social breakdown. The failure to recognise the government as a persecutor in Lukwago illustrates how the ‘objective’ assessment is often frail and superficial.

This superficiality was clear also in the British cases of AJ (Liberia) v Secretary of State for the Home Department57 and SB (Risk Freetown) Sierra Leone CG,58 both of which involved former child soldiers who feared persecution from civilians. The United Kingdom has adopted a similar approach to the United States and Australia for the standard of proof required. A ‘reasonable likelihood’59 of harm is sufficient; the standard of proof is ‘not a demanding one’.60

In SB (Risk Freetown), the applicant was a former child soldier who had been abducted by the Sierra Leonean Revolutionary United Front at the age of 13. His father was killed and he had lost all contact with his family. In his testimony, he gave numerous examples of physical abuse by the civilian population, who either recognised him as a former persecutor or associated him with the revolutionary group. At one stage, he was almost beaten to death by locals in a refugee camp. Despite this

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56 Two months before the case was heard, Human Rights Watch released a report documenting the arbitrary arrest and torture of suspected Lord’s Resistance Army sympathisers: State of Pain: Torture in Uganda (2004).
57 [2006] EWCA Civ 1736.
59 R v Secretary of State for the Home Department; Ex Parte Sivakumaran [2003] 1 WLR 840.
60 GM (Eritrea) and Others v Secretary of State for the Home Department [2008] EWCA Civ 833.
past persecution, the inquiry focused on the risk of harm from the government defence forces, which was dismissed by evidence of a ceasefire.61

In AJ (Liberia), the Court found that the claimant had never been at risk of persecution by the community. It considered it implausible that he would be recognised as a former child soldier on the streets of Monrovia. As a matter of fact, this is erroneous. There are many ways that the claimant could have been identified.62 However, what is perhaps more concerning is that the tribunal made an error of law. The question should not have been whether the claimant feared recognition but whether he feared the persecution that could flow from his status as a former child soldier.

The harm feared need not be violent to be damaging. Stigmatisation by the community affects both boy and girl soldiers. Where initiation into an armed group closely mirrors cultural practices of transition into adulthood, many children fear being punished as adults on return.63 This is particularly so for former girl soldiers forced to return home: they face stigmatisation for having been sex slaves as well as for belonging to a rebel group. On top of this, former girl soldiers will often return with HIV/AIDS and other sexually transmitted diseases, physical disablement and severe psychological trauma. Some will have ‘rebel babies’ — the fruit of their rape.

As one girl put it:

I’m not happy at all because they ruined me. I had to cut short my studies. I have no hope that I will one day be somebody. I gave birth to two children and was not prepared. I have two children and no means of survival. I worry about what will happen next.64

In summary, the superior courts have confirmed that the threshold for ‘well-founded fear’ is not high. Despite this, adjudicators continue to apply tests that are erroneous in both fact and law. Ultimately, the equity of a decision hinges on the breadth and depth of evidence. In cases where there are conflicting yet credible sources of evidence, caution must be exercised and a result that benefits the claimant

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61 It is unclear in this case whether the failure to consider harm from the community was an error on behalf of the plaintiff — for not emphasising this harm — or an error on behalf of the decision-maker.
62 The evidence revealed that he had legions on his skin consistent with the administration of drugs. He might also have had tattoos or wounds consistent with being a fighter.
64 Human Rights Watch, above n 56.
is to be desired. Where evidence is scarce, a decision-maker can reasonably infer persecution from the totality of the facts presented, as the standard of proof is low. When considering the ‘agent’ of persecution, it is important that decision-makers recognise the number of representatives of the agent. Finally, when dealing with persecution by the civilian population, adjudicators need to be alert to the different shades of persecutory conduct. It is likely that stigmatisation by the community will be the most controversial. This is because the ‘traditional’ idea of persecution seems to be state-based.65

**Persecution**

The focus in this part of the article is whether stigmatisation by the community can amount to serious harm. In some cases, decision-makers overlook persecution by the community. When this happens, applicants must base their claims solely on past persecution. The *Refugee Convention* does not define ‘persecution’, and the *UNHCR Handbook* notes that attempts to do so have had little success. The *Vienna Convention on the Law of Treaties* provides that any treaty should be interpreted in context and in light of its object and purpose.66

The *Refugee Convention* is clearly concerned with the protection of human rights: it refers explicitly to the *Universal Declaration of Human Rights* in its preamble. ‘Persecution’ should be liberally construed so as to give effect to these rights, especially as new norms concerning gender and other ‘fringe’ groups develop, and it should include a broad spectrum of harm — from ‘traditional’ ideas of government persecution of (male) political dissidents through to the marginalisation of women for transgressing social norms. If the ambit of persecution is inclusive and nuanced, then the most contentious question becomes one of threshold: how serious must the harm be in order for it to amount to persecution?67

McHugh J in the High Court case of *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* provides some general principles on persecution.68 For example, it must be oppressive so that the individual cannot be

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65 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, 22 (per Gleeson CJ).
67 Some jurisdictions such as Australia have raised the threshold by statute, which now requires ‘serious harm’: *Migration Act 1958* (Cth) s 91R.
expected to tolerate it, and there should be a real chance that the conduct will be repeated on return. However, persecution need not already have been suffered.\textsuperscript{69} It is unclear whether, in the Court’s view, stigmatisation meets the ‘serious’ threshold. Although not \textit{prima facie} violent, stigmatisation is equally damaging, especially for girl soldiers. Punishment for the transgression of cultural norms has been acknowledged as a form of persecution by the UNCHR,\textsuperscript{70} and the UK House of Lords in the case of \textit{Hoxha} held that community rejection after sexual violence amounted to persecution.\textsuperscript{71} Baroness Hale accepted that the consequences of sexual violence are ‘long lasting and profound’, particularly if the victim comes from a community which adds to the earlier suffering she has endured … There are many cultures in which a woman suffers almost as much from the attitudes of those around her to the degradation she has suffered as she did from the original assault.\textsuperscript{72}

For returning girl mothers, it is often very difficult for communities to re-accept them, even though they know that the armed group is responsible for their ‘ruin’.\textsuperscript{73} In the words of Baroness Hale:

\begin{quote}
The victim is punished again and again for something which was not only not her fault but was deliberately persecutory of her, her family and her community.
\end{quote}

Although there are some examples where community ‘cleansing’ has taken place to heal these girls, it may not be enough to overcome communal shame or to remove taboos about welcoming ‘murderers’ and ‘ruined women’ back to the village.\textsuperscript{74}

\begin{itemize}
\item \textsuperscript{69} Respondents S152/2003 (2004) 222 CLR 1, 72 (per McHugh J).
\item \textsuperscript{70} UNHCR, \textit{Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees} (2002) 2, 6.
\item \textsuperscript{71} \textit{R (On the Application of Hoxha) v Special Adjudicator; R (On the Application of B) v Immigration Appeal Tribunal} [2005] UKHL 19.
\item \textsuperscript{72} The facts in \textit{Hoxha} are analogous to the situation of former girl soldiers. The appellant was raped by Serbian soldiers in front of her husband, child and neighbours. Instead of locating the disgrace with the soldier, it was seen as a disgrace for the husband, and according to Albanian culture he should have rejected his wife. This is despite the fact that the community had witnessed the persecution by a common enemy.
\item \textsuperscript{73} For discussion on forms of community aggression towards the victims of sexual violence, see: International Committee of the Red Cross, \textit{Addressing the Needs of Women Affected by Armed Conflict} (2004).
\item \textsuperscript{74} In some communities, spiritual beliefs may prevent communities from welcoming back former combatants. Unless former child soldiers are properly ‘healed’, they will not be allowed to return: Mike
A further problem is that, although a claimant may be able to establish persecution, asylum will not be granted without showing that the state is unable or unwilling to offer an adequate level of safety. It is an underlying premise of the Refugee Convention that the international community should act as a ‘surrogate’ when the protective machinery of a state lapses.\textsuperscript{75}

The question for the courts is whether the protection offered by the claimant’s state of origin is sufficient. They held in the cases of Horvath v Secretary of State for the Home Department\textsuperscript{76} and Respondent S152/2003\textsuperscript{77} that a formal criminal mechanism is required to protect former girl soldiers from stigmatisation, but it is doubtful whether this will ever be adequate. As Baroness Hale noted in Hoxha, ‘it is not easy to protect against this sort of deep-seated prejudice’.\textsuperscript{78} Indeed, in some cultures it may be impossible to bring relief to ‘ruined’ women.

A declaration of a cessation under article 1C(5) of the Refugee Convention means that there is nothing left to fear back home, and states may refoule asylum seekers. In AJ (Liberia) and SB (Risk Freetown), both claimants feared harm from the community. However, the courts found that the end of hostility had brought about a change of circumstances such that they no longer risked harm.\textsuperscript{79} The Refugee Convention requires that there be a connection between the persecution alleged and the change held to have taken place under article 1C(5).

As such, the Court’s invocation of the clause was an error of fact, as it linked the persecution of child soldiers with ‘war’. According to the testimony and available evidence, claimants had experienced explicit and violent harassment from the civilian population, which had little to do with the state of the conflict and everything to do with the community’s desire to punish former rebels. This possibility is supported by

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\textsuperscript{75} This has been referred to as the ‘protection theory’. Most common law countries subscribe to this idea of protection. See generally Respondent S152/2003 (2004) 222 CLR 1, 55 (per McHugh J).
\textsuperscript{76} [2001] AC 489.
\textsuperscript{77} (2004) 222 CLR 1.
\textsuperscript{78} R (On the Application of Hoxha) v Special Adjudicator; R (On the Application of B) v Immigration Appeal Tribunal [2005] UKHL 19, 38.
\textsuperscript{79} Refugee Convention art 1C.
\end{flushleft}
the UNHCR Handbook, which warns that regime change does not always mean that the attitudes of the population have changed.

An invocation of ‘cessation’ declares that there is no well-founded fear of future risk. The former child soldier will then look to base his or her claim purely on past harm, arguing that past persecution was so heinous that he or she should not be expected to return home. However, while evidence of past persecution will in some cases produce a presumption as to the risk of future persecution, an assessment of independent future harm is required in most cases. According to the text of the treaty, an exemption is granted to ‘statutory’ refugees only.80

This was discussed in Hoxha, where three main issues relevant to child soldiers presented themselves. The first was that claimants must, in order to fall under the cessation clause, first be recognised as refugees under article 1A(2). The argument that they had at some time been refugees was rejected. A formal recognition process was required. This can be a problem for child soldiers, especially if war formally concludes while they are in transit, or they are stuck in the immigration system for some time. This was the situation in AJ (Liberia), where the claim took two years to move from tribunal level through to the court of appeal. During this time the situation in Liberia became more stable, and a change of circumstances was declared. Since he was not considered to be a refugee in the first place, the Court did not consider an exemption based on past persecution. This is unsatisfactory, as the text of the Refugee Convention makes refugee status declaratory.

The second issue concerned the role of past persecution, and whether fear of the continuing effects of this harm was sufficient to mount a claim. Baroness Hale rejected the general principle. However, where past persecution causes future persecution for a convention reason, then this would suffice. Although past persecution can lead to similar persecution in the future, this is not always the case. This is particularly relevant to child soldiers, especially girls, as their persecution may lead to different types of future persecution. For example, their first persecution — abduction, rape and sexual slavery — often leads to community rejection because they have transgressed social norms.

80 ‘Statutory refugees’ is a name given to those falling under art 1A(1) of the Refugee Convention, and covers groups who had already been given protection under the pre-convention arrangements. It largely includes those fleeing the horrors of World War II.
The third issue concerned discrimination between ‘statutory’ and other refugees. Lord Hope of Craighead, drawing on reasonable authority, concluded that during the drafting of the *Refugee Convention* states did not want to extend this benefit to other refugees, nor was there any state practice sufficient to overcome the express words of limitation. However, he did concede that, in some cases, persons who were particularly vulnerable by reason of the continuing effects of the persecution suffered in the past, and thus less able to cope on return, could be given leave to remain on compassionate grounds.

This leaves the door open for child soldiers. However, as was seen in *Aj (Liberia)*, even the most compelling evidence of past persecution and the real risk of suicide that the claimant faced on return were not enough. Instead, the tribunal found, and the appeal court agreed, that although he would initially have no home, no money and no support, there was ‘no reason he would remain destitute indefinitely’. However, if he had not been persecuted so badly, and lost his entire family, he would have had a home and community to return to.81

Following the case of *In Re Chen*,82 US courts have recognised that in some extreme circumstances, non-statutory refugees can obtain asylum for humanitarian reasons based solely on past persecution. This is in line with the *UNHCR Handbook*, which suggests that non-statutory refugees who have suffered ‘atrocious’ forms of persecution should not be sent home. This position is confirmed in the latest statement from the UNHCR relating to the change of circumstances in Sierra Leone.83

Ultimately, it will be at the discretion of states to cancel protection or indeed refuse to grant protection once hostilities have formally ended. *Hoxha* rejected the idea that there was sufficient state practice to indicate a trend. However, decision-makers must keep in mind that the plight of child soldiers may, in some cases, go beyond the horror experienced by ‘statutory’ refugees. Child soldiers are not only the

81 The only avenue left for the appellant was to claim risk of suicide, which would breach art 3 and/or art 8 of the *European Convention of Human Rights*. This should not be the only option available for former child soldiers.
82 *In re Chen* 201 & N Dex 16 (BIA 1989).
83 The possibility of exemption being granted to non-statutory refugees is confirmed in the latest statement from the UNHCR relating to the change of circumstances in Sierra Leone. Although the official ‘cessation’ is to come into effect in December 2008, the directive notes that those who continue to fear persecution, or have suffered significant past persecution, can be exempted from this clause: UNHCR, *Applicability of Ceased Circumstances Cessation Clauses to Refugees from Sierra Leone* (2008) S.
victims and witnesses of horror, but also equally the forced perpetrators of it. Their memory is not only of significant grief, but also of torturous guilt and regret.

**Nexus: The Causal Question**

For an applicant to succeed, his or her persecution must also satisfy the nexus requirement of the refugee definition; that is, the persecution must be ‘for reasons of’ his race, religion, nationality, political opinion or membership of a particular social group. This element of the definition has been used to limit access to protection, as not every person fleeing torture, violation or grave human rights abuses can connect this harm to a convention ground.\(^8^4\) In child soldier cases, persecution has been found for reasons of a variety of protected grounds. The following will focus on past persecution for reasons of membership of the social group ‘children’ and future persecution for reasons of membership of the social group ‘former child soldiers’.

There are two key issues relating to nexus. The first is whether there must be a conscious intent on behalf of the persecutor to harm the individual for a reason listed in the *Refugee Convention*. There is considerable divergence on this point within common law courts. Goodwin-Gill argues that nowhere in the drafting history of the convention was the intent of the persecutor considered important.\(^8^5\) Despite this, Foster and Hathaway have identified three broad interpretations of nexus: a focus on persecutor intent, a mix of persecutor intent and state protection, and the predicament approach.\(^8^6\)

The predicament understanding is to be preferred for its ability to accommodate the complex factors that motivate persecution in times of war. It asks the claimant to give a holistic account of persecution, and then assesses whether a protected category is involved. For example, children abducted by the Lord’s Resistance Army in Uganda are needed to boost the ranks. The knowledge that children make ideal soldiers means that a protected category, ‘children’, is related to this predicament. However, the intent analysis was used in *Lukwago* and it produced very different results.

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\(^8^5\) Goodwin-Gill and McAdam, above n 33, 101.  
The second issue is causation. It is accepted that persecution can be for more than one reason, but the question of causation can become difficult when persecution occurs for a mix of reasons, some of them unrelated to the *Refugee Convention*. For example, a former child soldier may be repeatedly detained by police and beaten. Is he beaten to find out information about a rebel group (not a convention reason) or as punishment for being a child soldier (a convention reason)? The Michigan Guidelines suggest that the protected category need only be a ‘contributing’ factor to the risk of being persecuted. However, the guidelines do note that a ‘remote’ link might be irrelevant. Despite this, the ‘sole cause’ test continues to be applied in the United States, requiring that convention reasons are the only reasons for persecution.

In *Lukwago* the claimant tried to establish past persecution on account of his membership of the social group ‘children’. However, following *INS v Elias-Zacarias*, US courts have interpreted ‘on account of’ to require a focus on the persecutor’s intent. In *Elias*, the Court looked first at the persecution feared and the protected ground, in this case, political opinion. It then looked at the content of the political opinion, which was political neutrality, and asked whether the guerrillas wanted to recruit him on account of this neutrality. They found that recruitment was only intended to fill the ranks, and rejected his application for this reason.

A focus on ‘intent’ has led to many inconsistencies across the US asylum tribunals, and the problems are in the most part evidentiary. How does the Court guess the persecutors’ motive when they have perhaps never expressed one or they are unable to testify at the asylum hearing? Ultimately, it comes down to decision-makers choosing an intent they like. In *Lukwago*, the Court accepted that forced conscription into the rebel group could be persecution. However, it rejected the argument that the conscription was on account of his status as a child. It followed *Elias* closely, and concluded that the Lord’s Resistance Army was motivated by the need to fill the ranks.

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87 502 US 478.

88 It is unusual that the Court did not consider whether the guerrillas would harm him if he refused to join or subsequently tried to escape. Recall that in the Australian case of 96/12101, the tribunal found that although forced re-conscription in itself does not satisfy the nexus to imputed political opinion (that is, he is not being recruited *because* of his political opinion), any attempt to dissent or escape would certainly incur a punishment for a political opinion imputed to him by these acts. This case also focused on the persecutor’s intent.

In coming to this conclusion, the Court in *Lukwago* seemed to adopt a ‘sole purpose’ test of causation.\(^9\) As there was evidence that the Lord’s Resistance Army abducted from the population generally, this seemed to suggest that children were not abducted qua children. However, there is ample evidence that children are targeted as desired soldiers, primarily because of their immaturity and malleability.\(^1\) Children have a distinct value in warfare, and this is widely acknowledged. Just because an armed force is especially brutal and far-reaching in its malevolence does not deny the possibility that it targets particular social groups.

However, it was accepted in *Lukwago* that persecution by the Lord’s Resistance Army on the claimant’s return would be on account of his membership of the social group ‘former child soldiers’. This is a great result, as it acknowledges that former child soldiers suffer distinct harm because of this status. However, it was somewhat curious that the Court was willing to drop the sole purpose test in this instance: recall they had just concluded that the resistance army indiscriminately attacks everyone. Now that *Lukwago* has recognised that child soldiers are attacked because of their status, discussion now turns to whether ‘former child soldiers’ actually satisfies the test for social group under the convention.

**Social Group**

The principle contention of this article is that former child soldiers should be considered a social group for the purposes of the *Refugee Convention*. In light of the previous discussion, this should not be difficult. The convention ground of social group has commonly been held to have the least clarity. It has been difficult to draw on the convention history, as one of the only reasons offered for its inclusion was from the Swedish member who suggested ‘experience has shown that refugees are persecuted because they have belonged to particular social groups’.\(^2\) There are two approaches to constructing a ‘social group’ within the common law: the *ejusdem*

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\(^1\) This was in fact mentioned in the judgment.

generis, or protected characteristics, approach and the social perception approach. The former focuses on a ‘common immutable characteristic’ and the later assesses whether the group is perceived as a ‘social unit’ by the rest of society. The UNHCR guidelines advocate that these should be combined.

Foster and Hathaway argue that the protected characteristics approach is to be preferred. In their view, the social perception test is ‘little more than a licence for subjective assessment of merit’. It is conceivably much easier for decision-makers to dismiss findings because of inadequacy of country of origin information. In addition, there will always be concerns that decision-makers import western concepts of ‘perception’. This is perhaps best illustrated by AJ (Liberia), where the claimant was not recognised as a child soldier. Compare this reasoning to the Australian decision of N97/19506, where the tribunal considered that family and community ties were so strong in Sierra Leone that recognition was plausible.

Despite these arguments, some general points of agreement can be gleaned. The term ‘social group’ is not a ‘catch all’, but neither is it a ‘closed list’. In line with the requirement for nexus, the size of the group should not matter and the harm need not be feared by all members of the group. However, it is likely that broad social groups will be rejected by floodgates arguments. Finally, the social group must not be defined by the persecution feared.

The protected characteristics approach has gained much currency in common law jurisdictions. In Lukwago, the Court applied the reasoning of the Board of Immigration Appeals in Re Acosta, which required the group to have a common

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93 Hathaway and Foster, above n 86, 480.
94 Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, 40 (per McHugh J).
95 They propose ‘a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights’.
96 Hathaway and Foster, above n 86, 482.
98 Hathaway, above n 51,159.
100 Khawar (2002) 210 CLR 127 (per Kirby J).
101 See, eg, Applicant A v Minister For Immigration and Ethnic Affairs (1997) 190 CLR 225.
immutable characteristic that ‘cannot change, or should not be required to change’. This immutable characteristic could take the form of a shared past experience. ‘Former military leadership’ was a possible example. The idea of a past experience is supported in Canada (Attorney General) v Ward, which found ‘voluntary association’ unalterable due to its historical permanence.

The Lukwago court concluded that former child soldiers shared experiences of ‘abduction, persecution and escape’, and this cannot be changed and was now fundamental to their identity. Other experiences may be included, for example, rape, abuse, forced killing, forced rape, drug taking, and other rituals that have substantially altered their identity. These forms of experience also inform our understanding of why this social group is persecuted so pervasively. Their identity offends on so many levels. Finally, this social group also exists independently of the persecution feared. Regardless of their treatment by society, ‘former child soldiers’ are recognised in many domestic and international instruments as a group in need of special assistance.

‘Former child soldiers’ would also succeed on the social perception test. According to this analysis, the group must be perceived as having a ‘characteristic, attribute, activity, belief, interest or goal that unites them’. There is substantial evidence that child soldiers are perceived as a group by the international community, who pity them; by domestic bodies, who struggle to deal with them; and by the local community, who are scared of them or seek to exclude them.

The Exclusion Clause

The previous discussion indicated that former child soldiers can be refugees within the meaning of article 1A(2) of the Refugee Convention. However, within the system of refugee protection, adjudicators are compelled to look at the totality of circumstances in assessing refugee status, including any individual criminal guilt. The challenge former child soldiers inevitably face is the application of the article 1F

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102 [1993] 2 SCR 689.
103 Foster and Hathaway note that ‘voluntary’ in this context does not necessarily connote ‘choice’; rather it serves to distinguish this group whose characteristics are perhaps innate: above n 86, 481.
104 Applicant A (1997) 190 CLR 225, 40 (per McHugh J).
105 Ibid.
exclusion clause, or the domestic legislative equivalents. Article 1F excludes applicants where there are serious reasons for considering that they have committed:

(a) a crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes; (b) a serious non-political crime; (c) a crime contrary to the purposes and principles of the United Nations.

Article 1F(a) is most relevant to child soldiers. As international law is amorphous and subject to change, the content can be gathered from ‘international instruments’ that substantiate international criminal law at any time. However, article 1F is subject to domestic modification, and common law states vary widely in the way they give effect to it. Australia, the United States and Canada have applied exclusion principles to child soldiers according to their own body of international criminal process that has developed in administrative courts and tribunals.

The following discussion assumes that child soldiers have committed the whole assortment of crimes under article 1F(a). As such, it focuses only on the relevance and availability of criminal defences. It also flags other ways a claimant may avoid exclusion in a case where defences are unsuccessful or unavailable, and briefly comments on policy implications beyond exclusion, focusing on its interaction with the principle of aut dedere aut judicare.

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106 The idea of ‘exclusion’ was first expressed in international law through the Universal Declaration of Human Rights. Art 14(2) states that refugee status must not be granted to those being prosecuted for non-political crimes or acts contrary to the purposes of the United Nations. This has been followed by the development of international human rights law and humanitarian law, especially in the field of individual criminal responsibility. It is widely acknowledged that art 1F of the Refugee Convention was intended to exclude those deemed undeserving of international protection, and to ensure that perpetrators of heinous acts are brought to justice. As such, it operates as an exception to the principle of non-refoulement. The idea that a claimant is unworthy of protection is the fundamental premise of exclusion, and must be kept in mind when dealing with child soldiers: see WAKN v Minister for Immigration and Multicultural and Indigenous Affairs 138 FCR 579, 47.

107 SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 1, 23.
Defences

The debates surrounding the relevant international instruments have been discussed elsewhere. Unless there is a statute dealing with crimes for the particular conflict, the Rome Statute of the International Criminal Court (ICC) is the relevant codification of international criminal principles. The relevant defences can also be drawn from this instrument. In relation to child soldiers, the defence of infancy and duress will be discussed. Although superior orders and intoxication are relevant, they are perhaps more difficult to sustain when a child is involved in conflict for some time.

Infancy is not codified by the Rome Statute, but it is a defence under international criminal law. In most domestic courts, it is generally held that criminal responsibility requires two elements: the mens rea (criminal mind) and the actus reus (criminal act). When it comes to young children, a lack of mens rea is often assumed. The difficult question is determining the age that children develop a capacity for criminal thought. The age of criminal responsibility varies widely across jurisdictions, but is usually much lower than the age of adult criminal sanction. A lack of consensus across domestic courts has led to great confusion at the international level. The statutes for the international criminal tribunals for Rwanda and Yugoslavia do not mention age, whereas the Rome Statue does not exercise jurisdiction over persons under 18. This is, however, acknowledged as a procedural necessity rather than a statement of law.

The difficulty of setting an age was discussed by the UN secretary-general in his report on the establishment of the Special Court for Sierra Leone. Under the

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108 See generally Gallagher, above n 63.
109 The application of the Rome Statute has been endorsed in Australia in the case of SYYY (2005) 147 FCR 1 and in Canada in M v Canada (Minister of Citizenship and Immigration) 115 ACWS (3rd) 1040.
110 In SYYY (2005) 147 FCR 1, at 64, the Australian Federal Court found that the relevant instrument need not be in existence at the time of the criminal act, but acknowledged that the impugned conduct in that case had crystallised under customary law anyway.
111 For example, in South Africa a seven-year-old can possess mens rea, but will not be subject to the full force of criminal sanction until 18. On the other hand, Sweden sets both responsibility and sanction at age 15. See Michael Cavadino and James Dignan, Penal Systems: A Comparative Approach (2006) 297.
113 Art 26.
114 Happold, above n 112, 77.
Court’s statute, the age of criminal responsibility is set at 15, a pragmatic balance between the demands of the people of Sierra Leone and human rights groups. In Sierra Leone, the use of child soldiers was particularly rife and to dismiss these children as lacking the maturity to commit these crimes does not do justice to victims. To a woman gang-raped by 16- or 17-year-olds, her violators were more than capable of carrying out the crime.

The lack of consensus and hesitancy to make universal guidelines is perhaps an indication that ‘infancy’ is a chimera. Age by itself is not a cogent indicator of maturity. Neither does it reflect the knowledge, emotional capacity or competencies of each child. When dealing with crimes of such gravity, a defence granted on imputed immaturity is harmful for justice, as the guilt dissipates with the defence. Rather, an argument of duress or superior orders shifts the blame to the key masterminds of the conflict. In this way, victims are not left with a sense that their suffering is somehow less horrific, and someone is acknowledged as responsible.

Although not a satisfactory defence in itself, age may be relevant when considering other defences, for considering procedural safeguards and for generally mitigating sentencing. As the defence of infancy is unsettled, duress could be stronger for child soldier claimants, and more equitable for victims. However, the strength of duress in international criminal law is somewhat contested. In Prosecutor v Erdemovic, a slim majority of the International Criminal Tribunal for Yugoslavia rejected duress as a complete defence to war crimes, finding it a mitigating factor only. However, this decision is not reflected by the Rome Statute, which provides for a complete defence under section 31(I)(d). Canada and Australia have both recognised this defence in asylum proceedings.

Under the Rome Statute, duress requires a threat of imminent harm, a necessary or reasonable attempt to avoid harm, and an intention not to inflict greater harm than the kind avoided. This last proportionality requirement is a potential

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115 In addition, s 7 of the Rome Statute incorporates special provisions to safeguard the rights of juvenile offenders.


117 In Prosecutor v Drazen Erdemovic (Sentencing Judgment) IT-96-22-Tbis, ICTY, the trial chamber took into account that he was only 23 at the time he committed war crimes.

118 Canada (Minister of Citizenship and Immigration) v Hussain [2002] FCJ No 274.

problem for child soldiers. In the Australian decision of *N96/12101*, the tribunal found that the inflicted harm, shooting not to kill, was not disproportionate to the evil of being killed by superiors. However, child soldiers will often be ordered to maim and kill at gunpoint. If the harm inflicted is equal to the harm feared, does the law require child soldiers to take their own lives instead? In his *Justification and Excuse in Criminal Law*, J. C. Smith notes that

> heroism is a splendid thing but is usually considered to be conduct going beyond the call of duty, which is why the hero is awarded a medal. A person should not be liable to life imprisonment for failing to be a hero.120

Ultimately, it will come down to the facts of the case. In the Australian decision of *N1998/534*, it was found that although the claimant was forced to join the rebels, there was no evidence that he was specifically ordered to rape a woman and shoot a five-year-old boy and pregnant woman. However, in cases where claimants have been abducted and traumatised at a particularly young age and for a particularly long time, it might be reasonable to infer a feeling of constant duress.

The United States has a very different domestic application of the exclusion clause, and the existence of a duress defence is contested.121 Under the US *Immigration and Nationality Act*, refugee status cannot be given to anyone who ‘ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion’.122 The application of this bar has had very different results in federal circuits. There is currently a certiorari petition before the US Supreme Court seeking resolution of this difference.123

In *Bah v Ashcroft*,124 the claimant, Bah, was abducted from his village and forced to join the Revolutionary United Front (RUF). He watched as his father was incinerated and his sister was raped and killed. He was given a choice to join to RUF or to die. As a member of the RUF he was forcibly administered drugs, was ordered to shoot a female prisoner, and cut off the limbs and heads of villagers. He tried twice to

123 Oral argument was held on 5 November and the Court is expected to deliver its decision in early 2009.
124 341 F 3rd 348 (5th Cir) 2003.
escape, but both times was caught by Nigerian peacekeepers and tortured. Bah explained that the reason the RUF amputated the limbs of civilians was to scare them so that they would not support the government. On this assertion the Court applied the ‘persecutor bar’ and found that he had persecuted people on account of their political opinion. Bah argued that, as he did not share the opinions of the RUF, the bar should not apply. The Court found that ‘[t]he syntax of the statute suggests that the alien’s personal motivation is not relevant’. Despite clear likelihood of torture on return — he produced a newspaper article detailing a prize for his capture — he did not satisfy the Court that it would be more likely than not that he would be harmed.

However, in Hernandez v Reno\textsuperscript{125} the Court appeared to apply a culpability test. ‘Voluntariness’ was not to be read into the statute. However, it pointed out that the Supreme Court required ‘all aspects relevant to the individual’s conduct ... [to] be examined’. As such, conduct needed to be examined closely to see if the claimant really did assist in persecution. In Hernandez, the Court found that the claimant was at all times compelled by the threat of death, had tried to escape, and shot only when his commander stood directly behind him. It distinguished this from Frederenko, where the Nazi prison guard was at all times free to leave. The distinction that Hernandez drew between ‘voluntariness’ and ‘taking into account all the facts’ appears to be one of semantics. However, it is a much better result and suggests that duress can be argued under the guise of ‘low culpability’.

Under a strict application of the ‘persecutor bar’, no child soldier will be able to succeed\textsuperscript{126} — unless, of course, the court chooses to disregard it, as in Lukwago. However, the low culpability approach advocated in Hernandez would help to bring United States into line with its international obligations.\textsuperscript{127} In terms of condemning the recruitment of child soldiers, the United States has ratified the optional protocol to the Convention on the Rights of the Child, which places specific obligations on states parties to reintegrate and rehabilitate child soldiers.\textsuperscript{128} Further, the US Congress has recently passed the Child Soldier Accountability Act, which allows for the prosecution

\textsuperscript{125} Hernandez v Reno 258F 3\textsuperscript{rd} 806 (8th Cir 2001).
\textsuperscript{126} Although not dealt with directly in the case law, the ‘material support for terrorism’ bar also stands to block those involved with ‘terrorist groups’. See Gregory F Laufer, ‘Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Acts “Material Support for Terrorism” Provision’ (2006) 20 Georgetown Immigration Law Journal 437.
\textsuperscript{127} Murray v Schooner Charming Betsy US 64 (1804): ‘an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains’.
\textsuperscript{128} Arts 6(3), 7.
of child recruiters in the United States and bars their entry as refugees. It will be interesting to see if these developments translate into real justice for the victims of child recruitment.

**Other Mitigating Factors**

If criminal defences fail, a last hope of avoiding exclusion may be to urge that inclusion under article 1A(2) be considered before exclusion under article 1F. Admittedly, this is a fairly weak argument. However, a consideration of inclusion may help to inform the decision-maker of the situation of child soldiers, and thus mitigate an unduly harsh decision. The *Refugee Convention* does not establish a procedure for assessing claims. The UNHCR guidelines on the exclusion clauses say that ‘inclusion should generally be considered before exclusion’, but note that there is no rigid formula.129 A concomitant of this debate is the proportionality issue, that is, whether arguments for inclusion (the gravity of treatment feared) should be weighed against arguments for exclusion (the gravity of the criminal conduct).

A construction in line with the *Vienna Convention on the Law of Treaties* would suggest that the broad humanitarian and protective values of the *Refugee Convention* are to be upheld when assessing refugee status. As such, decision-makers should order their inquiry in a way that best meets these values. The Lawyers Committee for Human Rights argues that an automatic finding of exclusion may be inconsistent with the exceptional nature of the clause. It has also been suggested that natural justice requires inclusion to be considered first, as the adjudicator must take into account all factors relevant to a claim.130

A consideration of inclusion before exclusion could be beneficial to child soldier claimants as it picks up on the ‘unusual’ story these child perpetrators. Whether forced or voluntary, their participation with the armed group lacks the vital ingredient of agency, as well a conviction for the cause they fight. Indeed, child soldiers must be distinguished from the ‘traditional’ persecutor under article 1F(a), who is often freely affiliated with an ethno-nationalist separatist group. Ultimately, it will be up to each adjudicator to decide the order of fact-finding in each case. This

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approach has been justified in Australia by Kirby J, who argues that as the Refugee Convention ‘is expected to operate in the real world of speedy, economical and efficient decision making’, 131 adjudicators will approach the convention in an order they see fit. However, he also notes that the construction that does not ‘frustrate the object’ of the convention is to be preferred. An immediate application of the exclusion clause will frustrate the protective aspirations of the convention, especially where child soldiers have a strong case for inclusion.

An argument that inclusion should be considered first suggests that decision-makers undertake a proportionality assessment. There seems to be support for a balancing approach to article 1F(b), but the same does not readily extend to article 1F(a), where the crimes are decidedly more serious. Common law states have appeared to reject the balancing test. 132 As a final resort, other human rights mechanisms can step in. These include an appeal to the Convention against Torture or the European Convention on Human Rights. 133 However, the threshold of proof is unusually high. Judging from the published cases, chances of success seem slim. Even if a claimant is successful, the broad spectrum of refugee rights is not granted on a successful plea based on these conventions.

**Beyond Exclusion?**

The practical outcome of exclusion is a return to the country of origin, but not necessarily to prosecution and justice. For child soldiers returning to fragmented developing countries, the likelihood of a trial is dubious. It would depend on a high level of negotiation between host and flight state, including extradition arrangements and a capacity to prosecute. 134 For those returning to regimes that recruited them in the first place, there is no chance of prosecution. Whose sense of justice is then served by returning child soldiers to the communities they destroyed? That of the decision-

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131 Minister for Immigration and Multicultural Affairs v Singh (2002) 209 CLR 533, 87 (per Kirby J).
132 See T v Secretary of State for Home Department [1995] IAR 142; INS v Aguirre-Aguirre (1999) 110 SCT 1439; Malouf v Canada 190 NR 230, 231 (1995); Applicant NADB of 2001 v Minister for Immigration and Ethnic Affairs (2002) 71 ALD 41. Although Canadian and Australian cases deal with 1F(b), it is unlikely that they would find in favour of a balance for art 1F(a) considering the severity of the crimes.
133 These were applied in Lukwago, SB (Risk Freetown) and AJ (Liberia).
maker, the illusory ‘international community’ or the victim whose violation goes unpunished?

Aut dedere aut judicare — the duty to extradite or prosecute — is a principle frequently incorporated into treaties that deal with serious international crimes. The content of the principle is exactly that: to extradite the criminal at the request of the state of origin or to take steps to prosecute in domestic courts.\(^{135}\) Other treaties provide that crimes are to have universal jurisdiction.\(^{136}\) The widespread incorporation of this principle suggests it could be an evolving principle of customary international law.\(^ {137}\) There is no explicit obligation on states to prosecute the offenders who they exclude, and although it is the logical next step it ‘covers an interaction between two states and an individual, which goes beyond the scope of the Refugee Convention’.\(^ {138}\) The Lawyers Committee for Human Rights maintains that simple exclusion is not enough, especially for crimes under article 1F(a), which invoke universal jurisdiction.

The final factor that decision-makers must consider is the practical impact of their exclusion decisions. Justice, peace and healing are better served by dealing with the guilt and suffering of these former combatants than by abandoning them on the periphery of refugee camps, city slums and ghettos.

**Conclusion**

The international community is rapidly moving to end impunity for those who use child soldiers. However, the natural corollary of refugee protection for these abused children has not been fully realised. A balance must be found between the protective and rehabilitative needs of these young adults and the desire that their heinous crimes do not go unpunished. It is a policy conundrum with no easy answer. Ultimately, it will come down to the facts of each case. The inclusion analysis has shown that child soldiers from a variety of backgrounds are *prima facie* refugees. Whether they should be excluded will depend on strong evidence of culpability and a high level of agency. These individuals should immediately be prosecuted. For others, something more is

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\(^{136}\) For example, *Convention against Torture* art 7.

\(^{137}\) Bassiouni, above n 135, 43.

required than a blind acceptance or denial of status. In line with the wide ratification of the optional protocol to the *Convention on the Rights of the Child*, responsibility for the child soldier issue has now been internationalised. This is all the more important when receiving states continue to benefit from the arms and minerals trade that underpin many of the conflicts involving child soldiers. An informal method of justice that acknowledges guilt but focuses on rehabilitation will at once serve the interests of victims as well as uphold the protective values of the *Refugee Convention*. 
ARTICLE

America’s (Non-)Implementation of the Freedom from Torture

Lucas Robson

Introduction

In 1994, upon ratifying the Convention against Torture, the United States assumed the obligation to take measures to prevent torture in any territory under its jurisdiction. At the time, the government stated that US law substantially accorded with the provisions of the convention and thus no further implementation was necessary. This article argues that current domestic US law fails in important respects to prohibit and punish torture in the context of the ‘war on terror’ to the extent required by the convention. The US government maintains that it abides by the non-derogable prohibition on torture in the treaty, yet widely

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1 Final-year Arts/Law/Diploma of Modern Languages student at the University of Melbourne.
2 Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
4 According to the Committee against Torture, ‘no exceptional circumstances whatsoever may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction ... This includes any threat of terrorist acts or violent crime’: General Comment No 2: Implementation of Article 2 by States Parties, [5], UN Doc CAT/C/GC/2 (2008).
5 George W Bush, ‘President Discusses Creation of Military Commissions to Try Suspected Terrorists’ (Speech delivered at the White House, Washington, DC, 6 September 2006); Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Second
publicised torture scandals have focused media attention and critical commentary on the treatment of people detained by the US around the world as it pursues terrorist suspects.\(^5\)

This article focuses on whether the United States has sufficiently implemented its convention obligations into domestic law to prohibit and punish acts of torture against non-citizens held by the United States outside its territory. This issue is of vital importance because, as we shall see, these detainees have the weakest protections under domestic law and are therefore particularly vulnerable to mistreatment. This article examines constitutional rights, criminal sanctions and military law to evaluate the level of protection US law provides to detainees and its compliance with its treaty obligations. These areas do not exhaust America’s obligations under the convention.\(^6\) However, they do provide the most direct guarantees against the practice of torture by the United States.

**America’s Obligations under the Convention**

The *Convention against Torture* is unusual among the human rights treaties in that it is framed in terms of states parties’ obligations rather than rights themselves. Nowhere is there a provision stating that everyone has a right to be free from torture. However, the convention’s preamble refers to provisions of this kind contained in other human rights instruments.\(^7\) This analysis focuses on states parties’ obligations to take ‘effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’\(^8\) and to ‘ensure that all acts of torture are offences under its criminal law’,\(^9\) as these are the central responsibilities of a state

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\(^6\) Other key obligations include non-refoulement (art 3); inability to use coerced evidence in legal proceedings (art 15); prohibition on cruel, inhuman and degrading treatment or punishment (art 16); extradition procedures (art 8); education and information campaigns regarding torture (art 10); reviewing interrogation rules and practices (art 11).

\(^7\) See also, eg, *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976).

\(^8\) *Convention against Torture* art 2(1).

\(^9\) Ibid art 4(1).
party to the convention in respect of its own officials. The UN Committee against Torture has expressed the view that ‘territory under [the state party’s] jurisdiction’ includes ‘all areas under the de facto effective control of the state party’. It is the implementation of this extraterritorial aspect of the state party’s obligations that will be the focus of this examination.

Reservations and Understandings

When the United States ratified the Convention against Torture, it entered two reservations, nine ‘understandings’ and one declaration — more than any other state party — which may have modified the content of its obligations under the convention. America’s ‘understandings’ may constitute ‘reservations’, as they arguably ‘purport … to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’, rather than merely ‘reflect the accepted view of the agreement’. Indeed even the legal advisers to the administration of President George W. Bush noted that the ‘understandings’ regarding the definition of torture in article 1 ‘created a valid and effective reservation’.15

As discussed below, the American ‘understandings’ regarding the definition of torture seem to narrow the definition in the convention and may therefore fall foul of the position of the UN Human Rights Committee that reservations must not ‘seek to remove an autonomous meaning to [treaty] obligations’. By tampering with the

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10 Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture (25 July 2006) 36th sess, [15], UN Doc CAT/C/USA/CO/2. See also the definition including ‘during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control’: Committee against Torture, above n 3, [16].


15 Letter from John C Yoo to Alberto R Gonzales, 1 August 2002, in Karen J Greenberg and Joshua L Dratel (eds), The Torture Papers: The Road to Abu Ghraib (2005) 218, 220 (emphasis added).

16 UN Human Rights Committee, General Comment 24: General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in
definition of torture, which is the basis of the convention, the United States has left itself open to accusations that its reservation is contrary to the object and purpose of the treaty — to prohibit torture as defined\textsuperscript{17} — thereby rendering the reservation invalid.\textsuperscript{18} Indeed, the Committee against Torture recommended in its 2000 and 2006 concluding observations that the United States remove its reservations.\textsuperscript{19}

The Netherlands has argued that America’s ‘understanding’ ‘appears to restrict the scope of the definition ... under article 1 of the Convention’.\textsuperscript{20} Both the Netherlands and Sweden have argued that the United States remains bound by the definition in article 1.\textsuperscript{21} It is therefore clear that the understanding is in fact a reservation, as it does not reflect an accepted interpretation. However, the Committee against Torture has not taken the controversial step of unilaterally severing the reservations.\textsuperscript{22} As we shall see below, the definitional ‘understandings’ mirrored in domestic law seem to infringe the object and purpose of the treaty in important respects. Arguably, the United States therefore has obligations beyond its reserved position.\textsuperscript{23}

\textit{Relation to Declarations under Article 41 of the Covenant} (11 November 1994) 52\textsuperscript{nd} sess, [19], UN Doc CCPR/C/21/Rev.1/Add.6.


\textsuperscript{19} Committee against Torture, \textit{Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture} (15 May 2000) 24\textsuperscript{th} sess, [180], UN Doc A/55/44; Committee against Torture, above n 10, [40].

\textsuperscript{20} Committee against Torture, \textit{Status of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Reservations, Declarations and Objections under the Convention} (22 January 1998), 29, UN Doc CAT/C/2/Rev.5. This comment would mean that the reserved provisions do not apply as between the reserving and objecting states: \textit{Vienna Convention} art 21(3).

\textsuperscript{21} Ibid 29–31.

\textsuperscript{22} The UN Human Rights Committee has reserved the right to do so: above n 16, [18]; Steiner, Alston and Goodman, above n 18, 1146–7.

\textsuperscript{23} UN Human Rights Committee, above n 16, [18]. Compare America’s objection to this comment, arguing that states do not have to ‘give effect to’ the Committee’s interpretation of a treaty: Steiner, Alston and Goodman, above n 18, 1147.
The Federal Question

Despite the US government’s argument that its ability to legislate on torture is limited by the federal system, the Committee against Torture has pointed out that the federal government bears responsibility for implementing international law and cannot avoid obligations by reference to domestic political arrangements. In any event, the United States has acknowledged that its structure ‘does not detract from or limit [its] substantive obligations’ and that it does in fact have legislative power over ‘offences against the law of nations’.

The Place of Treaties in US Law

Constitutionally, treaties form part of the ‘supreme Law of the Land’. However, their direct effect can be limited by the terms on which they are ratified. The United States ratified the Convention against Torture on the basis of a declaration that the convention was ‘not self-executing’. This means that, while the treaty’s provisions are unaffected and remain in binding force internationally, their domestic use is circumscribed. The domestic effect of such a declaration, in essence, is that people cannot sue directly for breach of the treaty’s provisions — such a right would rely on implementing legislation. Comprehensive legislation incorporating the convention holus bolus has never been enacted, which means that an examination of

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24 Committee against Torture, above n 2, [48]; UN High Commissioner for Human Rights, above n 11, II(5).
25 Committee against Torture, above n 10, [4]. See also Vienna Convention art 27.
26 Committee against Torture, above n 2, [20].
27 US Constitution art I, s 8, cl 10; Committee against Torture, above n 2, [23].
29 ‘Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a “non-self-executing” agreement will not be given effect as law in the absence of necessary implementation’: American Law Institute, above n 14, §111(3).
30 UN High Commissioner for Human Rights, above n 11, III(1).
31 Committee against Torture, above n 2, [56]; Steiner, Alston and Goodman, above n 18, 1137.
33 Mannington Mills v Congoleum Corporation, 995 F 2d 1287, 1298 (3rd Cir, 1979) (Circuit Judge Weis).
the ‘piecemeal’ legislative framework is required to explore the incorporation of the right.

**Constitutional Protections**

**Constitutional Rights**

The US government insists that its constitutional guarantees of human rights effectively protect against the practice of torture. It cites the Eighth Amendment freedom from ‘cruel and unusual punishments’ and the Fourth and Fifth Amendment rights to due process as protections against torture. However, the government itself has sought to curb the successful claim of such rights by non-citizens detained outside the United States through restrictive legal interpretations, executive signing statements and military orders.

These constitutional guarantees may not be effective bars to the practice of torture, as they are limited in their applicability. First, the Eighth Amendment is limited to ‘punishment’, which has been interpreted to apply only to convicted criminals, not necessarily indefinite executive detainees. The Fifth Amendment’s substantive due process requirement would prevent ‘excessive force’ that ‘shocks the conscience’, which is interpreted as only extending to ‘extreme acts of physical torture’.

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34 Joshua L Dratel, ‘The Legal Narrative’ in Greenberg and Dratel (eds), above n 32, xxi, xxi.
35 Committee against Torture, above n 2, [14], [49].
36 *US Constitution* amend IV, V, VIII; ibid [49].
37 ‘Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations’ (4 April 2003) in Greenberg and Dratel (eds), above n 32, 286, 316, 320.
38 George W Bush, President’s Statement on Signing of HR 2863, the ‘Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006’ (30 December 2005): ‘section 1005 does not confer any constitutional right upon an alien detained abroad as an enemy combatant’.
40 *Ingraham v Wright*, 430 US 651, 664 (1977) (Powell J). See also Committee against Torture, above n 2, [108]; above n 37, 317.
Extraterritorial Application

There have been mixed findings when the question of the extraterritorial applicability of constitutional rights has come before the courts. However, the most recent Supreme Court authority found that constitutional rights can protect non-citizens outside the United States when it is not ‘impractical or anomalous’ to apply them. The Court ruled that non-citizens held at Guantanamo Bay are constitutionally entitled to the writ of habeas corpus. This holding, however, seemed quite specifically based on the history and nature of the writ itself, and thus may not be extended to other constitutional rights.

It also identified three relevant factors: the citizenship and status of detainees, the nature of the sites of apprehension and detention, and the practical obstacles to granting the right. Of these three factors, location and practical obstacles may be different with regard to other detention facilities around the world, particularly in the Middle East. With regard to sites such as prisons in Iraq and Afghanistan — which are less fully controlled by the US, where its control is not of an indefinite nature, and where forces are strained by reconstruction efforts and security threats — courts may not reach the same conclusions.

There is an argument to be made that constitutional rights should apply more broadly than merely at Guantánamo, as to find otherwise allows the executive branch to act overseas without a check on its power in a manner inconsistent with the separation of powers. However, this is an untested argument, and thus a weak basis

43 In re Guantánamo Detainee Cases, District Judge Green recognised Fifth Amendment rights because ‘Guantánamo Bay must be considered the equivalent of a US territory in which fundamental constitutional rights apply’: 355 F Supp 2d 443, 464 (DDC, 2005). Cf Khalid v Bush: ‘Due to their status as aliens outside sovereign United States territory ... the petitioners possess no cognizable constitutional rights’: 355 F Supp 2d 311, 321 (DDC, 2005) (District Judge Leon).
46 See the lengthy description of the history and nature of the writ at ibid 9–15.
48 Ibid 38–40. These factors were used to distinguish the earlier Supreme Court holding that constitutional protections did not apply to a German found guilty of war crimes by a US tribunal and imprisoned overseas from the Guantánamo Bay cases.
49 Ibid 41: ‘if the detention facility were located in an active theater of war, arguments that issuing the writ would be “impracticable and anomalous” would have more weight’.
on which to rest full protection of the right to be free from torture in US law. It is therefore possible that the United States is not constitutionally barred from committing torture overseas in weakly controlled, fragile areas, even if it is within a facility over which the United States has ‘effective control’ and thus a convention obligation to prevent torture. However, instability or a state of war are not permissible grounds for derogation under the convention, and therefore the US Constitution does not provide the level of protection required by the convention.

Criminal Law

One of the key obligations of states parties to the Convention against Torture is to criminalise ‘acts of torture’. They must be ‘punishable by appropriate penalties which take into account their grave nature’. This threat of criminal sanctions against individuals who order or conduct torture plays an important part in ensuring that torture does not take place.

Extraterritorial Application of Criminal Law

Generally, America’s domestic criminal law extends extraterritorially to areas not within any nation and to US military, diplomatic and other installations overseas by virtue of the ‘special maritime and territorial jurisdiction’. However, US law lacks an offence of ‘torture’, so while the component acts such as assault, maiming,

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51 Committee against Torture, above n 3, [16].
52 Convention against Torture art 2(2).
53 Ibid art 4(1).
54 Ibid art 4(2).
56 18 USC §7(7), (9) (2006).
murder\textsuperscript{59} and manslaughter\textsuperscript{60} could be punishable under the special maritime and territorial jurisdiction, the act of torture itself cannot.\textsuperscript{61}

The Committee against Torture has expressed concern that this approach does not take account of the gravity of torture and the obligation to ensure proportionate punishment.\textsuperscript{62} The approach of prosecuting the component acts of torture also ignores the totality of the situation and the view of the Committee that acts constituting cruel, inhuman or degrading treatment can cross the line into torture when used ‘in combination’.\textsuperscript{63}

The offences of criminal deprivation of constitutional rights nominated by the US government as potential grounds for prosecution\textsuperscript{64} do not have extraterritorial application.\textsuperscript{65} They are therefore not available to detainees held outside the United States.

\textbf{Extraterritorial Criminal Torture Statute}

The United States is required under the \textit{Convention against Torture} to establish jurisdiction over offences by US nationals\textsuperscript{66} or by other people present in US territory\textsuperscript{67} wherever committed. In order to fulfil this obligation, the United States

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\item \textsuperscript{59}18 USC §1111 (2006).
\item \textsuperscript{60}18 USC §1112 (2006).
\item \textsuperscript{61}Compare US government assertions that ‘any act falling within the convention’s definition of torture is clearly illegal and prosecutable everywhere in the country’: Committee against Torture, above n 2, [11], [48].
\item \textsuperscript{62}\textit{Convention against Torture} art 4(2). See also Committee against Torture, above n 3, [11]: ‘By defining the offence of torture as distinct from ... other crimes ... States parties will directly advance the Convention’s overarching aim of preventing torture’; Theo van Boven, \textit{Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur on the Question of Torture Submitted in Accordance with Commission Resolution 2002/38}, UN ESC, Commission on Human Rights, 59\textsuperscript{th} sess, [26](a), UN Doc E/CN.4/2003/68 (2002): ‘Torture should be designated and defined as a specific crime of the utmost gravity’.
\item \textsuperscript{63}Committee against Torture, \textit{Report of the Committee against Torture}, UN GAOR, 52\textsuperscript{nd} sess, Supplement No 44, [157], UN Doc A/52/44 (1997).
\item \textsuperscript{64}Committee against Torture, above n 2, [180]; US Department of State, \textit{List of Issues to Be Considered during the Examination of the Second Periodic Report of the United States of America: Response of the United States of America (2005)} S1.
\item \textsuperscript{65}18 USC §§241, 242 (2006).
\item \textsuperscript{66}\textit{Convention against Torture} art 5(1)(b).
\item \textsuperscript{67}Ibid art 5(2).
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implemented the Extraterritorial Criminal Torture Statute (ECTS) in 1994. This statute makes it an offence to commit torture (as defined in §2340) outside the United States, and extends jurisdiction over US nationals or foreign nationals present in the United States. An ‘unintended legislative anomaly’ in 2001 for a time placed overseas military and diplomatic installations outside the reach of the statute, which was rectified by redefining ‘the United States’ in the statute in 2005.

The restrictive definition given to torture by the US reservations to the Convention against Torture and in the ECTS has been the subject of much criticism, with some even arguing that the US administration’s narrow definitions ‘essentially legalised’ torture. Article 1 of the convention defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The statute defines torture as:

an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.

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69 18 USC §2340A(a) (2006).
70 18 USC §2340A(b) (2006).
71 Committee against Torture, above n 4, [48]–[49]; 18 USC §7(9) (2006); above n 37, 291; Association of the Bar of the City of New York, Committee on International Human Rights and Committee on Military Affairs and Justice, 'Human Rights Standards Applicable to the United States' Interrogation of Detainees' in Greenberg and Dratel (eds), above n 32, 557, 575.
73 Otterman, above n 12, 115.
74 Convention against Torture art 1.
It further defines ‘severe mental pain or suffering’ as ‘prolonged mental harm caused by or resulting from’ one of four predicate acts, which include infliction or threatened infliction of physical pain, administration of mind-altering substances, threat of imminent death or threatening one of these acts against another person.\textsuperscript{76} These definitions closely shadow America’s ‘understanding’ to the \textit{Convention against Torture}.\textsuperscript{77} The \textit{ECTS} differs from the convention in its restrictive definition of ‘physical or mental pain or suffering’, the requirement of specific intent and the omission of any mention of purpose.

Aside from these legislative discrepancies, the Bush administration wrote a series of memoranda, the now-infamous ‘torture memos’, which gave additionally restrictive interpretations of key terms in the \textit{ECTS}.\textsuperscript{78} The most significant, the ‘Bybee memo’, argued that ‘torture’ was a term reserved for the most ‘extreme’ acts,\textsuperscript{79} an interpretation called into question by the Committee against Torture\textsuperscript{80} and inconsistent with the drafting history of the \textit{Convention against Torture}.\textsuperscript{81} In the public relations firestorm resulting from the Abu Ghraib scandal, that memo was rescinded and replaced by the ‘Levin memo’.\textsuperscript{82} Overall the Levin memo is less restrictive in its definitions. However, its practical import may be limited, as a footnote states that the new standards do not impugn the conclusions of previous legal advice.\textsuperscript{83}

The Bybee memo defined ‘severe’ pain as pain that is ‘difficult for the subject to endure’ based on a reading of the term in an emergency healthcare statute.\textsuperscript{84} Bybee

\textsuperscript{76} 18 USC §2340(2) (2006).
\textsuperscript{77} UN High Commissioner for Human Rights, above n 11, II(1)(a)–(b).
\textsuperscript{78} Memorandum from Jay S Bybee to Alberto R Gonzales, 1 August 2002, ‘Standards of Conduct for Interrogation under 18 USC §§2340–2340A’ in Greenberg and Dratel (eds), above n 32, 172; Yoo, above n 15.
\textsuperscript{79} Bybee, above n 78, 172.
\textsuperscript{80} US Department of State, above n 64, 4.
\textsuperscript{81} Manfred Nowak, ‘What Practices Constitute Torture?: US and UN Standards’ (2006) 28 \textit{Human Rights Quarterly} 809, 813. Inclusion of the phrase ‘extremely severe pain or suffering’ was rejected in the drafting of the \textit{Convention against Torture}.
\textsuperscript{83} Ibid 2 (n 8): ‘we have reviewed [the Office of Legal Counsel’s] prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum’.
\textsuperscript{84} Bybee, above n 78, 176.
argued that to amount to ‘severe’, physical pain would need to be ‘equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death’. The Levin memo removed this standard and argued that ‘severe physical suffering’ could meet the definition even if it did not involve ‘severe pain’.

The redefinition of ‘severe mental pain or suffering’ to mean ‘significant psychological harm of significant duration … lasting for months or even years’ was not drastically altered by the Levin memo, which maintained the need for ‘some lasting duration’ and ‘some mental damage or injury’ as opposed to mere pain. The list of required predicate acts in the US understanding and ECTS are completely foreign to the Convention against Torture itself, and the Committee against Torture has expressed some disquiet about this restrictive definition, especially its requirement of temporal duration.

Bybee required that the ‘infliction of such [severe] pain must be the defendant’s precise objective’. His argument allowed as a defence a good faith belief (even if unreasonable) that the action would not cause severe pain. This approach has been widely criticised, as it seems that this requirement could hamper the statute’s application in most cases, where the purpose of the action is to get information, not merely to inflict pain. The Levin memo skirted the issue, stating that it would be inconsistent with the president’s ‘no torture’ policy to evade the statute based on the specific-intent test.

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85 Ibid 172.
86 Levin, above n 82, 2, 10.
87 Bybee, above n 78, 172.
88 Levin, above n 82, 14.
89 Committee against Torture, above n 10, [13].
90 Bybee, above n 78, 174.
91 Ibid 175.
92 Seeking information is a prohibited purpose under the definition of torture in the Convention against Torture (art 1).
93 American Bar Association, ‘Report to the House of Delegates’ in Greenberg and Dratel (eds), above n 32, 1132, 1139. See also above n 37, 293; Colin Dayan, The Story of Cruel and Unusual (2007) 61; Pfiffner, above n 28, 155.
94 Levin, above n 82, 16–17: ‘In light of the President’s directive that the United States does not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture.’
However, Levin failed to refute Bybee’s reasoning on the matter, thus leaving the potential defence open. He did, however, distinguish ‘motive’ from ‘intent’ and opine that ‘[t]here is no exception under the statute permitting torture to be used for a “good reason”’. The administration’s specific-intent test does not seem to meet the Committee’s requirement that the intent element be an ‘objective determination’.

At first glance, the failure to incorporate the purposes in the *Convention against Torture* into the definition may seem to make the prohibition on torture in the *ECTS* broader. However, it is emblematic of America’s approach in prioritising the intensity of pain rather than the purpose to distinguish torture from other forms of cruel, inhuman or degrading treatment. The discrepancy also facilitates the narrower reading of intent discussed above, allowing that coercion to acquire information may not be within the definition.

The ability of the *ECTS* to fulfil America’s obligations under the *Convention against Torture* is hampered not only by its restrictive definitions, but also by its lack of enforcement. The Committee against Torture ‘regrets’ that it has yet to be used as the basis for a prosecution, despite well-publicised actions widely believed to constitute torture.

**Defences**

The US administration has also sought to protect personnel from criminal liability by allowing defences of necessity, self-defence and presidential prerogative. Bybee argues that the harm of further al-Qaeda terrorist attacks may outweigh the

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95 Ibid 17.
96 Committee against Torture, above n 3, [9]: ‘elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances’.
97 Nowak, above n 81, 820–22.
98 American Bar Association, above n 93, 1139; Pfiffner, above n 28, 155.
99 Association of the Bar of the City of New York, above n 71, 576; Committee against Torture, above n 4, [50].
100 Committee against Torture, above n 10, [13].
101 Bybee, above n 78, 207–9; above n 37, 307–9.
102 Bybee, above n 78, 211–12; above n 37, 309–13.
103 Bybee, above n 78, 173; above n 37, 302–7.
harm of torture in a given case — justifying torture under a ‘necessity’-type defence\textsuperscript{104} — and that the need to protect others from attack could awaken a self-defence argument, especially in light of the executive branch’s obligation to protect the nation.\textsuperscript{105}

More broadly, Bybee and the Department of Defense Working Group on Detainee Interrogations argued for the possibility of a defence based on presidential power.\textsuperscript{106} The president’s commander-in-chief authority could, in this view, shield a torturer from criminal liability, as a prosecution would amount to unconstitutional congressional interference in war matters.\textsuperscript{107} This argument fails to consider the rule of limited presidential powers\textsuperscript{108} and the express power of Congress to regulate the military and ‘Captures on Land and Water’.\textsuperscript{109}

When the Committee against Torture expressed concern about this potential defence, the United States pointed to the Levin memo,\textsuperscript{110} which merely notes that discussion of defences was ‘unnecessary’ and ‘inconsistent with the President’s unequivocal directive that United States personnel not engage in torture’,\textsuperscript{111} but fails to refute the reasoning in the earlier statement.\textsuperscript{112}

\textsuperscript{104} Bybee, above n 78, 207. See also \textit{Public Committee against Torture in Israel v Government of Israel} (1999) HC 5100/94, [34] (Supreme Court of Israel), excerpt in Steiner, Alston and Goodman, above n 18, 234, 240.

\textsuperscript{105} Bybee, above n 78, 211–12; \textit{Cunningham v Neagle}, 135 US 1 (1890).

\textsuperscript{106} Bybee, above n 78, 200: ‘Any effort to apply [the ECTS] in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional’. See also above n 37, 302–7.

\textsuperscript{107} Bybee, above n 78, 207.

\textsuperscript{108} \textit{Youngstown Sheet & Tube Co v Sawyer}, 343 US 579 (1952): ‘The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself’: at 585 (Black J delivering the opinion of the Court). ‘[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President … can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture’: at 642 (Jackson J concurring). See also Otterman, above n 12, 134.

\textsuperscript{109} \textit{US Constitution} art I, s 8, cl 11. See also Pfiffner, above n 28, 157–8.

\textsuperscript{110} US Department of State, above n 64, 23.

\textsuperscript{111} Levin, above n 82, 2.

Criminal Responsibility and Convention Obligations

There are therefore numerous shortcomings in America’s incorporation of the criminal law aspects of ensuring the freedom from torture, namely the lack of a specific crime of torture within the special maritime and territorial jurisdiction, the definitions in America’s ‘understandings’ to the Convention against Torture and in the ECTS and its arguable defences.

The legislative incorporation of the prohibition on torture is inadequate in that the definitions are narrower than those in the Convention against Torture. The administrative interpretations given to those definitions are overly restrictive at best, and incompatible with the object and purpose of the convention at worst.\(^\text{113}\) The Levin memo has lowered the bar on the severity of pain tests, but has left relatively unchanged (and unclear) the idea of specific intent. This test, if applied in line with the Bybee view, is clearly contrary to the object of the convention, as it would allow the expressly prohibited purposes in the convention to act as defences under the ECTS.

In general, defences to torture are in direct violation of articles 2(2) and (3) of the Convention against Torture, which state that the prohibition is non-derogable and that superior orders are not a defence.\(^\text{114}\) Therefore, the defences argued for by the United States are completely inconsistent with its obligation to criminalise all acts of torture.\(^\text{115}\) Defences, including constitutional ones, do not relieve the United States of its international obligation to prosecute torture,\(^\text{116}\) nor do they provide authority to carry out torture.\(^\text{117}\) They merely leave the United States in breach of its obligations.

Far from taking ‘effective legislative, administrative, judicial and other measures to prevent acts of torture’,\(^\text{118}\) the United States has attempted to ‘provide the highest assurance that no court would subsequently entertain charges’ against US

\(^{113}\) Ibid 183.

\(^{114}\) Convention against Torture art 2; Committee against Torture, above n 3, [26].

\(^{115}\) Convention against Torture art 4(1).

\(^{116}\) American Law Institute, above n 14, §111, comment (a): ‘failure of the United States to carry out an obligation on the ground of its unconstitutionality will not relieve the United States of responsibility under international law’.

\(^{117}\) Public Committee against Torture in Israel v Government of Israel (1999) HC 5100/94, [36] (Supreme Court of Israel), excerpt in Steiner, Alston and Goodman, above n 18, 234, 240.

\(^{118}\) Convention against Torture art 2(1).
personnel. The restrictive definitions, a dearth of prosecutions under the ECTS and the creation of defences to torture charges undermine the criminal law’s role in preventing torture and thus fulfilling convention obligations.

Obligations of the Military and Intelligence Agencies

In the context of the war on terrorism, it is the military and intelligence agencies that have played the role of apprehending, detaining and interrogating many suspects. Actions of military and intelligence personnel come within the purview of the Convention against Torture, so it is appropriate to consider laws and policies that delimit appropriate standards and legal requirements for such personnel.

Legislative Provisions

The Military Extraterritorial Jurisdiction Act extends criminal jurisdiction over crimes punishable by more than one year’s imprisonment committed anywhere outside the United States. It covers military employees, people accompanying the armed forces overseas, military personnel who have since retired and government contractors ‘supporting the mission’ of the Department of Defense. This jurisdictional reach, however, does not cure the lack of a domestic crime of torture which the Act could extend overseas, does not cover active military personnel, and may not cover Central Intelligence Agency (CIA) personnel or contractors (this would depend on whether they were ‘supporting’ Defense).

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119 Memorandum from John Ashcroft to George W Bush, 1 February 2002, ‘Justice Department’s Position on Why the Geneva Convention Did Not Apply to al Qaeda and Taliban Detainees’ in Greenberg and Dratel (eds), above n 32, 126.
120 Convention against Torture art 1: ‘at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.
121 Military Extraterritorial Jurisdiction Act, 18 USC §3261(a) (2006). See also Committee against Torture, above n 4, [46].
122 Military Extraterritorial Jurisdiction Act, 18 USC §3261(a), (d) (2006).
123 Military Extraterritorial Jurisdiction Act, 18 USC §3267(1) (2006). See also Committee against Torture, above n 4, [49].
The War Crimes Act formerly incorporated international understandings of torture by criminalising certain breaches of the Geneva Conventions, including torture. The Bush administration, however, sought to protect its personnel from domestic prosecution by asserting that the Geneva Conventions did not apply to its fight with al-Qaeda. This battle was seen as a ‘new kind of war’ that rendered the Geneva Conventions ‘obsolete’. This declaration effectively placed the war on terror outside the War Crimes Act, with the corollary that torture by US personnel could not be prosecuted under that Act.

When the US Supreme Court determined that at least the Geneva Conventions’ common article 3 did in fact apply to ‘illegal enemy combatants’ in the war on terror, the administration introduced the Military Commissions Act, which restricted the grounds of prosecution under the War Crimes Act. The Military Commissions Act defined for itself what constituted a breach of common article 3, expressly denying any influence to internationally accepted definitions. It also allowed the president to ‘interpret’ the Geneva Conventions by executive order to define what interrogation techniques may be used.

Torture remains a war crime under the War Crimes Act, but in a much weaker form, defined with the familiar ‘specific intent’ and restrictive ‘severe mental

127 Ashcroft, above n 119, 126.
128 Memorandum from George W Bush to the Vice President et al, 7 February 2002, ‘Humane Treatment of al Qaeda and Taliban Detainees’ in Greenberg and Dratel (eds), above n 32, 134.
130 Cf US Department of State, above n 64, 83: ‘The applicability of and compliance with the Geneva Conventions is a matter unrelated to the scope of US obligations under the Convention against Torture.’
pain and suffering’ tests.\textsuperscript{137} The president, in his executive order under the authority of the Military Commissions Act, provides that any program of interrogation approved by the director of the CIA complies with common article 3, and therefore would not constitute a war crime, if it does not infringe the restrictive ECTS standard of torture, constitutional rights and other tests not in line with the Convention against Torture definition.\textsuperscript{138}

Thus the Military Commissions Act served to remove the teeth from the War Crimes Act regarding the prosecution of military personnel for torture. The Bush administration’s determination that the Geneva Conventions do not apply to the war on terror, in addition to the restrictive definitions introduced by the Military Commissions Act, make the War Crimes Act insufficient to fully prohibit actions that would be considered torture under international law. For example, treatments such as water-boarding, inducing hypothermia, sleep deprivation, forced standing and loud music could all fall outside of the amended War Crimes Act, but may well constitute torture under international norms.\textsuperscript{139}

The Uniform Code of Military Justice (UCMJ)\textsuperscript{140} provides worldwide jurisdiction to prosecute members of the US armed forces for various crimes.\textsuperscript{141} Civilians ‘serving with or accompanying an armed force’ during a ‘time of declared war’ would also be subject to the code.\textsuperscript{142} It is possible that CIA agents could be considered to be ‘serving with’ the armed forces.\textsuperscript{143} Crimes under the UCMJ include cruelty and maltreatment (§893), murder (§918), manslaughter (§919), rape (§920), maiming (§924) and assault (§928).


\textsuperscript{138} George W Bush, Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency (20 July 2007) s 3(b). Other prohibited acts are those in violation of the War Crimes Act, Military Commissions Act or ‘willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency’. Arguably, if carried out to get information, actions would not be ‘done for the purposes of humiliating or degrading’ the detainee. See Pfiffner, above n 28, 164.

\textsuperscript{139} Otterman, above n 12, 188; Pfiffner, above n 28, 163, 165.


\textsuperscript{141} Uniform Code of Military Justice, 10 USC §§802, 805 (2006). Crimes are defined in ch 47, sub-ch X.

\textsuperscript{142} Uniform Code of Military Justice, 10 USC §§802(a), (10) (2006).

\textsuperscript{143} Association of the Bar of the City of New York, above n 71, 577.
A charge for torture under the ECTS could likely be brought under the UCMJ’s general provision allowing for the prosecution of any federal statutory offence. In addition, if all of the elements of the ECTS were not made out, but the action in question could be considered a ‘disorder [or] neglect … to the prejudice of good order and discipline in the armed forces, [or] conduct of a nature to bring discredit upon the armed forces’, this could constitute an offence under the UCMJ despite not strictly meeting the definition of ‘torture’. However, this is not a particularly strong basis on which to rest the prosecution of torture offences.

Again, this mechanism of criminal liability has no direct ‘torture’ offence, which means that it does not fulfil America’s obligations under article 4 of the Convention against Torture. In addition, policy implementation of the UCMJ’s restrictions has been flawed, with some interrogation mechanisms that may breach those standards having been approved. In those instances, the administration’s legal advice recommended that ‘permission or immunity’ be granted to avoid potential liability under the UCMJ. This suggests that these legislative restrictions are viewed as capable of circumvention, which is inconsistent with the non-derogability of the prohibition against torture.

The Detainee Treatment Act incorporated two significant advances in the protection against torture, but also undermined them at the same time. Section 1002 ensures that detainees under the control of the Department of Defense may not be subjected to any technique of interrogation not listed in the US Army Field Manual. The current edition of the Field Manual expressly bans all coercive techniques previously used at Guantánamo and in Iraq and Afghanistan, and

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146 Committee against Torture, above n 3, [11]; see also van Boven, above n 62, [26](a): ‘Torture should be designated and defined as a specific crime of the utmost gravity’.
147 Beaver, above n 32, 234.
148 Convention against Torture art 2(2), (3); Committee against Torture, above n 3, [6].
151 US Department of the Army, Field Manual 2–22.3: Human Intelligence Collector Operations (2006). The new Field Manual replaced a manual that was deemed not binding at Guantánamo Bay as it was based on the Geneva Conventions (see Beaver, above n 32, 229): Otterman, above n 12, 181.
prohibits cruel, inhuman and degrading treatment. However, it permits 30-day isolation and some ‘fear-up’ techniques, which involve using a detainee’s fear to encourage cooperation by linking ‘the elimination or reduction of the fear to cooperation’. Nevertheless, an interrogator must not ‘threaten or coerce’ a detainee — a fine distinction to draw in the field.

Secondly, the so-called McCain amendment provides that no detainee held by any branch of the US government may be subjected to cruel, inhuman or degrading treatment or punishment anywhere in the world. However, that prohibition is limited by its definition, which refers to the constitutional rights. As discussed above, those amendments do not provide strong guarantees against mistreatment of non-citizen detainees held overseas.

These advances, however, were further undermined by the insertion of a new defence to any criminal prosecution against a member of the armed forces or other government agent arising out of the detention and interrogation of aliens deemed by the administration to be a threat. An officer engaging in practices that were ‘officially authorized and determined to be lawful’ and that a ‘person of ordinary sense and understanding’ would not know were unlawful has a defence if he or she did not actually know the acts were unlawful. This defence is highly problematic, as it seems to allow officers to suspend their judgement and engage in dubious practices on the strength of advice — advice which has in the past proved so questionable that the administration has had to replace it. It also goes close to instituting a defence of superior orders, as it exculpates officers who rely on advice of superiors.

Secondly, the Detainee Treatment Act was undermined by a statement issued by President Bush, which stated that ‘[t]he executive branch shall construe [the Act]

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152 US Department of the Army, above n 151, [5]–[74]. It expressly prohibits forced nakedness or sexual acts, hooding, beatings, water-boardng, use of dogs, and inducing hypothermia among others: at [5]–[75].

153 This is known as ‘separation’. See ibid appendix M.

154 Ibid [8]–[35]; Otterman, above n 12, 181–3.

155 US Department of the Army, above n 151, [8]–[35].


160 Levin, above n 82, 2.

161 Cf Convention against Torture art 2(3).
in a manner consistent with the constitutional authority of the President to supervise
the unitary executive branch and as Commander in Chief and consistent with the
constitutional limitations on the judicial power’. 162 Although the United States has
assured the Committee against Torture that this does not constitute a derogation
from the prohibition on torture, 163 it is worrisome in its reference to presidential
authority in light of the as yet unrefuted argument that the president’s authority to
deal with detainees could justify torture. 164

Aside from the amendments it made to the War Crimes Act, the other impact
of the Military Commissions Act was to make it practically harder for detainees to
bring challenges to the legality of their detention, as it purports to strip detainees of
their habeas corpus rights. 165 This trend of restricting appeal rights, begun in the
Detainee Treatment Act 166 and furthered in this Act, is contrary to the
recommendations of the UN special rapporteur on torture, who has noted that
administrative detention ‘beyond judicial control’ is problematic, and thus detainees
should have access to expeditious means to challenge their detention, for example, by
way of a habeas corpus petition.167

**Detainee Treatment Policies**

In addition to these formal legislative requirements and protections, the
administration has put in place numerous orders and guidelines that require humane
treatment of detainees, but enter various caveats that undermine the protection
offered. For example, the US Secretary of Defense ordered that *Geneva Convention-
compliant treatment was required ‘to the extent appropriate and consistent with
military necessity’. 168 The later Department of Defense directive ordering *Geneva Convention*
protections for all detainees applies only to Defense personnel and

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162 Bush, above n 38.
163 Committee against Torture, above n 10, [8].
164 Bybee, above n 78, 202, 207.
Ottermann, above n 12, 186.
167 Van Boven, above n 62, [26](h)–(i).
168 Memorandum from Donald Rumsfeld to Chairman of the Joint Chiefs of Staff, 19 January 2002,
‘Status of Taliban and al Qaeda’ in Greenberg and Dratel (eds), above n 32, 80 (emphasis added).
detainees.169 While it is difficult to argue that the abuses at Abu Ghraib were carrying out explicit administration policy, it is hard to entirely dissociate the tone set by legal advice and policy decisions to evade international law and minimise domestic constraints from actions in the field.170

**Military and Intelligence Regulation and Convention Obligations**

The US military is bound by more rigorous and comprehensive regulations on its use of force against detainees than enshrined in the general criminal law. However, these restrictions, in the War Crimes Act, the Uniform Code of Military Justice and the Detainee Treatment Act, have been undermined by the defence of ignorance in the Detainee Treatment Act and their limited applicability to other non-military branches of the US government, most notably the CIA.

The US government now acknowledges the CIA’s program of detaining ‘high-value’ detainees at ‘black sites’ around the world.171 These sites would doubtless be under de facto US control, and therefore subject to Convention against Torture obligations.172 The US president argued that the ‘alternative set of procedures’ used by the CIA to interrogate certain terrorist suspects are ‘safe, and lawful, and necessary’.173 However, the Committee against Torture has concerns about secrecy and the inability of the Red Cross to access such sites,174 while the UN special rapporteur has noted that incommunicado detention is the most frequent context of torture and has argued that it should be made illegal.175 In addition, in March 2008, the president vetoed a bill that would have extended the standards of the Army’s Field

170 Alvarez, above n 112, 178 (n 12); Editorial, ‘Holding the Pentagon Accountable’, above n 5: ‘a dotted line from President Bush’s decision to declare Iraq a front in the war against terror, to government lawyers finding ways to circumvent the Geneva Conventions, to … the hideous events at Abu Ghraib prison’.
171 Bush, above n 4.
172 See *Convention against Torture* art 5(1)(a); Committee against Torture, above n 3, [16].
173 Bush, above n 4.
174 Committee against Torture, above n 10, [17].
175 Van Boven, above n 62, [26](g). See also ibid [17].
Manual to the CIA’s interrogation program because it would have prevented the CIA from using its ‘specialized interrogation procedures’.

**Conclusion**

The administration of George W. Bush has continually asserted that it does not engage in ‘torture’, yet its incorporation of the freedom from torture into domestic law leaves much to be desired. Humane treatment of detainees and compliance with international standards are seen as questions of policy, not questions of binding international law. In this way, international law is swept aside, while domestic law is crafted to allow freedom of action for the armed forces and especially for intelligence agencies. The *Convention against Torture* clearly enshrines a non-derogable prohibition on torture, and binds all states parties to take effective measures to prevent it. The narrow readings, restrictive legislation, definitional reinterpretations, and the creation of defences have clearly undermined America’s incorporation of its obligations under the convention to prohibit and punish torture. The election of Senator Barack Obama to the presidency of the United States hopefully signals a shift in US policy on this issue. While he has committed to closing Guantánamo Bay and states that he will ensure that the United States does not commit torture, only time will tell whether he will preside over a ‘prohibition’ in the Bush mould or whether he intends to prohibit torture in compliance with America’s international obligations.

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176 HR 2082 Intelligence Authorization Act for Fiscal Year 2008 (Enrolled as Agreed to or Passed by Both House and Senate) §327(a).
177 George W Bush, ‘President’s Radio Address’ (Radio Address delivered on 8 March 2008).
178 Bush, above n 128, 135. See also Alvarez, above n 112, 181.
179 Geneva Conventions were set aside (Bush, above n 128) and the customary international law of war and jus cogens norms against torture were found not to bind the executive branch (Bybee, above n 126, 82).
180 Convention against Torture art 2.
Do Nuclear Weapons Violate the Right to Life under International Law?

Tim Wright

Introduction

Since the 1980s, many states have argued in various international forums that the use of nuclear weapons is prohibited by article 6 of the International Covenant on Civil and Political Rights, which guarantees the right to life. Thousands of individuals have also asserted, in communications submitted to the UN Human Rights Committee (HRC), that article 6 prohibits the possession, testing and deployment of nuclear weapons, and many of them have seen human rights law as a potentially powerful tool with which to challenge the status quo and advance nuclear disarmament.

On a few notable occasions, peak international political and judicial bodies have declared nuclear weapons to be incompatible with the right to life, but such pronouncements have arguably had little effect on state behaviour. Some states, especially those with nuclear weapons, still stridently reject the notion that human

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1 President, Peace Organisation of Australia; Board Member, International Campaign to Abolish Nuclear Weapons; former advisor to Australian Democrats leader Senator Lyn Allison (2006–2008); former National Human Rights Policy Coordinator, United Nations Youth Association (2004).

rights law has any bearing on the legality of nuclear weapons. What role, then, might this important and evolving branch of international law play in bringing about a world free of nuclear weapons?

This article examines the scope of the right to life under the ICCPR, with a focus on how the HRC has interpreted article 6 in its general comments and applied it in communications brought by individuals. The article proposes that the Committee develop a more liberal approach in determining whether an author satisfies the ‘victim’ requirement under the First Optional Protocol, as this would better reflect its stated position that the right to life ‘should not be interpreted narrowly’. It argues that, in situations of armed conflict, the application of article 6 should be determined not only with reference to the rules of international humanitarian law, but also in light of the object and purpose of the ICCPR itself, a treaty whose operation does not cease in wartime. Finally, it assesses whether any state party to the ICCPR is, at present, in breach of its obligations under article 6 owing to its possession or deployment of nuclear weapons, and looks at the significance of such violations for the future of the disarmament movement and human rights law.

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2 See, eg, Transcript of Proceedings, Case in Legality of the Use by a State of Nuclear Weapons in Armed Conflict and in Legality of the Threat or Use of Nuclear Weapons (International Court of Justice, President Bedjaoui presiding, 15 November 1995, The Hague) 43–4, 64–7.


5 UN Human Rights Committee, General Comment 6: Right to Life (Art 6), as contained in Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies, UN Doc HRI/Gen/1/Rev.7 (12 May 2004) 128 [1].

6 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 225, [25].
Background

Article 6 of the ICCPR expressly provides that every human being has ‘the inherent right to life’,7 that this right shall be protected by law, and that no one shall be arbitrarily deprived of his or her life. According to the HRC, the right ‘is basic to all human rights’8 and no derogation from it is permitted ‘even in time of public emergency which threatens the life of the nation’.9 Jurist René Cassin described it as ‘the right of human beings to exist’,10 and it is generally considered to be a norm of jus cogens.11 Significantly, article 6 of the ICCPR requires states parties actively to protect the life of their citizens and to avert threats to their life.12 Thus, it entails positive obligations.

In 1983, the UN General Assembly adopted a resolution denouncing nuclear war as ‘a violation of the foremost human right — the right to life’.13 This prompted the HRC a year later to issue a highly controversial general comment clarifying the obligations of states under article 6 of the ICCPR in respect of nuclear weapons.14 The Committee held that ‘nuclear weapons are among the greatest threats to the right to life which confront [hu]mankind today’,15 and that their production, testing, possession, deployment and use ‘should be prohibited and

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8 UN Human Rights Committee, above n 3, [1].
9 UN Human Rights Committee, above n 5, [1].
11 See, eg, Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993) 105; Bertrand G Ramcharan, ‘The Concept and Dimensions of the Right to Life’ in Bertrand G Ramcharan (ed), The Right to Life in International Law (1985) 15; in Barcelona Traction, Light and Power Company (Belgium v Spain) (Judgment) [1970] ICJ Rep 3, the Court referred to the ‘principles and rules concerning the basic rights of the human person …’ as giving rise to obligations erga omnes, but it is not clear whether the Court was referring here to all human rights or only to some: at 32.
13 Condemnation of Nuclear War, GA Res 38/75, UN GAOR, 93rd plen mtg, UN Doc A/RES/38/75 (15 December 1983) [1].
14 UN Human Rights Committee, above n 3, 139.
15 Ibid [4].
recognized as crimes against humanity’. The precise meaning and intended effect of these statements have been hotly debated.

The HRC has also considered 10 individual complaints, the most recent in 2006, made under the First Optional Protocol to the ICCPR in which the authors alleged that a particular state party had violated their right to life by possessing, deploying, testing or threatening to use nuclear weapons. But in all 10 communications, the Committee held that the authors had failed to satisfy the requirement that they were ‘victims’ of such a violation. This has cast some doubt on whether the HRC still adheres to the sentiments of its 1984 general comment on article 6.

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16 Ibid [6].
The Right to Life in Armed Conflict

For the purposes of this article, it is necessary to consider whether article 6 of the ICCPR applies in situations of armed conflict. In 1996, the International Court of Justice (ICJ), which is the principal judicial arm of the United Nations, directly considered this question in an advisory opinion. During proceedings, many states argued that any use of nuclear weapons would violate article 6 of the ICCPR, while others claimed that the legality of nuclear weapons is not regulated by the ICCPR, as that treaty makes no mention of war or weapons.

The ICJ held that, ‘[i]n principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities’, but the test of what constitutes an arbitrary deprivation of life should be determined by the law applicable in armed conflict. Many international law scholars interpreted this as an outright dismissal by the Court of the relevance of human rights law to the question before it. It was widely seen to go against a trend towards treating human rights law and the law of war as complementary and permeable rather than strictly compartmentalised. The Court, by not delving into the whole spectrum of international law, bypassed significant contemporary developments. However, a more recent ICJ advisory opinion relating

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20 UN Charter art 92.
22 See, eg, the written statements submitted to the Court by Malaysia (at 13–14), Nauru (at 48–51), Solomon Islands (at 76–91), Egypt (at 15–16) and Indonesia (at 3). See also Michael J Matheson, ‘The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons’ (1997) 91 American Journal of International Law 419, 421–2.
23 See, eg, the written statements submitted to the Court by the United States (at 20, 43–6), the Netherlands (at 10–11), Russia (at 9–10) and the United Kingdom (at 64–8).
25 Ibid.
27 Ibid 323.
28 Ibid 317.
to the Israeli wall in the West Bank indicated that there could be greater overlap between the two branches of law.\textsuperscript{29}

The drafters of the \textit{ICCPR}, by including the word \textit{arbitrary} in the definition of the right to life, certainly intended to limit the scope of the right,\textsuperscript{30} and, although they did not support the inclusion of a list of circumstances in which the deprivation of life would be lawful, it is widely accepted that killings as a result of lawful acts of war are one such circumstance.\textsuperscript{31} But, despite the ICJ advisory opinion on nuclear weapons and in light of the opinion on the Israeli wall, surely the meaning of \textit{arbitrary} should be interpreted ‘in the context of the treaty as a whole, in the light of its object and purpose, and against constantly evolving standards’,\textsuperscript{32} and not exclusively by international humanitarian law.

In a dissenting view in the nuclear weapons case, Judge Abdul Koroma argued that, while it is accepted as a legal position that determination should be made according to the relevant \textit{lex specialis} — in this case, the law of armed conflict — ‘it does seem to me that too narrow a view has been taken of the matter’,\textsuperscript{33} because human rights law has as its \textit{raison d’être} the protection of the individual, both in peacetime and wartime. Like the \textit{UN Charter}, the \textit{ICCPR} and other like instruments emerged out of the shadow of grave human rights violations committed in World War II, including the atomic bombings of Hiroshima and Nagasaki.\textsuperscript{34} He argued that human rights norms and standards are so well ingrained today in global consciousness ‘that they flood through into every corner of humanitarian law’.\textsuperscript{35} The majority of the Court did not disagree entirely. It held that the deliberate use of nuclear weapons by a state, in any circumstances, would be incompatible with respect

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{29} \emph{Israeli Wall (Advisory Opinion)} [2004] ICJ Rep 136. See also John Tobin, ‘Seeking Clarity in Relation to the Principle of Complementarity: Reflections on the Recent Contributions of Some International Bodies’ (2007) 8(2) Melbourne Journal of International Law 356.
\item \textsuperscript{30} Bertrand G Ramcharan, ‘The Drafting History of Article 6 of the \textit{International Covenant on Civil and Political Rights}: Note from the Editor’ in Ramcharan (ed), above n 13, 42–61.
\item \textsuperscript{32} Gowlland-Debras, above n 26, 320. See also \textit{Vienna Convention on the Law of Treaties}, opened for signature 23 May 1969, 1155 UNTS 331, 8 ILM 679, art 31 (entered into force 27 January 1980).
\item \textsuperscript{33} Ibid 355.
\item \textsuperscript{34} Ibid. But ‘human dignity’ does not have the same legal significance as ‘human rights’.
\item \textsuperscript{35} Ibid 356.
\end{enumerate}
\end{footnotesize}
for ‘basic human dignity’,\(^{36}\) and it rejected the argument put by some states that the taking of life in armed hostilities is a necessary exception to the principle that the right to life is non-derogable:

[W]hen a weapon has the potential to kill between one million and one billion people ... human life becomes reduced to a level of worthlessness that totally belies human dignity as understood in any culture.\(^{37}\)

During the proceedings, Professor Philippe Sands noted that, while ‘a small but important minority’ of states consider international human rights norms to be ‘irrelevant’ or ‘inapplicable’ to the questions before the Court, ‘this position is contradicted by state practice, by doctrine, by jurisprudence, and by common sense ... Nuclear weapons are not above these laws’.\(^{38}\) Moreover, the Helsinki Resolution of 1985 provides that ‘[t]he existence of an armed conflict does not entitle a party unilaterally to terminate or suspend the operation of treaty provisions relating to the protection of the human person’.\(^{39}\) However, Australia’s foreign minister at the time, Gareth Evans QC, expressed doubt that international human rights law had any direct bearing on the questions before the Court,\(^{40}\) despite having its roots in the UN Charter.\(^{41}\) Representatives of other states flatly rejected the possibility: for example, the Russian delegation argued that human rights treaties were obviously ‘not designed ... to cover situations in which nuclear weapons could be used ... [B]y their very nature these treaties require peace and democracy’.\(^{42}\) The British representatives warned that, by interpreting an instrument ‘in a way which was never intended or

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\(^{36}\) Ibid.

\(^{37}\) Ibid.

\(^{38}\) Transcript of Proceedings, *Case in Legality of the Use by a State of Nuclear Weapons in Armed Conflict and in Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, President Bedjaoui presiding, 14 November 1995, The Hague) 53 [3].

\(^{39}\) Institute of International Law, *The Effects of Armed Conflicts on Treaties* (1985) art 2.

\(^{40}\) Transcript of Proceedings, *Case in Legality of the Use by a State of Nuclear Weapons in Armed Conflict and in Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, President Bedjaoui presiding, 30 October 1995, The Hague) 45 [26].

\(^{41}\) See, eg, *UN Charter* arts 1, 55, 62, 76.

\(^{42}\) Transcript of Proceedings, *Case in Legality of the Use by a State of Nuclear Weapons in Armed Conflict and in Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, President Bedjaoui presiding, 10 November 1995, The Hague) 44.
even contemplated by the parties’, the Court would ‘gravely endanger the certainty and stability of treaty relations’.43

Predictably, the United States was also firmly opposed to the application of human rights law to the question, asserting that it is ‘both implausible and illogical’ to conclude that, in becoming parties to the ICCPR, ‘states adopted by implication or inadvertence, a prohibition on the use of nuclear weapons that these same states have pointedly declined to establish in agreements dealing directly with arms control and armed conflict’.44 America cautioned that an opinion by the Court expressing support for the proposition that human rights instruments prohibit or restrict the use of nuclear weapons ‘could seriously impair international co-operation and the development of legal norms in these fields in the future’.45 It pointed out that no human rights treaty incorporating a right to life ‘could have been adopted if there were ... a requirement to deal expressly in their texts with the volatile question of nuclear weapons’.46

However, even if the use of nuclear weapons against a target state were lawful according to the rules of armed conflict — as the ICJ considers possible47 — it is difficult to imagine that in any circumstances it would not, owing to the radioactive fallout it would create, directly affect third states beyond the target state’s national boundaries. For this reason alone, the use of nuclear weapons would surely violate the right to life of civilians living in such states. Nevertheless, the ICJ appears to have substantially limited the applicability of international human rights law to questions concerning nuclear weapons. For those keen to utilise this doctrine of law as a vehicle for advancing nuclear disarmament, its advisory opinion on nuclear weapons has been an unwelcome setback — although some advocates have considered it worthwhile to cite the opinion in communications submitted to the HRC.

Moreover, the advisory opinion acutely demonstrated the difficulty the ICJ faces in developing international law in a principled way when the environment is highly politicised. In a sense, the question of nuclear weapons was perhaps too hot for

43 Transcript of Proceedings, Case in Legality of the Use by a State of Nuclear Weapons in Armed Conflict and in Legality of the Threat or Use of Nuclear Weapons (International Court of Justice, President Bedjaoui presiding, 15 November 1995, The Hague) 43.
44 Ibid 64.
46 Ibid.
47 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 225, [105(2)(e)].
the Court to handle. It floundered under the pressure of powerful states resistant to an opinion depriving them of what they consider their sovereign right: the right to possess and use nuclear weapons.

Significantly, the ICJ provided little insight as to whether the mere possession, deployment, testing or threat of use of nuclear weapons would violate article 6 of the *ICCPR*. On this question, the authority of the HRC, as contained in its general comments and decisions on individual complaints, remains highly relevant. This essay argues that, in coming years, the Committee should attempt to develop a more sophisticated jurisprudence in this area. To date, its individual complaints on this topic have tended to raise more questions than they have answered, and the boldness of its general comments on the right to life does not reflect the conservative approach it has taken in dealing with individual complaints. It should also begin challenging states, through its reporting process, which possess nuclear weapons or which in some other way support their continued existence.

**Decisions and General Comments of the HRC**

The HRC has issued two general comments on article 6 of the *ICCPR*.48 The first attached positive obligations on states parties in respect of the right to life, including a ‘duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life’.49 The Committee argued that any effort by a state party to avert war, especially thermonuclear war, would help to safeguard the right to life,50 and that a state must protect against the arbitrary deprivation of life not only by non-state criminals but also by its own security forces.51

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48 The HRC has the power under art 40(4) of the *ICCPR* to issue comments addressed generally to all states parties, usually in relation to a specific right. According to Joseph, Schultz and Castan, these ‘have proven to be a valuable jurisprudential resource’: above n 19, 21.
50 UN Human Rights Committee, above n 5, [2].
51 Ibid [3].
The HRC’s second and even more controversial general comment on the right to life went a step further in censuring states with nuclear capabilities on the basis that nuclear weapons pose one of the greatest threats to article 6 in the world today. It called upon all states, whether parties to the ICCPR or not, ‘to take urgent steps, unilaterally and by agreement, to rid the world of this menace’. Both general comments have been cited extensively in communications submitted to the HRC. For example, in EW et al v The Netherlands, the authors argued that the Netherlands, in preparing to deploy cruise missiles, had violated their right to life because it had not acted in accordance with the second general comment. Although general comments do not reflect the Committee’s views on individual complaints, it was relevant to this communication that the Committee had condemned in its general comment not only the use of nuclear weapons but also their deployment.

In a number of cases, the HRC has considered it appropriate to restate elements of its general comments on article 6. However, their influence on the Committee’s individual decisions has been more limited than some advocates might have hoped for or expected. Despite its willingness to criticise in a general sense all states parties with nuclear weapons, the Committee has been fairly ineffectual in actually advancing nuclear disarmament. This is perhaps because matters involving nuclear weapons are outside its immediate sphere of influence.

The most widely criticised aspect of the second general comment was its assertion that the production, testing, possession, deployment and use of nuclear weapons...
weapons should be prohibited and recognised as ‘crimes against humanity’.\(^{57}\) Dominic McGoldrick has argued that use of the word ‘should’ suggests that the Committee was describing a ‘desirable goal’ rather than an ‘immediate legal obligation’,\(^{58}\) and therefore the Committee was ‘stepping outside its role of supervising the immediate implementation of the right in the ICCPR’.\(^{59}\) But this is an unfair criticism. As a matter of logic and law, implementation of the treaty clearly requires states to eliminate the threat that nuclear weapons pose to human life, and this goal would be advanced if the production, inter alia, of nuclear weapons were considered crimes against humanity. The authors of *Aalbersberg et al v The Netherlands*, a communication submitted to the HRC in 2005, sought to rely on the committee’s comment,\(^{60}\) arguing that this clear statement ‘should not remain without … legal impact in individual complaints’, as the Committee ‘is not a political organ, but a judicial body’.\(^{61}\)

Importantly, the second general comment also notes that the actual use of nuclear weapons ‘may be brought about, not only in the event of war, but even through human or mechanical error or failure’.\(^{62}\) However, no communication submitted to the HRC has sought to rely on this specific point, even though it would potentially be quite useful in supporting a claim that the presence of nuclear weapons threatens the right to life of people within the same territory. To substantiate this particular claim, most authors have simply relied on the idea that nuclear weapons create a heightened risk of retaliatory attack.

\(^{57}\) UN Human Rights Committee, above n 3, [6].

\(^{58}\) McGoldrick, above n 17, 336.

\(^{59}\) Ibid.


\(^{61}\) Ibid. The authors of *EW et al v The Netherlands*, UN Human Rights Committee, Communication No 429/90, UN Doc CCPR/C/47/D/429/1990 (19 November 1990) had also sought to rely on the statement: 6 [3.4]. They cited art 6(c) of the *Charter of the International Military Tribunal* (8 August 1945): ‘Leaders, organizers, instigators, and accomplices, participating in the formulation or execution of a common plan of conspiracy … are responsible for all acts performed by any persons in execution of such plan [involving murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population]’. It is most often described as a ‘quasi-judicial body’: see, eg, Joseph, Schultz and Castan, above n 19, 21.

\(^{62}\) UN Human Rights Committee, above n 3, [4].
Compulsory Military Service

Five of the 10 communications concerning nuclear weapons were submitted by citizens of the Netherlands who objected to compulsory military service. In the first such case, *CBD v The Netherlands*, the author alleged that his country’s defence policy violated articles 6 and 7 of the *ICCPR*, that he was the victim of such violations, and that accordingly he should not be required to perform military service. He claimed that he had been forced to become an accomplice to a crime against peace. The HRC concluded that, as the *ICCPR* does not preclude the institution of compulsory military service by states parties, the author could not successfully claim to be a victim of a violation merely because he had been forced to perform military service.

Shortly thereafter, the Committee considered three similar communications, all of which failed. In *JPK v The Netherlands* and *TWMB v The Netherlands*, the HRC was unwilling to accept the authors’ claim that, if the ‘flexible response doctrine’ of the North Atlantic Treaty Organization (NATO) is intended to create a credible deterrent against attack, it must imply that political and military leaders are prepared

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64 Art 7 of the *ICCPR* prohibits states parties from subjecting people to torture or to cruel, inhuman or degrading treatment.


66 Ibid 5 [5.1].

67 Ibid 6 [6.2]. The author had an option, under the *Military Service (Conscientious Objection) Act 1970* (The Netherlands), to refuse to perform military service and instead perform alternative service. However, this fact did not appear to influence the HRC’s finding of inadmissibility — that is, the claim would have been inadmissible regardless of the Act.

to use nuclear weapons and, therefore, as conscripts they satisfy the ‘victim’ requirement of article 1 of the Optional Protocol.  

A more recent communication with similar facts is ARU v The Netherlands, in which the author argued that, by performing military service, his life was in danger for two reasons: first, there was a high risk of retaliation if NATO chose to use the nuclear weapons stationed in the Netherlands and, secondly, nuclear winter would necessarily result from the radioactive fallout created by any use of nuclear weapons. He also argued that, in being forced to commit a violation of the right to life, he himself was a victim of that violation. His claim, like the four before it, failed to satisfy the victim requirement.

It is clear from these cases that a person is not a victim of article 6 of the ICCPR simply because he or she has been forced to serve in the military of a state party which has nuclear weapons stationed on its soil. Nothing in the Committee’s decisions suggests that it would make any difference, for the purposes of satisfying the victim requirement, if the state party actually possessed nuclear weapons, as opposed to merely hosting them. The main difficulty has been in showing that a soldier, owing to his or her position, is at a greater risk of being the victim of a nuclear attack than an ordinary citizen within the particular territory, because nuclear weapons are, because of their sheer destructive potential, necessarily indiscriminate. The HRC’s jurisprudence on communications involving conscripts appears to be settled, and as such there is perhaps little potential for future cases of this kind to succeed.

**Deployment of Nuclear Weapons**

Two of the communications considered by the Committee involved ordinary Dutch citizens — not conscripted soldiers — objecting to the deployment of US nuclear

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71 Ibid 3 [3.2].

72 Ibid 3 [3.2].

73 Ibid 4 [4.2].
weapons on their soil. The first such communication, *EW et al v The Netherlands*, was submitted to the HRC on behalf of 6588 citizens who claimed that their right to life would be violated if the Netherlands deployed US nuclear-armed cruise missiles. The authors argued that they were ‘victims’ of such violation. Their justification was twofold: first, a cruise missile base would provide a prime target for military adversaries and, secondly, they could be made accessories to a crime against humanity. They needed to demonstrate a ‘real risk’ of a violation. The communication failed because the authors had not satisfactorily shown that the deployment of nuclear weapons would adversely affect their enjoyment of the right to life and that such an effect was imminent.

During the proceedings, the Netherlands argued that the communication was inadmissible under the *Optional Protocol* as it is in the interests of any citizen not to be exposed to the responses of an enemy in armed conflict. The authors responded that the violation was of such a nature that it affected all of them simultaneously, and the Committee agreed that ‘nothing precludes large numbers of persons from bringing a case under the *Optional Protocol*’. However, it stressed that the *Optional Protocol* ‘was not designed for conducting public debate over matters of public policy, such as support for disarmament’. This suggests, perhaps,

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76 Ibid 4 [3.1].
77 Ibid 6–7 [3.7]. For this proposition they relied on *Soering v United Kingdom*, European Court of Human Rights, Communication No 1/1989/161/217 (7 July 1989).
78 Ibid 14 [6.4].
79 Ibid. 8–9 [4.2]. The communication was said to be an *actio popularis*.
80 Ibid 6 [3.6]. See also *Ominayak v Canada*, UN Human Rights Committee, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (26 March 1990) [32.1].
81 Ibid 14 [6.3]. The Committee found that the communication did not fail on this ground.
82 Ibid 12 [6.2]. This point was reiterated in *ECW v The Netherlands*, UN Human Rights Committee, Communication No 524/1992, UN Doc CCPR/C/49/D/524/1992 (22 October 1992) at 3 [4.2]. See also *Aalbersberg et al v The Netherlands*, UN Human Rights Committee, Communication No 1440/2005, UN Doc CCPR/C/87/D/1440/2005 (2 August 2005), in which the Netherlands argued that the communication was an *actio popularis* because ‘several of the authors are active and outspoken opponents of nuclear weapons, of military forces and weapons in general, and have sought to use national judicial fora as venues for public political debate’; [4.5].
that it regarded the communication more as a tool for attracting publicity to the authors’ cause than a genuine attempt to enforce their rights. Arguably, it displays a degree of contempt by the Committee towards those attempting to advance nuclear disarmament through human rights law.

The second such communication involved a Dutch doctor who had been arrested for participating in a sit-down demonstration aimed at preventing the deployment of the US cruise missiles.\(^{83}\) He argued that the possession of nuclear weapons and preparations for their use amounted to ‘a crime against peace and a conspiracy to commit genocide’, and thus a violation of articles 6 and 7.\(^{84}\) But the HRC held that the author’s conviction for obstructing the free flow of traffic could not be seen as raising issues under either article.\(^{85}\) Another communication involved an Australian man who objected to his country’s complicity in the deployment and potential use of US nuclear weapons.\(^{86}\) He relied on the ICJ’s advisory opinion of 1996 to demonstrate that Australia had violated his right to life.\(^{87}\) The Committee concluded that Australia’s defence policy, which involves the US military facility at Pine Gap, did not pose an imminent, adverse risk to the author’s right to life.\(^{88}\)

It is unclear from these three cases in what circumstances, if any, an individual could successfully claim under the \textit{Optional Protocol} that he or she is a victim of the deployment of nuclear weapons. It seems that the HRC would accept such a claim only if the facts of the case were quite exceptional, for example, if an accident of some kind had taken place during deployment and the author’s life had been directly placed in danger.

\textit{Nuclear Testing}

The only communication concerning nuclear testing was submitted to the HRC in 1995 by three French citizens living in Tahiti who claimed to be victims of violations

\(^{84}\) Ibid 3 [3].
\(^{85}\) Ibid 3 [4.3].
\(^{87}\) Ibid [5.1].
\(^{88}\) Ibid [6.8].
by France of articles 6 and 17 of the ICCPR. The communication was made in response to an announcement by France that it would conduct underground nuclear tests in the South Pacific. During proceedings, six such tests were carried out. Notably, of the 10 communications involving nuclear weapons, this is the only one in which the HRC relied heavily on scientific evidence in deciding whether article 6 had been breached as alleged.

Referring to various authoritative medical and seismological studies, the authors of the communication argued that nuclear testing had endangered the lives of people residing in the test area, including their own, by exposing them to harmful doses of radiation and by contaminating the food chain. They noted an increased incidence of cancer and genetic abnormalities in the population of French Polynesia since earlier tests had been conducted, but France refuted that there was a causal link. France’s main argument was that, as it had used techniques designed to minimise the risk of radioactive contamination, it had not violated article 6 of the ICCPR. It asserted that ‘[p]urely theoretical and hypothetical violations’ do not suffice to make the authors ‘victims’ within the meaning of article 1 of the Optional Protocol. In other words, it rejected the science on which the authors based their claim.

The HRC decided that the nuclear tests by France had not resulted in a violation of the right to life and nor did the tests present an ‘imminent threat’ to the enjoyment of that right specific to each of the authors. It held that the authors could not claim to be victims whose right to life ‘was then violated or was under a real threat of violation’, as it was not convinced by the authors’ arguments about the health

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89 Art 17 of the ICCPR prohibits arbitrary interference with a person’s privacy and his or her family life. The European Court of Human Rights has also considered claims concerning nuclear tests, but they were not sufficiently substantiated: see LCB v United Kingdom, European Court of Human Rights, 27 EHRR 212 (9 June 1998).
91 Ibid.
92 Ibid [2.2].
93 Ibid.
94 Ibid [3.4].
95 Ibid [3.2].
96 Ibid [3.6].
97 Ibid [5.5].
98 Ibid.
dangers of nuclear testing, much less its ‘highly controversial’ contention that the tests had deteriorated the geological structure of the Mururoa and Fangataufa atolls.\textsuperscript{99}

Of all the communications submitted to the HRC involving nuclear weapons, this was perhaps the one with the greatest chance of succeeding, given the strength of scientific evidence supporting the claim. The decision has set a very high threshold for proving victimhood under article 1 of the \textit{Optional Protocol}.\textsuperscript{100} In any future communications involving nuclear testing, it might be necessary for an author actually to show that he or she had contracted a life-threatening illness as a result of the testing.\textsuperscript{101} It seems unlikely that the HRC would ever find that a mere declaration of intention to conduct nuclear tests had violated article 6, as this would clearly be a departure from the French case.\textsuperscript{102}

\textbf{Imminent Use of Nuclear Weapons}

The authors of the most recent communication involving nuclear weapons, \textit{Aalbersberg et al v The Netherlands}, distinguished their case from previous cases dealing with the deployment and testing of nuclear weapons\textsuperscript{103} on the basis that it addressed, for the first time, ‘the imminent use of nuclear weapons’.\textsuperscript{104} The case followed a refusal by the Dutch Supreme Court to declare that the use of nuclear

\textsuperscript{99} Ibid \textsuperscript{[5.6]}.  
\textsuperscript{100} See, however, the earlier case of \textit{Toonen v Australia}, UN Human Rights Committee, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (4 April 1994), which took a very permissive approach to the victim requirement.  
\textsuperscript{101} The Committee could, in such cases, order payment of reparations by the state party to the victims: see, eg, \textit{A v Australia}, UN Human Rights Committee, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997).  
\textsuperscript{103} \textit{Aalbersberg et al v The Netherlands}, UN Human Rights Committee, Communication No 1440/2005, UN Doc CCPR/C/87/D/1440/2005 (2 August 2005) [3.3].  
\textsuperscript{104} Ibid \textsuperscript{[4.3]}. 
weapons would, under all circumstances, be contrary to the Netherlands’ obligations under international law.\(^{105}\)

The Netherlands rejected the view that this ruling authorised the actual use of nuclear weapons in a specific case affecting the authors’ rights, and furthermore the Dutch government pointed out that it would never use nuclear weapons against its own citizens within its territory.\(^{106}\) The Committee decided that the authors were not ‘actually affected’ by any alleged violation.\(^{107}\) Again, it is unclear in cases involving the imminent use of nuclear weapons how a person might successfully claim to be a victim of the alleged violation.

### Violation of the Right to Life

The HRC’s general comments on the right to life indicate that the mere possession, testing and deployment of nuclear weapons can and do violate the \textit{ICCPR}, or at least that there exists a conflict — whether reconcilable or not — between article 6 and the reality that some 26,000 nuclear weapons remain in the world.\(^{108}\) However, this position has not translated into the success of a single individual complaint submitted to the Committee. Nuclear weapons have clearly presented it with a unique dilemma vis-à-vis developing a coherent and principled jurisprudence on article 6 and the victim requirement of the \textit{Optional Protocol}.

The problem arises, first and foremost, from the fact that we are all potentially victims of nuclear weapons, and as such it will invariably be difficult for an individual or group of individuals to claim that they are at a greater risk of death by nuclear weapons than the rest of humankind. This is perhaps why the HRC has been

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\(^{105}\) In reaching this conclusion, it relied on the ICJ’s advisory opinion of 1996: \textit{Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)} [1996] ICJ Rep 225.


bold in its general comments but meek in dealing with individual complaints concerning nuclear weapons. However, the contradiction of this position is obvious and problematic.

Secondly, nuclear weapons issues appear to be too politically charged for a body like the HRC to deal with in a satisfactory fashion, as it is not representative of the views of every state party to the ICCPR — or, for that matter, of any state party. Intense pressure from powerful states intent on maintaining their nuclear arsenals has prevented it from adopting a principled position on nuclear weapons and the right to life. The Committee is wary that non-compliance with its decisions, particularly on matters in the public spotlight, can severely undermine its authority, and it knows that states will likely put perceived national security interests ahead of the HRC’s wishes.

However, the Committee’s approach to individual complaints involving nuclear weapons has arguably been too restrictive, as demonstrated most starkly in the case involving French nuclear tests in the Pacific, where the Committee was unwilling to find that authors were victims of a violation even though they were clearly in a unique position of danger — that is, few others could have made a similar claim. It is also demonstrated by the fact that, to date, the individual complaints mechanism of the ICCPR has been entirely ineffective in providing individuals with an avenue for promoting nuclear disarmament.

Currently, all nine nuclear-armed states, with the exception of China, are parties to the ICCPR, as are the additional five states which host US nuclear weapons. However, only half of all such states — Belgium, France, Germany, Italy, the Netherlands, Russia and Turkey — have ratified the Optional Protocol allowing individual complaints. It is important, therefore, for advocates consider other

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109 Joseph, Schultz and Castan, above n 19, 188.
110 They are the United States, Russia, the United Kingdom, France, China, Israel, India, Pakistan and North Korea. However, there is some doubt as to whether North Korea possesses nuclear weapons.
111 They are Belgium, Germany, Italy, the Netherlands and Turkey. The United Kingdom also hosts US nuclear weapons. In addition, several other countries, including Australia, host foreign military bases that would potentially be involved in the use of nuclear weapons: see Leonard John Landon v Australia, UN Human Rights Committee, Communication No 646/1995, UN Doc CCPR/C/64/D/646/1995 (25 November 1998).
112 However, a state can of course be said to violate an individual’s rights under the ICCPR even if it is not party to the Optional Protocol.
formal avenues for exposing breaches, such as the Committee’s reporting process$^{113}$ and the inter-state complaints mechanism.$^{114}$ Disappointingly, the HRC has to date been unwilling to criticise a specific state for possessing nuclear weapons, but it did applaud the Ukraine for acceding to the Treaty on the Non-Proliferation of Nuclear Weapons,$^{115}$ which indicates that it still considers nuclear weapons issues to be within its ambit.

Non-government organisations should continue to apply pressure on the HRC to raise concerns about nuclear weapons when it questions states parties about their compliance with the treaty. This is the least that one could expect as a flow-on effect from its general comments. The International Campaign to Abolish Nuclear Weapons recently made a submission to the Committee in which it accused Australia of breaching its obligations under article 6 by supporting preparations for nuclear war carried out at ‘Pine Gap’, by allowing US nuclear-armed vessels to enter our waters, by relying on the ‘protection’ of US nuclear deterrence, and by exporting uranium to nuclear-armed countries.$^{116}$

Referring to the HRC’s general comments on article 6 and the ICJ advisory opinion on nuclear weapons, the submission argued that states parties to the ICCPR are legally required to take positive steps aimed at safeguarding the right to life, particularly steps that would potentially avert nuclear war, and that parties must not pass laws, adopt policies or act in such a way that would increase the likelihood of

$^{113}$ ICCPR art 40.

$^{114}$ Ibid art 41. However, this mechanism has never been used, presumably because of ‘the diplomatic and political implications of such an action’: Joseph, Schultz and Castan, above n 19, 21. The HRC has encouraged states to use this mechanism, reminding them that ‘every State Party has a legal interest in the performance by every other State Party of its obligations’: UN Human Rights Committee, above n 3, 192 [1]. The ICJ has said that states have an obligation under the UN Charter to promote universal respect for and observance of human rights: Barcelona Traction, Light and Power Company Ltd Case (Belgium v Spain) [1970] ICJ Rep 3, [34].


nuclear war. Australia is clearly not meeting these obligations, and nor are any of the 13 states parties that possesses or host nuclear weapons.

**Conclusion**

There is a clear conflict between article 6 of the *ICCPR* and the threat or use of nuclear weapons, which has given rise to an expectation among many advocates that international human rights law will in some way advance nuclear disarmament. However, this has not been the case. Instead, the HRC has been unwilling — or perhaps simply unable — to create effective avenues for individuals to exert pressure on their governments to pursue and achieve nuclear disarmament in all its aspects. The ICJ, meanwhile, has severely limited the application of human rights law in matters involving the wartime use of nuclear weapons.

The problem is not that the right to life is insufficiently broad to deal with nuclear weapons issues; rather, it is that there is no way of enforcing the right against states that place enormous security and political value on keeping their nuclear weapons, and as such development of the law in this area has been impeded. However, there remains some hope that article 6 of the *ICCPR* will one day provide the basis for a successful claim involving nuclear weapons, and that the HRC will soon begin challenging states which flout their human rights obligations by maintaining these worst weapons of terror.

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117 Ibid 8.

118 Arguably, other states parties are also in breach of their obligations for reasons relating to nuclear weapons. For example, Japan and South Korea both rely on the ‘protection’ of US nuclear deterrence: see ibid 3.

This year, the International Campaign to Abolish Nuclear Weapons argued in a submission to the UN Human Rights Committee that Australia is in breach of its obligations under human rights law owing to its support for nuclear weapons.
UPDATE

The Conclusion of a New Treaty to Ban Certain Types of Cluster Munitions

Dr Mark Zirnsak*

Introduction

In Dublin between 19 and 28 May, 107 governments negotiated a new international treaty, the Convention on Cluster Munitions, that will ban cluster munitions that ‘cause unacceptable harm to civilians’. Australia was part of the negotiations. While not perfect, this treaty will help on the path to getting rid of a class of weapon that has resulted in thousands of civilians being killed and maimed, often years after conflicts have ended. The next step will be to get as many countries to sign and ratify the treaty as soon as possible.

A cluster munition is a bomb, artillery shell or rocket whose outside canister opens to release a number of smaller bombs, known as submunitions, over a wide area when it is launched or dropped. The submunitions are designed to explode before, upon or just after impact with the ground, although many fail to do so. The unexploded submunitions can then lie dormant for years or even decades after conflicts end until they are disturbed, often by children attracted by their small size and bright colours. A number of other characteristics also render cluster munitions inherent violators of international humanitarian law. They are often inaccurate, have

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a large area of effect, and the vast majority of those injured or killed by cluster submunitions are civilians.

The Oslo process started with a meeting of like-minded governments in February 2007 in Oslo hosted by the government of Norway to discuss developing a new international agreement to deal with the humanitarian impact of cluster munitions. The meeting resulted in the Oslo Declaration by 46 countries present to ‘[c]onclude by 2008 a legally binding international instrument that will prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians’. Subsequent meetings took place in Lima, Vienna and Wellington followed by the Dublin Diplomatic Conference on Cluster Munitions in May 2008.

The new Convention on Cluster Munitions bans all the cluster munitions that have been extensively used. Cluster munitions are exempted if the submunitions contained weigh more than 20kg or have all the following characteristics: the munitions contain fewer than ten submunitions, each submunition weighs more than 4kg, each submunition is designed to detect and engage a single target, each submunition is equipped with an electronic self-destruct mechanism, and each submunition is equipped with an electronic self-deactivation mechanism.

The treaty requires that stockpiles of banned cluster munitions be destroyed within eight years of the country becoming party to the treaty. Countries are able to apply for extensions of four years if they are unable to meet the eight-year deadline for stockpile destruction. Countries that become party to the treaty agree to clear all areas contaminated by unexploded cluster munitions within 10 years. Extensions of up to five years for clearance can be applied for. The country responsible for dropping the cluster munitions is strongly encouraged to provide assistance to the country that the munitions have been dropped on for their clearance. The treaty requires that countries assist victims of cluster munitions under their control, which includes the families and communities of anyone injured by cluster munitions.

**Australia’s Involvement in the Process**

The Australian Department of Defence was able to get into the treaty the three loopholes it was seeking: first, Australia will be able to assist US forces in the use, transfer and stockpiling of cluster munitions, provided Australian troops themselves do not use the munitions and that Australia assesses that the use is in compliance with their understanding of the Geneva Conventions and their additional protocols;
secondly, Australia will be able to keep the SMArt 155 artillery shells that have been recently purchased, each of which has two submunitions with the characteristics exempted by the treaty; and thirdly, Australia will be able to keep an unlimited number of cluster munitions for research and training provided it believes that these are ‘the minimum number absolutely necessary’ for the purpose.

The Effect of the Treaty

Ninety-four states signed the treaty when it opened for signature in Oslo on 3 December. Many of the major manufacturers and users of cluster munitions stayed outside the treaty-negotiating process, for example, the United States, Russia, Israel and Pakistan. However, the new treaty will put pressure on these countries to stop the production, sale and use of the proscribed cluster munitions. There is some evidence of this, as on 19 June the US Secretary of Defense announced a new policy on cluster munitions, which recognises the need to minimise the unintended harm to civilians and civilian infrastructure associated with unexploded ordnance from cluster munitions, consistent with the obligation to minimise the collateral effects resulting from the use of force in pursuit of legitimate military objectives.

However, the US Department of Defense has stated that ‘[c]luster munitions are legitimate weapons with clear military utility’ and that a blanket elimination of cluster munitions was ‘unacceptable’. The new policy allows for US forces to continue to use inaccurate cluster munitions with high rates of live ‘duds’ until the end of 2018, provided the use is approved by the Combatant Commander. After 2018, US forces will only be permitted to use cluster munitions that result in less than 1 per cent ‘duds’ across a range of intended operational environments.

Prior to 2018, the US Department of Defense may export cluster munitions that have a dud rate greater than 1 per cent provided that the country receiving them agrees not to use the munitions after 2018. Currently Congress has a one-year ban on all exports of cluster munitions. While the US announcement flies in the face of the Convention on Cluster Munitions, it points to the growing pressure that countries that stay outside of the Convention will feel to comply with the new norm set.

This was the case with the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. While the major manufacturers, exporters and users of anti-personnel landmines have shunned the treaty, 156 countries have so far ratified it. This has resulted in the
number of countries that retain the capability to manufacture anti-personnel landmines dropping from 51 to 13. Even of the 13 that retain the capacity to manufacture, a number have ceased manufacturing. The US has not manufactured any anti-personnel landmines since 1997, South Korea has not done so since 2000 and China has ceased production since 2003. Furthermore, the trade in such mines has almost completely ceased.

The *Convention on Cluster Munitions* offers hope of a world free of the scourge of the worst types of cluster munitions.
Introduction

A cluster bomb is a weapon designed to cause death or harm by deploying multiple bomblets. Israeli armed forces dropped as many as four million such bomblets on Lebanon in the 2006 war involving Hezbollah, mostly within the last 72 hours of fighting, when a ceasefire was in clear sight. Reports suggest that Hezbollah also used cluster bombs against Israel.¹ Today, two years after the violence ended, many of the bomblets still litter the hills, fields and villages in the affected region, waiting for hapless civilians to detonate them by accident, as many did not explode upon impact. The consequences of cluster bomb use were predictable and well known to both parties — including the appalling reality that a large proportion of cluster bomb casualties are young children who mistake the bomblets for toys. Those dropped in Lebanon looked like tennis balls, butterflies and torch batteries with ribbons attached to them. They have proven difficult to detect in long grass and among the rubble of buildings razed to the ground.


But something good did come of this terrible war. The use of cluster munitions made the global community question whether the continued existence of these despicable weapons could be justified. Global outcry from individuals, non-government organisations, parliamentarians and United Nations agencies forced states to contemplate the need for a new international treaty to outlaw this entire class of weapon — a weapon which has, over several decades, caused untold humanitarian harm in Africa, Asia and the former Soviet Union. At a meeting in Dublin this May, after a year’s negotiations, 107 governments agreed on the text for such a treaty. This was a monumental achievement. The new law will open for signature this December. Though it is an imperfect document, it is a significant development that will save countless lives. This article tells of the road to the cluster bomb ban from a personal perspective, with a focus on Australia’s involvement.

Witnessing the Destruction First Hand

In October 2006, I decided to travel to Lebanon with a parliamentary colleague to see for myself the damage that had been caused two months earlier.\(^2\) I also wanted to add my voice to an international call for cluster bombs to be banished from global armaments for evermore. The trip was organised by the Australian Friends of Lebanon committee, and we were accompanied by 11 Lebanese Australians representing various groups. We travelled to the suburbs of Southern Beirut and towns in Southern Lebanon that had been most heavily hit by aerial bombardments, speaking to people in their bombed-out schools, hospitals and homes. I wanted to understand better the political situation in the country, the prospects for peace and the immediate and longer term needs of the Lebanese people, with the aim of advising the Australian Government upon our return. I did this, but our report was more or less ignored.

Everyone we met in this war-ravaged nation stressed the urgency of removing the unexploded bomblets dispersed across large areas of southern Lebanon. Most of the bomblets had come from American-made M42 cluster bombs, supplied some decades ago. The bomblets are about half the size of a hand grenade and are designed to land up to a kilometre from the site of the explosion. An estimated 10 to 50 per cent did not explode on impact. Between the end of the war and the time of my visit, they had killed 16 civilians, including several children, and injured roughly

one hundred. In the two years since then, they have killed and maimed hundreds more, and have made agriculture and mobility impossible in many parts of the country.

Israel had refused to provide Lebanon or any of the aid agencies involved in de-mining with the precise locations of the cluster bomb drops. Only 592 general locations had been identified at the time of my visit, but it was known that more than 6000 cluster bombs had been dropped in the last three days alone. To this date, Israel has not provided the necessary information for de-miners to get on with their job. The Howard Government voted down a Senate motion I later introduced urging Israel to provide the maps immediately. The consequence is that large tracts of land will remain affected for decades to come, providing a constant impediment to development, as well as perhaps a harsh warning to the Lebanese people.

At the time of our visit, little progress had been made to rebuild houses in the densely populated parts of southern Beirut. They were just piles of rubble. Out of desperation, people were residing in very unstable parts of complexes that had been only partially destroyed. Others were living with relatives in crowded conditions, as their own homes were no more. Health centres had been ruined, there was no running water, and travel by road was slow and extremely hazardous. Lebanon was forced to rely on electricity from other neighbouring countries because its own oil-based generating system had been wiped out. Sewage works were severely damaged, and 156 public schools were totally destroyed.

I met with the director of the United Nations Children’s Fund (UNICEF) in Beirut, who was responsible for the 389,673 children displaced by the conflict. One of his greatest concerns was to protect them from unexploded bomblets, and accordingly he organised for the distribution of material warning against contact with them. Leaflets, posters, water bottle labels and television programs displayed images of the cluster bomblets which had been used during the conflict. We also met with the president, prime minister, speaker of the parliament, foreign minister and the head of Hezbollah, who provided important insights into what I could do in Australia to improve the situation of the people of Lebanon and make sure that it did not happen again — anywhere in the world.
A Cluster Bomb Ban in Australia

At the start of December, before the summer parliamentary break, I introduced a private senator’s bill for a domestic prohibition on cluster munitions. It was co-sponsored by Australian Democrats senator Andrew Bartlett, Australian Greens senator Bob Brown and Labor Party senator Mark Bishop. Together we held a press conference at Parliament House where we described the grave humanitarian consequences of cluster bomb use. Tim Wright made a life-size model of a BLU97 cluster bomb which we used to demonstrate to the cameras how the bomblets disperse and what proportion would not explode upon impact.

In the second reading speech for the Cluster Munitions (Prohibition) Bill 2006, I explained that its specific purpose is to ensure that innocent civilians in conflict zones are not maimed, killed or put at risk as a result of Australians possessing, using or manufacturing cluster munitions. The introduction of the bill into the Senate came three months after the war in southern Lebanon and one month after a landmark report by Handicap International revealed that 98 per cent of people killed from unexploded cluster bomblets are civilians.3

I argued that the international community must unite in an effort to ensure that these horrific weapons are never used again. Earlier that year, even before the war in Lebanon had broken out, Belgium had legislated to ban the weapons and Norway had declared a moratorium on their use. Several other countries — including Austria, Ireland, Mexico, New Zealand and Switzerland — had called for a treaty to be drafted and put into force. I saw my bill as potentially providing momentum towards that goal. To my knowledge, it was only the second cluster bomb prohibition bill to be introduced in any parliament in the world, and the first to propose a blanket ban; the Belgian bill had provided only a partial one.

I noted in my speech that the problem of cluster bomb use is by no means limited to Lebanon. The ‘Coalition of the Willing’ dropped more than 1.9 million bomblets on Iraq in 2003 and 248,000 on Afghanistan in 2001 to 2002. In recent times, large numbers have also been used in Chechnya, the Sudan, Kosovo, Eritrea and Ethiopia. Appallingly, the BLU97 cluster bombs dropped by the United States Air Force on Afghanistan had the same yellow packaging as the food rations it had

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earlier distributed by warplane. In all of these countries, the implications of their use are still being lived out today.

I explained in the second reading speech that my bill would prevent members of the Australian Defence Force, whether serving in Australia or elsewhere, and whether serving with any other defence force, from deploying cluster munitions. Under the bill, a person must not intentionally develop, produce, acquire, stockpile, retain, transfer, use or engage in military preparations to use cluster munitions, container units or sub-munitions. Further, a member of the Defence Force must not engage in military preparations for a member of the defence force of another country to use cluster munitions, container units or sub-munitions. The bill obviously extends to acts by an Australian citizen outside Australia and to acts done on board Australian ships and aircraft. However, the offences set out in the bill do not apply in relation to the clearing of unexploded sub-munitions, de-mining education, or decommissioning.

If, as a result of an offence under the Act, a cluster munition is deployed, then that munition would need to be cleared, removed or destroyed in accordance with Australia’s obligations under a new international protocol which Australia had signed. The bill remains before the parliament today for consideration, even though I am no longer a senator. Australian Greens senator Christine Milne kindly reintroduced it for me, but it has not yet been voted on or debated.

The Senate Inquiry into the Bill

I did, however, win Senate support to refer the Cluster Munitions (Prohibition) Bill 2006 to the Senate Standing Committee on Foreign Affairs, Defence and Trade for a public inquiry. The committee published its report in May last year,4 after having received a total of 15 submissions as well as five ‘re-submissions’ responding to points raised in a submission from the Department of Defence. Nine supported the bill, including those from the Peace Organisation of Australia, Austcare, Landmine Action UK, the Australian Red Cross, the Medical Association for Prevention of War, Australians for Lebanon and the Australian Network to Ban Landmines. They underscored the moral importance of the bill. Several also highlighted the importance

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of the bill as a positive step for the protection of civilians and an impetus to efforts for an international treaty on cluster munitions.

One of the most remarkable discoveries made during the course of the inquiry was that the Defence Department had begun acquiring, for the first time in many years, its own stockpile of cluster munitions. I had learned earlier, through my questioning in the Senate, that Australia had once possessed a small stockpile of cluster bombs, but I assumed that we would not be interested in heading down that path again: first, because there was no apparent need for cluster bombs and, secondly, because it would surely result in public outrage. My main aim in introducing the bill had not been to prevent the Australian Government from acquiring new cluster bombs but to forbid it from using American and British cluster bombs in joint military operations, which seemed a far more likely prospect.

The Senate committee, which was dominated by Coalition senators, advised against the passage of my bill. It provided what *The Age* newspaper described in a headline as a ‘green light’ to proceed with the procurement or cluster munitions as planned. Defence took delivery of them late last year. The committee’s stance was perhaps predictable but still disappointing. It argued that certain sophisticated cluster bombs are acceptable, and there is no good case for a blanket ban. Yet the humanitarian aid organisations had told us otherwise. They argued that supposedly ‘safe’ cluster munitions had in fact been used to devastating effect in several wars, and that the very latest cluster munitions on the market — like the SMArt 155 artillery shells acquired by Australia — had not been tested for safety in the field.

I wrote a dissenting report rejecting the committee’s findings and drawing attention to arguments made by organisations such as the Medical Association for Prevention of War supporting a total ban, and I criticised the committee for not agreeing to hold a public hearing as part of its inquiry, especially in light of developments in relation to a cluster munitions treaty. However, the report barely rated a mention in the press, perhaps because cluster munitions, unlike landmines, had not yet found a place in the public consciousness. If the Australian people had fully understood the impact of these horrible weapons and the limitations of a partial ban, the Government’s position would have been politically disastrous.

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Negotiations for a Cluster Bomb Treaty

My attention then turned to the negotiations that had begun for an international treaty to ban cluster munitions. I wanted Australia to support the strongest law possible. I wrote letters to various Government ministers, under Prime Minister Howard as well as Rudd, making my case against the exemption of large categories of cluster munitions, a loophole that would allow parties to use cluster munitions belonging to non-parties, and the retention of live cluster munitions for training and identification purposes. I asked questions and made speeches in Parliament to raise debate on the matter. But the Government was intent on being part of what Nobel Peace Prize winner Jody Williams — who had spearheaded the campaign to ban landmines in 1997 — described as a ‘bad guys’ cabal’ in the negotiating ring.6

It was perhaps unsurprising that the Howard Government would play an obstructionist role — after all, it did not have a reputation for supporting strong disarmament measures. But I expected more from the new Rudd Government, which had expressed strong support for positive engagement in multilateral affairs. Its stance was certainly at odds with the image of being a good global citizen. Online activist group GetUp! sent an email out to its quarter of a million supporters with the appropriate title ‘But I thought we were supposed to be the good guys?’

Just days before the treaty text was finalised, I co-authored an opinion piece with Tim Wright for the Canberra Times,7 in which we exposed the scandal of what our Government was doing and saying in Dublin. We argued that it would almost have been better if Australia had not been there at all, as our government had insisted on putting military imperatives ahead of humanitarian needs. We informed the public of three things: first, that Australia had worked hard for the weakest possible definition of ‘cluster munition’ in the treaty to protect its new SMArt 155 artillery shells, which are cluster munitions by any ordinary definition of the term; second, that our delegation had claimed that certain ‘sophisticated’ cluster bombs — ones with self-destruct mechanisms or sensor fuses, for example — do not cause unacceptable harm to civilians, when in fact many of the cluster bombs dropped on Lebanon in 2006 probably fall within the category of exempted munitions; and third, that Australia had argued that small numbers of intact cluster bombs are needed for

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7 ‘Need for Total Ban on Cluster Bombs’, Canberra Times (Canberra), 27 May 2008.
training and identification purposes, when inert bombs will do just fine. Disappointingly, Australia got everything it wanted in the final text.

I have no doubt that the treaty would have been stronger without Australia’s interventions. This is the sad legacy of a nation which put short-sighted self-interest ahead of humanitarian needs. Cluster bombs should have been banned outright. Because of the loopholes in the text, we will need to rely on public pressure and political goodwill rather than international law to prevent parties like Australia from using the cluster bombs of non-parties or their own ‘advanced’ cluster bombs, or to stop them from retaining potentially large numbers of intact cluster bombs for training purposes.

The Path from Here
The next step will be to ensure that the Australian Government signs and ratifies the new law. This should not be a difficult task, given that it won all of the concessions it fought hard for. But we must not stop there. Individuals and non-government organisations must work hard to persuade the Government to decommission its stockpile of SMArt 155 cluster munitions, even though their use is permitted under the treaty, and to foreswear its involvement in joint cluster bomb drops with allied forces. We must also encourage it to play a more constructive role in outlawing other types of weapons — especially nuclear weapons — and in tackling the root causes of violent conflict around the world. No longer being in the Senate limits my options for campaigning but I have remained on the international parliamentary network for nuclear non-proliferation disarmament as an alumnus and am keen to do my bit with peace groups like the Peace Organisation of Australia and for campaigns such as the International Campaign to Abolish Nuclear Weapons.
ESSAY & SURVEY

Turning Public Support for Nuclear Disarmament into Political Action

Catriona H. E. Standfield*

Introduction

Some 26,000 nuclear weapons remain around the world despite overwhelming public opposition to their use and support for their abolition. We must capitalise upon this prevailing sentiment to encourage governments to do away with their nuclear weapons. This article outlines a strategy to empower citizens to put pressure on political representatives to adopt an anti-nuclear-weapon stance.

Negotiations for nuclear disarmament face some major challenges. First, the five nuclear-weapon states parties to the Treaty on the Non-Proliferation of Nuclear Weapons have not yet fulfilled their obligation under article VI to disarm. According to former Australian foreign minister Alexander Downer, one problem is that Russia still sees its nuclear weapons as a symbol of prestige, and in the United States fears of terrorism mean that it could be ‘political death’ if a politician advocated nuclear disarmament.1 However, the election of Barack Obama to the US presidency, after

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1 The author is in her second year studying Arts, Development Studies and Indonesian at the University of Adelaide. This essay was a winning entry in the Students for a Nuclear Weapons-Free World Competition organised by the World Federation of United Nations Associations and the World Academy of Art and Science. The author attended a conference in Geneva at the UN in July along with other winners.

1 Interview with the author (Adelaide, May 2008).
promising during his campaign to work towards a nuclear-weapon-free world, casts some doubt on this.²

A second challenge is the continued centrality of nuclear deterrence in the national security policies of all nuclear-armed states, and a third is that there has been less public pressure since the end of Cold War for these states to disarm, even from the international peace movement. Australian Democrats parliamentarian Sandra Kanck believes that ‘without that exposure, without that light being shone on it, as occurred in the past, [the nuclear-armed states] are increasing their weaponry, not decreasing it, and nobody’s noticing’.³ The decrease in public pressure for disarmament following the mitigation of the Cold War nuclear threat has arguably been an important factor contributing to the continuation of nuclear proliferation. The associated dangers now constitute a significant global threat.

Despite the challenges, there have been some positive developments. As former UN weapons inspector Dr Hans Blix has pointed out, globalisation and accelerating independence are forcing countries to cooperate as never before.⁴ Additionally, adherence to the Non-Proliferation Treaty is nearly universal with 189 states parties, and it appears that, while there is little political will by the nuclear-weapon states to disarm, the prospect that nuclear weapons will be used again is quite low. In Alexander Downer’s view, ‘[i]t’s impossible to imagine a circumstance where they would ever use them, and whether it could ever be worth their while to use them’.⁵

Public Opposition to Nuclear Weapons

Australian public opposition to nuclear weapons is strong. In a survey that I conducted in Adelaide this year, 79 per cent of respondents said that they felt the use of nuclear weapons in war could not be justified and 73 per cent thought that nuclear weapons were not necessary for a country to maintain its security. A much larger survey conducted by the Simons Foundation in Canada last year asked participants if they supported eliminating all nuclear weapons in the world through an enforceable

³ Interview with the author (Adelaide, April 2008).
⁴ Sydney Peace Prize Lecture (Sydney, 7 November 2007).
⁵ Interview with the author (Adelaide, May 2008).
agreement. In Britain, 85 per cent of respondents said ‘yes’; in France, 87 per cent; in Italy, 95 per cent; in Germany, 95 per cent; in the United States, 84 per cent; and in Israel, 78 per cent.6

Despite strong support for the elimination of nuclear weapons, and despite actions by groups such as the International Campaign to Abolish Nuclear Weapons and Greenpeace, some 26,000 nuclear weapons remain in the world. What implications do the lack of will to use nuclear weapons and the public support for their elimination have for encouraging governments to do away with them?

**Turning Sentiment into Action**

First, it is necessary to understand how attitudes towards issues are formed and how they can be influenced. A systematic approach to targeting particular political figures to become anti-nuclear-weapon spokespeople can then be developed. The outcome of this process will be to engage the public, hence multiplying the pressure on governments to eliminate nuclear weapons.

As explained by Dr L. Earle, attitudes in the individual are composed of three parts: cognitive (that is, facts), emotive (that is, feelings), and action tendencies (that is, patterns of behaviour).7 The cognitive influences the emotive, which influences the action tendency: this is important because while people have anti-nuclear feelings they may not have enough facts upon which to base these, and the response can often be apathy. For example, in the survey I conducted, 62 per cent of respondents had not heard of the *Non-Proliferation Treaty*, and 61 per cent were unable to estimate the number of nuclear weapons in existence. If people had more facts about nuclear weapons upon which to justify their anti-nuclear feelings, it would lead to a greater number of people taking an active role against them. This strategy should be implemented by anti-nuclear-weapon action groups, and the process should be as follows:

- Identify the strategic representatives who are opposed to nuclear weapons, and encourage them to become more outspoken on the matter. These politicians can be petitioned to address nuclear weapons issues by, for

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7 Interview with the author (Adelaide, April 2008).
example, joining the Mayors for Peace initiative or moving a relevant motion in parliament.

- Increase the facts politicians have on nuclear weapons. Knowledgeable people in the public sphere, such as natural scientists or social scientists, could present politicians with research into the negative effects of nuclear weapons and the social consequences, in the hope that they would play a more active role in advancing disarmament.

- Encourage politicians to hold community forums. These would allow politicians, scientists, action groups and pro-nuclear-weapon agitators to come together in a public setting to debate issues surrounding nuclear weapons.

- Encourage politicians to distribute messages to the public that sum up the dangers of nuclear weapons. These should also demonstrate how the public could persuade their governments to do away with, or stay away from, nuclear weapons.

The intended outcome of this process would be to capitalise on public anti-nuclear-weapon sentiment and to turn it into action. Intense public pressure on governments could create the leverage that is needed to effect change on this matter. Examples of action that could be taken by the public include the following: using the internet to create informal groups to organise people and further spread nuclear weapons facts; ensuring that nuclear disarmament is a publicly debated issue, especially at election times; and petitioning governments to implement the 13 practical steps for disarmament agreed during the Non-Proliferation Treaty review cycle.

This strategy would be more effective in democratic countries, where there is freedom of speech and press, such as in France, the United States and the United Kingdom. Restrictions on these freedoms in nuclear-weapon states like Russia, China and North Korea would potentially render it ineffective. However, this concern would not invalidate the strategy. What is important is that if the first three countries made steps towards disarmament, it could have a flow-on effect to countries that proliferate as a result of feeling threatened.
Conclusion

It is necessary to capitalise on anti-nuclear-weapon public sentiment to encourage governments to do away with, or stay away from, nuclear weapons. Politicians can become spokespeople who give the public more facts about nuclear weapons, thereby encouraging them to become more active in their opposition to nuclear weapons. This step is essential for building a critical mass of public concern that can then translate into pressure on governments to take an anti-nuclear-weapon stance. It empowers citizens and encourages them to hold their governments accountable to their obligation to disarm and to refrain from acquiring nuclear weapons.

Moreover, this approach would yield positive results where diplomacy or methods such as ‘counter-proliferation’ have failed so far. In my view, it would change the very way in which decisions about nuclear weapons are made. Once the attitudes underlying the decision-making process are adverse to nuclear weapons, non-proliferation efforts and the elimination of nuclear weapons will begin to be realised, leading the world down a safer path.
### Survey Results

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Not sure</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Have you heard of the Non-Proliferation Treaty?</td>
<td>62%</td>
<td>38%</td>
<td></td>
</tr>
<tr>
<td>2 If so, what is it?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>There were various responses to this question. They ranged from simply ‘non-nuclear’ to more detailed responses such as: ‘A treaty to limit the spread of nuclear weapons. Currently 189 countries have signed the treaty. Five of those have nuclear weapons. Also are members of the UN Security Council.’ In total, 27 respondents (30% of the total) were able to offer an explanation.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Do you know roughly how many nuclear weapons are in existence?</td>
<td>4%</td>
<td>61%</td>
<td>35%</td>
</tr>
<tr>
<td>4 Do you believe that terrorists are capable of acquiring and using nuclear weapons?</td>
<td>78%</td>
<td>6%</td>
<td>16%</td>
</tr>
<tr>
<td>5 Do you believe that nuclear weapons are safe in the hands of some governments, but pose a threat in the hands of others?</td>
<td>43%</td>
<td>40%</td>
<td>17%</td>
</tr>
<tr>
<td>6 Do you believe that the use of nuclear weapons in a war can be justified?</td>
<td>9%</td>
<td>79%</td>
<td>12%</td>
</tr>
<tr>
<td>7 Would you feel comfortable if you knew that your country possessed nuclear weapons?</td>
<td>18%</td>
<td>57%</td>
<td>25%</td>
</tr>
<tr>
<td>8 Do you believe that nuclear weapons are necessary for a country to maintain its security?</td>
<td>7%</td>
<td>73%</td>
<td>20%</td>
</tr>
</tbody>
</table>
Protesters in Geneva, Switzerland, in May call on nuclear-weapon states to disarm.