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# IMAGINING LAW:

ESSAYS IN  
CONVERSATION WITH  
JUDITH GARDAM

EDITED BY  
DALE STEPHENS  
AND PAUL BABIE



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# IMAGINING LAW:

## ESSAYS IN CONVERSATION WITH JUDITH GARDAM

Edited by Dale Stephens and Paul Babie

By any measure, Judith Gardam has accomplished much in her professional life and is rightly acknowledged by scholars throughout the world as an expert in her many fields of diverse interest — including international law, energy law and feminist theory. This book celebrates her academic life and work with twelve essays from leading scholars in Gardam’s fields of expertise.

‘It has been fifty-five years since astronaut Yuri Gagarin passed over Perth in his Vostok spacecraft, sparking the imagination of a young woman who at that moment felt part of something much bigger than herself. Judith deploys an idea of “otherness” in her work, drawing upon this earliest experience to promote in law the idea of global interconnectedness, which Gagarin saw physically when he peered through the window of his tiny spacecraft. As Gagarin looked down and saw further over the horizon of the Earth than any person ever had, Judith was looking back up into that same April night sky. She saw then, and continues to see, further over the horizon of human potential than most other people. Where others see only limits in humanity, she saw, and sees, unlimited possibility.’

— From the *Introduction* by Dale Stephens and Paul Babie.

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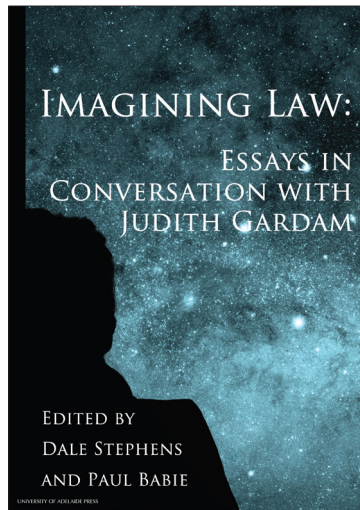
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Judith Gardam



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editor of numerous books and articles on these subjects. From 2005-10, she chaired the ILA Committee on the Use of Force, which produced the report, *The Meaning of Armed Conflict in International Law*. Judith Gardam served as rapporteur. From 1993-98, Mary Ellen was a professional military educator for the US Department of Defense at the George C Marshall European Center for Security Studies in Garmisch-Partenkirchen, Germany. Mary Ellen earned an MSc in international relations at the LSE, an LLB with first class honors, and a PhD from Cambridge University. She also holds a JD from Columbia University School of Law.

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# ACKNOWLEDGEMENTS

A project such as this one requires enormous teamwork. The Editors wish to thank all those who have participated to bringing this book to life. Most significantly, we wish to thank Professor Judith Gardam, who was so generous with her time and so gracious in her dealings with us. Her scholarship and international standing made our work with the contributors so much easier. It is clear that all contributors feel a deep respect for Judith and working with them was a joy; we all felt inspired by Judith and this translated into tremendous engagements and conversations along the way. We thank the several anonymous reviewers that were involved. The University of Adelaide Press sets a very high standard in such reviews and, not surprisingly, with the array of talent we have in this volume, this process proved to be very constructive and straightforward. We are particularly indebted to our numerous University of Adelaide Law School student researchers, who gave up their time willingly and often with little notice to contribute to the project. These students were India Short, Claudia Boccaccio, George Robertson and Tyson Bateman. We also thank the following students, who undertook a deeper oversight role in the development of this publication: Thomas Wooden (LLB 2016), Caitlyn Georgeson and Loise Wells (LLB 2015). We also thank researcher Richard Sletvold (LLB 2013) for his excellent bibliographic work. Finally, we thank our publisher, the University of Adelaide Press and its Director, Dr John Emerson and its editors Rebecca Burton and Julia Keller.

Dale Stephens and Paul Babie

8 August 2016

Adelaide, Australia



# 1

## INTRODUCTION: SEEING FURTHER OVER THE HORIZON — A WORLD OF LIMITLESS POSSIBILITIES

DALE STEPHENS AND PAUL BABIE<sup>1</sup>

### I

Judith Gardam was born in Perth, Western Australia, growing up there with her parents and sister and brother. Then, as now, Perth was a relatively isolated city and perhaps because of this, one of Judith's enduring memories as a young woman was the first space flight and orbit of the Earth by Soviet astronaut Yuri Gagarin on 12 April 1961. Asked later about the flight and his view of the Earth, Gagarin recalled:

What beauty. I saw clouds and their light shadows on the distant dear earth ... The water looked like darkish, slightly gleaming spots ... When I watched the horizon, I saw the abrupt, contrasting transition from the earth's light-colored surface to the absolutely black sky. I enjoyed the rich color spectrum of the earth. It is surrounded by a light blue aureole that gradually darkens, becoming turquoise, dark blue, violet, and finally coal black.<sup>2</sup>

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1 Adelaide Law School, The University of Adelaide. This chapter is based upon an interview of Emeritus Professor Judith Gardam conducted by Dale Stephens on 5 November 2015.

2 Yuri Gagarin (Ю́рий Алексе́евич Гага́рин) Space Quotations, *Eyes Turned Skyward* <<http://www.spacequotations.com/earth.html>>.

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Gagarin had the rare privilege of being able to see further over the horizon than any other person ever had.

Gagarin's tiny Vostok spacecraft passed over Perth during the night of 12 April and this left an indelible impression on Judith. Though she relentlessly asked her father, an engineer, a flood of questions about the spaceflight, her focus was not just on the technical aspects of the event, but rather something more. The event captivated her, and she recalls that it ignited within her a deep sense of curiosity about the broader world and inspired her imagination about unlimited possibilities. For Gagarin, his view further over the horizon only came through riding that Vostok rocket into a low Earth orbit for an hour and 48 minutes on 12 April 1961. Judith, however, spent a lifetime endeavouring to see further over the horizon than anyone else through her chosen field of international law. And beyond the horizon that limits so many of us in what we can imagine for our global community, Judith saw unlimited possibilities. This volume not only tells her story, but it also tells us what she saw over the horizon.

## II

Judith's ability to see limitless possibilities began to show itself from an early age. She describes herself as restless at secondary school. Her parents, particularly her mother, were her greatest fans, though they despaired at where their daughter might be headed. She played a lot of sport and did what was required to get by but without any particular drive for an ultimate goal. This is partly explicable by the social circumstances of the time. Life for a young woman in the 1960s imposed many personal and professional boundaries. She notes that, in relation to the legal profession, it was an era where the expectation was that she would marry a lawyer, not be one.

Despite this tacit societal pressure, Judith possessed a strong determination and gained admission to the University of Western Australia (UWA) Law School. She chose to undertake a law degree because, having seen first-hand the circumscribed lives of women in those times, she saw a professional qualification as a means of ensuring herself an independent future. She was one of only three women in her law class (one other notable contemporary female student being Antoinette Kennedy AO, who was later appointed the Chief Judge of the District Court in WA). Judith distinguished herself in her studies and graduated in 1966. While doing her articles of clerkship was a possible option, it was also a time when firms were distinctly unwelcoming to female graduates. Accordingly, Judith made the first of many choices throughout her life that would begin to hone her ability to see beyond what others could see: she decided to see the world for herself and thus undertook travel (by ship) to Europe to meet up with her sister Elizabeth. They then experienced the 'swinging sixties' of

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London, as well as witnessing the riots of Paris in 1968 and spending extended time in Sicily.

Judith returned to Australia in late 1968 following the death of her father and took up a position in the WA Crown Law Department as a Legal Officer. Given her impressive academic record, she was approached in 1970 to be a senior tutor at UWA Law School, where she taught constitutional and industrial law. Judith married in 1969 and resigned from UWA after the birth of her daughter, Selena, in 1971. During Selena's early years Judith took part-time tutoring positions and travelled overseas.

Returning to full-time work in 1975, Judith was appointed as a Research Fellow at the Law Reform Commission in WA. Her work there involved consideration of a wide range of references. This experience helped develop Judith's research skills and added impetus to her tendencies towards a social justice reform agenda.

In 1976, Judith's marriage ended and she left Perth for Melbourne with her daughter and her new partner, who was a tour manager for the musical promoters Evans/Gudinski. An entirely different world opened up for her — a new possibility through a new experience. She recounts this time with some fondness for its eclectic nature. She was exposed very closely to the music industry, observing that it was not unusual for her to come down to breakfast and find members of numerous Australian rock acts, including such famous bands as AC/DC and the Skyhooks, eating in the kitchen. The personal exposure to the Australian rock scene in the mid- to late 1970s added greatly to Judith's rich perspective on life. It gave her insights into the process of combining art with business and further informed the broader perspective that she was mastering.

At this time she took up a position as a Research Fellow at the Melbourne Law School, based at the University of Melbourne. She was working with Professor Michael Crommelin, who would later be appointed Dean of the Law School. Her area of professional focus in this position was natural resources law, both domestic and international, and legal aspects of the Antarctic. Life at the Melbourne Law School suited Judith. She found the academic environment stimulating and enjoyed the sense of community among the staff. She decided to undertake a higher degree and commenced an LLM degree by research, focusing on hydrocarbon pipelines, which she completed in 1981.

Her time in Melbourne was very rewarding both professionally and personally. In 1977, she met Adrian Bradbrook, who was a member of the academic staff at the University of Melbourne.<sup>3</sup> Theirs was a relationship that developed over time and

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3 See also Paul Babie, 'The Wily Quadruped Meets a Saucy Intruder: Adrian Bradbrook and the Intersection of Life and Law' in Paul Babie and Paul Leadbeter (eds), *Law as Change: Engaging with the Life and Scholarship of Adrian Bradbrook* (University of Adelaide Press, 2014) 1-21.

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eventually resulted in their marriage in 1980. The combined family now included Judith's daughter Selena and Adrian's children from a previous marriage, namely Fiona, Frances and Georgia.

Still restless and unsure of whether the life of an academic was really for her, she decided to fulfil a long-term ambition and be admitted to legal practice. Unfortunately for Judith, though, it was still an era where state parochialism had a significant role in defining the legal profession. Under Victorian Law Society rules, to be admitted to practice she needed to complete another LLB degree at a Victorian university. She opted to do this and enrolled at Monash University Law School in their LLB program, and she graduated in 1982 having won the Butterworth prize in Taxation and the Mallesons Prize in Commercial Law at the same time.

In 1983-4, a new possibility presented itself in the form of articles at Messrs Blake & Riggall solicitors in Melbourne, and Judith was admitted as a Legal Practitioner in the Supreme Court of Victoria and the High Court of Australia in 1984. While the focus of her professional practice at Blake & Riggall was commercial law, she recounts a pivotal moment in her time there. As with many life-changing events, this one occurred almost casually, but it set a particular trajectory for Judith which saw her make her most valuable contribution to legal scholarship. She recounts that on one random afternoon she found herself in the firm's library. She was attracted to a book on international law and armed conflict, which happened to be on the shelf. It revealed much about the ethos of law and its capacities to Judith and spoke of a broader universe of possibility. It sparked a deep interest in her regarding the field of international humanitarian law, especially in relation to the rights of victims of armed conflict, and prompted her to want to know more. It is supremely ironic, and somewhat fitting, that one of the world's most eminent international lawyers never actually studied the subject formally, but rather was self-taught. This acted as an advantage for Judith; there is something to be said about coming to a field from 'the outside', thus allowing for a sense of original perspective.

By then it was clear to Judith that legal practice was not her strength and that her future was in the academy, and she decided to undertake doctoral studies at Melbourne Law School. Her chosen field was the area that had taken her interest that day in the library: non-combatant immunity under international humanitarian law. She speaks of the debt of gratitude that she owes her supervisor, Professor Hilary Charlesworth, along with Adrian Bradbrook, for sharing with her their outstanding skills in the development and expression of ideas. In 1985, Judith was appointed as a senior tutor in law at Monash University and in 1987 she was appointed to a tenured lectureship in the Melbourne Law School.

Towards the end of her PhD study, in 1988, Adrian was appointed to a Chair in Law at the Adelaide Law School of The University of Adelaide. Judith joined him

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in 1989 when she accepted an offer of a tenured lectureship in the School. Given the Adelaide Law School's tradition of excellence in the field of international law, it was a perfect match for Judith's expertise. In 1991, Judith was awarded her PhD from the University of Melbourne. Completion of the PhD was a source of much personal satisfaction for Judith and she ranks it as a high point in her life.

The timing of Judith's research could not have been better. The field of international humanitarian law was developing strongly with numerous state ratifications of the Additional Protocols to the Geneva Conventions and a flood of other Conventions dealing with the means and methods of warfare being developed, along with re-statements of customary international law. The field is one that has a denseness of technical detail, but also one that invokes deep moral and social resonance with its subject matter. It was an ideal field for someone with Judith's forensic skills and contemplative nature to be grappling with and mastering. The world had also just witnessed the first Gulf War, and Judith's expertise was in strong demand. Her innovative PhD research resulted in prolific publication, as highly prestigious journals competed for her articles. Judith's arrival within the international law scene could not have been more auspicious, with the very best journals in the field all showcasing her research and ideas. In short, Judith was poised to embark on a career of showing the way towards unimagined possibilities in this burgeoning field.

In 1992 Judith was appointed as a senior lecturer at the Adelaide Law School and in 1996 was promoted to Reader. While international law was her primary interest, it was also evident that she found a rich, supportive collegial environment at Adelaide Law School, enabling her to pursue other passions in scholarship — most notably feminist legal studies, where, again, she glimpsed new possibilities. Judith's personal experiences naturally played a role in her interest in this field, as did her specialised talent of identifying with the 'other' and using that perspective to interrogate legal structures. Working with colleagues like Ngaire Naffine and Margaret Davies, Judith was at the forefront of the scholarship in this area and was quickly finding international acclaim for her ideas and writings in this field. Indeed, in the fusion of this field with international humanitarian law (IHL), Judith has been a leading voice of thinking and publishing. Her work on studying the impact of armed conflict on women and girls is of critical importance and stands as the established reference point for all of those who are interested in this field.

In 2006, Judith was promoted to the academic position of Professor at the Adelaide Law School. By this time, she had an extremely well-developed global reputation in the fields of international law and feminist legal theory. Her work in the field of IHL, in particular, was recognised with the awarding in 1998 of the Red Cross Service Award. Her stature as a highly accomplished academic was further recognised in 2010 with her election as a Fellow of the Academy of the Social Sciences in Australia.



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Judith has been the recipient of five ARC Discovery Grants in a diverse range of fields, including topics relating to women in armed conflict, the Security Council framework and legal frameworks for Antarctica. Most recently she has worked with Adrian Bradbrook on projects relating to sustainable energy and climate change, and access to energy as a human right. She has been the author or co-author of dozens of books, chapters, articles and reports, which include a highly influential 2002 United Nations commissioned *Expert Report on International Humanitarian Law and Human Rights Law Applicable to Women and Girls in Times of Armed Conflict*.<sup>4</sup> She has successfully supervised many honours and higher degree students and famously instills an internal discipline in her supervisory style; this ensures not only complete success but also cements research habits and a frame of objective analysis which lasts a lifetime. Having completed your thesis under the supervision of Judith Gardam carries with it considerable bragging rights and a shared sense of achievement in having made it through a tough academic boot camp.

By any measure, Judith Gardam has accomplished much in her professional life and is rightly acknowledged by scholars throughout the world as an expert in her many fields of diverse interest. When being interviewed for this publication, she said that she possessed a 'grasshopper mentality', in that many things took her interest. We are all the better for that tendency because, despite this broad range, she nonetheless has that enviable quality of deep focus and immersion in each topic she addresses. She observes that she has 'always been able to concentrate and lose [her]self in ideas'. She does seek to make the world a better place and invests heavily in authenticity and honest accounts of the world as it is and how it can be made even better. Judith was particularly touched by a statement she recalls Professor Hilary Charlesworth once making, where Hilary observed that Judith aims to lift the bar each time she writes. It is an insightful and correct observation and an aim at which she justly succeeds in achieving.

Judith confides that she has 'always been grateful for the existence of Universities where difficult and willful people like me can thrive (less so nowadays, I fear)'. It is this dual capacity for both quiet contemplation and for driving reform that has characterised her work. She is a fiercely independent person, though one with a deep well of generosity of spirit. Her work output has been steady, but more importantly it has been fueled solely by a desire to say important things when the time and sense of personal commitment in her were right. When Judith writes, you know instinctively that it will be worth reading — usually over again and again.

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<sup>4</sup> Judith Gardam, *Expert Report on International Humanitarian Law and Human Rights Law Applicable to Women and Girls in Times of Armed Conflict* (Study commissioned by the Secretary-General of the United Nations in response to Security Council Resolution 1325 (October 2000)) (New York: United Nations, 2002).

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The chapters in this volume celebrate the academic life and work of Emeritus Professor Judith Gardam. They are eclectic in scope and topic, but, in so being, they represent different periods of Judith's life and work. It is a remarkable accomplishment to have been so influential in so many areas. It means that in a volume such as this a diverse range of scholars are able to draw on this work in so many different ways.

Dale Stephens's story, which he recounts here, is, we hope, representative of the impact of Judith's work on that of others:

It was as a young Naval Legal Officer that I first encountered the scholarship of Professor Judith Gardam. It was in the mid-1990s and I was undertaking a literature review relating to the manner in which international law had been applied in the first Gulf War. It brought me into immediate contact with a number of then recent articles written by Judith dealing with the use of force and international humanitarian law and published, variously, in the *Virginia Journal of International Law*, the *American Journal of International Law* and the *Michigan Journal of International Law*. The articles spoke with great intensity of purpose and revealed what I thought to be a number of uncanny observations concerning military operations and the law. I hadn't particularly noted the author's specific biographical details initially and thought at first that these were written by an 'insider', probably a military legal officer who had participated in that conflict. Upon further review, I was surprised to learn that they were, in fact, written by a professional 'outsider', an academic who had a unique eye to the events and to the way law was assimilated and tempered through that conflict. I was deeply struck by the disarming insight into military approaches to concepts that she revealed with deep resonance in her assessment. To me, this has been the hallmark of Judith's original and immersive scholarship: the capacity to present an intimate and compelling review in a manner that also offers a high level of objectivity and an informed external critique. She has been described by one anonymous reviewer of the chapters in this volume as a person who 'always works from first principles and combines rigour and technical skill with a reformer's heart, a very rare combination in the discipline' — too true. Such skills are developed over a professional lifetime, no doubt, but were nonetheless derived from a central core of perspective that was there from the beginning.

There are no doubt many other young lawyers out there, researching some pressing topic, searching for guidance. With minimal effort, they will find the work of Judith Gardam and be pointed beyond the horizon of possibilities in their own work, marking a turning point in their life. They will come to appreciate how genuine scholarship can make such a decisive impact upon perception, raising the bar a little higher in making the world a better place to live. Perhaps that will happen through finding and engaging with the essays in this book, which not only honour their

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subject, Judith Gardam, but also demonstrate the profound impact that their subject has had on the development of their own scholarship.

### III

During the preparation of this publication, it became evident that Judith inspired enormous devotion from scholars and practitioners all over the world. The contributors to this volume all readily agreed to write chapters and all felt deeply influenced by Judith and her work. Given the range and depth of Judith's academic interests, it was always inevitable that the contributions themselves would be wide-ranging. This necessarily presents challenges for editing a volume of this nature. Yet the variety in style and familiarity with Judith's canon in the chapters only complements the richness of the volume. That diversity notwithstanding, three main themes emerge: energy law, international law and feminist legal theory. The contributions from the authors touch on each of these themes and the volume has been ordered accordingly. Taken together, the essays collected here cover the range of possibilities for law to which Judith has drawn our attention over the course of her career.

In Part One, Judith's partner and colleague, Adrian Bradbrook, writes on energy law, an early focus for Judith and one that she revisits from time to time in her professional life.

In Part Two, the chapters written by Mary Ellen O'Connell and Matthew Stubbs address the topic of the use of force under international law. This area of law represents her 'breakthrough moment' in galvanising international attention, and her work continues to resonate strongly in this highly contentious and critical field.

Part Three is itself divided into three sections. In the first of these, Michelle Jarvis, Ustina Dolgopol, Gina Heathcote, Hilary Charlesworth/Christine Chinkin and Jody Prescott address, in varying degrees, the issue of gender and armed conflict. This subset of IHL is one that Judith has personally shaped decisively and any serious scholar in this field benefits from her pioneering work in this area. Next, chapters written by Laura Grenfell and Ngaire Naffine deal with gender/feminist concepts advanced by Judith from perspectives of the post-conflict state in the first instance and law and religion in the second. Finally, the two remaining chapters, authored by Rebecca LaForgia and Margaret Davies respectively, address broader theoretical issues raised by Judith's work. Both authors skillfully take the 'alien' metaphor that Judith has used as a heuristic device in her scholarship to advance ideas regarding the nature and quality of law, and particularly international law.

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Hence the volume contains twelve essays from leading scholars in Judith's fields of expertise. While all twelve chapters are seemingly eclectic in their range of subjects, unmistakable common themes and threads run through them. And in every case, Judith's approach to scholarship is described in similar terms: she is a scholar who addresses the interconnectedness of subjects; she is driven by a desire to use the methodology of deconstruction and the 'other' to 'mobilise different truths' (in the words of Margaret Davies in her contributing chapter); and, while firmly resident within a strong methodological discipline, Judith is both practical and experimental with her use of methodology to advance her arguments.

While the genres of feminist theory, international law and energy law may have little to suggest obvious harmonisation, it is clearly evident that the contributing authors have found ample means to make the necessary connections. The themes of feminism in international law, of energy law and sex/gender, of international humanitarian law and sex/gender, of black letter process and methodological innovation are found throughout all pieces, all tying back to more general themes or methodological approaches adopted by Judith in her range of academic work. All authors in this volume were given full licence to draw on any part of Judith's work when drafting their own contributions. Significantly, her chapter on 'An Alien's Encounter with the Law of Armed Conflict'<sup>5</sup> features prominently in almost half of the chapters, such was its indelible mark on scholarly thinking. Authors have used both the substance of this work, or its methodological apparatus, to underpin their own contributions.

Some of the submissions in the volume address themes that have been at the forefront of Judith's thinking for decades — themes such as women, constructed identities and armed conflict, women's challenges and perspectives under international law with particular reference to post-conflict reconstruction and access to justice, the interconnections between legal structure and humanity, the growing accommodation and innovations within forums of international justice, of international humanitarian law, international criminal law and international human rights law, especially in the context of crimes of sexual violence. Other contributors have taken her innovative methodology and style of approach to guide their own trajectories of analysis into questions of irreconcilable rights regarding abortion and end of life decisions, of the fluid role of academic critique and the role of international lawyers in the development of perspective and approach, and of intellectual style and manoeuvre in subjects that have been the focus of Judith's impressive career.

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5 Judith Gardam, 'An Alien's Encounter with the Law of Armed Conflict' in Ngairé Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (LDC Information Services, 1997) 233-50.

## IMAGINING LAW

### IV

It has been fifty-five years since astronaut Yuri Gagarin passed over Perth in his Vostok spacecraft, sparking the imagination of a young woman who at that moment felt part of something much bigger than herself. Judith deploys an idea of 'otherness' in her work, drawing upon this earliest experience to promote in law the idea of global interconnectedness, which Gagarin saw physically when he peered through the window of his tiny spacecraft. As Gagarin looked down and saw further over the horizon of the Earth than any person ever had, Judith was looking back up into that same April night sky. She saw then, and continues to see, further over the horizon of human potential than most other people. Where others see only limits in humanity, she saw, and sees, unlimited possibility.

# PART I



# 2

## ENERGY AND LAW — SEARCHING FOR NEW DIRECTIONS

ADRIAN BRADBROOK

It is a little known fact that Judith Gardam has a professional interest in energy law dating back to the beginning of her long and distinguished academic career. While energy law is not her major legal interest, or one for which she has built her international reputation, this interest has continued for over thirty years until the present time. Her first university position was as a Research Fellow at the Melbourne Law School, based at the University of Melbourne, financed by an Australian Research Council grant to Professor Michael Crommelin, and her major LLM thesis<sup>1</sup> and her first four published articles were on the Australian law relating to hydrocarbon pipelines.<sup>2</sup> Her interests in the energy sector later changed and expanded to include

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1 Judith Gardam, *Government Regulation of Hydrocarbon Pipelines in Australia* (LLM Thesis, University of Melbourne, 1981).

2 Judith Gardam, 'Petroleum Pipelines — Land Use Planning and Environmental Aspects' (1987) 4 *Environmental and Planning Law Journal* 253; Judith Gardam, 'The Constitutional Implications of the Federal Pipeline Authority Act 1973' [1986] *Australian Mining and Petroleum Law Association Yearbook* 422; Judith Gardam, 'Legislative Regulation of the Construction and Operation of Pipelines in New South Wales' (1980) 8 *Australian Business Law Review* 386; Judith Butcher (as she then was), 'Government Regulation of Construction and Operation of Hydrocarbon Pipelines' (1977) 11 *Melbourne University Law Review* 146.



the link between energy and armed conflict<sup>3</sup> and energy and human rights law.<sup>4</sup> In both these areas, Judith was able to marry her interest in energy law with her major research focus on public international law.

The purpose of this chapter is to review the reasons for, and the current state of, international law in relation to the energy sector. It will then consider in detail the energy themes that motivate Judith and their possible evolution. As we will see, her emphasis is very much on sustainable energy solutions.

### THE CURRENT STATE OF INTERNATIONAL ENERGY LAW

The role and development of public international law in the energy sector has been slow to be recognised and has been late in development. Historically, energy policy and law have been strongly linked to national sovereignty and have been considered to be outside the role of international agreements. As recently as 1992, when Agenda 21<sup>5</sup> was negotiated internationally at the United Nations Conference on Environment and Development (UNCED), it proved impossible, due to competing national interests, for the international community to agree on a chapter on energy policy. Chapter 9 of this instrument, which was originally envisaged as a comprehensive chapter on energy, proved impossible to negotiate and was eventually replaced by a loosely worded chapter on the atmosphere, which makes only selective and limited references to sustainable energy solutions.<sup>6</sup>

The past twenty-five years have seen a gradual change in international attitudes to energy production and consumption, and today international energy law is rapidly evolving. There are many reasons for this evolution:

- Perhaps the greatest driver towards international co-operation and development has been the recognition that energy production and consumption have international environmental consequences and do not respect international boundaries. There have been many different manifestations of this, ranging from acid rain, caused in eastern European and Asian countries by the burning of sulphur-laden coal in countries

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3 Judith Gardam, 'Energy and the Law of Armed Conflict' (1997) 15 *Journal of Energy and Natural Resources Law* 87.

4 See Adrian Bradbrook and Judith Gardam, 'Energy and Poverty: A Proposal to Harness International Law to Advance Universal Access to Modern Energy Services' (2010) 57 *Netherlands International Law Review* 1; Adrian Bradbrook, Judith Gardam and Monique Cormier, 'A Human Dimension to the Energy Debate: Access to Modern Energy Services' (2008) 26 *Journal of Energy and Natural Resources Law* 526; Adrian Bradbrook and Judith Gardam, 'Placing Access to Energy Services within a Human Rights Framework' (2006) 28 *Human Rights Quarterly* 389.

5 *United Nations Conference on Environment and Development*, UN GAOR, 46<sup>th</sup> sess, Agenda Item 21, UN Doc A/Conf. 151/26 (12 August 1992) annex II.

6 The energy provisions are contained in ch 9.12 of the instrument.

upwind, to the Chernobyl nuclear accident in 1986, which caused radioactive nuclear fallout in many western European nations. In recent years, the major global environmental concern has been climate change, to which energy production and consumption is the major contributing factor.<sup>7</sup>

- Closely linked with this factor is the increasing use of the high seas for energy development and transport. The majority of world trade in oil is by sea in large tankers, and these have occasioned some spectacular environmental disasters due to oil leaks as a result of groundings and sinkings. The first of these was the *Torrey Canyon*, which foundered off the southwest coast of England in 1967, while perhaps the most notorious and polluting was the *Exxon Valdez*, which sank off the Alaskan coast in 1989.<sup>8</sup> Offshore oil and gas exploration and production have also spawned international instruments, such as the 1989 International Maritime Organization Guidelines and Standards for the Removal of Offshore Installations and Structures.<sup>9</sup> There is considerable potential for energy production and development from renewable resources in the high seas in the future, although this has not yet occurred other than at the research and demonstration stages. Such possible uses of the high seas include wave energy, offshore wind energy, ocean currents, and ocean thermal energy conversion (OTEC).<sup>10</sup>
- International co-operation and development have also increased as a result of energy trade. There are a growing number of bilateral and multilateral international instruments that have been negotiated in

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7 In developed countries, the energy sector accounts for around 80 per cent of all carbon emissions. The exact figure for the USA is 82.0 per cent: United States Environmental Protection Agency, *Overview of Greenhouse Gases* (15 April 2016) <[www.epa.gov/climatechange/ghgemissions/gases/co2.html](http://www.epa.gov/climatechange/ghgemissions/gases/co2.html)>. The figure for Australia is 76.9 per cent: Carbon Neutral, *Climate Change* (2015) <[www.carbonneutral.com.au/climate-change/australian-emissions/html](http://www.carbonneutral.com.au/climate-change/australian-emissions/html)>.

8 See Richard A Cahill, *Strandings and their Causes* (Fairplay Publications, 1985); John Townsend, *The Exxon Valdez* 1989 (Raintree, 1999). For information from the US Environment Protection Agency, see United States Environmental Protection Agency, *Oil Spills Prevention and Preparedness Regulations* (11 April 2016) <[www.epa.gov/oilspill/exxon.htm](http://www.epa.gov/oilspill/exxon.htm)>.

9 1989 Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone, 10 October 1989, 16<sup>th</sup> Assembly of the International Maritime Organization, IMO Assembly Resolution A.672(16) (adopted 19 October 1989).

10 For a discussion of OTEC and the legal issues associated with its introduction, see Todd Griset, 'Harnessing the Ocean's Power: Opportunities in Renewable Ocean Energy Resources' (2011) 16 *Ocean and Coastal Law Journal* 395; Michael Reisman, 'Key International Legal Issues with regard to Ocean Thermal Energy Conversion Systems' (1981) 11 *California Western International Law Journal* 425; Kent Keith, 'Laws Affecting the Development of Ocean Thermal Energy Conversion in the United States' (1982) 43 *University of Pittsburg Law Review* 1. The United States has legislated in this area: *Ocean Energy Thermal Conversion Act*, 42 USC ch 99 (2006).

recent years in this field. The best-known and most comprehensive of these is the Energy Charter Treaty,<sup>11</sup> negotiated in the early 1990s to promote trade between western Europe and the newly emerging nations of eastern Europe following the collapse of the Soviet Union. There are also many international agreements for the construction and operation of transboundary oil and gas pipelines.<sup>12</sup>

- International institutions have become prominent in this field. The United Nations is heavily involved in promoting sustainable energy solutions worldwide. Both the United Nations Development Programme and the United Nations Environment Programme have produced reports and developed policies promoting environmental and poverty-alleviating programs focused on energy, and all the six United Nations economic and social commissions have engaged in projects promoting sustainable energy.<sup>13</sup> Outside the United Nations, there is the International Energy Agency (IEA),<sup>14</sup> which was initially established by the Council of the Organisation for Economic Co-operation and Development (OECD) following the Arab Oil Embargo in 1973/4,<sup>15</sup> and which now researches on a range of international energy issues, focusing in particular on achieving sustainable energy outcomes. There is also the International Renewable Energy Agency (IRENA),<sup>16</sup> set up under the aegis of the German government, which under its founding agreement<sup>17</sup> researches all aspects of renewable energy development and promotion worldwide.

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11 *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998).

12 See, for example, Munir Maniruzzaman, 'International Energy Contracts and Cross-Border Pipeline Projects: Stabilization, Renegotiation and Economic Balancing in Changed Circumstances — Some Recent Trends' (2006) 4(4) *Oil, Gas & Energy Law Intelligence* 1149; Rafael Leal-Arcas and Mariya Peykova, 'Energy Transit Activities: Collection of Intergovernmental Agreements on Oil and Gas Transit Pipelines and Commentary' (Research Paper No 177/2014, Queen Mary School of Law, 16 December 2014).

13 The relevant commission for Australia is the United Nations Economic and Social Commission for Asia and the Pacific (UN-ESCAP), which has its headquarters in Bangkok, Thailand.

14 Established by the *Agreement on an International Energy Program*, signed 18 November 1974, 1040 UNTS 271 (entered into force 19 January 1976). See also Ann Florini, 'The International Energy Agency in Global Energy Governance' (2011) 2 *Global Policy* 40; Richard Scott, *The History of the International Energy Agency, 1974-1994: IEA, the First 20 Years* (OECD Publications and Information Centre, 1994-95) vols 1-2.

15 Established by the OECD Council at its 373<sup>rd</sup> Meeting on 15 November 1974.

16 See International Renewable Energy Agency (2015) <[www.irena.org/](http://www.irena.org/)>.

17 *Statute of the International Renewable Energy Agency (IRENA)*, opened for signature 26 January 2009, 2700 UNTS 27 (entered into force 8 July 2010).

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In general terms, the current state of international energy law appears to be as follows:

- There are comprehensive energy trade agreements designed to promote and regulate trade at the regional and world level. These have been relatively easy to negotiate and implement.
- There are some international agreements relating to the environmental hazards associated with energy production and development, although these are by no means sufficient. These have been much harder to negotiate and the results have been patchy. There was immediate recognition, following the Chernobyl nuclear incident, that there needs to be timely notification by the host country of any future incidents and an effective system of international co-operation to rapidly respond to a nuclear emergency. This led to the negotiation of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency<sup>18</sup> and the Convention on Early Notification of a Nuclear Accident<sup>19</sup> within six months of the emergency arising. The world community also succeeded in concluding and ratifying the 1985 Vienna Convention for the Protection of the Ozone Layer<sup>20</sup> and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (and its amendments)<sup>21</sup> to control the problem of ozone depletion, partly caused by the energy industry. In contrast, there has been a depressingly slow international response to the pressing need to take effective action on climate change, and, according to the most recent scientific research on climate change, the existing instruments are totally inadequate to address the problem.<sup>22</sup>
- Despite the work of the international institutions in this field, there have been very few international instruments promoting sustainable energy development worldwide. While the parties to the Energy Charter Treaty successfully concluded a comprehensive Protocol on Energy Efficiency

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18 *Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*, opened for signature 26 September 1986, 1457 UNTS 134 (entered into force 27 October 1986).

19 *Convention on Early Notification of a Nuclear Accident*, opened for signature 26 September 1986, 1439 UNTS 276 (entered into force 27 October 1986).

20 *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 324 (entered into force 22 September 1988).

21 *Montreal Protocol on Substances that Deplete the Ozone Layer*, signed 16 September 1987, 1522 UNTS 451 (entered into force 1 January 1989).

22 See below n 60 and accompanying text. Contribution of Working Groups I, II and III to the *Fifth Assessment Report* of the Intergovernmental Panel on Climate Change [Core Writing Team, RK Pachauri and LA Meyer (eds)] IPCC, Geneva, Switzerland, 151.

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and Related Matters,<sup>23</sup> there are only passing references to the need to promote sustainable energy solutions in the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol.<sup>24</sup> Outside these areas, there are only isolated examples of international instruments relating to renewable energy and energy efficiency.

- In relation to the use of the high seas for energy trade and energy production, the only relevant instrument is the United Nations Convention on the Law of the Sea,<sup>25</sup> which contains few relevant references.<sup>26</sup>

The overall conclusion is that whereas national laws in most countries contain comprehensive legislation regulating the production and consumption of those energy resources relevant to their jurisdictions (although not always comprehensive or effective legislation relating to the associated environmental harm), public international law in this field is in its infancy and is in need of further development.

It is important to examine the reasons for this inadequate response by international law. There is substantial doubt in many quarters that international law can achieve much in light of the different vested interests of the various countries. There are enormous differences in outlook between energy-exporting nations, which tend to see moves towards diversity of energy supplies and focus on renewable energies and energy efficiency as a threat to their sovereign wealth, and energy-importing nations, which have diametrically opposite economic interests. There is also the focus of the international community on national sovereignty, and the refusal of many countries to enter into any agreements which might compromise this principle.

Both these reasons are understandable, if not excusable. What is more perplexing, however, is the notion held by some lawyers and politicians that international law has nothing to offer to promote sustainable energy. This view is not only held by those who are opposed to significant legal change, but also even by some lawyers who campaign in favour of sustainable energy.<sup>27</sup> In some cases, it may be the result of ignorance of public international law, as the subject is optional at most

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23 *Protocol on Energy Efficiency and Related Matters* (signed December 1994) 34 ILM 446 (entered into force April 1998).

24 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 148 (entered into force 16 February 2005). There is no mention of energy at all in the Paris Agreement, FCCC/CP/2015/10/Add.1.

25 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('UNCLOS').

26 *Ibid* art 56. The major relevant provision is Article 56, relating to the exclusive economic zone.

27 A good illustration of this is my colleague and friend, Professor Richard Ottinger, Dean Emeritus of Pace Law School, White Plains, NY, USA, with whom I have argued this issue on a number of occasions.

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law schools and receives comparatively little attention in traditional legal education. In other cases, it results from the argument that, first, international law is not really 'law', as in most areas there is no effective legal means of enforcement; and, second, that nations can — and in many cases do — breach their obligations with impunity.

Like most international law academics, Judith Gardam has frequently had this debate with her students at The University of Adelaide, some of whom have been openly skeptical about the relevance of the subject. Indeed, she has debated this so often that she later began including an opening session with the students entitled 'Is international law "law"?''

The answer is that in light of international law theory, whereby international law is based purely on the consent of nations and cannot be imposed on them against their will, it is inappropriate to talk of enforcement. Moreover, the distinction between law and politics is sometimes seen as less clear-cut in the case of international law than in the case of domestic law. In reality, international law is a legal system that relies on distinct and sophisticated means by which to ensure compliance with its requirements.

### THE EVOLUTION OF SUSTAINABLE ENERGY LAW

The future of energy law is very unpredictable. Energy planners long ago abandoned the notion of energy planning in favour of 'scenario planning', out of the realisation that nearly all plans with a horizon of ten years or more turn out to be incorrect.<sup>28</sup>

Rather than trying to predict future energy law developments, I will discuss those features or themes in energy policy favoured by Judith in order to explain their potential role in shaping international energy law. In examining Judith's writings and in many conversations we have had, I have identified the following six themes:

1. energy and poverty
2. maximising the range of legal options
3. resolving issues by lateral thinking
4. the incremental or gradual approach to international law development
5. advancing renewable energy resources and energy efficiency
6. links with the law of armed conflict.

I discuss these themes in more detail below.

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<sup>28</sup> For a discussion of scenario planning, see Jeremy Bentham, 'The Scenario Approach to Possible Futures for Oil and Natural Gas' (2014) 64 *Energy Policy* 87.

## Energy and Poverty

The strongest theme is undoubtedly the link between energy and poverty. The alleviation of poverty has been a recent focus of the United Nations, and is one of the goals listed in the Sustainable Development Goals, a declaration of the General Assembly in 2015.<sup>29</sup> To achieve this goal will require the universal access to modern energy services. This is recognised in Goal 7 of the 2015 Declaration: 'Ensure Access to Affordable, Reliable, Sustainable and Modern Energy For All'. Without such access people are destined to live in poverty. The provision of such access many years ago was the major factor lifting the standard of development in developed countries and is a key element in providing a sustainable way of living for all the world's population. In recognition of the importance of the issue, in 2011 the United Nations declared 2012 to be the International Year of Sustainable Energy for All,<sup>30</sup> and in the following year it declared 2014-24 as the United Nations Decade of Sustainable Energy for All.<sup>31</sup> The Secretary-General, Ban Ki-Moon, went further and established a Sustainable Energy for All challenge for 2030, which seeks to achieve universal access to energy services by 2030.<sup>32</sup>

Energy is required to boil, purify, disinfect and store water.<sup>33</sup> The use by less developed states of traditional fuels such as wood, dung and charcoal for cooking, food preparation and space heating<sup>34</sup> not only exacerbates the long-standing environmental problems in many countries, particularly in Africa, of loss of habitat and desertification,<sup>35</sup> but also leads to distinctive health problems. As many as two

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29 *United Nations Declaration*, GA Res 70/1 (25 September 2015).

30 *International Year of Sustainable Energy for All*, GA Res 65/151, 65<sup>th</sup> sess, Agenda Item 20, UN Doc A/RES/65/151 (16 February 2011).

31 United Nations General Assembly, 'United Nations General Assembly Declares 2014-2024 Decade of Sustainable Energy for All' (Press Release, GA/11333 — EN/274, 21 December 2012).

32 Ban Ki-moon, *Sustainable Energy for All: A Vision Statement — Report of the Secretary General*, Agenda Item 19, UN Doc A/66/645 (22 December 2011) 4.

33 For a discussion of the relevance of the access to modern energy services to the provision of clean water, see Amulya Reddy, 'Energy Technologies and Policies for Rural Development' in Thomas Johansson and José Goldemberg (eds), *Energy for Sustainable Development: A Policy Agenda* (United Nations Development Programme, 2002) 115, 126.

34 In Africa, charcoal and firewood constitute 67 per cent of primary energy use: see Kui-Nang Mak and Friedrich Soltau, 'A United Nations Perspective on Law and Energy for Sustainable Development' in Adrian Bradbrook et al (eds), *The Law of Energy for Sustainable Development* (Cambridge University Press, 2005) 17.

35 The link between desertification and energy is recognised in para 41(d) of the *Plan of Implementation of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (4 September 2002). This

million people die prematurely each year from exposure to indoor air pollution caused by the use of solid fuels for cooking.<sup>36</sup>

The lack of access to modern energy services is particularly detrimental to women and children. Fuel gathering by children means that children's educational needs suffer, as there is little time available for education. Education is further prejudiced by the fact that the lack of electric lighting in the home means that study is effectively impossible after nightfall. Women suffer, as in most developing countries women and girls are responsible for cooking and heating.<sup>37</sup> As a result of indoor air pollution in native dwellings, they experience a higher rate of respiratory disease than men. Without modern energy services, they are forced to spend a significant amount of time searching for and collecting fuel, in the process risking sexual assault and snake bites. The time spent in fuel acquisition prevents women from engaging in income-producing and community activities as well as from improving their levels of education. The same situation applies to water, with women traditionally being responsible for ensuring the water supply for household needs. The absence of energy for water pumps substantially increases the time spent on such activities.<sup>38</sup> In light of this evidence, and bearing in mind Judith's strong emphasis in her published works on gender equality, it is not surprising that she has published three major articles focusing on the issue of access to energy services in less developed nations and the possible role of international and domestic law in alleviating this problem.<sup>39</sup>

At the national level, several states have taken legislative or policy steps to recognise the importance of modern energy services to human development. For example, South African legislation ensures that electricity service providers make electricity available 'to every applicant who is in a position to make satisfactory

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requires states to 'integrate measures to prevent and combat desertification as well as to mitigate the effect of drought through relevant policies and programmes, such as ... energy ...'

36 Thomas Johannsson and José Goldemberg, 'The Role of Energy in Sustainable Development: Basic Facts and Issues' in Johannsson and Goldemberg (eds), *Energy for Sustainable Development: A Policy Agenda* (United Nations Development Programme, 2002) 25, 32.

37 See Gunnar Köhlin et al, 'Energy, Gender and Development: What are the Linkages? Where is the Evidence?' (Policy Research Working Paper 5800, The World Bank, September 2011); Joy Clancy et al, *Gender Equity in Access to and Benefits from Modern Energy and Improved Energy Technologies: World Development Report Background Paper* (ETC Nederland BV, 2011); UNDP, *Gender and Equity for Sustainable Development: A Toolkit and Resource Guide* (United Nations Development Programme, 2004); Gail V Karlsson (ed), *Generating Opportunities: Case Studies on Energy and Women* (United Nations Development Programme, 2001).

38 UNDP, *Gender and Equity for Sustainable Development: A Toolkit and Resource Guide* (United Nations Development Programme, 2004) 14.

39 See above n 4.



arrangements for payment'.<sup>40</sup> This obligation upon electricity service providers has been interpreted as a right of applicants to access electricity supply if they have satisfied the payment requirements.<sup>41</sup> While this access is conditional on payment, many national electricity policies are increasingly being formulated in rights-based terminology that guarantees safe, affordable, adequate and reliable supplies of electricity available to all. In India and Brazil, the national governments each have a long-term plan to provide access to electricity to all rural households.<sup>42</sup>

There has also been action at the regional level. For example, the 1996 Protocol on Energy adopted by the South African Development Community, Article 3, states that one of its objectives is to 'strive to ensure the provision of reliable, continued and sustainable energy services in the most efficient and cost-effective manner'. Some regional organisations have also acknowledged the importance to human development of access to modern energy services. Pursuant to the European Council Directive 2009/72, Article 3(3), member states of the European Union are obliged to

ensure that all household customers ... enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices.<sup>43</sup>

It is at the multilateral level that legal initiatives in this area have been sparse. One of the few international law instruments that specifically refer to energy in the context of overcoming poverty is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>44</sup> Article 14(2)(h) of this Convention obliges state parties to eliminate discrimination against women, particularly in rural areas, and to ensure that they 'enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication'. Some instruments, such as the International Covenant on Economic, Social and

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<sup>40</sup> *Electricity Act 1987* (South Africa) s 10(1). See also *Loi no 2000-108 du fevrier 2000 relative à la modernisation et au développement du service public de l'électricité* (France) art 1.

<sup>41</sup> *Meyer v Moqhaka Local Municipality* Case No 4008/2003 [2004] ZAFSHC 122 (unreported, per Rampai J) 24.

<sup>42</sup> See Rosana Rodrigues dos Santos, 'Electricity for All' Rural Electrification Program — Brazil' <[www.zef.de/fileadmin/webfiles/renewables/abstracts/Oldenburg/Abstract\\_Rosana.pdf](http://www.zef.de/fileadmin/webfiles/renewables/abstracts/Oldenburg/Abstract_Rosana.pdf)>; Hon P Sayeed, Minister of Power, India, 'The Path to Sustainability: Accessibility, Availability, Acceptability', Keynote Address at the World Energy Congress, Sydney, Australia, September 2004.

<sup>43</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (1) (2009) OJ L 211 /55.

<sup>44</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

Cultural Rights,<sup>45</sup> apply to the issue of access to modern energy services tangentially, but do not address the issue directly.<sup>46</sup>

Judith's major contribution in this area has been to develop (with the current author) a proposal justifying and detailing a new international instrument, a Statement of Principles for Achieving Energy Access for All.<sup>47</sup> This proposed new 'soft law' instrument contains novel ideas by Judith (and her co-author), together with ideas influenced by other soft law instruments, in particular Agenda 21<sup>48</sup> and the Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests.<sup>49</sup> The new instrument proposes clauses relating to objectives, defining universal access to modern energy services, providing for accessibility and affordability, preventing discrimination, linking the issue with sustainable energy, and providing for state actions and strategies to implement access to modern energy services, together with participatory rights and remedies and international co-operation.<sup>50</sup>

### Maximising the Range of Legal Options

Judith is in favour of using the full range of legal options available to promote sustainable energy solutions. This applies both to domestic and international law.

In relation to international law, this means using all forms of soft law as well as the traditional binding (or 'hard law') treaties, protocols and conventions.<sup>51</sup> These soft law instruments may take the form of resolutions, declarations, guidelines, agreements, charters or statements of principles.<sup>52</sup> In this sense, Judith's approach is

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45 *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200(XXI), UN GAOR, 21<sup>st</sup> sess, Agenda Item 61, Supp No 16, UN Doc A/6316 (1966) 993.

46 See especially Article 11, which declares the right of everyone to an adequate standard of living for themselves and their family and to the continuous improvement of living conditions.

47 This proposal is detailed in Adrian Bradbrook and Judith Gardam, 'Energy and Poverty: A Proposal to Harness International Law to Advance Universal Access to Modern Energy Services' (2010) 57 *Netherlands International Law Review* 1.

48 Conference on Environment and Development (Agenda 21), UN GAOR, UN Doc A/CONF.151/26 (12 August 1992). See Nicholas Robinson (ed), *Agenda 21: Earth's Action Plan* (Oceana Publications, 1993).

49 Commonly referred to as the *Statement of Forest Principles*, UN Doc A/CONF.151/26 (Vol III) (14 August 1992).

50 For the detailed clauses, see Bradbrook and Gardam, 'Energy and Poverty', above n 4, 13ff.

51 For a discussion of international legal instruments and the means by which they evolve into international law, see Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007) 104-8, 210-60.

52 Edith Weiss, 'Conclusions: Understanding Compliance with Soft Law' in Dina Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford

consistent with the general development of international environmental law since its inception in the Stockholm Declaration of 1972. One of the distinguishing features of international environmental law has been the rapid development of soft law instruments, which until that time were little used and which are still less common in other areas of international law. The use of soft law documents as a form of confidence and consensus-building among nations in order to tackle environmental issues has proved to be successful in a number of different contexts and has the capability to provide the framework for the resolution of future energy issues.

In relation to domestic law, the role of law is sometimes misunderstood. The traditional methods of introducing change into society consist of regulation, stimulation and education, or a combination of any two or more of these measures.<sup>53</sup> Many people see the role of law as limited to regulation, which economists and others often refer to disparagingly as 'command and control' measures.<sup>54</sup> Economists prefer to effect changes by way of stimulatory changes (such as income tax deductions, government grants or loans to industry, or investment allowances). Most lawyers would agree on the importance of stimulatory measures.

However, those critical of the role of the law seem to overlook two factors. First, most stimulatory measures require law for their introduction. Thus, for example, every proposed tax concession given to investors in the energy sector requires a change to an existing statute or regulation to implement it. Second, and perhaps more importantly, society is not simply presented with a choice between regulation and stimulation in order to achieve a desired result. There is the further option of introducing both regulatory *and* stimulatory measures. This is often the most effective of the alternatives. It is sometimes referred to as the 'carrot and stick' approach. The 'stick' (that is, the regulatory measure) ensures that the private operator reaches prescribed minimum standards of performance. The 'carrot' (that is, the stimulatory measure) ensures that the operator goes as far as possible beyond the minimum prescribed performance standard. Regulation without stimulation means that there is no incentive to go beyond minimum standards, while stimulation without regulation may not produce any action at all.

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University Press, 2003) 535; Catherine Redgwell, 'International Soft Law and Globalization' in Barry Barton et al (eds), *Regulating Energy and Natural Resources* (Oxford University Press, 2006) 89; Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850.

53 I discuss this issue in Adrian Bradbrook, 'Energy Law as an Academic Discipline' (1996) 14 *Journal of Energy and Natural Resources Law* 190, 214ff.

54 For a theoretical discussion of regulation, see Barry Barton, 'The Theoretical Context of Regulation' in Barry Barton et al, *Regulating Energy and Natural Resources* (2006). See also Julia Black, 'Regulatory Conversations' (2002) 29 *Journal of Law & Society* 163.

Finally, the argument that education has nothing to do with the law misconceives the proper role of law in society. There are many illustrations of law being introduced as a primarily educative measure. Outside the energy sector, laws requiring the mandatory wearing of seatbelts in cars and crash helmets for motor cycles, and laws requiring plain packaging or requiring a compulsory health warning to be displayed on tobacco products, are useful examples.<sup>55</sup> Within the energy sector, many jurisdictions already have laws designed to educate the public. An example is legislation requiring the manufacturers and retailers of specified electrical appliances to display a label on each appliance showing its average energy consumption and level of efficiency according to a prescribed testing procedure.<sup>56</sup> This energy labelling requirement has been extended in some jurisdictions to motor vehicles<sup>57</sup> and has the potential of being used more extensively to promote sustainable energy solutions.

### Resolving Issues by Lateral Thinking

Judith is a strong believer in the art of lateral thinking to resolve entrenched disputes. While she has not written any articles on this point, we have often conversed on this topic. One illustration of this is the work by Judith and her co-author on developing guidelines for the protection of women in times of armed conflict.<sup>58</sup>

In the environmental area, the failure of the international community to resolve effectively the pressing and complex issue of climate change despite years of fruitless negotiations and conferences suggests that the area is ripe for examining an alternative approach. The Kyoto Protocol, which took so long to negotiate, had nowhere near the impact that was necessary, as reported by the Intergovernmental Panel on Climate Change (IPCC), to stabilise, let alone reduce, atmospheric carbon emissions.<sup>59</sup> While nations belatedly agreed to more rigorous carbon emissions standards in 2015 in the Paris Agreement,<sup>60</sup> much further work remains to be done to resolve the issue. The complexity of the climate change issue arises from the fact

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55 See, for example, *Tobacco Plain Packaging Act 2011* (Cth).

56 See, for example, Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances OJ [1992] L 297 /16.

57 See, for example, Vehicle Standard (Australian Design Rule 81/02 — Fuel Consumption Labelling for Light Vehicles) 2008 (as amended), made under the *Motor Vehicle Standards Act 1989* (Cth) s 7(1).

58 Judith Gardam and Michelle Jarvis, 'Women and Armed Conflict: The International Response to the Beijing Platform for Action' (2000) 32 *Columbia Human Rights Law Review* 1.

59 See Intergovernmental Panel on Climate Change, *Fifth Assessment Report on Climate Change* (Synthesis Report, IPCC, 2014).

60 UNFCCC/CP/2015/10/Add.1.

that it threatens the continued economic growth of developed nations, along with the right to development of developing nations; it affects the economic future of nations that trade in fossil fuels, particularly oil and coal; and it is unequal in its impact, in that some nations may actually benefit from a milder climate, while the very existence of others may be threatened and may disappear as a result of rising sea levels.

One idea is to tackle directly the major underlying cause of climate change: energy production and consumption. Energy is responsible for well over half the world's anthropogenic carbon emissions into the atmosphere. The actual percentage of carbon emissions attributable to energy production and consumption vary in each country according to that country's energy mix, but in developed countries such as the twenty-seven member states of the European Union it exceeds 80 per cent.<sup>61</sup> The alarmingly high contribution of energy to atmospheric carbon emissions is caused by continued heavy reliance worldwide on fossil fuels, particularly coal and oil, for energy needs.

I submit that the most effective solution to the climate change issue is to promote energy efficiency and renewable energy technologies to the maximum extent practicable. Such an approach could also arguably be extended to nuclear energy, which has the advantage of having no atmospheric carbon emissions (except in the construction phase). However, opinions differ on nuclear energy, and as a solution it appears to raise more environmental problems than it solves, particularly in light of the 2010 Fukushima disaster.

I submit that international law could best promote energy efficiency and renewable energy resources by creating a further energy-specific Protocol to the United Nations Framework Convention on Climate Change. The rationale is that, as energy production and consumption contribute the major share of atmospheric carbon emissions, if energy-based carbon emissions can be significantly reduced, the climate change issue will be automatically resolved.

There is no doubt that energy efficiency and renewable energy technologies are appropriate subjects for international law regulation, as there are already in existence important international instruments in these areas. The most significant is the Protocol on Energy Efficiency and Related Environmental Aspects,<sup>62</sup> based on

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61 European Energy Agency, *EN01 Energy And Non-Energy-Related Greenhouse Gas Emissions* <<http://www.eea.europa.eu/data-and-maps/indicators/en01-energy-related-greenhouse-gas-emissions/en01>>.

62 *Protocol on Energy Efficiency and Related Environmental Aspects*, opened for signature 17 December 1994, 34 ILM 446 (entered into force 22 April 1998). This Protocol is discussed in Adrian Bradbrook, 'Energy Efficiency and the Energy Charter Treaty' (1997) 14 *Environmental and Planning Law Journal* 327.

the Energy Charter Treaty.<sup>63</sup> This instrument could serve as a possible model for a more general Protocol proposed in this context. In itself, however, the Protocol to the Energy Charter Treaty cannot be regarded as an adequate world response to the issue. Renewable energy resources are largely overlooked in this Protocol, and the various clauses are phrased in a very general and non-binding manner and do not impose targets. Most importantly of all, however, there are currently only forty-five state parties to the Protocol, and the major energy-producing and consuming nations, such as the United States, China and India, are not included.

In an earlier article I have suggested the terms of a possible Energy Protocol to the UNFCCC.<sup>64</sup> In general, the terms consist of a variety of novel ideas, together with ideas and clauses contained in other conventions and protocols, particularly the Kyoto Protocol and the Protocol on Energy Efficiency and Related Environmental Aspects. The major feature of the proposal is to apply the principle of common, but differentiated, responsibilities to energy production and consumption. This principle has been recognised in international treaties since the Montreal Protocol in 1989. It has achieved further recognition in the UNFCCC and the Kyoto Protocol, where developed countries were listed in Annex 1 to the Convention and subjected to additional and more onerous legal responsibilities. As energy emissions in developed countries have been largely responsible for the creation of the climate change problem, it would seem equally appropriate, in this context, for the developed countries to assume additional responsibilities to reduce energy consumption based on fossil fuels.

The proposed additional legal responsibilities for developed countries would be to ensure that their energy consumption be reduced by an agreed percentage over a specified time period. This would mirror the core provisions of the Kyoto Protocol, whereby developed country parties collectively agreed, in Article 3.1, to reduce their overall emissions of atmospheric carbon emissions by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012. Each developed country party also agreed, in Annex B to the Protocol, to individual targets in the same commitment period.

I propose the adoption of energy intensity as the measuring system for energy consumption. 'Energy intensity' is defined in the proposed Protocol as 'the level of

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63 *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998).

64 Adrian Bradbrook, 'The Development of a Protocol on Energy Efficiency and Renewable Energy to the United Nations Framework Convention on Climate Change' (2001) 5 *New Zealand Journal of Environmental Law* 55. See also Stuart Bruce, 'International Law and Renewable Energy: Facilitating Sustainable Energy for All' (2013) 14 *Melbourne Journal of International Law* 1, 30ff.

energy needed per unit of output'.<sup>65</sup> Energy intensity is commonly used by energy specialists as an accurate measure of testing comparative energy efficiency levels. The essence of the proposal is that any given manufactured item requires a certain amount of energy to produce. The country that produces the given item using the smallest level of energy will have the lowest energy intensity (and vice versa). The aim for each country is to record the lowest level of energy intensity possible. Each developed country party will be required to reduce its energy intensity by an agreed percentage below initial levels in the first commitment period.<sup>66</sup> Developing countries would not be subject to binding energy intensity reductions, but would be required to undertake a variety of important measures promoting and co-operating in furthering the adoption of improved energy efficiency and renewable energy technologies.

### The Incremental or Gradual Approach to International Law Development

Judith believes that the gradual approach to international energy law development has the best potential for achieving change. Customary international law has a lot to offer in such circumstances. Much of her work on other aspects of international law development has examined the role of custom.<sup>67</sup> In many ways, although the origins and theory behind the two systems are quite different, in practice customary law is the international law equivalent to common law. Unfortunately, energy law has emerged so recently on the international law scene that there has been no time yet for the development of custom.<sup>68</sup> It is only in the very long term that custom may play a role in this context. In the meantime, the law in this field will only progress by developing new international law instruments.

Following the gradual approach, Judith supports the use in international energy law of the current favoured approach in environmental law in negotiating complex issues by seeking to use one or more non-binding soft law instruments and/or a Framework Convention as a precursor to a final comprehensive convention. Soft law instruments can be used to build confidence amongst nations that would otherwise refuse to sign and ratify a binding convention. This approach has operated

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65 For a discussion of energy intensity, see Ralph Samuelson, 'The Unexpected Challenges of Using Energy Intensity as a Policy Objective' (2014) 64 *Energy Policy* 373; Hisham Khatib, 'Energy Intensity: A New Look' (1995) 23 *Energy Policy* 727.

66 If energy intensity is considered to be too complex, it would be possible with minor amendments to the proposed Protocol to adopt a system of percentage reduction of either total energy consumption or fossil fuel consumption.

67 See Gardam and Jarvis, above n 58.

68 On this point, see Bruce, above n 64, 27.

very effectively in the case of ozone depletion, where the framework Vienna Convention was followed by a more comprehensive Montreal Protocol on Substances that Deplete the Ozone Layer,<sup>69</sup> together with later minor updating and amending protocols. This is also the approach being adopted to resolve the climate change issue, where the international community initially approved the United Nations Framework Convention on Climate Change and followed it up with the more detailed Kyoto Protocol and Paris Agreement.

### Advancing Renewable Energy Resources and Energy Efficiency

Judith believes in the notion of 'treading lightly on the Earth'. She has been influenced by the spiritual dimension underpinning environmental protection theory and the Gaia principle.<sup>70</sup> She thus naturally supports the use of renewable energy and energy efficiency technologies so as to reduce the need to use fossil fuels and to minimise the environmental harm caused by their continued use. In reducing the need for fossil fuels, renewable energy and energy efficiency technologies also assist in achieving national energy independence and security, as discussed below.<sup>71</sup>

This does not mean that Judith supports every type of renewable energy technology, however. She sensibly draws a distinction between 'clean' energy and other energy sources. For example, renewable energy includes hydro-electricity. This form of development, while being clean in the sense that it does not pollute the atmosphere, usually involves the building of dams and the creation of artificial lakes, which necessarily involve the drowning of land and often the displacement of people. While environmental groups provide general support for renewable energy projects, they usually strongly resist this type of development. Judith limits her support to small-scale 'run of the river' hydro projects, which cause no environmental harm.

A further example is nuclear energy. This form of energy is argued to be clean in the sense that it avoids the environmental harm usually associated with fossil fuel exploration and production and causes no atmospheric carbon emissions. In the late 1990s and 2000s, the world experienced a renewal of interest in this resource with the advent of concern about global warming, although this trend has gone into reverse since the Fukushima nuclear accident in Japan in 2010. Because of its potential to cause catastrophic environmental harm, Judith is a strong opponent of nuclear energy.

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69 *Montreal Protocol on Substances that Deplete the Ozone Layer*, signed 16 September 1987, 1522 UNTS 451 (entered into force 1 January 1989).

70 See generally, Gaia Theory, *Model and Metaphor for the 21<sup>st</sup> Century* <[www.gaiatheory.org](http://www.gaiatheory.org)>.

71 See below nn 72-3 and accompanying text.



## Links with the Law of Armed Conflict

Consistent with her work on the international law of armed conflict and the protection of civilians in such times, Judith is concerned with the possibility that energy shortages may eventually lead to armed conflict in many areas. Since as early as the 1970s, we have seen cases of energy 'blackmail', when the Arab oil embargo against Israel and selected countries that supported Israel caused severe energy shortages and economic disruption. We have also seen energy 'blackmail' occurring in Europe, when Russia has cut off or reduced gas supplies to certain countries in retaliation for political measures that they disagreed with. For this reason Judith strongly favours the need for nations to try to achieve energy independence. This work can be promoted by international organisations specialising in the field of sustainable energy.

The role of energy in causing international instability has long been overlooked.<sup>72</sup> Nations are unlikely to declare openly their concern over energy security, as there is no principle of international law that entitles one country to intervene militarily to acquire energy forcibly from another country. Nevertheless, evidence exists to show that energy security issues are responsible for much international instability in modern times. The current international dispute over sovereignty in the Spratly and Paracel Islands in the South China Sea is clearly concerned with the energy resources in the seas surrounding the islands rather than with sovereignty in the islands themselves. The long-standing dispute between the United Kingdom and Argentina over sovereignty of the Falkland (Malvinas) Islands has been fuelled by the likelihood of significant reserves of petroleum and gas in the surrounding seas.<sup>73</sup> Similarly, the willingness (or otherwise) of the United States to intervene militarily in various disputes seems to be largely motivated by concerns over oil and gas supplies. In this regard, its willingness to intervene in Iraq and in other war theatres of the Middle East can be contrasted with its refusal to engage in areas with few or no oil and gas reserves, such as Rwanda and Bosnia.

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72 For recent discussions of energy security, see Catherine Redgwell, 'International Energy Security' in Barry Barton et al (eds), *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (2004) 17; Bengt Johansson, 'Security Aspects of Future Renewable Energy Systems — A Short Overview' (2013) 61 *Energy* 598; Christian Winzer, 'Conceptualizing Energy Security' (2012) 46 *Energy Policy* 36; Benjamin Sovacool and Harry Saunders, 'Competing Policy Packages and the Complexity of Energy Security' (2014) 67 *Energy Policy* 641.

73 This is discussed in the 28 February 2014 edition of *The Economist*: see JB Stanley, *Oil and Gas in the Falkland Treasure Islands?* (28 February 2014, *The Economist*) <[www.economist.com/blogs/americasview/2014/02/oil-and-gas-falklands](http://www.economist.com/blogs/americasview/2014/02/oil-and-gas-falklands)>.

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## CONCLUSION

The discussion above shows that considerable strides have been made by both domestic and international law to the development of sustainable energy. Nevertheless, much remains to be done if we are to achieve a clean energy future worldwide. What further fundamental legal reforms could be made to promote sustainable energy?

The most obvious reform is to the international institutions that work in the energy sector. As discussed earlier,<sup>74</sup> in recent times the United Nations has done much useful work to promote sustainable energy. However, its work has been fragmented and often left unco-ordinated as a result of the division of sustainable energy between the various UN agencies. At present, the work is shared between the United Nations Environment Programme, the United Nations Development Programme, and the United Nations Department of Economic and Social Affairs and its six regional commissions. Each institution has its own perspective on sustainable energy, but none of them has overall responsibility for the promotion of sustainable energy solutions. This problem has been recognised by the United Nations by the establishment in 2004 of UN-Energy. This is described as a 'knowledge network' designed to promote coherence and inter-agency collaboration in relation to the three pillars of sustainable energy (access to energy, renewable energy and sustainable energy).<sup>75</sup> However, as UN-Energy is only an information-sharing network, it does not resolve the core issue of one agency taking sole responsibility for sustainable energy development.

Outside the United Nations, there are three major institutions relevant to sustainable energy — the International Atomic Energy Agency (IAEA),<sup>76</sup> the International Energy Agency (IEA)<sup>77</sup> and the International Renewable Energy Agency (IRENA).<sup>78</sup> The IAEA was established in 1957 in co-operation with the United Nations to promote safe, secure and peaceful nuclear technologies. At that time, nuclear energy was regarded as the likely major worldwide energy source of the future, and in that sense it seemed appropriate to devote an entire specialised agency

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74 See above nn 30-3 and accompanying text.

75 See United Nations Energy (2016) <[www.un-energy.org](http://www.un-energy.org)>.

76 Established in 1957 by the *Statute of the International Atomic Energy Agency*, opened for signature 23 October 1956, 8 UST 1092 (entered into force 29 July 1957); TIAS 3873; discussed in Alan Boyle, 'Nuclear Energy and International Law: An Environmental Perspective' (1989) 60 *British Yearbook International Law* 257.

77 See above n 14.

78 Established by the *Statute of the International Renewable Energy Agency* opened for signature 26 January 2009, 48 ILM 1223 (entry into force 8 July 2010).

to its support. In modern times, however, nuclear energy has only played a minor role worldwide and it seems inappropriate that it has an entire agency while sustainable energy has no such agency. As discussed earlier,<sup>79</sup> the IEA was originally established to co-ordinate the stockpiling of oil reserves to counter any future Arab oil embargo against Western nations, but has since assumed a role supportive of sustainable energy. As for the recently created IRENA,<sup>80</sup> it appears to be effective in promoting renewable energy resources, but unfortunately has no role in furthering the other two pillars of sustainable energy — access to energy and energy efficiency.

I submit that the most effective institutional means of supporting sustainable energy would be either to create a new specialised agency or to fundamentally reform one of the existing institutions to give it that role. While there is no legal reason to do so, for reasons of prestige and influence it would seem more appropriate if such an agency were within the United Nations framework. If this were to occur, the existing United Nations agencies involved with sustainable energy research could be freed of responsibility for such work and could devote their time and resources more fully to other aspects of sustainable development.

The other aspect of existing international law that requires rethinking in the energy context is the notion of state sovereignty. To advance the international law relating to sustainable energy, states will need to accept some limitations on their national energy policy decisions.<sup>81</sup> This will be difficult to achieve as states regard energy policy as an integral part of their sovereignty. However, there are two encouraging signs. First, the developing principles of international environmental law challenge this principle,<sup>82</sup> and we have seen international decisions which at least partially break away from the notion of state sovereignty as sacrosanct.<sup>83</sup> Second, recent international environmental law instruments have shown that in certain circumstances states are prepared to compromise on energy-related matters to achieve a global deal. The UNFCCC, the Kyoto Protocol and the Paris Agreement are the most recent illustrations of this trend.

While it is easy to be pessimistic about the slow pace of development in international sustainable energy law, a consideration of new legal measures supportive of such law, as discussed in this chapter, shows that we have progressed significantly since I referred in 1993 to energy law as 'the neglected aspect of environmental

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79 See above n 14 and accompanying text.

80 See above n 16 and accompanying text.

81 See Bruce, above n 64, 6-8.

82 See Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3<sup>rd</sup> ed, 2009) 217.

83 See, for example, *Trail Smelter Case (United States of America v Canada) (Awards)* (1941) 3 RIAA 1905; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7.

## IMAGINING LAW

law'.<sup>84</sup> Let us hope that necessary legal change supportive of sustainable energy will be introduced worldwide before significant non-reversible environmental harm is caused to the planet by continuing to support the fossil fuel industries.

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<sup>84</sup> Adrian Bradbrook, 'Energy Law: The Neglected Aspect of Environmental Law' (1993) 19 *Melbourne University Law Review* 1.



# PART II



# 3

## THE LIMITED NECESSITY OF RESORT TO FORCE

MARY ELLEN O'CONNELL

In 2004, Judith Gardam published her invaluable book, *Necessity, Proportionality and the Use of Force by States*.<sup>1</sup> In it she makes the case that all lawful resort to military force at the international level requires compliance with the principles of necessity and proportionality. Prior to her work, discussions of resort to force often overlooked these crucial principles, perhaps in part because of a paucity of expert analysis.<sup>2</sup> Professor Gardam's book addressed a critical deficit in our understanding of international law. Governments, scholars, and — most importantly — potential victims of armed conflict have been the beneficiaries.

In this contribution to the volume in her honour, I propose to revisit her discussion of necessity in the *jus ad bellum* in large part to respond to recent interest in characterising necessity as a lawful basis for the resort to armed force.<sup>3</sup> This

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1 Judith Gardam, *Necessity, Proportionality and the Use of Military Force by States* (Cambridge University Press, 2004); see also Mary Ellen O'Connell, 'Review of Judith Gardam, *Necessity, Proportionality and the Use of Force by States*' (2006) 100 *American Journal of International Law* 973, 974.

2 For exceptions, see Olivier Corten, *The Law Against War, The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010); Ian Brownlie, *The Use of Force by States* (Clarendon Press, 1963).

3 See, for example, Remarks of Alexandra Perina, US State Department, on necessity as a defence to the use of cyberattacks in responding to cyber espionage, theft and damage. ASIL Annual Meeting, Panel: Countermeasures in Cyberspace, 11 April 2014; Ian Johnstone, 'The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism' (2005) 43 *Columbia Journal of Transnational Law* 337-88.



characterisation clashes with the position set out in *Necessity, Proportionality and the Use of Force by States*. The lawful resort to armed force must be based on at least one of two or possibly three exceptions to the United Nations Charter prohibition on resort to force. Necessity is not one of the exceptions. Rather, it is an additional condition for lawful resort to force, which applies once a recognised basis is established. A national leader ordering a military attack on the territory of another state must first confirm that there is a lawful basis for doing so and that the use of force is both necessary and proportional, and conforms to other relevant rules of international law, such as the law of state responsibility and human rights law.

The discussion begins with an overview of the general law on resort to force, then turns to a full focus on necessity. The principle of necessity is found in a number of international law categories with a distinctive meaning in each. Keeping the various meanings and histories separate is a challenge to scholars. In the area of resort to force, the principle of necessity is a restriction on force; it does not and cannot permit military force. In other categories of international law, necessity may provide a defence to otherwise unlawful action, such as imposition of a trade barrier, but not to the otherwise unlawful resort to military force. The conclusion here is that proposals to expand the right to use force by claiming necessity appear to be based on either a faulty understanding of necessity or faulty reasoning about the legal regime on the use of force. Gardam's analysis of over a decade ago remains solid and astute.

### THE PROHIBITION OF FORCE

The predominant interpretation of the United Nations Charter holds that Charter Article 2(4) broadly prohibits the resort to force in international relations:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.<sup>4</sup>

The plain text of Article 2(4) may not strike the uninitiated contemporary reader as encompassing a general prohibition on resort to force. The drafting and negotiating history of the Charter makes clear, however, that the states involved intended to ban the first use of military force involving anything more than *de minimis* force.<sup>5</sup> The United

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<sup>4</sup> *Charter of the United Nations*, art 2(4).

<sup>5</sup> A *de minimis* use of force might involve a government vessel firing shots across the bow of a trespassing ship. See Mary Ellen O'Connell, 'The Prohibition of Force' in Nigel D White and Christian Henderson (eds), *The Research Handbook on International Conflict and Security Law* (Edward Elgar, 2013); Jane Stromseth, 'New Paradigms for the Jus ad Bellum?' (2006) 38 *George Washington International Law Review* 561. Stromseth acknowledges the wide breadth of Article 2(4), so that in advocating for a broader right of states to use force she sees the need to rewrite Article 2(4). This is most unlikely, given that UN members clearly rejected any rewriting of the Charter in 2005 at the United Nations World

States led the drafting of the Charter and carefully chose the terms of Article 2(4). The references in the Article to 'territorial integrity', 'political independence' and especially, 'in any other manner inconsistent with the Purposes of the United Nations' were meant to encompass a broad prohibition. A member of the US delegation, in responding to a question by the Brazilian delegation on Article 2(4)'s scope, said that 'the authors of the original text intended to state in the broadest terms an absolute all-inclusive prohibition; the phrase "or in any other manner" was designed to insure that there should be no loopholes'.<sup>6</sup>

This broad prohibition forms the primary international legal rule with respect to the use of force. Any lawful resort to force is an exception to the prohibition. Those who argue that states have a right to resort to force need to begin with Article 2(4), then identify the exception that makes the force justified. This structural aspect of international law on the use of force is significant for several reasons: exceptions are by their nature narrow. In case of doubt as to whether an exception applies, standard legal interpretation supports the primary rule in distinction to the exception. Also, exceptions are interpreted in light of the object and purpose of the primary rule. The Charter has only two express exceptions: one provides for the Security Council's right to authorise force, and the other is the right of unilateral or collective self-defence in Article 51.

Further, scholars arguing to expand the legal right to resort to force often do so by drawing analogies to domestic law or to other principles of international law. Necessity, for example, is analogised to the right of self-defence as a lawful basis for resort to force. The better analogy would begin with Article 2(4) and explain how necessity is like other exceptions to domestic law prohibitions on the use of force or to the express exceptions to Article 2(4). Comparing necessity to Article 51 might lead to a quite different conclusion about the scope of a state's rights than when Article 51 is read first in light of Article 2(4), which generally prohibits resort to force.

Despite this understanding of Article 2(4), Julius Stone, who taught law at the University of Sydney for many years, was already arguing in 1951 — just six years after the adoption of the Charter — for interpreting Article 2(4)'s scope as limited. He asserted that Article 2(4) only restricted states from using force aimed at interfering with the territorial integrity or political independence of the state being attacked. In other words, Stone argued that the new UN Charter only prohibited conquest. Post 9/11, several American scholars have cited Stone's arguments to support the right to resort to force in situations going far beyond those permitted under standard

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Summit in New York. *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60<sup>th</sup> sess, 8<sup>th</sup> plen mtg, Agenda Item s 46 and 120, UN Doc A/60/L.1 (15 September 2005) 22-3. Moreover, as a *jus cogens* norm, the prohibition on the use of force in Article 2(4) is not subject to diminution. See above n 4.

6 United Nations Conference on International Organization (25 April 1945) 334-5.

Charter interpretations.<sup>7</sup> Stone and his recent followers, however, cannot prevail over the negotiating history of the Charter and six decades of subsequent interpretation. Respecting Article 2(4), Harvard's Louis Sohn, for example, responded to Stone that Article 2(4) must be read as generally excluding the use of force when read together with the Charter as a whole, especially Article 1(1), which calls on states to settle disputes peacefully and comply with international law.

Moreover, as just discussed, Charter provisions that actually permit the use of force are written as exceptions to a broad prohibition. Exceptions would be largely irrelevant if Article 2(4) permitted all force not aimed at political independence and territorial integrity. Military reprisals, for example, of the type advocated by United States officials in 2013 against Syria for alleged chemical weapons use, would not have interfered with political independence or territorial integrity. Reprisals, however, are clearly prohibited under the standard interpretation of Article 2(4). The UN General Assembly made this clear in its Declaration on Friendly Relations, which supports the broad reading of Article 2(4)'s prohibition and expressly prohibits reprisals.<sup>8</sup>

The Charter does contain two exceptions to Article 2(4). Both are limited in what they permit: Articles 39-42 provide for the UN Security Council to authorise measures aimed at re-establishing international peace and security in situations where measures short of force have failed or are likely to fail.<sup>9</sup> Article 51 permits the

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7 See, for example, Matthew Waxman, 'Regulating Resort to Force: Form and Substance of the UN Charter Regime' (2013) 24 *European Journal of International Law* 26; Abraham Sofaer, 'On the Necessity of Pre-emption' (2003) 14 *European Journal of International Law* 209, 213.

8 Principle 1 of the UN General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States includes this provision: 'States have a duty to refrain from acts of reprisal involving the use of force'. *Declaration of Friendly Relations*, UN GOAR, 6<sup>th</sup> Comm, 25<sup>th</sup> sess, Agenda Item 85, UN Doc A/RES/25/2625 (24 October 1970).

9 *Charter of the United Nations* Article 39: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40: In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42: Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as

unilateral and collective use of force in self-defence if an armed attack occurs until the Security Council can act.<sup>10</sup>

Beyond the Charter, states have on many occasions cited a right to assist governments in suppressing internal rebellion by organised armed groups. France, for example, intervened in its former colonies over twenty times between 1962 and 2013, on the basis of an invitation by a government.<sup>11</sup> A much smaller group of states argue that there is a right to intervene for humanitarian purposes, to respond to terrorist threats, or to prevent the acquisition of weapons.<sup>12</sup> In 2005, however, all members of the United Nations came together at a world summit in New York to reconfirm their commitment to the UN Charter rules on the use of force with no changes except for the clarification that the Security Council could act in cases of humanitarian crisis.<sup>13</sup>

Readers might suppose that the United States, a country characterised by both a commitment to the rule of law and the frequent resort to military force, might be a leader in arguing to expand the legal right to resort to force beyond the Charter. In fact, the United States has been conservative respecting the Charter. The US joined the consensus in New York in 2005, and Olivier Corten's research shows that the US accepts that the use of force is lawful only on the basis of 'rules laid

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may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

10 *Charter of the United Nations* art 51: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

11 See the report by Andrew Hansen, *The French Military in Africa* (8 February 2008) Council on Foreign Relations <<http://www.cfr.org/france/french-military-africa/p12578>>. Since the report was issued, France has undertaken major interventions in Mali and Central African Republic. See also the evidence and argument against the legality of intervention by invitation of a government in Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 *British Yearbook of International Law* 189-252.

12 Israel is the only state that apparently uses major military force to prevent weapons acquisition. It attacked Iraq in 1981 to prevent the acquisition of nuclear weapons by bombing a nuclear power reactor at Osirik. It attacked Syria in 2007 to prevent the building of a weapons facility and several times in 2013 to stop deliveries of conventional weapons. Israel attacked a truck convoy of weapons in Sudan in 2009. The US and Israel together have threatened military force against Iran over its nuclear program. Considerable evidence also exists that the US and Israel unleashed computer malware called the Stuxnet worm in 2009-10 to damage Iran's nuclear program. In my view, the worm was a violation of the non-intervention principle but did not rise to the level of an Article 2(4) violation. See Mary Ellen O'Connell, 'Cyber Security Without Cyber War' (2012) 17 *Journal of Conflict and Security Law* 187.

13 *2005 World Summit Outcome*, above n 5, 30.

down by the UN Charter, which, when it is a unilateral action, reduces the debate to an interpretation of the institution of self-defence'.<sup>14</sup> The US has, plainly, pushed well beyond the Charter's provision for self-defence in, for example, arguing for the right to attack to pre-empt a future threat<sup>15</sup> or for the right to attack states that are 'unwilling or unable to deal with problems of terrorism'.<sup>16</sup> Yet the US has never rejected the Charter, and, as attenuated as some of its claims have been over the years, the US consistently links them to self-defence. In 2013, President Obama even attempted to link his proposed reprisal attacks on Syria for chemical weapons use to the defence of the US.<sup>17</sup>

In remaining within the Charter paradigm, the US has not to date attempted to base the resort to force on necessity. US arguments for why controversial drone attacks are lawful have ranged over eight different claims; none of the claims included a plea of necessity.<sup>18</sup> In May 2013, Obama provided three principal arguments aimed at justifying US drone attacks outside armed conflict zones:

Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war — a war waged proportionally, in last resort, and in self-defense ...

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<sup>14</sup> Corten, above n 2, 232.

<sup>15</sup> *United States National Security Strategy 2002* (17 September 2002) Whitehouse Archives <<http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>>.

<sup>16</sup> See, for example, State Department Legal Adviser Brian Egan, 'International Law, Legal Diplomacy and the Counter-ISIL Campaign' (Speech delivered at the American Society of International Law, Washington, DC, United States of America, 1 April 2016) <<http://www.state.gov/s/l/releases/remarks/255493.htm>> and Attorney General Eric Holder, 'Attorney General Eric Holder Speaks at Northwestern University School of Law' (Speech delivered at Northwestern University School of Law, Chicago, IL, United States of America, 5 March 2012) <<http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>>.

<sup>17</sup> The President sought a resolution of Congress to authorise a use of force against Syria in August 2013 in the following terms:

(a) Authorization. — The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in connection with the use of chemical weapons or other weapons of mass destruction in the conflict in Syria in order to —

(1) prevent or deter the use or proliferation (including the transfer to terrorist groups or other state or non-state actors), within, to or from Syria, of any weapons of mass destruction, including chemical or biological weapons or components of or materials used in such weapons; or

(2) protect the United States and its allies and partners against the threat posed by such weapons.

<sup>18</sup> See Mary Ellen O'Connell, 'International Law and Drone Attacks Beyond Armed Conflict Zones' in David Cortright, Rachel Fairhurst and Kristen Wall (eds), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (The University of Chicago Press, 2014) 63-73.

## IMAGINING LAW

America does not take strikes to punish individuals; we act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near-certainty that no civilians will be killed or injured — the highest standard we can set.<sup>19</sup>

The President's speech first references the US concept of a worldwide war in self-defence which began in response to the 9/11 attacks. If there really were such a war, no additional arguments would be needed for military force in Pakistan, Yemen, Somalia or elsewhere. Under international law's definition of armed conflict, however, the US has been engaged in an armed conflict with the Taliban and Al-Qaeda from October 2001 though 2014 in Afghanistan.<sup>20</sup> Perhaps for this reason, Obama also asserts that the US may use military force against those 'who pose a continuing and imminent threat'. Since 1958, some have tried to argue that Article 51 allows force against an imminent threat because that is what the 'inherent right' of self-defence meant prior to the adoption of the UN Charter.<sup>21</sup>

The President's third argument implies a right to use military force 'when there are no other governments capable of effectively addressing the threat'. While this argument is associated in the President's speech with self-defence, Article 51 gives no indication whatsoever of a right to attack states on such a basis. Rather, Article 51 clearly requires that a state acting in self-defence be responding to an actual armed attack. Shaping the response, so that it 'halts and repels' an attack, requires knowing details of the attack. Thus, force in lawful self-defence requires evidence of an actual armed attack occurring. If the attack has already occurred prior to the ability of a state to respond, then action in self-defence depends on evidence of further attacks in close temporal proximity to the initial attack or attacks. Deciding on a 'necessary and proportionate' defence is pure conjecture without evidence of an armed attack. Even where there has been an armed attack, without evidence of further such attacks in temporal proximity to the initial attack, the defending state will have difficulty meeting the necessity and proportionality requirements.

Obama does acknowledge that in addition to a lawful basis for resort to force, other conditions must be met. He mentions 'last resort', which is one form of the principle of necessity, and he also mentions the principle of proportionality. The

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19 President Barack Obama, 'Remarks by the President at the National Defense University' (Speech delivered at the National Defense University, Fort McNair, Washington DC, 23 May 2013) <<http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>>.

20 *International Law Association Report of the Use of Force Committee on the Meaning of Armed Conflict in International Law*, 2010 ('*ILA Report on the Meaning of Armed Conflict*') (Judith Gardam was the Committee's rapporteur for this report).

21 Derek Bowett, *Self-Defence in International Law* (Praeger, 1958) 184-5.

President does not mention the law of state responsibility.<sup>22</sup> While the remainder of this chapter will discuss the principle of necessity, understanding necessity requires consideration of both state responsibility and proportionality. Restricting resort to force to cases where a state has a lawful basis to do so and meets the requirements of necessity, proportionality and state responsibility renders almost all use of force unlawful — including responses to a significant armed attack. Moreover, as will be discussed below, necessity is a general principle of international law, meaning that it does not change under the influence of a change in general state practice followed out of a sense of legal obligation, as rules of customary international law do.<sup>23</sup> Necessity is basically unchanging in the context of the use of force. The value of such sturdy principles is demonstrated in times like these, when national leaders seem prone to dramatic, short-term policies regardless of legality or longer-term benefits, such as the benefit of restricting resort to force.

### THE PRINCIPLE OF NECESSITY

The principle of necessity appears in various subsets of international law, including the law governing resort to force (*jus ad bellum*),<sup>24</sup> the law governing the conduct of force (*jus in bello*),<sup>25</sup> the law on state responsibility,<sup>26</sup> and human rights law.<sup>27</sup> In all of these subsets, necessity has a common meaning to some extent, but is also distinctive.<sup>28</sup> Gardam refers to the common origin of necessity and its development in divergent directions:

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22 Above n 19.

23 See above n 4.

24 See Gardam, above n 1, 4-7, 148-55.

25 See Gardam, above n 1, 7-8; *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 (entered into force 7 December 1978) art 53; Nils Melzer, *Interpretive Guidance to the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross, 2009) 78-81 <[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/\\$File/ICRC\\_002\\_0990.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.pdf)>.

26 International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, UNGA, 55<sup>th</sup> sess, Supp No 10, UN Doc A/56/10, art 25; see also the discussion of countermeasures under art 22. United Nations General Assembly, *Responsibility of States for Internationally Wrongful Acts*, UNGAOR, 56<sup>th</sup> sess, Agenda Item 162, UN Doc A/RES/56/83 (12 December 2001).

27 See *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, (27 August to 7 September 1990) United Nations Human Rights Office of the High Commissioner <<http://www2.ohchr.org/english/law/pdf/firearms.pdf>>.

28 Necessity is a 'multifaceted principle of international law'. Nicholas Tsagourias, 'Necessity and the Use of Force: A Special Regime' (2011) 41 *Netherlands Yearbook of International Law* 11, 12. While this comment is accurate, Tsagourias's other claim, at 13-14, that the law on the use of force is based on the

[N]ecessity has had a number of meanings in different contexts in the relations between States. It is perhaps best known as the plea that States began to rely on during the nineteenth century to justify actions, including the use of force, that were in breach of the State's international obligations or were otherwise perceived as unfriendly. A component of this developing practice, however, was what is now known as necessity in the modern law of self-defence, in the sense that action must be by way of a last resort after all peaceful means have failed.<sup>29</sup>

In relation to the *ius in bello* ... [t]he idea of necessity is reflected in the doctrine of military necessity and as such is consistently referred to as one of the general principles on which IHL is based ... 'Military necessity ... consists of the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.'<sup>30</sup>

To the three versions that Gardam discusses, add the necessity principle governing the use of lethal force in peacetime, which governs when the police or others with authority may use lethal force. They may do so if 'absolutely necessary in the defence of persons from unlawful violence'.<sup>31</sup> To use lethal force in other circumstances interferes with the human right to life. In this respect, necessity in human rights law shares a similar meaning to that in the law of state responsibility, where necessity is a defence for a wrongful act not involving the use of force. By contrast, in the *jus ad bellum*, necessity is a condition of the lawful resort to force; and in the *jus in bello*, it is a guiding principle in the conduct of armed conflict — in particular, in targeting. As will be discussed in the next section, some who see necessity as a lawful basis for resort to military force appear to conflate the necessity defence in the law of state responsibility and the meaning of necessity in the *jus ad*

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principle of necessity, owing to necessity's link to a 'right of self-preservation', is idiosyncratic. It fails to consider the Just War Doctrine's role in the formation of today's law on the use of force, including the principle of necessity. See Gardam, above n 1, 32; Stephen C Neff, *War and the Law of Nations: A General History* (Cambridge University Press, 2005) 64. Robert Sloane shares Tsagourias's view of necessity in the use of force being related to a concept of 'self-preservation' in Robert D Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 10 *American Journal of International Law* 447, 455. From their questionable explanation of the origin of *jus ad bellum* necessity, Tsagourias and Sloane then proceed to fail to sufficiently distinguish what necessity means in the *jus ad bellum* versus other categories of international law. Any support they offer for basing the resort to force on necessity must be questioned in light of these problems. See Tsagourias at 22, 23-4, 26, 38, 40 and Sloane at 447, 494-7. Tsagourias and Sloane also derive support for necessity as a basis for the lawful resort to force in their common but, again, idiosyncratic reading of several decisions of the International Court of Justice.

29 Gardam, above n 1, 4-5, citing Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens and Sons, London, 1953) 70-7, 71, 74 (citing *The Neptune*, 4 International Adjudication Manuscripts 372 (1797)).

30 Gardam, above n 1, 7, citing The Lieber Code, art 13.

31 *McCann & Others v United Kingdom*, Series A no 324, App no 18984/91 (1995).



*bellum*.<sup>32</sup> Indeed, the Obama administration may even have conflated the meaning of necessity in the *jus ad bellum* and in human rights law.<sup>33</sup>

Necessity, regardless of the legal category, is a general principle of law, not a rule of customary international law. This is Gardam's position as well as Bin Cheng's, whose book on general principles remains the authoritative work.<sup>34</sup> Accurately including necessity among the general principles and not the rules of customary international law is critical to the analysis in this chapter.<sup>35</sup> General principles are not influenced by changing state practice, as occurs with rules of customary international law. Thus, the invocation by a state that it used military force on the basis of necessity might, eventually, influence the meaning of necessity if necessity were a rule of customary international law.<sup>36</sup> Such an invocation does not influence the content of a general principle.

The general principles consist of principles that are either adopted in many legal systems, or are inherent in legal systems and linked to the structure or operation of the system. Examples of general principles common to legal systems include the rule governing the nationality of corporations; the rule including interest payments in damage awards; and rules governing the conduct of lawyers. General principles that are inherent to legal systems include many of the rules governing judicial process; good faith; *pacta sunt servanda*; and necessity.<sup>37</sup> The general principles that are found

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32 See Tsagourias, above n 28, 39-41.

33 Department of Justice, White Paper on Lawfulness of a Lethal Operation Directed against a US Citizen who is a Senior Operational Leader of Al-Qaida or an Associated Force (February 2013) NBC Media <[http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf)>.

34 See above n 29.

35 Sloane opines that whether necessity is categorised as a rule of customary international law or a general principle is not important. For purposes of the application of the principle of necessity, I agree. Note my characterisation below n 54 that the ICJ's reference to necessity as a customary rule was 'harmless error'. Where the categorisation matters is with respect to rule change. Rules of customary international law may potentially change with new state practice and *opinio juris*. General principles such as necessity do not change — they are a critical part of the legal system. Sloane, above n 28, 445.

36 See Belgium's argument in a case Serbia tried to bring against it and other NATO member states for the unlawful use of force during the Kosovo crisis. 'Verbatim Record', *Legality of the Use of Force (Yugoslavia v Belgium)* [1999] ICJ, CR 99/15; see also Sloane's criticism of Belgium's attempt to use necessity to justify the use of force against Serbia. Sloane, above n 28, 495.

37 Article 38 of the ICJ Statute includes the general principles as a primary source of international law together with treaties and rules of customary international law. Alain Pellet has found express reference to general principles in only four decisions of the PCIJ and ICJ. See Alain Pellet, 'Article 38' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2006) 677. Nevertheless, on careful reading, general principles are referenced in almost every decision. See Mary Ellen O'Connell, Richard F Scott, Naomi Roht-Arriaza, *The International Legal System, Cases and Materials* (Foundation Press, 7<sup>th</sup> ed, 2015). The reference of the ICJ to *jus ad bellum* necessity in the Nuclear Weapons advisory opinion as a rule of 'customary international law'

by searching legal systems to find a common rule are derived from a consent-based source, much as treaty and customary law rules are.<sup>38</sup> These rules are well explained by the theory of positivism.

The other category of general principles is not based on consent or other forms of positive action. As inherent to a legal system, these rules are discerned through reason and tend to have ancient pedigrees. Such rules are not overridden by the sort of change that can override a treaty or rule of customary international law.<sup>39</sup> Because they are formed through means other than voluntary consent or other affirmative material acts, inherent general principles are best explained using natural law theory, rather than positivism. These features of inherent general principles are also true of *jus cogens* norms and may account for why some scholars actually classify inherent general principles as *jus cogens* norms.<sup>40</sup> The more persuasive position is that only ethical or moral norms belong in the *jus cogens* category. Inherent, structural or other principles integral to the system of international law as a legal system belong more appropriately in the general principles category. These principles are not generally the type of higher, moral norms typically included among the *jus cogens* norms, such as the prohibitions on torture, slavery, genocide and aggression. Nevertheless, the inherent general principles are essential to the system of international law. It would be impossible for international law to be law in the contemporary sense without them.

The principle of necessity is readily classified as an inherent general principle in all four categories of international law where it is found. Necessity limits the use of force, coercion or unlawful conduct by a state. It is not a primary rule that establishes rights, but a secondary rule providing a defence to a violation of a primary rule or guidance to the process of enforcing rights. Within the *jus ad bellum*, Gardam defines

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appears to be a harmless error. *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 and see below n 54.

38 If national legislatures and other law-making bodies throughout the world commonly change a rule, the general principle of international law will also change. The current international law general principle respecting the nationality of corporations is place of incorporation. Should national legislatures change this rule to place of beneficial ownership or place of corporate headquarters, the international legal rule would also change.

39 Inherent general principles must, therefore, be explained using natural law theory, not positivism, just as *jus cogens* are. See Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory & Practice of Enforcement* (Oxford University Press, 2008) 9.

40 For example, the rule that two states may not deprive a third state of its rights has been cited as a *jus cogens* norm. See, for example, *Free Zones of Upper Savoy and the District of Gex (France v Switzerland) (Judgement)* (1932) PCIJ (ser. A/B) No. 46, 96. See also Alfred Verdross, 'Jus Dispositivum and Jus Cogens in International Law' (1966) 60 *American Journal of International Law* 55. Yet in the list of *jus cogens* norms found in the 1987 *Restatement Third of American Foreign Relations Law (Restatement)* and in judicial decisions since World War II, examples of *jus cogens* involve ethical or moral norms almost exclusively.

the general principle of necessity as mandating that no peaceful alternatives exist prior to a resort to force: force is a 'last resort after all peaceful means have failed'.<sup>41</sup> In addition to the requirement of last resort, the principle of necessity also requires that the party resorting to force must calculate that there is a high likelihood of success — that force will likely accomplish the legitimate objective.<sup>42</sup> In this sense, Brownlie has called the principle of necessity 'innate in any genuine concept of self-defence'.<sup>43</sup>

Both meanings have been part of the *jus ad bellum* from earliest times. Historians of the law of war trace today's *jus ad bellum* to the Just War teaching of Augustine of Hippo in the fifth century and earlier. Augustine taught that resort to war was justifiable for only a limited set of causes. He also insisted that, even when fighting in a just cause, killing and destruction must be kept within certain limits. The Just War Doctrine became increasingly sophisticated, so that by the early nineteenth century, in correspondence over the conditions that applied to resort to force in cases of self-defence, the United States and the United Kingdom could agree on a detailed legal formula respecting the principles of necessity and proportionality.<sup>44</sup> The 1842 correspondence concerned an incident involving a ship called the *Caroline*. US Secretary of State Daniel Webster described a legitimate use of force in self-defence as force that is not 'unreasonable or excessive,' but rather 'limited by ... necessity', when a party was confronted by a need to use force that was 'instant, overwhelming, leaving no choice of means, and no moment of deliberation'.<sup>45</sup> Oscar Schachter has pointed out that necessity in this formulation is an additional requirement, applied after the state resorting to force has established a lawful basis, such as self-defence.<sup>46</sup>

Robert Sloane believes Schachter's assessment is incorrect because in Sloane's view 'no *jus ad bellum*' existed at the time of the *Caroline*.<sup>47</sup> As discussed above, Sloane fails to recognise that the Just War restrictions on resort to force continued to

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41 Gardam, above n 1, 5.

42 On likelihood of success, see Seth Lazar, 'War', *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N Zalta (ed), para 2.5 <<http://plato.stanford.edu/archives/sum2016/entries/war/>>.

43 Brownlie, above n 2, 434.

44 The Just War Doctrine evolved when natural law theory was the sole explanation of law in the West, prior to the emergence of positivism. Because there was little positive law regulating the use of force until the twentieth century, some scholars who strove to rid international law from any vestige of natural law argued that the international system had no *jus ad bellum* until the emergence of these treaties.

45 See Robert Yewdell Jennings, 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82, 89.

46 Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620, 1634-5.

47 Sloane, above n 28, 457.

be cited by governments throughout the nineteenth century.<sup>48</sup> Strict positivists, like Lassa Oppenheim, railed into the early twentieth century against any aspect of natural law such as the Just War Doctrine remaining part of international law. Oppenheim's protests are just another indication that in fact governments and scholars did continue to look to the natural law doctrine of Just War. Those who saw it as their mission to rid the world of any vestige of natural law never in fact succeeded.<sup>49</sup>

Gardam, too, finds early indication of *jus ad bellum* necessity in classic Just War scholarship.<sup>50</sup> She specifically mentions last resort but omits chance of success. It may be that the two concepts are so intertwined for her that she sees no need to separate them: if force is a last resort, logically it is a 'resort' — in other words, it is a viable option and not a vain pursuit. Yet, in the Just War Doctrine, the last resort and chance of success are usually listed separately.<sup>51</sup>

In her discussion of the principle of proportionality, Gardam says that complying with proportionality requires determining the legitimate aim of using

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48 'Historians, statesmen, moralists and propagandists continued to discuss the responsibility for and justice of wars, but lawyers gave it up.' Neff, above n 28, 197, citing Quincy Wright, 'Changes in the Conception of War' (1924) 18 *American Journal of International Law* 755, 765. It must be doubted that all lawyers gave up Just War thinking completely. Those still engaged with it, especially government officials, would have consulted with international law specialists on the topic; even if they continued to cite Grotius and Vattel, some assistance in interpreting those authorities would have been provided. Moreover, Neff cites generally British and American international law scholars for this point. Many Catholic international law scholars in Europe, the Americas and Asia would have continued to adhere to Just War thinking. Indeed, Neff cites several international law scholars, Halleck, Heffter, Bluntschli, Funck-Brentano and Sorel, writing in the mid-nineteenth century, who 'attempted to deny that there was a legal right to [resort to war], in the absence of a *justa causa* of the traditional sort ... [This was] a reversion to the old — supposedly discarded — just-war view'. Neff, at 200 (footnotes omitted).

49 O'Connell, above n 39.

50 Gardam, above n 1, 32.

51 Lazar, above n 43. The Catholic Church continues to use the Just War Doctrine as the basis for assessing the morality or immorality of any particular conflict. The 2000 revised edition of the Catholic Catechism contains this statement of the Doctrine:

The strict conditions for legitimate defense by military force require rigorous consideration. The gravity of such a decision makes it subject to rigorous conditions of moral legitimacy. At one and the same time:

- the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain;
- all other means of putting an end to it must have been shown to be impractical or ineffective;
- there must be serious prospects of success;
- the use of arms must not produce evils and disorders graver than the evil to be eliminated. The power of modern means of destruction weighs very heavily in evaluating this condition.

These are the traditional elements enumerated in what is called the 'just war' doctrine. The evaluation of these conditions for moral legitimacy belongs to the prudential judgment of those who have responsibility for the common good. *Catechism of the Catholic Church* (United States Conference of Catholic Bishops, 2<sup>nd</sup> ed, 2000) 2309.

force.<sup>52</sup> Determining the legitimate aims of force is also necessary to determine if force will succeed. She then goes on to explain that proportionality implicates achieving 'balance' between the injury perpetrated by the initial unlawful use of force and the destruction imposed in response to it. The party using force lawfully aims to avoid a disproportionate response. Proportionality requires not so much an assessment of legitimate aims as an assessment of the injury. The response must not be worse than the initial unlawful action. Assessing legitimate aims is more essential to the necessity assessment — the aims must be identified to determine if force can achieve them.

With the First Hague Peace Conference of 1899, multilateral treaty-based limits on resort to force began to be adopted. In 1945, as discussed above, a general prohibition on resort to force became binding on all UN members; and within a few decades it was perceived to be a *jus cogens* norm, meaning that the resort to force was discussed in terms of natural law theory. The Charter's two exceptions to the prohibition on force contain no express reference to necessity, proportionality, state responsibility or other rules found in general international law. Chapter VII, Article 42 does provide that the Security Council should first ascertain that means short of force have proven inadequate to restore peace and security.<sup>53</sup>

The International Court of Justice has found that despite the lack of express provision in the Charter, rules on the use of force beyond the Charter apply in addition to the Charter's provisions. The court treats the Charter as providing the lawful bases for resort to force, and then has looked to necessity and other rules for the conditions of lawful resort to force. The ICJ has consistently mentioned the obligation to comply with the principle of necessity in cases involving the *jus ad bellum*. The ICJ explained in the *Nicaragua* case that the principles of necessity and proportionality were part of the law on self-defence prior to the adoption of the Charter in 1945. The Charter's reference to the 'inherent right of self-defense' in Article 51 is a reference to such principles that are part of general law that the Charter did not clearly amend. In the Nuclear Weapons advisory opinion, the court said:

'there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law'. This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.<sup>54</sup>

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52 Gardam, above n 1, 156.

53 Above n 9.

54 See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 245, (quoting *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, 94. The ICJ in this case refers to necessity and proportionality as customary international law rules rather than as general principles; this erroneous categorisation was not critical to the court's opinion. See also *Oil Platforms (Islamic Republic of Iran v United States of America) (Judgement)* [2003] ICJ Rep 161, 198.

The court's formulation of necessity relies on the chance of success conception, as opposed to the last resort.

In this respect, *jus ad bellum* necessity is similar to *jus in bello* necessity. In the *jus in bello*, to determine whether a particular target is a legitimate target, the attacking party must determine whether the attack is designed to accomplish a legitimate military objective. If so, the attacker goes on to assess whether the attack will result in disproportionate loss of civilian lives or destruction of civilian property. Necessity respecting both the *jus ad bellum* and *jus in bello* is premised on an initial permissive right to use force. In the *jus ad bellum*, the basis must be one of the three discussed above; in the *jus in bello*, the existence of armed conflict hostilities is the legal basis for intentionally targeting enemy fighters.<sup>55</sup> In both legal categories, necessity then provides further regulation on aspects of the resort to force.

Necessity in the law of state responsibility plays a very different conceptual role. International actors may invoke necessity as a defence to a charge of law violation. The International Law Commission's 2001 Draft Articles on State Responsibility provide the standard formulation used today when the defence of necessity is invoked. This formulation appears in the section of the Articles entitled 'Circumstances Precluding Wrongfulness':<sup>56</sup>

*Article 25*

*Necessity*

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) the international obligation in question excludes the possibility of invoking necessity; or
- (b) the State has contributed to the situation of necessity.

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<sup>55</sup> *ILA Report on the Meaning of Armed Conflict*, above n 20.

<sup>56</sup> Articles on State Responsibility, above n 28. A number of scholars have discussed whether the defences in the section on Circumstances Precluding Wrongfulness are justifications or excuses. See, for example, Vaughan Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 *European Journal of International Law* 405. This is an interesting question with practical implications such as whether compensation might be owed — it might be where necessity is an excuse. It likely would not be in the case that necessity is a justification. This question is, however, beyond the scope of this chapter.

The ILC's basic presentation of necessity in 1(a) above incorporates both meanings of necessity that are part of *jus ad bellum* necessity. The unlawful responsive action must be a last resort, and it must be a 'way' to accomplish a legitimate end. The last resort sense is the dominant meaning in the law of state responsibility; likelihood of success is dominant in the *jus in bello*. Both meanings weigh equally in the *jus ad bellum*, arguably the most consequential area of human conduct and in greatest need of stringent regulation.

The International Court of Justice, as noted above, has referred to *jus ad bellum* necessity in a number of cases. Nevertheless, it is difficult to find a case in which the legality of resort to force actually turned on necessity. David Kretzmer indicates why this is so in his detailed analysis of the principle of proportionality in the *jus ad bellum*, stating that the question of

[p]roportionality arises ... only when the aim or ends pursued [through resort to military force] are legitimate. When it comes to state liability, if those ends are illegitimate all forcible measures used will *ips[o] facto* be illegitimate, whether they are proportionate or not.

The same may be said of forcible measures and where they meet the standard of necessity. There are very few examples of post-1945 resort to military force that lend themselves to necessity or proportionality assessment because we have so few examples of lawful resort to military force by either side in an armed conflict. States with a right to respond often do not do so. This was true of Iraq during Israel's attack on the Osirik nuclear reactor. US assistance to El Salvador against Nicaragua in the early 1980s came without a formal invitation or report to the Security Council, among other defects.<sup>57</sup>

Moreover, it is difficult to confirm cases where states refrained from resort to force because of *jus ad bellum* restrictions. One exemplary case, however, concerns South Korea's conduct with respect to the intermittent attacks from North Korea over the years. Despite the many missile strikes and other forms of force linked to North Korea, South Korean leaders have respected the legal limits on counterattacks. South Korean restraint has helped to avoid another major armed conflict on the Korean peninsula for almost sixty years.

As for examples where the principle of necessity has been violated, Judith Gardam has questioned the extent of the use of military force in the liberation of Kuwait during the 1990-91 Gulf War.<sup>58</sup> In August 1990, Iraq violated Article 2(4) of the United Nations Charter by invading Kuwait and claiming to re-absorb it as

57 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), above n 54; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Judgement)* [1986] ICJ Rep 14 [194].

58 Gardam, above n 1, 159-66.

Iraq's long-lost 'nineteenth province'. Kuwait's own small armed forces made some attempt to defend the nation, as was their right under Article 51, but those forces were quickly overwhelmed. The UN Security Council became involved and, after a period of attempting to use economic sanctions to persuade Iraq to withdraw, the Council authorised a coalition of states to use force to liberate Kuwait. The coalition forces quickly drove Iraq's armed forces out of Kuwait and drove them beyond a swathe of territory that became a demilitarised zone for Kuwait's future security. Famously, the coalition did not proceed to Baghdad to remove Saddam Hussein from power, because doing so, in the view of coalition leaders, was not necessary to the liberation of Kuwait. Indeed, fighting unrelated to the liberation of Kuwait could not be justified under the principle of necessity, since it was clearly beyond the force required to remove the occupier. Failing to respect the principle of necessity would make any killing and destruction both unnecessary and disproportionate.

Two other cases where states had a lawful basis for resort to military force but failed to adequately assess the necessity of force further illustrate this point. The United States and the United Kingdom began fighting in Afghanistan on 7 October 2001. The two states indicated that the legal basis of the resort to force was Article 51 self-defence. Both Security Council Resolution 1368 and a British White Paper making the case for Afghanistan's state responsibility with respect to the 9/11 attacks supported the US-UK position.<sup>59</sup> The White Paper argued that the acts of Al-Qaeda could be attributed to the Taliban government, given the close association of the two groups. Attribution of this type is required for the use of military force on the territory of a sovereign state.<sup>60</sup> The Taliban fled Afghanistan's capital, Kabul, in December 2001. Any further use of force was arguably unnecessary to accomplish self-defence. Even if the necessity of continued fighting could have been shown, the question of proportionality would arise — such as whether the use of high aerial bombardment caused disproportionate numbers of deaths with respect to whatever the military objective remained after the fall of the Taliban. By mid-2002, with Hamid Karzai's elevation to the leadership of Afghanistan, international forces shifted the purpose of fighting to supporting him. The armed conflict in self-defence became a counter-insurgency or civil war.

In March 2011, the Security Council authorised NATO members and other states to use military force to protect civilians in the Libyan civil war.<sup>61</sup> It seemed clear

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59 See Mary Ellen O'Connell, 'Lawful Self-Defense to Terrorism' (2002) 63 *University of Pittsburgh Law Review* 889.

60 We must now question the validity of the attribution, given subsequent evidence and given the high standard of attribution that the ICJ found is required for the resort to force in self-defence against a state for the acts of a non-state actor group.

61 Hugh Roberts, 'Who Said Ghaddafi Had to Go?' (2011) 33 *London Review of Books* 8.



soon after NATO began attacks in Libya that the alliance's military objective aimed at ending the regime of Muammar Ghaddafi, not simply protecting civilians.<sup>62</sup> Russia and China argued that fighting to change the regime exceeded the Security Council's mandate and was thus a resort to unlawful force.<sup>63</sup> Pursuing regime change resulted in 30 000 people dying — many, if not most, civilians — in about six months. With the fall of Ghaddafi, near anarchy erupted, with many more civilian deaths due directly or indirectly to internal conflict and lack of government services. If the principle of necessity had been taken seriously, such widespread fighting would not have been initiated, even if the Security Council had authorised it.

In the case of the 2011 Libya intervention, both the Security Council, in authorising force, and the individual states, in actually using force, were required to consider the principle of necessity. So far, much of the discussion has focused on individual state uses of force, especially in self-defence. Necessity as a general principle applies to all uses of force, however, whether in self-defence or with Security Council authorisation. The Council must assure itself that there are no alternatives to force and that the use of force has a high likelihood of success. In the case of the Iraqi invasion of Kuwait, the Security Council mandated that states impose economic sanctions on Iraq. After five months, the Council determined that the use of force was the only alternative.

The authorisation for force to protect civilians in Libya is more controversial, both in respect to last resort and to whether force would succeed in accomplishing the purpose for which it was authorised. Principally, the Council authorised force before any serious attempt to negotiate for the safety of civilians. Still, if the resolution authorised force only for the emergency protection of civilians, it arguably did meet the standard of necessity, given there was 'no moment for deliberation'. Regime change, however, was a very different matter. Not only was force not a last resort respecting the ouster of Ghaddafi, but also, presumably, the purpose of regime change was to ensure good governance for Libya with a new regime. Not only did that not happen, it could be predicted that it would not happen. Social science research is quite explicit that outside imposition of government is unlikely to lead to democracy or better governance outcomes.

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62 Subsequent to the use of force, the argument was heard that only with regime change could civilians be protected. At the time of the Security Council debate such an attenuated claim was not in the discussion. UK and French officials cited time and again that Libyan forces were on the road to the town of Benghazi. The only logical deduction from this line of argument was that the aim of force in Libya would be to stop that force on the road. Ibid.

63 Patrick Goodenough, 'Russia, China Accuse West of Exceeding UN Resolution, Making Libyan Crisis Worse', *CNS News*, 29 March 2011 <<http://cnsnews.com/news/article/russia-china-accuse-west-exceeding-un-resolution-making-libyan-crisis-worse>>.

Gardam agrees that the Security Council must respect necessity and proportionality both in decisions to authorise force and in the way that force is used when authorised.<sup>64</sup> For her, the inclusion in Article 24 of the Security Council's need to observe international law, mentioned in Chapter I of the Charter, applies to these obligations not specifically mentioned in the Charter text. The Council is an entity established under international law, and its actions are governed by international law as well as its own procedural rules.<sup>65</sup> The Council has a good deal of discretion in fulfilling its mandate under the Charter but does have limitations imposed by general law, including the restrictions found outside the Charter in human rights law, international humanitarian law, and the structural rules of international law.<sup>66</sup>

### WHY NECESSITY FAILS AS A BASIS FOR THE LAWFUL RESORT TO FORCE

In 2005, Ian Johnstone wrote:

Military action for humanitarian purposes or to counter acts of terrorism is not easily accommodated within existing legal rules on the use of force. The implications of a rigid application of those rules have prompted renewed interest in the pleas of necessity as a defense against violations of the law.<sup>67</sup>

Johnstone focuses on humanitarian intervention and acknowledges that accepting necessity as a lawful basis for the use of force in humanitarian causes would be a change from existing law. Other authors suggest that necessity already provides a lawful basis not only for humanitarian intervention,<sup>68</sup> but also for military force to counter terrorism and to counter weapons proliferation.<sup>69</sup> Corten, however, offers extensive evidence that necessity as a defence for the use of force for these or other reasons is 'only rarely invoked and never accepted by States as a whole'.<sup>70</sup>

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64 Judith Gardam, 'Legal Restraints on Security Council Military Enforcement Action', (1996) 17 *Michigan Journal of International Law* 285, 318.

65 The leading ICJ opinion on the status of the United Nations as an entity under international law with authority to act only as expressly or impliedly provided in the Charter is the Reparations Advisory Opinion of 1949. *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174. The Security Council also has procedural rules. 'Provisional Rules of Procedure of the UN Security Council' [1983] S/96/Rev.7. When the UN acts within member states, some national law will be relevant to UN personnel in addition to the international law under which they operate.

66 Anne Peters, *Article 25, The United Nations Charter: A Commentary* (Oxford Scholarly Authorities on International Law, 2012) 787, 821, 826-7; see also Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford Scholarly Authorities on International Law, 2011).

67 Johnstone, above n 3, 337.

68 Sloane, above n 28, 447.

69 See, for example, John-Alex Romano, 'Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity' (1999) 87 *Georgetown Law Journal* 1023.

70 Corten, above n 2, 199, ch 4.

Johnstone's argument is for a limited expansion of necessity to situations of true *extremis*. He looks to Article 25 of the Articles on State Responsibility and takes the words that exclude the use of necessity as a basis for the use of force and offers an interpretation of those same words to do the opposite. Rather than disallowing force, he reads them as allowing force in limited circumstances. Article 25 states in relevant part: 'In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity'.<sup>71</sup> Most of us take the words to mean that because the Charter provides no exception to the prohibition on force for necessity, Article 25 excludes necessity as a defence to the use of force. Johnstone, however, writes:

A careful reading of the relevant articles and commentaries suggests that, while necessity is no defense to acts that violate peremptory norms, the ILC deliberately took no position on whether all unlawful uses of force violate such a norm. It therefore left open the possibility that necessity may be invoked as a defense to forcible actions that fall short of aggression.<sup>72</sup>

Johnstone finds support in two ambiguous examples in the ILC reports on state responsibility. 'It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims of humanitarian intervention ...'<sup>73</sup> Johnstone supports his proposition with the ILC's sole example of a claimed right of humanitarian intervention on the basis of necessity, the 1960 Belgian intervention in Congo. He also cites the ILC's comment that even though humanitarian intervention is excluded by the UN Charter's Chapters VII and VIII, it is not excluded by Article 25.<sup>74</sup>

Upon first consideration, the idea of expanding the right to use force on the basis of a defence to wrongful conduct, rather than on a permissive basis, might be appealing, even to those who see the value in the current restrictive rules on the use of force. As a defence, the basic regime on the use of force remains in place — just one seemingly small addition is made, barely disturbing the general scheme.<sup>75</sup> Upon deeper reflection, however, multiple problems emerge. Johnstone's only authority for

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71 International Law Commission, above n 26.

72 Johnstone, above n 3, 339. Article 26 further limits aggressive force as a *jus cogens* violation.

73 Ian Johnstone, above n 3, 347, citing ILC 53<sup>rd</sup> Report, Commentary, art 25, para 20.

74 Ibid.

75 The reasoning is similar to the Israeli High Court decision on torture. The court carefully considered the absolute prohibition on the use of torture in international law and in a well-reasoned, erudite decision held that Israel was required to comply with that obligation, despite the increased risk that compliance might pose to security. Yet, near the very end of the decision, the court said that Israeli interrogators charged with the crime of using torture could interpose the defence of necessity. By allowing the defence, the court eliminated the 'absolute' from the absolute prohibition on the use of torture. *Public Committee against Torture v The State of Israel*, GSA, HCJ2 5100/94 (6 September 1999) 33-8.

his proposal are two brief comments made during a drafting process for the Articles on State Responsibility which lasted over fifty years. The comments provide virtually no support for humanitarian intervention becoming lawful on the basis of necessity. The two comments are not only ambiguous, as Johnstone accepts, but they are also anomalies in the volumes of ILC reports on state responsibility. Moreover, the first comment is erroneous and the second is evidence as much against the proposal as in favor of it.

Regarding the first comment, Belgium intervened in Congo in 1960 very soon after granting the massive country independence from colonial rule. Belgium undertook the operation to rescue Belgian nationals clearly at risk in the violent competition for control of the new nation. Today, the Belgian intervention would be referred to as 'rescue of nationals', not 'humanitarian intervention'. Johnstone is interested in legalising the type of military action that took place with respect to the Kosovo crisis in 1999. Rescue of nationals is arguably lawful if it involves only minimal use of force. A good example of a lawful rescue is the 2012 case of American Jessica Buchanan and Dane Poul Thisted in Somalia by US Navy Seals.<sup>76</sup> The two Westerners were taken hostage for ransom. Somalia, being virtually without government, could not secure their release. The Seals did, killing some of the hostage-takers in the effort, but generally moving in and out of Somalia rapidly without unnecessary killing or destruction, based on media accounts. The more dramatic hostage rescue cases involving the Israelis at Entebbe, Uganda,<sup>77</sup> and the British in Operation Barras in Sierra Leone<sup>78</sup> arguably involved excessive force, and, therefore, have been more controversial than the Somalia rescue.

Lawful rescue of the Buchanan-Thisted type falls below the Article 2(4) threshold but not outside international law.<sup>79</sup> The relevant law for such an operation is the law of countermeasures, which is another of the circumstances precluding wrongfulness in

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76 Karen DeYoung and Greg Jaffe, 'Navy SEALs Rescue Kidnapped Aid Workers Jessica Buchanan and Poul Hagen Thisted in Somalia', *The Washington Post*, 25 January 2012 <[http://www.washingtonpost.com/world/national-security/us-forces-rescue-kidnapped-aid-workers-jessica-buchanan-and-poul-hagen-thisted-in-somalia/2012/01/25/gIQA7WopPQ\\_story.html](http://www.washingtonpost.com/world/national-security/us-forces-rescue-kidnapped-aid-workers-jessica-buchanan-and-poul-hagen-thisted-in-somalia/2012/01/25/gIQA7WopPQ_story.html)>.

77 For the facts of the Entebbe, Uganda operation, see Arthur Mark Weisburd, *Use of Force: The Practice of States since World War II* (Pennsylvania State University Press, 1997) 276-7. The US tried to use this justification regarding the invasions of Grenada and the Dominican Republic. It is by now known that US citizens were not in danger in either case. See John Quigley, 'The United States Invasion of Grenada: Stranger than Fiction' (1987) 18 *The University of Miami Inter-American Law Review* 271; Corten, above n 2, 1.

78 Kim Sengupta, 'British Soldier Killed in Sierra Leone' *The Independent* (11 September 2000) <<http://www.independent.co.uk/news/world/africa/british-soldier-killed-in-sierra-leone-699335.html>>; see also Will Fowler, *Operation Barras: The SAS Rescue Mission, Sierra Leone 2000* (Cassell Military, 2005).

79 Mary Ellen O'Connell, 'The True Meaning of Force', *AJIL Unbound* (4 August 2014) <<https://www.asil.org/blogs/true-meaning-force>>, replying to Tom Ruys, 'The Meaning of "Force" and the

the law of state responsibility. The international law of countermeasures incorporates a version of the necessity principle found in general law. Countermeasures may not involve the use of military force. That has been the rule since the adoption of the UN Charter. Prior to the Charter, countermeasures were known as reprisals and could involve the use of military force short of war if such force was necessary in the circumstances.<sup>80</sup> Today, countermeasures may only incorporate force that does not violate Article 2(4), so force of a minimal type, such as shooting across the bow of trespassing fishing vessels. The force must be proportional to the injury and may be undertaken only after notice and an opportunity to remedy the violation.

In my view, the action of detaining wanted terrorist suspect Abu Khattala in Libya in 2014 could be defended as a countermeasure. US military personnel involved in the operation followed police-type law enforcement rules. They deployed only the force necessary to detain Khattala, so there was no apparent violation of Article 2(4). Further, the breakdown of authority in Libya was such that under the international law of countermeasures, the US could claim the right to carry out a law enforcement action there even in violation of Libyan sovereignty. In the circumstances, the countermeasure was necessary as the only way to bring Khattala to justice for his role in the killing of US diplomatic personnel. The carefully executed mission resulted in no casualties, indicating it was proportionate to the injury suffered by the US — lack of Libyan due diligence respecting criminal law enforcement.<sup>81</sup>

The operation that led to the killing of Osama bin Laden could also have been defended as a countermeasure but for the fact that the US Navy Seals apparently had orders to kill bin Laden even if he surrendered. The United States, Israel and other states contemplating using drones or other military weapon systems or tactics would do well to consider recalibrating operations to fit the countermeasure paradigm. Even if complying with the rule of law were not a good in itself, the success of countermeasures in accomplishing objectives is often higher than unlawful uses of military force, such as drone attacks with Hellfire missiles beyond armed conflict zones.<sup>82</sup>

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Boundaries of the *Jus Ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)? (2014) 108 *American Journal of International Law* 159.

80 'Retorsions' were once also referred to as countermeasures but involved lawful actions, such as diplomatic protest or withdrawing discretionary aid. See Oscar Schachter *International Law in Theory and Practice* (Springer, 1991) 185.

81 On states' obligations of due diligence respecting non-state actor armed groups, see *Armed Activities on the Territory of the Congo (Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 146, 301. See also James Thuo Gathii, 'Irregular Forces and Self-Defense Under the UN Charter' in ME O'Connell (ed), *What is War? An Investigation in the Wake of 9/11* (Brill/Martinus Nijhof, 2012) 91, 97.

82 Mary Ellen O'Connell, 'Game of Drones' (2015) 109 *American Journal of International Law* 889 (book review essay).

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The ILC's second comment that humanitarian intervention may be unlawful under Chapters VII and VIII but not under the defence of necessity is hardly an endorsement of necessity as a lawful basis for resort to force. Indeed, the comment could simply be read as more support that the defence of necessity in the law of state responsibility is not part of the regime on the use of force. As explained above, the international legal regime on the use of force restricts the lawful use of force to three narrow exceptions. Moreover, it cannot be emphasised enough that Article 2(4) is a *jus cogens* norm, and that in 2005, the year of Johnstone's proposal, United Nations members came together and pronounced their full support of the Charter rules. Under those rules, force may be necessary when used in self-defence or when the Security Council has determined that measures other than force are inadequate to restore international peace. The only change to the use of force regime decided in 2005 concerned a clarification of the Security Council's authority. The members agreed that the Security Council could consider humanitarian crises as implicating international peace, even when the situation is contained within the borders of one country. This clarification further weakens Johnstone's proposal to allow unilateral intervention in humanitarian crises on the basis of necessity. In 2011, the Security Council authorised states to intervene to protect civilians in the Libyan civil war. Many states expressed their official view that without Security Council authorisation, the intervention would have violated Article 2(4). The Libya case counters any remaining arguments for expanding necessity.

## CONCLUSIONS

More than a decade ago, Judith Gardam authored what has become the standard work on necessity and the use of force. This Chapter has revisited her treatment of necessity in the *jus ad bellum* in light of the scholarship on necessity in the intervening years. An assessment of this scholarship leads to three propositions, updating and expanding Gardam's analysis:

*First*, necessity is a general principle inherent to the international legal system, meaning that the correct interpretation of necessity has an enduring quality — it does not change, even with changing state practice and *opinio juris*.

*Second*, necessity has two meanings in the *jus ad bellum*: it requires that the use of force be a last resort and that there be a high likelihood that the use of force will succeed in accomplishing the legitimate objective of resorting to force.

*Third*, necessity is not now, was not in the past, and will not in the future be a basis for the lawful resort of force. States must look to the UN Charter for exceptions to the prohibition on the use of force, not the doctrine of necessity, in

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the first instance. In the legal regime on the use of force, the principle of necessity imposes additional conditions on resort to force which, if not met, can prohibit uses of force despite the existence of any lawful basis.

# 4

## HUMAN RIGHTS OBLIGATIONS AS A COLLATERAL LIMIT ON THE POWERS OF THE SECURITY COUNCIL

MATTHEW STUBBS<sup>1</sup>

### INTRODUCTION

Professor Judith Gardam's distinguished record of scholarship speaks for itself. What is less well known is Judith's record as an inspiring teacher and colleague. To those of us who were fortunate to be her students, Judith conveyed not only her enthusiasm for, and commitment to, international law, but also her intellectual discipline. No student of Judith's could forget her admonitions on the importance to scholars of international law of striving to truly understand its sources. As a colleague, I found supervising doctoral candidates with Judith a pleasure because of her interest in their projects and her dedication to mentoring the next generation of scholars. The humanity that pervades Judith's scholarship and teaching is all the more powerful because of the rigorous and disciplined approach to the law which is her hallmark.

The limits of the powers of the Security Council have been the subject of considerable debate since the rise of the Security Council which accompanied the end of the Cold War.<sup>2</sup> Notwithstanding the absence of any organ competent to engage in

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1 The author thanks Dr Kim Sorensen for his outstanding research assistance.

2 See, for example, Dapo Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 *International and Comparative Law Quarterly* 309, 338-9; Jose E Alvarez, 'Judging the Security Council'



a review of the Council's decisions,<sup>3</sup> and irrespective of the political character of many of its most important functions,<sup>4</sup> the Council's powers are nonetheless not unlimited. Indeed, the recent practice to be examined in this chapter has demonstrated that

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(1996) 90 *American Journal of International Law* 1, 4; *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep 57, 64; Martti Koskenniemi, 'The Place of Law in Collective Security' (1996) 17 *Michigan Journal of International Law* 455, 455-90; Anne Peters, 'Article 25' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2012) 787, 807-42; M Michael Reisman and Douglas L Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanction Programmes' (1998) 9 *European Journal of International Law* 86; Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175, 175-93. On related debates about calls to reform the UNSC, see, for example, Yehuda S Blum, 'Proposals for UN Security Council Reform' (2005) 99 *American Journal of International Law* 632, 632-49; Richard Gowan and Nora Gordon, *Pathways to Security Council Reform* (May 2014) Center on International Cooperation, New York University <[http://cic.nyu.edu/sites/default/files/pathways\\_sc\\_reform\\_final.pdf](http://cic.nyu.edu/sites/default/files/pathways_sc_reform_final.pdf)>; Panel of Eminent Persons on United Nations — Civil Society Relations, *We the Peoples: Civil Society, the United Nations and Global Governance — Report of the Panel of Eminent Persons on United Nations — Civil Society Relations*, UN Doc A/58/817 (11 June 2004) 10, 45-6 [95]-[100]; *Strengthening of the United Nations: An Agenda for Further Change — Report of the Security-General*, 57<sup>th</sup> sess, Agenda Item 53, UN Doc A/57/387 (9 September 2002) 8-9 [20]-[22]; Bart MJ Szewczyk, 'Variable Multipolarity and UN Security Council Reform' (2012) 53 *Harvard International Law Journal* 451, 451-70, 497-9, 500-4; Thomas G Weiss, 'The Illusion of UN Security Council Reform' (2003) 26 *Washington Quarterly* 147, 147-59.

3 Even the International Court of Justice has said it does not have the power to review SC decisions: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1975] ICJ Rep 16, 45 [89]. See generally Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff, 2009) 99-101; Kenneth Manusama, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (Martinus Nijhoff, 2006) 3-46; August Reinisch, 'Introduction' in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press, 2010) 1, 1-17; Antonios Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press, 2010) 54, 54-76. On debates about judicial review of the UNSC by the ICJ, see, for example, Alvarez, above n 2, 1-39; DW Bowett, 'Judicial and Political Functions of the Security and the International Court of Justice' in Hazel Fox (ed), *The Changing Constitution of the United Nations* (British Institute of International and Comparative Law, 1997) 73, 77-88; Charter of the United Nations art 36(3) ('Charter'); Kathleen Renée Cronin-Furman, 'The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship' (2006) 106 *Columbia Law Review* 435, 443-7, 460-1.

4 On the 'political', non-justiciable character of SC decisions, under art 39 of the Charter, to establish international criminal tribunals, see *Prosecutor v Kanyabashi (Decision on the Defence Motion of Jurisdiction)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-96-15-T, 18 December 1997) [20]; *Prosecutor v Milošević (Decision on Preliminary Motions)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54, 8 November 2001) [5]-[11]; *Prosecutor v Tadić (Decision on the Defence Motion on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 10 August 1995) [24], [44]. Cf *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) [24].

its powers are subject to important collateral limits arising from the human rights obligations of states.

The response of international law to the rise of the Security Council was a topic addressed by Judith Gardam in her 1996 article in the *Michigan Journal of International Law* entitled 'Legal Restraints on Security Council Military Enforcement Action'. Here, Gardam argued that, when undertaking military enforcement actions, the Security Council was bound by requirements of proportionality and necessity analogous to those applicable in the *jus ad bellum*,<sup>5</sup> and also by the rules of international humanitarian law forming the *jus in bello*.<sup>6</sup> This chapter looks not to uses of force, but to sanctions imposed by the Security Council. Nonetheless, two of Gardam's concluding observations make for a suitable starting point for this analysis. First, she noted the legal character of the Charter:

The text of the Charter, a legal document, is not only compatible with but arguably, through its emphasis on human rights and humanitarian values, requires the Security Council to measure its responses against legal criteria.<sup>7</sup>

Second, Gardam noted the significance of the rise of human rights law within the body of international law:

It is inconceivable that it was intended that the use of force in all circumstances, except self-defence, would be granted to a political body subject to no legal controls whatsoever. This runs counter to the increasingly important role that international law is perceived to play in the international community, particularly in the area of human rights.<sup>8</sup>

These two points apply with equal force to this chapter's consideration of non-forceful sanctions under Article 41 of the Charter as they do to authorisations to use force under Article 42.

Arguably, the most important context in which human rights obligations have been used as a collateral limit on the Security Council's powers in recent practice is in respect of states parties to the European Convention on Human Rights (ECHR).<sup>9</sup> This chapter examines both the European practice and also challenges under

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5 Judith Gardam, 'Legal Restraints on Security Council Military Enforcement Action' (1996) 17 *Michigan Journal of International Law* 285, 293, 301-12.

6 Ibid 294, 295 n 33, 301-2, 312-20, 322.

7 Ibid 321.

8 Ibid 322.

9 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force on 1 June 2010) ('ECHR').

international human rights law to the lawfulness of states' implementations of their obligations under the Charter.<sup>10</sup>

The second section of this chapter will address the potential conceptual approaches to the relationship between human rights obligations and the law of the Charter. The third section examines five key cases in which human rights obligations have been invoked before regional or international bodies to challenge the implementation of Security Council Resolutions.<sup>11</sup> This examination focuses solely on the question of the relationship between human rights obligations and the law of the Charter in each case. The final section offers observations on the significance of the practice examined in this chapter and identifies some unresolved issues that remain to be addressed in the future practice of states and institutions. The purpose of this chapter is to clarify current regional and international practice in respect of the use of the human rights obligations of states to serve as a collateral limit on the powers of the Security Council, and to consider what the future consequences of such practice might be.

### CONCEPTUAL APPROACHES

The question of collateral limits on the powers of the Security Council is not one of interpretation of the Charter alone. These challenges impose *collateral* limits on the powers of the Security Council because each begins from the basis of human rights law, and then considers its relationship to the Charter. Thus the limitations that apply arise not from the Charter as a matter of internal logic, but from international human rights law overlaying a logic external to the Charter. For this reason, the extensive

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10 A related topic, but one that is outside the scope of this chapter, is the potential for challenges within national courts to operate in a similar way. See, for example, *Abdelrazik v Minister of Foreign Affairs* [2009] FC 580 (Federal Court of Canada); *Abmed v Her Majesty's Treasury* [2010] 2 AC 534 (Supreme Court, UK); *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332 (House of Lords, UK).

11 These five decisions most clearly raise the issue of the resolution of potential conflicts between international human rights law and the law of the Charter. Other cases touch on these issues. However, even in *Al-Jedda v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 27021/08, 7 July 2011) ('*Al-Jedda* (ECtHR)'), there was no need to reconcile the two bodies of law due to the Grand Chamber's conclusion that the relevant Security Council Resolution did not in fact require the conduct which was alleged to be in breach of human rights obligations. As the Court said at 58 [105]:

The Court does not consider that the language used in this Resolution indicates unambiguously that the Security Council intended to place Member States ... under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments ... In the absence of clear provision to the contrary, the presumption must be that the Security Council intended States ... to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law.

literature on the internal limits of the powers of the Security Council<sup>12</sup> is not directly relevant to this chapter.

The question of the relationship between the Charter and the body of international human rights law may be resolved through the application of one of (at least) three conceptual approaches. Two of these approaches, which are interpretive tools of international law applicable generally and which were examined by the International Law Commission in its *Fragmentation of International Law* study, are *lex superior* and harmonisation.<sup>13</sup> A third potential approach is autonomy.

The approach of autonomy would lead to human rights institutions applying their normal rules and procedures, ignoring any potential consequences for the law of the Charter (this has also been called dualism). The potential for autonomous application of particular areas of international law was the motivating concern behind the International Law Commission's work on the *Fragmentation of International Law*. Observing 'the emergence of specialised and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice'<sup>14</sup> as a key challenge, the Commission's report formulated the problem posed by this development as being that

such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.<sup>15</sup>

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12 See, for example, Fassbender, above n 3, chs 4-6; Joy Gordon, 'The Sword of Damocles: Revisiting the Question of Whether the United Nations Security Council is Bound by International Law' (2012) 12 *Chicago Journal of International Law* 605, 616-45; Martti Koskenniemi, 'The Police in the Temple: Order, Justice and the UN: A Dialectical View' (1995) 6 *European Journal of International Law* 325, 325-8, 338-48; Manusama, above n 3, 1-46; Gabriël H Oosthuizen, 'Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law' (1999) 12 *Leiden Journal of International Law* 549, 549-58; Aziz Tuffi Saliba, 'Is the Security Council *Legibus Solutus*? An Analysis of the Legal Restraints of the UNSC' (2012) 20 *Michigan State International Law Review* 401, 401-19. On the external limits of SC powers, see, for example, Devika Hovell, 'A Dialogue Model: The Role of the Domestic Judge in Security Council Decision-Making' (2013) 26 *Leiden Journal of International Law* 579, 579-97; Tzanakopoulos, above n 3, 54-76.

13 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, finalised by Martti Koskenniemi, UN Doc A/CN.4/L.682 (13 April 2006) 24-8 [36]-[43], 118-20 [229]-[231], 168 [328]-[330], 181-5 [365]-[367], 207 [410]-[411] ('Fragmentation of International Law').

14 Ibid 11 [8].

15 Ibid.

Whilst the purpose of the *Fragmentation* study was to respond to the dangers of autonomous application of individual legal regimes, autonomy remains one of the potential approaches to the relationship between international human rights law and the law of the Charter. Autonomy has the advantage of clarity, but raises critical questions about the special status of the Charter in international law, and is inherently unappealing due to the fact that the result of this approach is that a state must choose which of two competing regimes it will violate.

A second possible conceptual approach to the relationship between these international legal regimes is to apply the maxim *lex superior*. One of the classic examples of *lex superior* is the Charter,<sup>16</sup> Article 103 of which dictates:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Adopting this approach to the question of the relationship between Charter obligations and obligations under international human rights law, the solution would be simple — the Charter obligation would prevail. This was the form of *lex superior* apparently invoked by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua* when, rejecting the assertion of the United States that Nicaragua was compelled to exhaust the Contadora process before it could invoke the jurisdiction of the Court, the Court added:

Furthermore, it is also important always to bear in mind that all regional, bilateral, and even multilateral, arrangements that the Parties to this case may have made, touching on the issue of settlement of disputes or the jurisdiction of the International Court of Justice, *must be made always subject to* the provisions of Article 103 of the Charter.<sup>17</sup>

The one qualification to this absolutist approach is that the Charter obligation could not prevail if the conduct required under the Charter were in violation of a *jus cogens* norm, because in that instance the *jus cogens* norm would prevail.<sup>18</sup> Despite the simplicity of this approach, its problem is that it assigns no weight or significance to important areas of international law which are not the *lex superior*: in this case, the body of international human rights law.

<sup>16</sup> Ibid 168-73 [328]-[340].

<sup>17</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Reps 392, 440 [107] (emphasis added).

<sup>18</sup> Fassbender, above n 3, 590; *Fragmentation of International Law*, UN Doc A/CN.4/L.682, 176-8 [346]-[350]; Andreas L Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation' (2005) 74 *Nordic Journal of International Law* 297, 317-8 (but see 318-19); *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS (entered into force 27 January 1980) arts 53, 64.

A third possible conceptual approach, harmonisation (also known as systemic or systematic integration), is more nuanced. The need to harmonise competing regimes of international law is tacitly accepted in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which prescribes the rule of treaty interpretation: 'There shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the parties'.

In *Fragmentation of International Law*, the International Law Commission examined harmonisation at length.<sup>19</sup> Its report held out the hope that 'although ... two norms seemed to point in diverging directions, *after some adjustment*, it is still possible to apply or understand them in such way that no overlap or conflict will remain'.<sup>20</sup> This was said to require 'an attempt to reach a resolution that *integrates the conflicting obligations* in some optimal way in the general context of international law'.<sup>21</sup> Later in the report, it was said that 'it seems more appropriate to play down that sense of conflict and to *read the relevant materials from the perspective of their contribution to some generally shared — "systemic" — objective*'.<sup>22</sup> Similarly, it was argued that 'the principle of integration ... points to the need to carry out the interpretation so as to see the rules in view of *some comprehensible and coherent objective, to prioritize concerns that are more important at the cost of less important objectives*'.<sup>23</sup>

Applying harmonisation to the interaction of the Charter with international human rights law is an inherently more complex process than applying either the

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19 On the report's treatment of harmonisation, see Jörg Kammerhofer, 'Systemic Integration, Legal Theory and the ILC' (2008) 19 *Finnish Yearbook of International Law* 157. On harmonisation more generally, see, for example, Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 1 *Yale Human Rights & Development Law Journal* 85; Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279; Nele Matz-Lück, 'Harmonization, Systemic Integration, and "Mutual Supportiveness" as Conflict-Solution Techniques' (2006) 17 *Finnish Yearbook of International Law* 39; Duncan French, 'Treaty Interpretation and the Incorporation of Extraneous Rules' (2006) 55 *International and Comparative Law Quarterly* 281; Freya Baetens, 'Muddling the Waters of Treaty Interpretation? Relevant Rules of International Law in the *MOX Plant* OSPAR Arbitration and *EC-Biotech Case*' (2008) 77 *Nordic Journal of International Law* 197; Campbell McLachlan, 'Investment Treaties And General International Law' (2008) 57 *International and Comparative Law Quarterly* 361; Benn MacGrady, 'Fragmentation of International Law or "Systemic Integration" of Treaty Regimes: *EC-Biotech Products* and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2008) 42 *Journal of World Trade* 589.

20 *Fragmentation of International Law*, UN Doc A/CN.4/L.682, 28 [43] (emphasis added).

21 *Ibid* (emphasis added).

22 *Ibid* 207 [412] (emphasis added).

23 *Ibid* 211 [419] (emphasis added). In one instance, harmonisation is not necessary. See *Fragmentation of International Law*, UN Doc A/CN.4/L.682, 169 [331] (references omitted):

The question has sometimes been raised whether also Council resolutions adopted *ultra vires* prevail by virtue of Article 103. Since obligations for Member States of the United Nations can only derive out of

hierarchical rule of *lex superior* or the dualism of autonomy. Nonetheless, at the conceptual level, the desirability of harmonisation is clear: both the Charter and international human rights law are regimes of great importance, and neither should be permitted to obliterate the other. However, even at this level of abstraction, the difficulties of harmonisation are also apparent: there is no real sense of how the 'adjustment' spoken of is to be made, other than by reference to the identification of some 'shared' or 'coherent objective' which enables an interpreter to 'prioritize' a particular goal. Applying such an approach in practice will hardly be without its challenges.<sup>24</sup>

The purpose of this section has been to identify the most important potential conceptual approaches to the relationship between the Charter and international human rights law. The clarity of the application of the Charter as *lex superior* (even allowing for the potential impact of *jus cogens* norms), or of human rights law autonomously, stands in contrast to the complexity of the harmonisation approach. Equally, however, the merits of harmonisation are also clear: as Judges Higgins, Kooijmans and Buergenthal noted in the *Arrest Warrant Case*, international law seeks an 'accommodation' of competing values 'and not the triumph of one norm over another'.<sup>25</sup> As the following analysis will demonstrate, the choice from amongst these three competing approaches will determine the extent to which the human rights obligations of states can function as a collateral limit on the powers of the Security Council.

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such resolutions that are taken within the limits of its powers, decisions *ultra vires* do not give rise to any obligations to begin with.

If a decision of the Security Council is made *ultra vires*, there is no harmonisation required in the event of any inconsistency with other obligations. This approach is consonant with the wording of art 25 itself: 'to accept and carry out the *decisions* of the Security Council *in accordance* with the present Charter' (emphasis added).

Nonetheless, it will be a rare instance where this limit applies, given the broad scope of discretion the Security Council (and other organs) enjoys under the Charter after the ICJ in its *Certain Expenses (Advisory Opinion)* sanctioned the pursuit of any actions serving the Purposes of the Organization: 'These purposes are broad indeed ... when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization': (*Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Reps 151, 168).

24 Compare, for example, the approach of the majority of the Grand Chamber in *Hassan v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 29750/09, 14 September 2014) to the co-application of international humanitarian law and the ECHR, with the partly dissenting judgment of Judge Spano (joined by Judges Nicolaou, Bianku and Kalaydjieva) which derided the majority's 'attempt to reconcile norms of international law that are *irreconcilable*': at 59 [6] (emphasis in original).

25 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 86-7 [79] (Judges Higgins, Kooijmans and Buergenthal) ('Arrest Warrant Case').

USING THE HUMAN RIGHTS OBLIGATIONS OF STATES AS A MEANS OF  
COLLATERAL ENFORCEMENT

*Kadi v Council of the European Union*

Mr Yassin Abdullah Kadi, a Saudi Arabian national, resident in Jeddah, was identified in the Security Council as a possible supporter of Al-Qaeda and, in October 2001, was placed by the Sanctions Committee on the list of individuals and entities whose assets were to be frozen. The first list of entities had been published in March 2001, and thereafter, the European Commission, complying with SC Resolution 1267 (1999),<sup>26</sup> issued regulations that implemented the European Union's own measures against possible supporters of Al-Qaeda.<sup>27</sup> These measures included a regulation with an amended annex of named supporters, including, amongst others, Mr Kadi, whose funds were to be frozen by the European Union (EU) and its member states.<sup>28</sup> Mr Kadi filed an application with the Court of First Instance seeking an annulment of the regulations as they pertained to him, arguing that the regulations violated certain fundamental rights — right to a fair hearing, right to respect for property and of the principle of proportionality, and right to effective judicial review — which were guaranteed in the ECHR.<sup>29</sup>

Mr Kadi's argument, in essence, was that 'Community institutions cannot abdicate their responsibility to respect his fundamental rights by taking refuge behind

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26 SC Res 1267 (1999), UN SCOR, 55<sup>th</sup> sess, 4051<sup>st</sup> mtg, UN Doc S/RES/1267(1999) (15 October 1999).

27 Commission Regulation (EC) No 2062/2001 of 19 October 2001, Amending, for the Third Time, Council Regulation (EC) No 467/2001, Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan and Repealing Regulation (EC) No 337/2000 [2001] OJ L 227/25 ('Commission Regulation (EC) No 2062/2001 of 19 October 2001'); Council Regulation (EC) No 467/2001 of 6 March 2001, Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan, and Repealing Regulation (EC) No 337/2000 [2001] OJ J 67/1; Council Regulation (EC) No 881/2002 of 27 May 2002, Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida network and the Taliban, and Repealing Council Regulation (EC) No 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial resources in Respect of the Taliban of Afghanistan [2002] OJ L 139/9.

28 Commission Regulation (EC) No 2062/2001 of 19 October 2001 [2001] OJ L 227/25, 25.

29 *Kadi v Council of the European Union* (Court of First Instance of the European Union, Second Chamber, Extended Composition, 21 September 2005) [37]-[41], [59], [139] ('Kadi').



decisions adopted by the Security Council'.<sup>30</sup> The Council of the European Union and the Commission of the European Communities responded with a plea of Article 103:

Member States ... have agreed to carry out without reservation the decisions taken in their name by the Security Council, in the higher interest of the maintenance of international peace and security ... [O]bligations imposed on a Member of the United Nations under Chapter VII of the Charter ... prevail over every other international obligation to which the member might be subject. In that way Article 103 of the Charter makes it possible to disregard any other provision of international law ... in order to apply the resolutions of the Security Council.<sup>31</sup>

The five judges of the Court of First Instance, handing down their judgment on 21 September 2005, generally rejected Mr Kadi's arguments. The Court used Article 103 of the Charter as the basis for asserting that the obligations of EU members under the Charter 'clearly prevail over every other obligation of domestic law or of international treaty law' (including the ECHR)<sup>32</sup> and, pointing to Article 25 of the Charter, argued that '[t]hat primacy extends to decisions contained in a resolution of the Security Council'.<sup>33</sup> The Court expressly stated that 'Member States may, and indeed must, leave unapplied any provision of Community law ... that raises any impediment to the proper performance of their obligations under the Charter of the United Nations'.<sup>34</sup> Given these conclusions, the Court of First Instance declined to review the legality of the contested regulations, arguing that such review would amount to judicial review of the Security Council,<sup>35</sup> and be forbidden by Article 103.<sup>36</sup>

Nonetheless, the Court also held that it had the capacity to engage in indirect judicial review of the implementation of Security Council resolutions vis-à-vis *jus cogens*,<sup>37</sup> noting: 'The indirect judicial review carried out by the Court ... may therefore, highly exceptionally, extend to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed'.<sup>38</sup>

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30 Ibid [150].

31 Ibid [156].

32 Ibid [181].

33 Ibid [183].

34 Ibid [190].

35 Ibid [209]-[225].

36 Ibid [222].

37 Ibid [226]-[230].

38 Ibid [231].

Although this step has been described as 'bold' and 'unexpected',<sup>39</sup> it appears to be a simple recognition that, because the Charter cannot authorise conduct in breach of *jus cogens*, Article 103 cannot shield any such conduct from review.<sup>40</sup> The Court found, however, on the facts that the disputed regulations did not violate Mr Kadi's *jus cogens* rights.<sup>41</sup>

Mr Kadi appealed to the Grand Chamber of the Court of Justice of the European Union (CJEU), which adopted a radically different approach to the Court of First Instance, giving no discernible weight to Article 103 of the Charter.<sup>42</sup> Instead, the Grand Chamber emphasised its role of enforcing EU law irrespective of which Charter principles might be invoked. Indeed, the Grand Chamber's approach was (with one exception to be considered below) to consider the EC Treaty law in isolation and without reference to the Charter at all.<sup>43</sup> Aust has gone so far as to state that the CJEU 'did not seem fully to appreciate that EU Member States are legally bound by Chapter VII resolutions'.<sup>44</sup>

The Grand Chamber reasoned that, because 'the Community is based on the rule of law ... neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty'.<sup>45</sup> Referring repeatedly to the Charter as 'an international agreement', as if to deny it any special status,<sup>46</sup> the Grand Chamber asserted that its role was unaffected by the Charter: '*an international agreement* cannot affect ... the autonomy of the Community

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39 Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51 *Harvard International Law Journal* 1, 20.

40 See above n 18.

41 *Kadi* (CFI, Second Chamber, Extended Composition, 21 September 2005) [37]-[41], [59], [139], [232]-[292]. See also Sara Poli and Maria Tzanou, 'The *Kadi* Rulings: A Survey of the Literature' (2009) 28 *Yearbook of European Law* 533, 552-3. For an argument that there had been a breach of *jus cogens*, see Luis M Hinojosa Martínez, 'Bad Law for Good Reasons: The Contradictions of the *Kadi* Judgment' (2008) 5 *International Organizations Law Review* 339, 349-52.

42 The CJEU has been said to have proceeded by 'ignoring the international law elements pertinent to the case': Jan Klabbers, 'Book Review: Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*' (2011) 8 *International Organizations Law Review* 483, 484.

43 *Treaty Establishing the European Community*, opened for signature 7 February 1992, [1992] OJ C 224/6 (entered into force 1 November 1993) ('EC Treaty').

44 Anthony Aust, 'Kadi: Ignoring International Legal Obligations' (2009) 6 *International Organizations Law Review* 293, 295.

45 *Kadi v Council of the European Union* (Court of Justice of the European Union, Grand Chamber, C-402/05 P and C-415/05 P, 3 September 2008) [281] ('Kadi').

46 A more orthodox description acknowledges 'the constitutional role of the UN Charter in international law': Martínez, above n 41, 340. See also de Búrca, above n 39, 23, 26; Martínez, above n 41, 343.

legal system'.<sup>47</sup> The Grand Chamber expressly held that 'obligations imposed by *an international agreement* [that is, the Charter] cannot have the effect of prejudicing the constitutional principles of the EC Treaty'.<sup>48</sup> Indeed, according to the Grand Chamber, Article 103 was simply irrelevant to its task:

[I]t is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation ... is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.<sup>49</sup>

Reasserting the autonomy of EC law, the Grand Chamber held that

review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty *as an autonomous legal system* which is not to be prejudiced by *an international agreement*.<sup>50</sup>

The Court again referred to its role within 'the internal and autonomous legal order of the Community'<sup>51</sup> requiring it to

ensure the review, *in principle the full review*, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.<sup>52</sup>

Thus, according to the Grand Chamber, no Charter principles required any deviation from the application of the full rigours of review by the CJEU of measures implementing the Security Council sanctions regime.

The Grand Chamber asserted, somewhat unpersuasively, that such review of Community acts was not relevant to the Charter: 'the review of lawfulness ... by the Community judiciary applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such'.<sup>53</sup> The Court declared, emphasising the separation between EU law and that of the Charter, that 'any judgment given by the Community judiciary deciding that a Community

47 *Kadi* (CJEU, Grand Chamber, C-402/05 P and C-415/05 P; 3 September 2008) [282] (emphasis added).

48 *Ibid* [285] (emphasis added).

49 *Ibid* [299].

50 *Ibid* [316] (emphasis added).

51 *Ibid* [317].

52 *Ibid* [326] (emphasis added).

53 *Ibid* [286].

measure ... is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law'.<sup>54</sup>

These claims, however, assert a distinction between European and international law which cannot be accepted in full.<sup>55</sup> As Aust observed, 'this was correct only in a formal sense. But, its effect is that EU Member States may now have to act in conformity with EU law as laid down by the ECJ even if it conflicts with their legal obligations under a Chapter VII resolution'.<sup>56</sup> Indeed, Martínez's criticism of the CJEU in *Kadi* referred to 'the artificiality of its dualist discourse',<sup>57</sup> explaining that 'when the European Regulation simply applies the SC decision with no margin of discretion, the frontier between both norms disappears, and the judicial review of one entails the parallel evaluation of the other'.<sup>58</sup> In such a case, as Cuyvers has noted, 'UN primacy sits uneasily with any judicial review at the EU or national level'.<sup>59</sup> Perhaps implicitly recognising this, the Grand Chamber attempted to establish a leeway within the international sphere to accommodate the European requirements:

[T]he Charter ... does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter ... leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.<sup>60</sup>

Wherever such leeway might arise, it certainly is not obvious in Articles 25 or 103 of the Charter.<sup>61</sup>

By asserting the autonomy of the EU legal system in unequivocal terms, and thereby adopting a dualist approach to the relationship between international law

54 Ibid [288].

55 See, for example, Miša Zgonec-Rošej, 'Yassin Abdullah Kadi & Al Barakaat International Foundation v Council and Commission, Joined Cases C-402/05 P & C-415/05 P' (2009) 103 *American Journal of International Law* 305, 311: 'While the judgment does not compromise the primacy of the relevant Security Council resolutions on the international plane, it affects their implementation at the EC and domestic levels'.

56 Aust, 'Kadi', above n 44, 297.

57 Martínez, above n 41, 341.

58 Ibid 342; cf Jean d'Aspremont and Frédéric Dogagne, 'Kadi: The ECJ's Reminder of the Elementary Divide Between Legal Orders' (2008) 5 *International Organizations Law Review* 371, 371-2, 374-8.

59 Armin Cuyvers, 'The *Kadi II* Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States' (2011) 7 *European Constitutional Law Review* 481, 483.

60 *Kadi* (CJEU, Grand Chamber, C-402/05 P and C-415/05 P, 3 September 2008) [298].

61 This is also not the sort of leeway that was found in the particular Resolution in question in *Al-Jedda* (ECtHR, Grand Chamber, Application No 27021/08, 7 July 2011): see above n 11.

and EU law, the Grand Chamber might be seen to have sidestepped the issue of the primacy of Article 103 of the Charter.<sup>62</sup> In fact, however, the significance of the decision in *Kadi* is unmistakable: decisions of the Security Council which member states are required under Article 25 to carry out, and which in theory enjoy the primacy given to Charter obligations under Article 103, are nonetheless vulnerable to collateral attack through regional judicial institutions on the basis of human rights obligations.

In its application of the law to the facts, the Grand Chamber made at least some concessions. Although the Court had referred to 'in principle ... full review',<sup>63</sup> in fact it allowed some measure of latitude in the implementation of ECHR standards (although this was less a concession to the Charter than to security concerns). Thus, the Grand Chamber accepted that

with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.<sup>64</sup>

Nonetheless, the Grand Chamber cautioned that 'that does not mean ... that restrictive measures ... escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism'.<sup>65</sup> Instead, the Court proposed some balancing — albeit not of Charter considerations against EU law, but of security concerns against human rights — through the use of

techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice.<sup>66</sup>

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62 See, for example, de Búrca, above n 39, 22-6, 29, 40-9; Christian Tomuschat, 'The *Kadi* Case: What Relationship is There Between the Universal Legal Order Under the Auspices of the United Nations and the EU Legal Order?' (2009) 28 *Yearbook of European Law* 654, 657-60; Katja S Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights' (2009) 9 *Human Rights Law Review* 288, 293-8. Cf Piet Eeckhout, '*Kadi* and *Al Barakaat*: Luxembourg is not Texas — or Washington DC' on *EJIL: Talk!* (25 February 2009) <<http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/>>.

63 A point emphasised in Koen Lenaerts, 'The *Kadi* Saga and the Rule of Law Within the EU' (2014) 67 *Southern Methodist University Law Review* 707, 715.

64 *Kadi* (CJEU, Grand Chamber, C-402/05 P and C-415/05 P, 3 September 2008) [342].

65 *Ibid* [343].

66 *Ibid* [344].

Even adopting such techniques and permitting, for example, actions to be taken without prior notice to affected individuals (so long as subsequent options for challenging a decision were available to them), the Court nonetheless found violations of rights to make a defence, to effective legal remedies, and to be free from arbitrary deprivation of property.<sup>67</sup> The Court therefore annulled the relevant regulations.<sup>68</sup>

Thus the Grand Chamber in *Kadi* departed significantly from the Court of First Instance. In place of an application of Article 103 to shield from judicial review actions implementing Security Council Resolutions (except in the case of violations of *jus cogens*), the Grand Chamber largely ignored the Charter and instead repeatedly emphasised the autonomy of European law, calling into question the special status of the Charter. The polarity of these two approaches led Hilpold to observe that *Kadi* is 'a leading case in the EU judicial system without furnishing — in itself — definite hints for the solution of the underlying problems'.<sup>69</sup> *Kadi* raises but does not answer many questions of interest to international lawyers.

The significance of *Kadi* is in its demonstration that the effective powers of the Security Council on a broad reading of Articles 25 and 103 may be subject to powerful collateral limits. These limits can be brought to bear through legal attacks on actions implementing Security Council Resolutions brought on the basis of rules contained in other spheres of international, regional or municipal law (in this case human rights law). This situation results from the Grand Chamber of the CJEU insisting on the autonomous application of the EC Treaty to the exclusion of the Charter, without any attempt at harmonisation or acceptance of any status of *lex superior*.

### *Sayadi v Belgium*

*Sayadi v Belgium*<sup>70</sup> concerned an individual communication to the Human Rights Committee (HRC) alleging violations by Belgium of rights under the International Covenant on Civil and Political Rights (ICCPR) enjoyed by Mr Nabil Sayadi and

67 Ibid [348], [349], [370].

68 Ibid [372].

69 Peter Hilpold, 'EU and UN Law in Conflict: The *Kadi* Case' (2009) 13 *Max Planck Yearbook of United Nations Law* 141, 142.

70 Human Rights Committee, *Views: Communication No 1472/2006*, 94<sup>th</sup> sess, UN Doc CCPR/C/94/D/1472/2006 (29 December 2008) annex ('Views of the Human Rights Committee Under Article 5, Paragraph 4, of the *Optional Protocol to the International Covenant on Civil and Political Rights*') ('*Sayadi*'). For a summary of the case, see Annalisa Ciampi, 'Security Council Targeted Sanctions and Human Rights' in Bardo Fassbender (ed), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (Oxford University Press, 2011) 98, 123-7. For an extended critique, see Marko Milanović, 'The Human Rights Committee's Views in *Sayadi v Belgium*: A Missed Opportunity' (2009) 1 *Goettingen Journal of International Law* 519, 519-38.

Ms Patricia Vinck, married Belgian nationals residing in Belgium.<sup>71</sup> The authors of the communication had been placed on the Sanctions Committee's list of possible supporters of Al-Qaeda when the Belgian Government, on 19 November 2002, informed the Committee that Mr Sayadi and Ms Vinck 'were, respectively, the director and secretary of Fondation Secours International, reportedly the European branch of the Global Relief Foundation, an American association that has been on the sanctions list since 22 October 2002'.<sup>72</sup> Subsequently, and while Mr Sayadi and Ms Vinck were not charged with an offence, EU and Belgian legislation froze their assets and banned them from travelling internationally.<sup>73</sup> In 2005, Mr Sayadi and Ms Vinck sought, and were granted, an order from the Brussels Court of First Instance requiring the Belgian Government 'to initiate the procedure to have their names removed from the Sanctions Committee's list';<sup>74</sup> however, the Committee refused to delist the applicants.<sup>75</sup>

At issue in *Sayadi* was both the admissibility of the applicants' communication to the HRC, and their substantive claims of violations of, *inter alia*, rights to freedom of movement under the ICCPR through Belgium's implementation of the 1267 Sanctions regime.<sup>76</sup>

The HRC concluded that the communication was admissible under Article 1 of the Optional Protocol to the ICCPR.<sup>77</sup> In its reasons at the admissibility stage handed down on 30 March 2007, the HRC rejected an argument that it was not competent to rule on implementations of Security Council Resolutions. The HRC emphasised the autonomy of its role (much as the Grand Chamber of the CJEU would do in *Kadi* the following year), explaining:

While the Committee could not consider alleged violations of other instruments such as the Charter of the United Nations ... the Committee was competent to admit a communication alleging that a State party had violated rights set forth in the Covenant, regardless of the source of the obligations implemented by the State party.<sup>78</sup>

In its reasons at the merits stage handed down on 22 October 2008, the HRC examined Article 46 of the ICCPR, which relevantly provides: 'Nothing in the

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71 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

72 *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, 4 [2.2].

73 *Ibid* 4 [2.3].

74 *Ibid* 5 [2.5].

75 *Ibid* 21 [8.3].

76 *ICCPR* arts 2(3), 12, 14(1)-(3), 15, 17, 18, 22, 26, 27.

77 *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, 18 [7.2].

78 *Ibid* 18 [7.2].

present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations'. However, as the Grand Chamber of the CJEU had done one month before in *Kadi*, the HRC emphasised the autonomy of its role, stating that

there is nothing in this case that involves interpreting a provision of the Covenant as impairing the provisions of the Charter of the United Nations. The case concerns the *compatibility with the Covenant of national measures taken by the State party* in implementation of a Security Council resolution.<sup>79</sup>

The HRC therefore proceeded to examine whether Belgium had violated the ICCPR when it complied with its Charter obligations to enforce the relevant Security Council Resolutions. Although the parties had referred to Article 103 of the Charter, in its merits decision the HRC did not expressly take that provision into account. Indeed, the HRC did not take into account Belgium's Charter obligations at all.

The HRC found that Belgium had breached the authors' right to freedom of movement in Article 12 of the ICCPR, because the restrictions imposed were not 'necessary to protect national security'. The HRC noted that Belgium had originally submitted the authors' names to the Sanctions Committee.<sup>80</sup> It further noted that, after the termination of a criminal investigation with no adverse findings against the authors, Belgium had submitted two delisting requests in respect of the authors.<sup>81</sup> This was not enough to satisfy the HRC, which relied on the outcome of the criminal investigation and the delisting requests to prove that the original submission of names, and enforcement of the Security Council Resolutions in the interim, were in breach of Article 12.<sup>82</sup> No allowance was made for Belgium's Charter obligations in the HRC's reasoning regarding Article 12.<sup>83</sup>

In finding a breach of the Article 17 right not to be subjected to unlawful attacks on the authors' honour and reputation (through their appearance on published lists of sanctions targets), the HRC again ignored Belgium's Charter obligations.<sup>84</sup> Placing no weight on Belgium's claim that it was obliged to transmit the authors' names to the Sanctions Committee (whilst not disputing the accuracy of that claim), the HRC

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79 Ibid 22 [10.3] (emphasis added).

80 Ibid 23-4 [10.7].

81 Ibid 24 [10.8].

82 Ibid 23-4 [10.7]-[10.8]. Milanović has heavily criticised the approach here: 'This is not reasoning, not even result oriented jurisprudence — this is simply the Human Rights Committee's wishful thinking'. Marko Milanović, '*Sayadi*: The Human Rights Committee's *Kadi* (or a pretty poor excuse for one ...)' on *EJIL: Talk!* (29 January 2009) <<http://www.ejiltalk.org/sayadi-the-human-rights-committee%E2%80%99s-kadi-or-a-pretty-poor-excuse-for-one>>.

83 Contrary to the authors' submissions, on the facts the HRC found no breach of arts 14 or 15, again without taking any account of Charter obligations: *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, 24-5 [10.9]-[10.11].

84 Ibid 25-6 [10.12]-[10.13].



found a violation of Article 17 as 'even though the State party is not competent to remove the authors' names ... it is responsible for the presence of the authors' names on those lists'.<sup>85</sup>

The HRC in *Sayadi* thus pursued a similar approach to *Kadi*, in that Belgium's Charter obligations were ignored, Article 103 was given no weight, and instead the ICCPR was applied without modification or harmonisation. There were, however, a significant number of individual opinions, some strongly dissenting from the approach of the majority of the HRC.

Sir Nigel Rodley, Ivan Shearer and Iulia Antoanella Motoc dissented on the issue of jurisdiction, stating that

the State party has done what it could to secure the authors' de-listing. In so doing it has provided the only remedy within its power ... [U]nless the Committee believes that the State party's mere compliance with the Security Council listing procedure ... is capable of itself of violating the Covenant, it is not clear how the authors can still be considered victims ... of violations of the State party's obligations.<sup>86</sup>

To similar effect was the dissenting opinion of Ruth Wedgwood. She first expressed the view that the allegations were not really against Belgium at all, but against the Security Council:

The complaint ... is inadmissible because it pleads no cognizable violation by the State party.

The authors are complaining about the actions and decisions of the United Nations Security Council, not the acts of Belgium.<sup>87</sup>

Second, Wedgwood referred to Articles 25 and 103 of the Charter, relying on these as excluding the jurisdiction of the HRC:

The Committee is not entitled to use the hollow form of a pleading against a State to rewrite those provisions ... [I]t has no appellate jurisdiction to review decisions of the Security Council. Neither can it penalize a State for complying with those decisions. It would be inconsistent with the constitutional structure of the United Nations Charter, and its own responsibilities under the Covenant.<sup>88</sup>

Ivan Shearer's dissenting opinion on the merits took a similar approach. Expressly applying Articles 25 and 103 of the Charter, Shearer noted that '[t]he Committee's reasoning ... appears to regard the Covenant as on a par with the United

85 Ibid 26 [10.13].

86 Ibid, app A, 27 (Sir Nigel Rodley, Ivan Shearer and Iulia Antoanella Motoc).

87 Ibid app A, 29 (Ruth Wedgwood).

88 Ibid, app A, 30.

Nations Charter, and as not subordinate to it'.<sup>89</sup> Instead, Shearer stated (drawing an analogy to the application of the *lex specialis* maxim to determine the co-application of human rights and humanitarian law):<sup>90</sup> 'Human rights law must *be accommodated within*, and harmonized with, the law of the Charter'.<sup>91</sup> However, it was *lex superior*, rather than harmonisation, that Shearer applied in his conclusion that 'the State party acted in good faith to discharge its obligations *under a superior law*. There can be no violation of the Covenant in these circumstances'.<sup>92</sup>

In these dissenting opinions, Charter provisions were applied to the exclusion of the ICCPR (an approach that had been taken by the Swiss Federal Court in *Nada*, as detailed below, and Court of First Instance in *Kadi*, but not by the CJEU). One interesting feature of the HRC opinions is the lack of a middle ground. No attempt at harmonisation was made; members adopted polar positions. Perhaps, therefore, *Sayadi* was the HRC's *Kadi*. Of course, one vital difference is that there is no immediate consequence of a finding by the HRC that Belgium had violated the authors' rights under the ICCPR, unlike within the European system where decisions of the CJEU and the European Court of Human Rights (ECtHR) are likely to be enforced or carried out.<sup>93</sup>

### *Nada v Switzerland*

Mr Youssef Nada, an elderly Italian/Egyptian national living in a small Italian enclave, Campione d'Italia, within Switzerland, was severely impacted by Swiss implementation of the transit ban required by SC Resolution 1390 (2002) in respect of individuals (including Mr Nada) listed pursuant to SC Resolutions 1267 (1999) and 1333 (2000).<sup>94</sup> Mr Nada had unsuccessfully applied to the Focal Point for Delisting established under SC Resolution 1730 (2006) to be removed from the

89 Ibid, app B, 32 (Ivan Shearer).

90 See, for example, Roberta Arnold and Noëlle Quéniwet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff, 2008); Samaneh Hassanli, A Proposal for the Implementation of Human Rights Treaty Obligations in Armed Conflict (PhD Thesis, University of Adelaide, 2014) [a thesis I was privileged to co-supervise under Professor Gardam's guidance]; Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011).

91 *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, 32 (Ivan Shearer) (emphasis added).

92 Ibid 33 (emphasis added).

93 See, for example, Milanović, 'A Missed Opportunity', above n 70, 536-7.

94 SC Res 1267 (1999), UN SCOR, 55<sup>th</sup> sess, 4051<sup>st</sup> mtg, UN Doc S/RES/1267(1999) (15 October 1999); SC Res 1333 (2000), UN SCOR, 56<sup>th</sup> sess, 4251<sup>st</sup> mtg, UN Doc S/RES/1333(2000) (19 December 2000); SC Res 1390 (2002), UN SCOR, 57<sup>th</sup> sess, 4452<sup>nd</sup> mtg, UN Doc S/RES/1390(2002) (28 January 2002).

list.<sup>95</sup> His case before the Grand Chamber of the ECtHR alleged violations of his right to liberty and right to respect for private and family life (during the period from 2003, when he was first refused passage through Switzerland, to 2009, when he was delisted and again allowed to transit through Switzerland).<sup>96</sup> Resolution of Mr Nada's claims necessarily required the Court to reconcile Switzerland's obligations under the ECHR with its obligations under the Charter.

Before the Swiss authorities, Mr Nada argued that 'the Security Council's sanctions were contrary to the United Nations Charter and to the peremptory norms of international law (*jus cogens*)' and that accordingly 'Switzerland was not obliged to implement them'.<sup>97</sup> The Swiss Federal Court, handing down its decision on 14 November 2007, disagreed.<sup>98</sup> The Court accepted that 'the delisting procedure fails to meet both the requirement of access to a court ... and that of an effective remedy'.<sup>99</sup> Nonetheless, the Federal Court noted the obligation on Switzerland as a member state to carry out the decisions of the Security Council under Article 25 of the Charter, and the primacy of Charter obligations under Article 103.<sup>100</sup> The Court concluded that only breach of a *jus cogens* obligation would justify a state failing to fulfil its Charter obligations,<sup>101</sup> that Mr Nada's affected rights did not enjoy the status of *jus cogens*,<sup>102</sup> and thus that Mr Nada's claim must fail because the sanctions regime allowed 'member States no margin of appreciation in their implementation'.<sup>103</sup>

Mr Nada appealed to the European Court of Human Rights. Handing down its decision on 12 September 2012, the Grand Chamber noted that Article 30(1) of the Vienna Convention on the Law of Treaties specifically excepts Article 103 of the Charter from its general rules regulating the application of successive treaties relating

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95 SC Res 1730 (2006), UN SCOR, 62<sup>nd</sup> sess, 5599<sup>th</sup> mtg, UN Doc S/RES/1730 (2006) (19 December 2006).

96 *Nada v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 10593/08, 12 September 2012) 1 [3], 37-8 [126]-[128] ('*Nada*').

97 *Ibid* 7 [38].

98 For an English summary, see *Nada v State Secretariat for Economic Affairs* (2007) ILDC 461.

99 *Nada v State Secretariat for Economic Affairs* (Swiss Federal Court, 14 November 2007) [8.3] ('*Nada v SSEA*'), quoted in *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 10 [50].

100 See the discussion of the Federal Court judgment in *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 8 [42].

101 *Ibid* 9 [46].

102 *Ibid* 9 [47].

103 *Nada v SSEA* (Swiss Federal Court, 14 November 2007) [8.1], quoted in *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 10 [50].

to the same subject matter.<sup>104</sup> The Grand Chamber also quoted from *Fragmentation of International Law*:<sup>105</sup>

Article 103 does not say that the Charter prevails, but refers to *obligations under the Charter* ... [T]his also covers duties based on binding decisions by United Nations bodies [including] ... resolutions of the Security Council that have been adopted under Chapter VII of the Charter.<sup>105</sup>

Observing that '[t]wo diverging commitments must ... be harmonised as far as possible',<sup>106</sup> the Grand Chamber of the ECtHR contemplated the application of a presumption that '[i]n the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations'.<sup>107</sup> The Court confirmed this interpretive principle, but whereas in its earlier decision in *Al-Jedda* the failure to specify a consequence of interment without trial had left room for its application, in *Nada* the relevant SC Resolutions were explicit.<sup>108</sup>

The critical step in the Grand Chamber's reasoning was its finding that Switzerland's obligations under the ECHR could be reconciled with its obligations under the Charter because 'Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council'.<sup>109</sup> This finding was possible only because the Grand Chamber adopted a loose interpretation of the relevant Charter obligations. First, the Court argued that

the United Nations Charter does not impose on States a particular model for the implementation of the resolutions adopted by the Security Council under Chapter VII. Without prejudice to the binding nature of such resolutions, the Charter in principle leaves to UN member States a free choice among the various possible models for transposition of those resolutions into their domestic legal order. The Charter thus imposes on States an obligation of result, leaving them to choose the means by which they give effect to the resolutions.<sup>110</sup>

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104 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 25 [80].

105 *Fragmentation of International Law*, UN Doc A/CN.4/L.682, 168-9 [331] (emphasis in original), quoted in *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 26 [81].

106 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 46 [170].

107 *Ibid* 46 [171], quoting *Al-Jedda* (ECtHR, Grand Chamber, Application No 27021/08, 7 July 2011) 57 [102].

108 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 47 [102].

109 *Ibid* 49 [180].

110 *Ibid* 48 [176].

Second, the Grand Chamber relied on the text of SC Resolution 1390 (2002) as allowing leeway, both in the exception to the travel ban in Paragraph 2(b) where 'necessary for the fulfillment of a judicial process'<sup>111</sup> and in Paragraph 8, which referred to the taking of 'immediate steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations'.<sup>112</sup>

The Court therefore concluded that Switzerland had failed to take advantage of 'the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order' to achieve 'some alleviation of the sanctions regime applicable to the applicant ... without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions provided for therein'.<sup>113</sup>

Formally, in reaching its conclusions regarding Article 8 of the ECHR, the Court did not address the question of primacy:

That finding dispenses the Court from determining the question ... of the hierarchy between the obligations of the States Parties to the Convention ... and those arising from the United Nations Charter ... [T]he important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent.<sup>114</sup>

The significance of the Grand Chamber's decision lies in its attempt to achieve harmonisation of Switzerland's obligations under the Charter and the ECHR. Its actual reasoning, finding that Switzerland enjoyed a measure of latitude in how it implemented the relevant Security Council Resolutions, might well be questioned (and, indeed, was by some judges — a matter considered below), but it is the attempt to achieve harmonisation between the two relevant legal regimes that puts *Nada* in a different position to *Kadi*.<sup>115</sup> Notwithstanding this attempt at harmonisation, however, the end result remained the same — implementation of the relevant Security Council Resolution by the member state was limited by a regional court on the basis of the state's human rights obligations.

Two concurring opinions are worth noting. Judges Bratza, Nicolaou and Yudviska expressed 'considerable doubts' about the conclusion that Switzerland enjoyed latitude in carrying out its obligations under the Security Council Resolutions,

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111 Ibid 48 [177].

112 Ibid 48 [178].

113 Ibid 52 [195].

114 Ibid 53 [197].

115 One commentator called the reasoning 'milder' than *Kadi*: Solène Guggisberg, 'The Nada Case Before the ECtHR: A New Milestone in the European Debate on Security Council Targeted Sanctions and Human Rights Obligations' (2012) 8 *Croatian Yearbook of European Law and Policy* 411, 428.

instead holding that 'the obligation imposed ... was a binding one which ... allowed no flexibility or discretion to the States as to whether to give full effect to the sanctions imposed'.<sup>116</sup> Nonetheless, even for these judges, Switzerland had failed 'to take such steps as were open to them to mitigate the effects of the measures' implementing the Security Council Resolution.<sup>117</sup>

Similarly, Judge Malinverni held that 'it is difficult ... to sustain the argument that Switzerland had any room for manoeuvre in the present case'.<sup>118</sup> However, the judge also found human rights obligations relevant to the Security Council, asking of Articles 25 and 103 'do those two Charter provisions actually give the Security Council carte blanche? That is far from certain'. Instead, referring to Article 24(2) requiring the Security Council to 'act in accordance with the Purposes and Principles of the United Nations' and Article 1(3) as establishing one of those purposes to be 'respect for human rights and for fundamental freedoms', Judge Malinverni stated that '[o]ne does not need to be a genius to conclude from this that the Security Council itself must also respect human rights'.<sup>119</sup>

These provisions of the Charter thus gave Judge Malinverni an opening to harmonise Switzerland's Charter obligations and human rights obligations in a manner favourable to human rights. The judge also took inspiration from *Kadi* and *Sayadi*,<sup>120</sup> asking 'should the Court, as guarantor of respect for human rights in Europe, not be more audacious than the European Court of Justice or the Human Rights Committee'?<sup>121</sup> The judge criticised any broad application of Article 103 as liable to upset 'the balance that States should strike between the requirements of collective security and respect for fundamental rights, since it means that rights will be sacrificed for the sake of security'.<sup>122</sup>

These concurring opinions demonstrate that, even to the extent that some judges recognised the limited leeway available to states in the implementation of Security Council Resolutions, there remained nonetheless, through the process of

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116 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 66 [5] (Judges Bratza, Nicolaou and Yudviska). See also *Nada* at 65 [1], 67 [8] (Judges Bratza, Nicolaou and Yudviska). Similarly: 'looking at the text of the relevant UNSC resolution this argument is not entirely convincing': Auke Willems, 'The European Court of Human Rights on the UN Individual Counter-Terrorist Sanctions Regime: Safeguarding Convention Rights and Harmonising Conflicting Norms in *Nada v Switzerland*' (2014) 83 *Nordic Journal of International Law* 39, 56.

117 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 67 [9] (Judges Bratza, Nicolaou and Yudviska).

118 *Ibid* 72 [10] (Judge Malinverni).

119 *Ibid* 73 [15].

120 *Ibid* 73-5 [15]-[20].

121 *Ibid* 74 [20].

122 *Ibid* 75 [21].

harmonisation, a requirement to offer procedural and substantive safeguards where those were lacking in the United Nations system. Again, harmonisation seemed to water down the significance of Articles 25 and 103 of the Charter, and was held to require member states to take steps to remedy human rights problems in the manner of their implementation of Security Council Resolutions if the Security Council had not itself responded to its own dictate to observe human rights. While *Nada* was undoubtedly more nuanced than *Kadi* in its insistence on a harmonisation of human rights obligations and Charter imperatives, the result reached in the case demonstrates the extent to which even harmonisation can marginalise Article 103 of the Charter.

### *Kadi II*

Following *Kadi*, the Chairman of the Sanctions Committee released to France and thence to the European Commission and Mr Kadi a 'narrative summary of the reasons' for Mr Kadi's listing.<sup>123</sup> Mr Kadi was given an opportunity by the Commission to respond, before the Commission adopted a new regulation re-imposing sanctions on Mr Kadi.<sup>124</sup> Mr Kadi challenged that new regulation on similar grounds to his initial challenge.

The three judges of the General Court, handing down their decision in *Kadi II* on 30 September 2010, noted the argument that, if *Kadi* were followed, the CJEU's 'judicial review is liable to encroach on the Security Council's prerogatives'.<sup>125</sup> It also noted that

certain doubts may have been voiced in legal circles as to whether the judgment of the Court of Justice in *Kadi* is wholly consistent with, on the one hand, international law and, more particularly, Articles 25 and 103 of the Charter of the United Nations and, on the other hand, the EC and EU Treaties.<sup>126</sup>

The General Court in *Kadi II* also observed that in *Kadi*

the Court of Justice ... seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law — in this case the law deriving from the Charter of the United Nations.<sup>127</sup>

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123 *Kadi v European Commission* (Court of Justice of the European Union, General Court, Seventh Chamber, T-85/09, 30 September 2010) [27] ('*Kadi II*').

124 Commission Regulation (EC) No 1190/2008 of 28 November 2008, Amending for the 101<sup>st</sup> time Council Regulation (EC) No 881/2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida network and the Taliban [2008] OJ L 322/25.

125 *Kadi* (CJEU, General Court, Seventh Chamber, T-85/09, 30 September 2010) [114].

126 *Ibid* [115].

127 *Ibid* [119].

The General Court in *Kadi II* went so far as to state that 'those criticisms are not entirely without foundation'.<sup>128</sup> As Cuyvers has noted, these observations by the General Court in *Kadi II* amount to a 'candid and fundamental criticism' of *Kadi*.<sup>129</sup>

Nonetheless, the General Court in *Kadi II*, although noting that it was not bound by the decision of the Grand Chamber in *Kadi*,<sup>130</sup> decided to defer to that decision.<sup>131</sup> It therefore undertook the 'full review'<sup>132</sup> mandated by *Kadi*, and unsurprisingly reached the same conclusion that the sanctions measures were invalid. The General Court held that 'the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection'.<sup>133</sup> Discounting the significance of the focal point for delisting and the Office of the Ombudsperson,<sup>134</sup> the General Court catalogued some of the human rights difficulties with the Security Council's sanctions regime:

[T]he Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining ... actions against individual decisions taken by the Sanctions Committee ... [R]emoval of a person from the Sanctions Committee's list requires consensus within the committee ... [T]here is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively ... For those reasons at least, the creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee.<sup>135</sup>

The General Court therefore held that the process leading to the making of the contested regulation did not satisfy the requirements of the ECHR, and annulled the

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128 Ibid [121].

129 Cuyvers, above n 59, 488.

130 *Kadi* (CJEU, General Court, Seventh Chamber, T-85/09, 30 September 2010) [112].

131 Ibid [121], [123].

132 Ibid [126].

133 Ibid [127].

134 See, for example, Erica de Wet, 'From *Kadi* to *Nada*: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions' (2013) 12 *Chinese Journal of International Law* 787, 789 [3] (references deleted):

The most meaningful qualitative improvement from the perspective of listed individuals and entities has been the introduction of the Ombudsperson through UNSC Resolution 1904 (2009), who replaced the Focal Point in relation to the *Al Qaida* sanctions committee ... However, despite the undisputed relief that her conscientious efforts have brought to those de-listed, the ultimate decision for de-listing remains a political one in the hands of the sanctions committee and the UNSC.

135 *Kadi* (CJEU, General Court, Seventh Chamber, T-85/09, 30 September 2010) [128].



regulation.<sup>136</sup> This decision was challenged, ultimately, by the European Commission, the Council of the European Union and no less than fourteen EU member states.<sup>137</sup>

Delivering its judgment on the appeal on 18 July 2013, the Grand Chamber dealt remarkably briefly with the arguments regarding the clash between ECHR and Charter obligations. The Grand Chamber in *Kadi II* stated that *Kadi* was based on

the constitutional guarantee which is exercised, in a Union based on the rule of law ... by judicial review of the lawfulness of all European Union measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union.<sup>138</sup>

The Grand Chamber in *Kadi II* simply indicated 'there has been no change in those factors which could justify reconsideration of that position'.<sup>139</sup>

The Grand Chamber's reasons made clear how onerous the 'full review' it demanded in order to meet the ECHR obligations would be.<sup>140</sup> Very few, if any, concessions were made to peace and security imperatives or Charter obligations.<sup>141</sup> Although the Grand Chamber rejected the General Court's approach to some ECHR issues,<sup>142</sup> it nonetheless concluded that the regulation was correctly annulled, because

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136 Ibid [188].

137 United Kingdom, Republic of Bulgaria, Czech Republic, Kingdom of Denmark, Ireland, Kingdom of Spain, French Republic, Italian Republic, Grand Duchy of Luxembourg, Hungary, Kingdom of the Netherlands, Republic of Austria, Slovak Republic and Republic of Finland. See *European Commission v Kadi* (Court of Justice of the European Union, Grand Chamber, C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013) [71].

138 Ibid [66].

139 Ibid.

140 Ibid [111]-[134].

141 This is not to say that the CJEU's review was stricter than the General Court's, but to emphasise the strictness of the CJEU's review itself. It has been observed that the CJEU 'sought to reiterate the principles upon which the General Court's judgment was based, albeit tempering its conclusions with a measure of practicality and deference to the complexities of foreign relations': Harley J Hooper, 'An Unsteady Middle Ground: Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and United Kingdom v Yassin Abdullah Kadi (No 2)* [2013] ECR 00000 (18 July 2013)' (2014) 20 *European Public Law* 409, 414. Nonetheless, as de Wet observes, the CJEU applied a 'high level of scrutiny': de Wet, above n 134, 791 [10]. Similarly, van den Herik underscores the CJEU's 'high standard of judicial review': Larissa J van den Herik, 'Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regimes' (2014) 19 *Journal of Conflict and Security Law* 427, 447. Feinäugle describes the CJEU's review as 'a praiseworthy continuation of badly needed human rights protection in the sanctions context': Clemens A Feinäugle, '*Commission v Kadi*' (2013) 107 *American Journal of International Law* 878, 882.

142 *Kadi* (CJEU, Grand Chamber, C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013) [138]-[140], [142]-[149].

none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.<sup>143</sup>

Although the Grand Chamber sought to draw support from the result in *Nada*,<sup>144</sup> in fact the reasoning underlying *Kadi II* is quite different. Notwithstanding the arguments of the European Union institutions and fourteen member states (and the views of the General Court), in *Kadi II* the thirteen judges of the Grand Chamber of the CJEU once again treated EU law as autonomous, and applied it without any expressed or evident attempt at harmonisation with the law of the Charter.

### *Al-Dulimi v Switzerland*

Less than two months after the decision of the CJEU in *Kadi II*, the Second Section of the ECtHR handed down its decision in *Al-Dulimi v Switzerland*.<sup>145</sup> Mr Khalaf M Al-Dulimi, a resident of Jordan, is alleged to have been the head of finance for Saddam Hussein's Iraqi secret service. His assets, and those of a company of which he was formerly the managing director (Montana Management Inc), were frozen by Switzerland from 7 August 1990, implementing SC Resolution 661,<sup>146</sup> and became liable to confiscation by Switzerland from 18 May 2004 in its implementation of the listing of Mr Al-Dulimi and the company by the 1518 Sanctions Committee.<sup>147</sup> Mr Al-Dulimi's challenges, both to the Swiss measures implementing the sanctions before the Swiss Federal Court<sup>148</sup> and to his listing by the Sanctions Committee through an application to the Focal Point for Delisting,<sup>149</sup> were unsuccessful. His argument was that Switzerland had breached his right of access to a court under Article 6 of the ECHR.

The judges of the Court agreed that *Nada* could be distinguished on the basis that the discretion to implement that was (perhaps unconvincingly) asserted

143 Ibid [163]. See also [141], [151]-[162].

144 Ibid [133].

145 *Al-Dulimi v Switzerland* (European Court of Human Rights, Second Section, Application No 5809/08, 27 November 2013 ('*Al-Dulimi*').

146 SC Res 661 (1990), UN SCOR, 45<sup>th</sup> sess, 2933<sup>rd</sup> mtg, UN Doc S/RES/661(1990) (6 August 1990).

147 *Al-Dulimi* [3]-[31].

148 Ibid [38] (Judges Karakaş, Vučinić and Keller, supported by the partly dissenting Judge Sajó).

149 Ibid [39].

there did not exist in *Al-Dulimi*.<sup>150</sup> The majority professed to apply harmonisation, stating that the ECHR 'cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law'.<sup>151</sup> However, the judges referred to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, but then identified the relevant body of law for this purpose (in addition to the ECHR) as being 'the rules concerning the international protection of human rights',<sup>152</sup> and not the Charter. Moreover, there was no attempt to harmonise Charter obligations. Instead, the majority stated that

where the relevant organisation protects fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides ... the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.<sup>153</sup>

In other words, if the sanctions regime met ECHR standards (the 'equivalent protection' test), the Court would presume that the ECHR was not violated when a state implemented those sanctions. It was not argued that the sanctions regime did meet ECHR standards, so a finding that Switzerland had breached its obligations was inevitable.<sup>154</sup> This judgment applied pure autonomy, as it did not take the Charter into account at all when examining the standard that must be met by a state in order to meet its ECHR obligations.

The dissenting judgment of Judge Lorenzen, joined by Judges Raimondi and Jočiené, indicated that, on the facts, the 'conflict between obligations under the United Nations Charter and under the Convention could only be solved by giving one of them priority'.<sup>155</sup> The dissenting judges would have resolved the issue of priority by applying the *lex superior*: 'in case of a conflict between the obligations under Article 103 of the Charter and obligations under the Convention, States parties to both legal instruments are bound to give the Charter obligations priority'.<sup>156</sup>

Unlike *Nada*, there was no attempt at harmonisation in *Al-Dulimi*. Instead, four judges applied autonomy, and three applied *lex specialis*. An appeal to the Grand Chamber was heard on 10 December 2014; judgment was delivered on 21 June 2016, when this book was already in press.

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150 Ibid [117], 67.

151 Ibid [112].

152 Ibid.

153 Ibid [114].

154 Ibid [123]-[135].

155 Ibid 69 (Judge Lorenzen, joined by Judges Raimondi and Jočiené).

156 Ibid.

THE CONSEQUENCES OF CURRENT PRACTICE AND ISSUES FOR THE FUTURE

Current practice in the use of the human rights obligations of states as a collateral limit on the powers of the Security Council has some important consequences, and leaves unresolved some significant issues for the future. This section reflects on the present state of the jurisprudence, and the underlying conceptual approaches at play in existing decisions. It then considers these decisions in the broader context of the idea of an equilibrium in the international legal order, and notes the impact on these decisions of the Security Council's intransigence about how its sanctions regimes impact human rights. Next, the most significant limitation on the practice examined in this chapter is considered. Whatever might be the merits of the nascent European constitutionalism on display in *Kadi* and *Kadi II* for EU members, in order to influence international law, the new (weakened) understanding of Article 103 of the Charter will have to be reflected in general state practice if it is to impact on the Charter's application as a matter of international (and not European) law. Finally, the chapter considers whether Article 103 is, in fact, dead.

A Fractured Jurisprudence

*Kadi*, *Sayadi*, *Nada*, *Kadi II* and *Al-Dulimi* all resulted in findings that human rights obligations had been breached in the implementation of Security Council Resolutions imposing targeted sanctions, even under the improved procedures now prevailing with the Security Council having established the Focal Point for Delisting (in 2006) and Office of the Ombudsperson (in 2009, in respect of what is now called the ISIL (Da'esh) and Al-Qaida sanctions regime). These decisions demonstrate the potential for regional courts (both the CJEU and ECtHR) and international institutions (the HRC) to restrict the ability of states to implement Security Council Resolutions, and thus demonstrate the ability of affected individuals to use human rights obligations as a collateral limit on the powers of the Security Council.

However, the jurisprudence is far from coherent. The Court of First Instance in *Kadi* would have applied Article 103 to prevent review, except in the case of a violation of *jus cogens* norms; it was the Grand Chamber of the CJEU that applied European law autonomously without reference to the law of the Charter. *Sayadi* took a similar view of the autonomy of the ICCPR, but with some notable dissenting opinions in favour of the application of the law of the Charter. The General Court in *Kadi II* expressed considerable sympathy for criticisms of *Kadi*, although in the end it chose to follow *Kadi*; and the Grand Chamber in *Kadi II*, although retaining its autonomous approach to European law, nonetheless adopted quite different reasoning than the General Court in finding that the regulations should be annulled.

In *Al-Dulimi*, four judges applied autonomy, while three dissented and applied *lex specialis*. The jurisprudence is thus fractured in important respects — once lower court decisions and dissenting judgments are taken into account, it ranges from applications of Article 103 to the exclusion of human rights law to full applications of human rights law without reference to the Charter.

The reasoning employed by the Grand Chamber of the ECtHR in *Nada* is significantly different.<sup>157</sup> Departing from the approach of autonomy employed in the other decisions, *Nada* expressly sought to harmonise human rights law with the requirements of the Charter. Although on the facts the relevant regulations were held to breach the ECHR, in *Nada* the ECtHR at least attempted to achieve harmonisation of potentially conflicting ECHR and Charter obligations, an approach which was both more nuanced and more compelling than those taken in *Kadi*, *Sayadi*, *Kadi II* and *Al-Dulimi*.

### The Surprising Rise of Autonomy, Demise of *lex superior* and Search for Harmonisation

Perhaps the most striking feature of current practice is the absence of applications of the *lex superior* maxim (notwithstanding its frequent invocation by the states and organisations whose actions have been challenged).<sup>158</sup> Instead, with the exception of some overruled lower court decisions and dissenting opinions, the predominant judicial approach has been one of autonomy, with some increasing attention being paid to harmonisation.

That autonomy was the approach chosen by the CJEU in *Kadi* and *Kadi II* and by the HRC in *Sayadi* is surprising. As Reinisch has noted, the CJEU in *Kadi* was 'radical in its overall attitude and ... uncompromisingly dualist with regard to its view of the relationship between international law and European law'.<sup>159</sup> Indeed, Tomuschat has observed strikingly: 'Human rights should never suffer. Yet, the EC/EU and its Court should attempt to remain within the agreed international frameworks rather than opting for the construction of a fortress Europe'.<sup>160</sup> Conversely, Lenaerts has praised the giving of 'priority to the constitutional identity of the EU'.<sup>161</sup> Notwithstanding the simplicity of autonomy, which requires (largely) only the application of existing

157 See, for example, de Wet, above n 134, 790.

158 This approach has not been without academic support. See, for example, Aust, 'Kadi', above n 44, 295-6.

159 Peter Hilpold, 'UN Sanctions Before the ECJ: The *Kadi* Case' in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press, 2010) 18, 19.

160 Tomuschat, above n 62, 663.

161 Lenaerts, above n 62, 709.

legal tests and doctrines, it fails to consider the relationship between the human rights obligations of states and their obligations under the Charter. D'Aspremont and Dopagne have celebrated the decisions as a welcome reminder 'that legal orders are naturally and inextricably estranged from each other',<sup>162</sup> but even they concede that the decisions create 'sweeping practical difficulties which member States now face to comply with their UN obligations'.<sup>163</sup>

Autonomy is only as persuasive as the frequent attempts made by its proponents to characterise the resulting review as relevant only to national or regional measures, and not impacting Security Council Resolutions.<sup>164</sup> Given that the result is to deny implementation of those Resolutions, this distinction is difficult to support. Nonetheless, it is autonomy that is the chief conceptual approach employed in the decisions examined in this chapter.

The rise of autonomy has resulted in the demise of *lex superior* as a conceptual approach to the relationship between international human rights law and the law of the Charter. Although at the opposite end of the spectrum to autonomy, the application of *lex superior* would not have been surprising, given the wording of Article 103. Instead, the demise of *lex superior*, confined to overruled lower court decisions and dissenting opinions, has been remarkable.<sup>165</sup>

Harmonisation, the approach arguably most apposite to the relationship between human rights law and the law of the Charter, was a surprising omission from *Kadi*, *Sayadi*, *Kadi II* and *Al-Dulimi*. In its decision in *Nada*, however, the Grand Chamber of the ECtHR adopted harmonisation as its conceptual approach. Whilst the result reached was the same (the sanctions-implementing measure was held to breach human rights law), the fact that an attempt was made to co-apply the two systems of international law was an important departure from the approaches of the CJEU and HRC. It remains to be seen how the Grand Chamber of the ECtHR

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162 D'Aspremont and Dogagne, above n 58, 372.

163 Ibid 377.

164 'Of course, formally, the ECJ is right: the Security Council measures cannot be affected by EU courts' review of EU implementing measures ... But the ECJ decision does force the EU member states to violate their obligations under the Charter of the UN: it forces them to disobey the Security Council, lest they disobey the EU court': Antonios Tzanakopoulos, 'Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ' on *EJIL: Talk!* (19 July 2013) <<http://www.ejiltalk.org/kadi-showdown/>>.

165 This is so even accepting that '[i]n view of its exceptional character ... [b]efore Art. 103 is used, conflict avoidance techniques need to be applied (such as harmonization ...) to avoid incompatibilities between Charter law and other international agreements': Andreas Paulus and Johann Ruben Leiß, 'Article 103' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3<sup>rd</sup> ed, 2012) 2110, 2120.

will approach the issues when it decides the appeal in *Al-Dulimi*, after the Second Section's split between autonomy and *lex specialis*.

Questions of harmonisation are perhaps particularly relevant given that respect for human rights is contained within the Charter itself. Article 24(2) of the Charter requires the Security Council to 'act in accordance with the Purposes and Principles of the United Nations'. Relevantly, those 'Purposes and Principles' include in Article 1(3) 'promoting and encouraging respect for human rights and for fundamental freedoms'.<sup>166</sup> Moreover, as de Wet has noted, the approach of harmonisation 'reduces the risk of an open rebellion against and destabilisation of the United Nations system for the protection of international peace and security'. De Wet further notes that harmonisation 'contributes to the unity of the international legal order and serves as a counter-force against fragmentation of international law'.<sup>167</sup> In short, harmonisation is the appropriate tool to reconcile the co-application of potentially competing regimes of international law. As Klabbers has noted regarding the decisions examined in this chapter, 'the international legal order has far more to offer than the stark choice between blind obedience and outright disobedience'.<sup>168</sup>

Of course, the difficulties of harmonisation should not be underestimated. They are patent in the dissenting opinion of Ruth Wedgwood in *Sayadi*: 'Human rights and the enforcement decisions of the Security Council share a common concern for the lives of innocent people'.<sup>169</sup> This identification of a common purpose says little about which regime is to prevail in case of conflict. For Wedgwood (dissenting) in *Sayadi*, it was the Charter obligation.<sup>170</sup> For the ECtHR in *Nada*, it was the human rights obligation.<sup>171</sup> How harmonisation can be achieved remains an open question for the future. The ECtHR's approach in *Nada* is not the last word on this topic,<sup>172</sup>

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166 Art 55(c) further provides that 'the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion', albeit that the responsibility for this provision falls to the General Assembly and the Economic and Social Council.

167 De Wet, above n 134, 806 [48].

168 Klabbers, above n 42, 489.

169 *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, app A, 30 (Ruth Wedgwood). See also Clementine Olivier, 'Human Rights and the International Fight Against Terrorism: How do Security Council Resolutions Impact on States' Obligations under International Human Rights Law? (Revisiting Security Council Resolution 1373)' (2004) 73 *Nordic Journal of International Law* 399, 403-4.

170 *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, app A, 30 (Ruth Wedgwood).

171 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 46-53 [170]-[199].

172 The actual application of the principle in *Nada* has been criticised as 'an example of covert rejection of ... UNSC obligations which are perceived as violating human rights norms': de Wet, above n 134, 807 [49].

nor will its pending decision in *Al-Dulimi* resolve all of the issues. Nonetheless, as a conceptual approach to resolving the need to co-apply human rights law and the law of the Charter, harmonisation is the best hope for the development over time of a coherent jurisprudence.

## Equilibrium

In an important sense, the cases examined in this chapter show the international legal system returning to a position of equilibrium. Reflection on two earlier comments appears illustrative. In 1994, Wilhelm Grewe wrote that

the more the SC appears willing and capable of operating in the way originally envisaged by the drafters of the Charter, the more apparent it becomes that there are virtually no substantial limitations on the powers conferred upon the Council.<sup>173</sup>

Conversely, the Separate Opinion of Judge Shahabuddeen in the *Lockerbie Case* asked:

Are there any limits to the Council's powers of appreciation? In the *equilibrium of forces* underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results?<sup>174</sup>

One interpretation of the cases examined in this chapter, which use international human rights law as a collateral limit on the power of the Security Council, is that equilibrium in the international order is being restored after the earlier rise of the Security Council.<sup>175</sup>

These cases also reveal two other forms of equilibrium being sought: first, the balance of power between the EU and UN (a topic generally outside the scope of this chapter); and second, as Hilpold's description of *Kadi* reminds us, 'equilibrium between the need to fight terrorism more effectively and the parallel need to uphold fundamental rights in this struggle'.<sup>176</sup>

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173 Wilhelm G Grewe, 'The History of the United Nations' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 1994) 1, 22.

174 Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United Kingdom*) (*Provisional Measures*) [1992] ICJ Rep 3, 32 (emphasis added). Judge Shahabuddeen did not answer these questions, but observed (at 32): 'If the answers to these delicate and complex questions are all in the negative, the position is potentially curious. It would not, on that account, be necessarily unsustainable in law'.

175 See, for example, van den Herik, above n 141, 4-12.

176 Hilpold, 'EU and UN Law in Conflict', above n 69, 181. Similarly, Margulies states that the CJEU in *Kadi II* 'failed to pay sufficient heed to the delicate balance between fairness and efficacy in counterterrorism sanctions': Peter Margulies, 'Aftermath of an Unwise Decision: The UN Terrorist



The cases examined in this chapter can be seen as searching for an equilibrium in the power dynamic between EU and UN law, between the Security Council and its non-members, and between the suppression of terrorism and protection of human rights. It should not be expected that the equilibrium represented on any of these three issues by the cases examined will remain static into the future: these will each be dynamic areas of future practice.

### The Security Council Has Only Itself to Blame

To a significant extent, the Security Council's troubles are of its own making. Its disregard of human rights issues can hardly have endeared it to the various judicial bodies before whom claims have been made seeking to impose collateral limits on the Council's powers. The Security Council also had no lack of forewarning of the human rights difficulties of its Resolutions.<sup>177</sup> The dissenting opinion (on admissibility) of Sir Nigel Rodley, Ivan Shearer and Iulia Antoanella Motoc in *Sayadi* was clear in its view of the Council's failings:

We acknowledge, of course, that the authors may have been unjustly harmed by operation of the extravagant powers the Security Council has arrogated to itself, including the obstacles it has created to the correction of error. It is more than a little disturbing that the executive branches of 15 Member States appear to claim a power, with none of the consultation or checks and balances that would be applicable at the national level, to simply discard centuries of States' constitutional traditions of providing bulwarks against exorbitant and oppressive executive action. However, the Security Council cannot be impleaded under the Covenant, much less the Optional Protocol.<sup>178</sup>

Similarly, Judge Malinverni in *Nada* sought to show that the problem was of the Security Council's own creation, quoting Constance Grewe's statement that

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Sanctions Regime After *Kadi II*' (2014) 6 *Amsterdam Law Forum* 51, 63. Notably, the resurgence of human rights protection in the cases examined in this chapter responds to the observation 'that since 2001 the balance between rights and security has shifted towards the latter, the UN individual counter-terrorist sanctions being a prime example of the shift towards protection of the security of the state at the cost of human rights guarantees': Willems, above n 116, 55.

177 See, for example, Iain Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 *Nordic Journal of International Law* 159; Andrew Hudson, 'Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights' (2007) 25 *Berkeley Journal of International Law* 203; Ian Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 *American Journal of International Law* 275, 294-9.

178 *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, app A, 27.

for as long as the United Nations has not introduced a human rights protection mechanism ... comparable or equivalent to that introduced in the member States and at European level, the domestic and European courts remain competent to verify that acts implementing Security Council decisions respect fundamental rights.<sup>179</sup>

Judge Malinverni added:

Accordingly, any insufficient, or even deficient, protection of those rights in the context of the United Nations system, where it has not been compensated for by a review of such respect at domestic level, should lead the Court to find a violation of the Convention.<sup>180</sup>

The corollary of the point that the Security Council has only itself to blame is that part of the solution might lie with the Council as well. If a more careful approach to human rights had been taken by the Security Council from the outset, one wonders whether there would have been as much practice imposing collateral limits on the powers of the Council.<sup>181</sup> It seems too late, however, for a return to the Security Council's perception as all-powerful under an application of the *lex superior* maxim.<sup>182</sup>

Nonetheless, as de Wet has suggested, improved protection of human rights at the Security Council level, perhaps by a judicial or quasi-judicial procedure, could lead to some level of 'judicial deference by the European courts' in their review of EU measures implementing Security Council Resolutions.<sup>183</sup> Similarly, Martínez suggests that '[t]he most reasonable solution ... would consist of the establishment of an independent body at the UN with power to adjudicate on claims of individuals and entities against their inclusion on the consolidated list'.<sup>184</sup> Greater action to protect human rights by the Security Council could, therefore, both increase the likelihood of judicial deference from international, regional and national courts and

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179 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 76 [24] (Judge Malinverni), quoting Constance Grewe, 'Les exigences de la protection des droits fondamentaux', in Constance Grewe et al (eds), *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l'Union européenne; équilibres et déséquilibres de la balance* (Bruylant, 2010) 71, [no pinpoint reference is provided by Judge Malinverni].

180 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 76 [24].

181 See, for example, Eeckhout, above n 62.

182 Cf *ibid*; Hilpold, 'EU and UN Law in Conflict', above n 69, 179.

183 De Wet, above n 134, 799 [29]. De Wet cautions: 'Until such a time as impartial and independent judicial review is introduced at the United Nations level ... judicial rebellion ... is unlikely to subside in Europe': at 807 [50].

184 Martínez, above n 41, 356-7.

monitoring bodies, and increase the potential for harmonisation to result in some meaningful application of Article 103.

### Europe Is Not the World: Wider Practice Will Be Important

The relationship between the Charter and international human rights law is far from settled, even in the context of the sanctions regimes which are the subject of the decisions examined in this chapter. Amongst other issues, much of the existing practice is European, and European law is not international law. *Kadi* might be a high-water mark of European constitutionalism,<sup>185</sup> but it is its significance for international law that is of global interest.

To return to one of Professor Gardam's most helpful admonitions to students, it is important to consider the sources of international law. Whatever their status within the EU under its treaty arrangements, at best, judicial decisions can be a subsidiary source of international law.<sup>186</sup> If there is to be a change in the interpretation and application of Article 103 at international level, in the absence of a formal agreement amending the Charter, this can occur only as an instance of 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' under Article 31(3)(b) of the Vienna Convention on the Law of Treaties.<sup>187</sup>

One of the clearest examples of the evolution in application of a treaty provision comes from the Charter itself: Article 27(3) is interpreted, notwithstanding its text, to prevent a Resolution being passed only if a 'no' vote is cast by a permanent member.<sup>188</sup> It may well be the case that a less absolute interpretation of Article 103

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185 See, for example, D'Aspremont and Dogagne, above n 58; Giuseppe Martinico, Oreste Pollicino and Vincenzo Sciarabba, 'Hands off the Untouchable Core: A Constitutional Appraisal of the *Kadi* Case' (2010) 11 *European Journal of Law Reform* 281.

186 Statute of the International Court of Justice art 38(1)(d).

187 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). As to subsequent agreement and practice in treaty interpretation, see Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3<sup>rd</sup> ed, 2013) 212-16; Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7<sup>th</sup> ed, 2008) 633-4; Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 521, 552-60; Hazel Fox, 'Article 31(3)(a) and (b) of the Vienna Convention and the *Kasikili/Sedudu Island* Case' in Malgosia Fitzmaurice, Olufemi A Elias and Panos Merkouris (eds), *Issues of Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff Publishers, 2010) 59; Richard K Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 216-49; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 2<sup>nd</sup> ed, 1984) 135-8.

188 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971]

becomes evident in the future practice of states, in line with the decisions examined in this chapter; but there is as yet no compelling account of state practice in the interpretation of the Charter to suggest that international law has in fact changed to align with the judgments issued in *Kadi*, *Sayadi*, *Kadi II* and *Al-Dulimi*. Whether state practice from outside the EU will follow where the CJEU and HRC have led remains to be seen in the future.

### Reports of the Death of Article 103 Are Greatly Exaggerated<sup>189</sup>

James Crawford's verse about Mr Kadi's litigation ran as follows:

*While wandering through a wadi  
in the wastes of Saudi  
I came across Mr Kadi  
cracking rather hardy.  
I said 'you must feel blue  
at what they've done to you';  
he said to me 'that's true,  
but I've got the CJEU,  
lacking whose authority  
the P5 sorority  
are now a small minority,  
who've lost their old priority'.  
And so went Mr Kadi  
wandering down his wadi:  
'it's all because of me;  
I killed Article 103!'<sup>190</sup>*

As the analysis in this chapter demonstrates, Article 103 may not be dead yet. However, even at best (in *Nada*) it has been seriously harmonised. Article 103 remains an essential part of the international legal order ('maintaining the coherence and the unity of the international legal system'),<sup>191</sup> although it is now possibly of more limited

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ICJ Reps 16, 22. See, for example, Aust, *Modern Treaty Law and Practice*, above n 187, 215-16; Dörr, above n 187, 558; Fox, above n 187, 62; Gardiner, above n 187, 226, 245; Sinclair, above n 187, 137-8.

189 With apologies to Mark Twain.

190 James Crawford, 'Mr Kadi and Article 103 (A Poem)' on *EJIL: Talk!* (29 July 2013) <<http://www.ejiltalk.org/mr-kadi-and-article-103-by-james-crawford-a-poem/>>.

191 Paulus and Leiß, above n 165, 2136.

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scope than previously thought. Of course, Crawford's implication that the Security Council has had its wings clipped is entirely apposite.<sup>192</sup>

Only future practice will further illuminate how Article 103 is to be harmonised with international human rights law, and how (and whether) it will also need to be harmonised with other branches of international law (perhaps the most obvious being international humanitarian law). It seems clear, however, that the application of Article 103 will require nuanced examination, and where necessary harmonisation with other norms, and that the *lex superior* status of the Charter can no longer be relied upon to trump other areas of law. An absolutist understanding of Article 103 is dead; how the law of the Charter can be harmonised with other areas of law is the real question for the future.

## CONCLUDING OBSERVATIONS

It is now a reality, at least in the EU, that the human rights obligations of states function as a collateral limit on the powers of the Security Council through restricting the implementation of Security Council Resolutions at national or regional level. At the time of Professor Gardam's 1996 article on the Security Council and humanitarian law, such a result might have seemed improbable. In that respect, much has changed. Indeed, the potential for collateral challenges to Security Council Resolutions has been recognised as 'a far greater threat to the authority of the UN than challenges to the bindingness of a particular Security Council resolution as in the *Lockerbie Cases*'.<sup>193</sup>

The possible conceptual approaches to the relationship between the law of the Charter and human rights law range from *lex superior*, a strict application of Article 103 of the Charter to exclude any form of review of measures implementing Security Council Resolutions, to autonomy, a strict application of human rights law with no consideration of the Charter. In the critical cases examined in this chapter, both of these extremes are represented, although the more moderate and nuanced approach of harmonisation has at least entered consideration in *Nada*.

It was the application of autonomy by the Grand Chamber of the CJEU in *Kadi* and *Kadi II*, the HRC in *Sayadi*, and later by the Second Section of the ECtHR in *Al-Dulimi* that sent shockwaves through the international legal community. In *Nada*, however, the Grand Chamber of the ECtHR signalled the middle ground

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192 But see James Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review* 3, 10: 'It may be that decisions of the Security Council are subject to the authority of the Charter, but the fact is that there is no regular institutional means for bringing Charter constraints to bear on the Security Council'.

193 *Ibid.*

that should be the focus of future practice (notwithstanding that it did not persuade the CJEU to use this approach in *Kadi II*, and that it was not adopted in the Second Section's decision in *Al-Dulimi*) — the question of harmonising Charter obligations with those of human rights law, seeking to accommodate both as far as possible.

The current practice arising from the challenges in regional and international institutions to the implementation of Security Council Resolutions reflects the tension that Professor Gardam observed between the law of the Charter and the humanitarian project reflected in human rights law (and humanitarian law). The process of exploring and defining these relationships has only just begun, although the potential for the human rights obligations of states to serve as a potent collateral limit on the powers of the Security Council is abundantly clear. However, enforcing collateral limits on the Security Council, and achieving harmonisation of the law of the Charter with human rights law, is only necessary where there is potential normative conflict. An alternative would be to follow Professor Gardam's advice:

[O]ne method by which the Security Council can fulfill its Charter duty to encourage respect for human rights and humanitarian principles is to set an example and ensure its ... actions are conducted in an exemplary fashion.<sup>194</sup>

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194 Gardam, above n 5, 322.



# PART III





# Gender and Armed Conflict



# 5

## PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE CRIMES: HOW FAR HAVE WE PROGRESSED AND WHERE DO WE GO FROM HERE? SOME THOUGHTS BASED ON ICTY EXPERIENCE

MICHELLE JARVIS<sup>1</sup>

### INTRODUCTION

The past two decades have brought some remarkable developments when it comes to accountability for conflict-related sexual violence.<sup>2</sup> The historical silence

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1 Deputy to the Prosecutor, Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia (ICTY). The views expressed in this chapter are those of the author and not necessarily those of the ICTY or the United Nations.

2 For a definition of sexual violence, see *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T (2 September 1998) [688]. ('The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact'); *Prosecutor v Kvočka (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Case No IT-98-30/1-T, 2 November 2001)[180] (endorsing the *Akayesu* definition of sexual violence and further noting that 'sexual violence is broader than rape and includes such crimes as sexual slavery or molestation'). See further footnote 343 (noting that '[s]exual violence would also include such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender

surrounding these crimes<sup>3</sup> was severely fractured — even if not entirely shattered — by the work of the ad hoc and hybrid criminal courts and tribunals, particularly the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone. The International Criminal Court (ICC), too, recovering from a shaky start,<sup>4</sup> is showing signs of improved approaches to sexual violence crimes.<sup>5</sup> The United Nations (UN) Security Council has now adopted an ambitious agenda on women, peace and security,<sup>6</sup> has mandated the appointment of a Special Representative to the Secretary-General on Sexual Violence in Conflict,<sup>7</sup> and receives annual reports on the status of conflict-related sexual violence worldwide.<sup>8</sup>

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related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization' and other similar forms of violence'. See also Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002). Elements of Crimes (Article 7(1)(g)-6 regarding the crime against humanity of 'sexual violence': 'The perpetrator committed an act of a sexual nature against one or more persons or caused such person to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent' where such conduct is of comparable gravity to rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation).

3 See, for example, Michelle Jarvis and Elena Martin Salgado, 'Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice' in Anne-Marie de Brouwer et al (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, 2013) 99, 102.

4 See, for example, Susana SáCouto and Katherine Cleary, 'The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court' (2009) 17(2) *American University Journal of Gender, Social Policy & the Law* 339, 339-59. See generally, Women's Initiatives for Gender Justice, Publications <<http://www.iccwomen.org/publications/>>.

5 See, for example, Office of the Prosecutor of the International Criminal Court, 'Policy Paper on Sexual and Gender-Based Crimes' (June 2014) <[http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1011.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1011.aspx)>.

6 SC Res 1325 UN SCOR, 4213<sup>th</sup> mtg (31 October 2000) (the Security Council's landmark resolution on women, peace and security). See further SC Res 1820, UN SCOR, 5916<sup>th</sup> mtg, UN Doc S/RES/1820 (19 June 2008); SC Res 1888, UN SCOR, 6195<sup>th</sup> mtg, UN Doc S/RES/1888 (30 September 2009); SC Res 1889, UN SCOR, 6196<sup>th</sup> mtg, UN Doc S/RES/1889 (5 October 2009); SC Res 1960, UN SCOR, 6453<sup>rd</sup> mtg, UN Doc S/RES/1960 (16 December 2010); SC Res 2106, UN SCOR, 6984<sup>th</sup> mtg, UN Doc S/RES/2106 (24 June 2013). See also UN Women, *Preventing Conflict Transforming Justice Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325* (October 2015) <<http://wps.unwomen.org/en/highlights/global-study-release>>.

7 SC Res 1888, UN SCOR, 6195<sup>th</sup> mtg, UN Doc S/RES/1888 (30 September 2009).

8 For example, *Sexual Violence in Conflict, Report of the Secretary-General*, UN GAOR, 67<sup>th</sup> sess, Agenda Item 33, UN Doc A/67/792-S/2013/149 (14 March 2013). See further SC Res 1960, UN SCOR, 6453<sup>rd</sup> mtg, UN Doc S/RES/1960 (16 December 2010) (requesting the Secretary-General to submit annual reports on sexual violence in conflict).

In perhaps the most unexpected development, the United Kingdom's Preventing Sexual Violence in Conflict Initiative, unveiled by former Foreign Secretary William Hague, placed accountability for conflict-related sexual violence prominently on the political agenda for the first time.<sup>9</sup> The UK initiative has also facilitated a much-needed dialogue between criminal justice practitioners, policy makers, military officials, humanitarian responders, members of civil society and others who have a role to play in the accountability process.<sup>10</sup>

This intense focus on conflict-related sexual violence has, justifiably, led some commentators to question the level of priority now given to the issue at the expense of other devastating gender-related harms arising from conflict.<sup>11</sup> Certainly, it is time that the critique on gender and armed conflict moved beyond the narrow focus on sexual violence to the many other gendered dimensions of conflict and their treatment within the framework of international criminal law.<sup>12</sup> Even so, as a practitioner at the ICTY for the past fifteen years, I have to conclude that sexual violence, more than any other category of crimes, is subject to misconceptions that block analysis, thwart accountability efforts and minimise prospects of redress. At the heart of the problem is the failure to fully recognise rape and similar crimes as violent acts. This in turn has a myriad of adverse consequences throughout the investigation and prosecution process.

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9 The United Kingdom used its presidency of the G8 to put the issue of conflict-related sexual violence on the political agenda, which led to the adoption of a Declaration on Preventing Sexual Violence in Conflict by G8 Foreign Ministers. United Kingdom, *Preventing Sexual Violence in Conflict Initiative (PSVI)* <<https://www.gov.uk/government/policies/preventing-sexual-violence-in-conflict>>.

10 For example, in developing its *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (11 June 2014) <<https://www.gov.uk/government/publications/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict>>; the UK brought together a broad cross-section of experts including criminal justice practitioners, policy makers, medical experts, humanitarian responders and NGOs.

11 For example, Judith Gardam, 'More of the Same — Feminist Interactions with IHL', (Paper presented at Centre for International Governance and Justice Workshop: Recent Developments in Feminist Thinking in International Law and International Rights, Australian National University, 3 December 2014). See also Liesl Gertholtz, 'It's Not Just About Sexual Violence', *The World Post*, 4 September 2013 <[http://www.huffingtonpost.com/liesl-gertholtz/its-not-just-about-sexual\\_b\\_3045633.html](http://www.huffingtonpost.com/liesl-gertholtz/its-not-just-about-sexual_b_3045633.html)>; Fionnuala Ní Aoláin, 'The Gender Politics of Fact-Finding in the Context of the Women, Peace and Security Agenda, in The Future of Human Rights Fact-Finding' (Paper presented at NYU CHR and GJ International Human Rights and Fact-Finding in the Twenty-First Century Conference, 1 November 2013).

12 See, for example, Serge Brammertz and Michelle Jarvis, 'Lessons Learned in Prosecuting Gender Crimes Under International Law: Experiences from the ICTY' in Chile Eboe-Osuji (ed), *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay* (Martinus Nijhoff Publishers, 2010) 96, 98-100. See generally, Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law* (Kluwer Law International, 2001).

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So, while it is important to place sexual violence in context as one of the many pressing gender issues arising out of conflict, it is also important to take stock of how far we have come over the past two decades and to clearly assess where the future challenges lie. Moreover, rather than obscuring the other gendered harms arising out of conflict, our objective should be to use our increasingly rich experience in prosecuting sexual violence crimes as a springboard for more multifaceted approaches to gender and international criminal law in the future.

In this chapter, I draw upon my experience at the ICTY to propose some (but by no means all) answers to these questions. When it comes to the future, there is still much work to do on improving approaches to holding senior officials accountable for sexual violence crimes, and this forms the main focus of my comments. I also offer some brief observations on more effective approaches to building global capacity for prosecuting sexual violence crimes and the need to breathe more life into the duties of commanders to prevent sexual violence as a conflict unfolds. Finally, I note the manner in which incorporating gender perspectives, as seen in our work on sexual violence crimes to date, has strengthened the framework for international criminal law more generally.

### HOW FAR HAVE WE PROGRESSED?

A starting point for gauging progress is to cast our minds back to the mid-1990s when the ICTY was starting its operations. Media reports on widespread sexual violence during the conflicts in the former Yugoslavia had brought the issue of wartime rape to people's attention in a new and compelling way.<sup>13</sup> However, as the ICTY started out on its novel journey, many fundamental questions were being asked about what could be expected of this bold new initiative when it came to the prosecution of conflict-related sexual violence.

For example, many people were asking whether rape was even recognised as a crime under international law.<sup>14</sup> Fortunately, ICTY case law has answered that question with a resounding 'yes'. There were not many express references to sexual

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13 For example, 'Serbian "rape camps": Evil upon Evil', *The Miami Herald*, 18 December 1992; 'Serben vergewaltigen auf obersten Befehl', *Die Welt*, 1 October 1992; Catherine MacKinnon, 'Crimes of War, Crimes of Peace' in Stephen Shute and Susan Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993* (New York Basic Books, 1993) 83. The Security Council passed resolutions specifically condemning rape, for example, SC Res 808, UN SCOR, UN Doc S/RES/808 (22 February 1993); SC Res 827, UN SCOR, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993).

14 The confusion stemmed from the fact that rape is not expressly mentioned either as a grave breach to the *Geneva Conventions of 1949* or in common Article 3 to those Conventions.

violence in provisions forming the fabric of international criminal law in 1993<sup>15</sup> and there was only one reference to rape in the ICTY Statute.<sup>16</sup> However, one of the ICTY's big successes has been reconceptualising many general provisions — such as torture, inhuman treatment, cruel treatment, enslavement and persecution — to include sexual violence.<sup>17</sup>

Others were asking whether survivors of sexual violence would be willing to come forward to speak to investigators and to testify in court. Again, ICTY experience has answered this question with a clear 'yes'. Some survivors have come forward with the aid of protective measures that have concealed their identity from the public, and others have been willing to testify without protection. Certainly, the stigma often associated with sexual violence is something that must be handled carefully. However, our overall experience at the ICTY shows that stigma is not an insurmountable barrier. Many survivors want to speak about their experience, provided that we pay attention to creating the right conditions throughout the investigation and prosecution process. This may require an investment of time and resources — but it can be done.

Related to this, many people were asking whether the historical silence surrounding sexual violence would be repeated in the ICTY's work. Today, the ICTY's published statistics suggest that 'almost half of those convicted by the ICTY

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15 Express references to sexual violence crimes can be found in the following: Germany, *Official Gazette Control for Germany*, No 50-55, 20 December 1945, Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity 3 (listing rape as a crime against humanity); *Geneva Convention Relative to the Protection of Civilian Persons in time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), art 27 (protecting women against 'any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'); *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 (entered into force 7 December 1978), art 75(2)(b) (prohibiting 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault') and art 76(1) (mandating that '[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), art 4(2)(e) (prohibiting 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault').

16 SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64<sup>th</sup> sess, 6155<sup>th</sup> mtg, UN Doc S/RES/1877 (7 July 2009) art 5(g) (listing 'rape' as a crime against humanity).

17 Jarvis and Martin Salgado, above n 3, 101,103-104; Michelle Jarvis, 'An Emerging Gender Perspective on International Crimes' in Boas and Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Brill Academic Publishers, 2003) 157, 163-72. Regarding sexual violence as persecution, see, for example, the discussion in this chapter of the *Stakić* case.



have been found guilty of elements of crimes involving sexual violence'.<sup>18</sup> The ICTY has also had developments, such as the *Kunarac et al* case,<sup>19</sup> which focused exclusively on widespread patterns of sexual violence. This is not to say that progress has been perfect. The ICTY has had cases where sexual violence was initially missed during investigations and then belatedly added to indictments.<sup>20</sup> There have also been cases where sexual violence charges were raised too late and the Prosecution was not permitted to add them to indictments.<sup>21</sup> There are many reasons underlying these missteps, but the bottom line is that they provide focus for improved approaches in the future.<sup>22</sup>

One of the biggest questions being asked in the mid-1990s was about the perceived 'strategic' use of sexual violence during the conflicts in the former Yugoslavia<sup>23</sup> and how this could be reflected in the ICTY's work. In large part, the idea that sexual violence had been used as a tool of ethnic cleansing helped many people see for the first time that accountability for wartime sexual violence must be a priority for the international community and that these crimes could not be dismissed as an unfortunate but incidental by-product of conflict. In particular, newspaper headlines that women were being raped pursuant to high-level orders galvanised attention in a way that the international community had not previously

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18 See United Nations International Criminal Tribunal for the former Yugoslavia, *Crimes of Sexual Violence* <<http://www.icty.org/en/in-focus/crimes-sexual-violence>>.

19 *Prosecutor v Kunarac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001).

20 See, for example, Jarvis, above n 17, 178 (regarding the failure to include sexual violence charges in the ICTY's first indictment which was issued against Dragan Nikolić).

21 *Prosecutor v Lukić* (Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as well as on Milan Lukić's Request for Reconsideration or Certification of the Pre-Trial Judge's Order of 19 June 2008) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-98-32/1-PT, 8 July 2008).

22 The ICTY Office of the Prosecutor has completed an extensive legacy project to review and assess its work on sexual violence crimes since its establishment, to make available insights for the future. See Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016).

23 For example, Letter from Secretary-General to the President of the Security Council, 24 May 1994 in Commission of Experts Final Report, UN Doc S/1994/674 (27 May 1994), para 237. See also Hastings Law School Symposium, 'Rape as a Weapon of War in the Former Yugoslavia' (1994) 5 *Hastings Women's Law Journal* 69; Elizabeth A Kohn, 'Rape as a Weapon of War: Women's Human Rights During the Dissolution of Yugoslavia' (1994) 24 *Golden Gate University Law Review* 199; Rhonda Copelon, 'Surfacing Gender: Reconceptualizing Crimes against Women in Time of War' in Alexandra Stiglmayer (ed), *Mass Rape: The War against Women in Bosnia-Herzegovina* (University of Nebraska Press, 1994).

seen.<sup>24</sup> The idea that a commander might order a subordinate to commit rape as part of a military strategy was, understandably, shocking.

In cases at the ICTY, there has been limited direct evidence of sexual violence pursuant to express orders, contrary to what might have been expected based on the media reports.<sup>25</sup> However, ICTY cases confirm the integral role that sexual violence played in the conflicts in the former Yugoslavia. One of the most significant vehicles through which this has been shown is joint criminal enterprise (JCE) liability. The Prosecution has successfully shown that, as part of the Bosnian Serb campaign to cleanse territory in Bosnia and Herzegovina of non-Serbs, the JCE members agreed on a catalogue of crimes, including forcible transfer, deportation, murder and sexual violence. The ICTY Appeals Chamber has also accepted a legal framework whereby, even if not initially, then at least over time, a common criminal purpose expands to include sexual violence.<sup>26</sup>

By contrast, some of the questions being asked in the mid-1990s have not yet been so easily answered and remain pending before the ICTY. For example, as commentators on the conflict in Bosnia and Herzegovina raised the prospect that the ethnic cleansing constituted genocide, others began questioning whether the widespread sexual violence had genocidal aspects to it as well.<sup>27</sup> On the question of whether sexual violence can be charged as genocide, there are strong precedents from the ICTR, starting with the *Akayesu* case.<sup>28</sup> ICTY case law, too, confirms the

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24 Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence*, above n 22, ch 2.

25 See, however, *Prosecutor v Todorović (Sentencing Judgement)* (International Criminal Tribunal for the former Yugoslavia, Case No IT-95-9/1-S, 31 July 2001) [34], [38]-40], [48], (concerning a guilty plea based, in part, on ordering acts of sexual violence to be committed against male prisoners) ('*Todorović* case').

26 See further below for a detailed discussion of JCE liability in the context of ICTY sexual violence cases.

27 For example, Rhonda Copelon, 'Surfacing Gender, Re-Engraving Crimes against Women in Humanitarian Law' (1994) 5(2) *Hastings Women's Law Journal* 243.

28 *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [731]-[733]. See also *Prosecutor v Muhimana (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-95-1B-T, 28 Rwanda, Trial Chamber I, Case No ICTR-96-13-T, 27 January 2000) [158] [907]-[908]; *Prosecutor v Gacumbitsi (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-2001-64-T, 17 June 2004) [291]-[292].

theoretical possibility of charging sexual violence as genocide,<sup>29</sup> even if no conviction has yet been entered on this basis.<sup>30</sup>

Notwithstanding some unresolved questions in ICTY case law concerning sexual violence, progress has unquestionably been significant. Were a Nuremberg Principles-type assessment<sup>31</sup> undertaken of the key legal principles emerging from the second wave of international courts and tribunals over the past two decades, the importance of prosecuting sexual violence crimes — along with all other violent crimes — would now be included.<sup>32</sup> Indeed, recognition of sexual violence crimes might well be considered as one of the most significant advances of this phase of international justice.

### WHERE DO WE GO FROM HERE?

While progress towards accountability for sexual violence crimes over the past two decades has been significant, it has also exposed ongoing obstacles. Further, we have seen areas where we can more effectively leverage our experience to date in prosecuting

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29 *Prosecutor v Furundžija (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [172]. See also *Prosecutor v Karadžić (Review of the Indictments pursuant to rule 61 of the rules of procedure and evidence)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-95-5-R61, 11 July 1996) [84], [94].

30 However, the issue of sexual violence as genocide remains pending in two of the ICTY's last trials. See *Prosecutor v Karadžić (Prosecution's Marked-Up Indictment)* (International Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-95-5/18-PT, 19 October 2009) Count 1 (charging sexual violence committed in detention centres as genocide based on serious bodily or mental harm and as a condition of life calculated to bring about the physical destruction of the group); *Prosecutor v Mladić (Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-09-92-PT, 16 December 2011). Count 1 (charging sexual violence committed in detention centres as genocide based on serious bodily or mental harm and as a condition of life calculated to bring about the physical destruction of the group).

31 In 1947, the UN General Assembly asked the International Law Commission to formulate 'the principles of international law recognized in the charter of the Nürnberg Tribunal and in the judgement of the Tribunal'. See GA Res 177(II), 2<sup>nd</sup> sess, 123<sup>rd</sup> plen mtg, Agenda Item 34, UN Doc A/RES/177(II) (21 November 1947). The International Law Commission subsequently formulated seven principles, regarded as the fundamental legal concepts arising from the Nürnberg proceedings. See 'Yearbook of the International Law Commission' (1950) Volume II, 97. These fundamental principles included concepts such as the responsibility of individuals for international crimes, the absence of immunity for Heads of State for international crimes, and the irrelevance of acting under superior orders for determining individual responsibility for international crimes.

32 This would be justified not only based on the work of the ICTY, but also based on the work of other ad hoc and hybrid courts and tribunals, particularly the ICTR and Special Court for Sierra Leone, as well as, increasingly, the ICC's work.

sexual violence crimes in order both to bring about better outcomes for victims and to strengthen the framework of international justice more generally.

### Improving Approaches for Holding Senior Officials Accountable for Sexual Violence Crimes

As the focus moved from the ICTY's relatively simple cases involving direct perpetrators of sexual violence to much more complex cases seeking to hold senior officials responsible for these crimes, a number of challenges have emerged that require more thought in the future. While sexual violence victims have emphasised the importance of seeing the direct physical perpetrators of their assaults held to account,<sup>33</sup> it is equally important to ensure that senior officials are made to answer for their action or inaction. Moreover, if the accountability of senior officials for sexual violence crimes is not diligently pursued, an important lever to exert pressure for changing their behaviour in future conflicts is overlooked. These individuals, more than any others, have the power to prevent violations of international criminal law, including sexual violence.<sup>34</sup>

#### *1. Recognising the Violent Nature of Rape as an Essential Foundation for Building Cases against Senior Officials*

Experience at the ICTY has underscored that properly characterising rape and similar crimes as violent acts is an essential foundation for building sexual violence cases against senior officials. Arguably, the historical silence surrounding wartime rape at least partly reflected the mistaken view that it was more a crime against the victim's honour than a violent crime.<sup>35</sup> The honour framework in turn generates assumptions that rape, as primarily a sexual rather than a violent act, is motivated solely by personal desire and is therefore disconnected from the prevailing context of mass atrocity, as compared to other violent crimes.<sup>36</sup>

When the relatively straightforward rape cases involving direct perpetrators are being prosecuted, these mischaracterisations may have little impact on the prosecution process. However, further up the chain of command — for example, at the level of senior political and military leaders who may have been physically far removed from

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33 This point was made by participants during a workshop organised by the Ministry of Foreign Affairs of Sweden, 'Combating Impunity for Sexual and Gender Based Crimes at National Level' (Stockholm, 20-21 May 2014).

34 See further below (discussion of 'command responsibility in real time').

35 For example, Jarvis and Martin Salgado, above n 3, 101-2.

36 See generally, Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence*, above n 22, ch 3.

the crimes — these mischaracterisations can constitute very real barriers to success. First, they lead to discounting the seriousness of — and, accordingly, the priority given to — sexual violence crimes. This is an enormous problem in the context of conflict-related atrocity, where investigators and prosecutors are usually confronted with an overwhelming volume of criminality to address, combined with limited resources. As a result, difficult decisions are constantly made about which crimes to prioritise.<sup>37</sup> The low priority accorded to sexual violence was reflected in an early, publicly reported comment from an ICTY Office of the Prosecutor staff member:

I've got ten dead bodies, how do I have time for rape? That's not as important.<sup>38</sup>

Second, if rape is viewed as a purely sexual matter, rather than as a violent physical assault, it is more likely to be dismissed as an opportunistic or personally motivated act that is 'qualitatively'<sup>39</sup> different from other violent acts committed during conflict. As a result, connections between sexual violence and broader patterns of violent crimes unleashed during conflict are obscured. At the same time, the success of senior leadership cases depends on both accurately seeing rape in context and understanding the role it played in the violent campaign unleashed by the senior official. If sexual violence is not accurately contextualised, accountability efforts will fail.<sup>40</sup> Arguably, this problem is reflected in ICTY judgments accepting that violent acts such as murder and property damage carried out in the midst of a violent ethnic cleansing campaign were foreseeable to senior officials — invoking their criminal responsibility — but that acts of sexual violence were not.<sup>41</sup> It is similarly reflected in findings accepting that violent acts such as murder and beatings carried out in

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37 For example, *Prosecutor v Karadžić (Prosecution's Marked-Up Indictment)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber III, Case No IT-95-5/18-PT-S, 19 October 2009), (charging Karadžić with crimes committed throughout large parts of Bosnia and Herzegovina between 1991 and 1995 including ethnic cleansing in twenty municipalities, the forty-four-month siege of Sarajevo and genocide in Srebrenica in July 1995). See also *Prosecutor v Mladić (Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-09-92-PT, 16 December 2011).

38 Peggy Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (2002) 34(3) *Case Western Reserve Journal of International Law* 305, 310-11.

39 *Prosecutor v Rukundo (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-70-A, 20 October 2010) [236] (classifying an act of sexual assault as 'qualitatively different from the other acts of genocide perpetrated by Rukundo').

40 See generally, Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence*, above n 22, ch 7.

41 See below the discussion of the *Milutinović et al* and *Djordjević* cases. See also *Prosecutor v Rukundo (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-2001-70-A, 20 October 2010) [227]-[238]. Contrast this with the Partially Dissenting Opinion of Judge Pocar.

the midst of a violent ethnic cleansing campaign were intended to target the victim because of their ethnicity, but that acts of sexual violence were not.<sup>42</sup>

Although the ICTY does not have a perfect record when it comes to dismantling historical misconceptions that obscure the violent nature of rape and similar crimes, there has been important progress to build on in the future. The conceptual change is reflected in the fact that the phrase 'sexual violence' or even more accurately 'sexualised violence' — rather than the phrase 'sex crimes' — has now become almost standard. The Office of the Prosecutor has also reconceptualised many existing legal concepts that require proof of a violent act to cover sexual violence. So, for example, in appropriate cases, sexual violence has been prosecuted as the following: torture, recognising that it involves the infliction of severe pain or suffering;<sup>43</sup> persecution, recognising that it involves the violation of the fundamental human right to bodily or physical integrity;<sup>44</sup> and genocide, recognising that it involves, for example, the infliction of serious bodily or mental harm.<sup>45</sup> These have been important advances in the way that conflict-related sexual violence is perceived and presented to a court.

However, given the pervasiveness of the misconceptions, and our obvious vulnerability to relapse, it is important to train all staff members involved in the investigations and prosecution process so that they are both aware of the misconceptions and equipped to successfully circumvent them. This should be accompanied by the development of written policies and the designation of senior gender focal points

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42 For example, *Prosecutor v Milutinović (Judgement Vol 2)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [1245]. The Prosecution successfully appealed this finding. See *Prosecutor v Šainović (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [573]-[600] (on appeal the case was known as *Šainović et al* rather than as *Milutinović et al*).

43 For example, *Prosecutor v Furundžija (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [264]-[269]; *Prosecutor v Kunarac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [654]-[656], [687].

44 For example, *Prosecutor v Milutinović, (Judgement Vol 1)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [188], [192]; *Prosecutor v Stakić (Judgment)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-97-24-A, 22 March 2006) [872].

45 For example, *Prosecutor v Karadžić (Prosecution's Marked-Up Indictment)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-95-5/18-PT, 19 October 2009) Count 1 (charging sexual violence committed in detention centres as genocide based on serious bodily or mental harm and as a condition of life calculated to bring about the physical destruction of the group); *Prosecutor v Mladić (Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents)* Case No IT-09-92-PT, 16 December 2011, Count 1 (charging sexual violence committed in detention centres as genocide based on serious bodily or mental harm and as a condition of life calculated to bring about the physical destruction of the group).

to minimise the prospects that poor practices will creep back in to the work of a prosecution office over time.<sup>46</sup> Finally, prosecutors need to think strategically about how to lead evidence and make arguments that will best underscore to fact finders the inherently violent aspect of rape and other similar acts and the connection between these acts and other violent crimes. This is particularly important when the crimes were not committed on a large scale or in public view or in other circumstances where the violent aspect of rape may be less obvious to fact finders.

The hope is that, by rejecting the honour framework and reinforcing the violent reality of rape throughout the investigation and prosecution process, prosecutors will not only improve the accountability process, but will also ultimately contribute towards dismantling the crippling stigma that can be directed towards the survivors of these crimes within their families and communities.

## *2. Recognising that Responsibility for Sexual Violence May Extend far beyond the Direct Physical Perpetrator*

A corollary of the misconception that obscures the violent nature of rape and similar crimes is the assumption that these crimes are motivated solely by personal desire and, therefore, that criminal responsibility rests only with the direct physical perpetrator. Arguably, the ICTY had a head start in challenging this assumption. As noted above, much of the unprecedented concern expressed by the international community over sexual violence, particularly in Bosnia and Herzegovina, stemmed from perceptions that it had been used as a 'weapon of war' in the conflict. While this framework can cause some problems of its own,<sup>47</sup> it represented an important shift towards better recognition of the potential connections between sexual violence and conflict.

Even so, in practice, when it came time to consider charging senior political and military figures with sexual violence crimes, conceptual barriers abounded and still present ongoing challenges. How could the ICTY Office of the Prosecutor seek to attribute responsibility for sexual violence crimes to officials who were often very far removed from the scene of the crime and who may not have had any knowledge of the specific incidents in question? The answer, which has ultimately been confirmed in ICTY cases, was that it could be done in the same way as for any other category of crimes, once we dismantle assumptions that sexual violence is qualitatively different from other violent acts.

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<sup>46</sup> See generally Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence*, above n 22, ch 4.

<sup>47</sup> For example, it can lead to the assumption that sexual violence can only be prosecuted if it forms part of a policy or if it has been committed on a widespread or systematic basis. See generally, Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence*, above n 22, ch 6.

### 3 A Case Study: Linking Sexual Violence Crimes to Senior Officials Using JCE Theory

To date, the Office of the Prosecutor has succeeded in attributing responsibility for sexual violence crimes to officials who were not direct physical perpetrators, using a variety of the modes of liability available under Article 7 of the ICTY Statute.<sup>48</sup> However, JCE has become central to most efforts at the ICTY to link sexual violence to senior officials and provides a useful case study of some of the conceptual issues that will have to be navigated in the future.

JCE is a mechanism for attributing criminal responsibility to an accused person who has acted together with others to bring about a criminal result, regardless of the role the accused played in physically perpetrating the crime. Both JCE and similar theories of joint commission, such as the co-perpetration theory applied before the ICC,<sup>49</sup> are particularly powerful tools for international prosecutors. The vast scope of the crimes usually under consideration necessarily entails contributions of many different kinds by multiple individuals. As the *Tadić* Appeals Chamber put it in commenting on the importance of the JCE doctrine in the context of international crimes:

[m]ost of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act ... the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less — or indeed no different — from that of those actually carrying out the acts in question. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would

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48 For example, *Prosecutor v Kvočka (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-98-30/1-T, 2 November 2001) [319]-[320] (finding that sexual violence formed part of a system of ill-treatment under JCE (Category 2)); *Prosecutor v Krstić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [616]-[617] (finding that sexual violence was foreseeable based on JCE (Category 3)); *Prosecutor v Furundžija (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [274] (aiding and abetting the crime of rape); *Prosecutor v Delalić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT- 96-21-A, 20 February 2001) [769]-[770], [775] (convicting Mučić for sexual violence based on superior responsibility). See also above n 25 (*Todorović* case). See generally, Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence*, above n 22, ch 7.

49 For example, *Prosecutor v Lubanga (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against His Conviction)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 A5, 1 December 2014) [434]-[528].



disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator to physically carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.<sup>50</sup>

JCE responsibility rests on proof that the accused made a significant contribution to the crime and shared the intent of his or her fellow JCE members to bring about the crime.<sup>51</sup>

The ICTY's case law recognises three categories of JCE. Category 1 involves the situation where all members of the JCE share the intent to commit the crime in question. Category 2 is a subset of Category 1 and involves joint responsibility for running an organised criminal system, such as a concentration camp. Category 3 — known as the extended form of JCE — attributes responsibility to an accused person for a crime that is a foreseeable consequence of implementing a JCE of which he or she is a member.<sup>52</sup>

The starting point for applying JCE theory to sexual violence crimes is to consider whether there is evidence that it forms part of the common criminal purpose agreed upon by the JCE members (Category 1) or that it forms part of an organised criminal system run by the JCE members (Category 2). However, assumptions that sexual violence is simply an unfortunate side-effect of the conflict— and is therefore incidental to it — will present conceptual barriers to constructing JCE (Categories 1 and 2) cases that include sexual violence.

The *Stakić* case at the ICTY provides a compelling example of how sexual violence can be successfully prosecuted as part of a common criminal purpose pursuant to JCE (Category 1). Milomir Stakić was a municipal-level leader in Prijedor — the site of some of the most extreme ethnic cleansing patterns documented during the conflict in Bosnia and Herzegovina. He was charged with crimes including sexual violence which had occurred in detention camps in Prijedor municipality, even though he was not involved in the day-to-day running of the camps and had not inflicted any of the sexual violence himself.<sup>53</sup>

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50 *Prosecutor v Tadić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [191]-[192].

51 For example, *Prosecutor v Brđanin (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-99-36-A, 3 April 2007) [430].

52 For example, *Prosecutor v Brđanin (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-99-36-A) [363]-[365]; *Prosecutor v Tolimir (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case No IT-05-88/2-T, 12 December 2012) [888]-[898].

53 See generally, *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003).

Stakić was found responsible as a participant in a JCE<sup>54</sup> to ethnically cleanse Prijedor municipality by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control, where persecution, deportation and forcible transfer fell within the common purpose.<sup>55</sup> The persecution, in turn, encompassed sexual violence committed in the notorious Omarska, Keraterm and Trnopolje prison camps.<sup>56</sup> In reaching this conclusion, the Trial Chamber noted the role that the prison camps played in the implementation of the common plan. Stakić was found to have acted jointly with the police, military and other civilian authorities in Prijedor in order to create a coercive environment that would cause the non-Serb residents to flee.<sup>57</sup> Stakić consented to the removal of the targeted population 'through whatever means necessary',<sup>58</sup> including sexual violence.

The *Krajišnik* case sheds further light on the factors that will be important in inferring an agreement to commit sexual violence for the purposes of JCE (Category 1) liability. Momčilo Krajišnik was an influential Bosnian Serb political leader who played a key role in implementing the ethnic cleansing campaign in Bosnia and Herzegovina. He was the President of the Bosnian Serb Assembly and a member of the Presidency of the Bosnian-Serb Republic.<sup>59</sup> He was charged and convicted at first instance as a member of a JCE to commit crimes including persecution, which encompassed sexual violence. The Trial Chamber was not satisfied that sexual violence was a part of the common criminal plan from the outset. However, it was satisfied that the plan to expel the non-Serb population expanded over time to include sexual violence crimes. In coming to this conclusion, the Trial Chamber was guided by factors such as the

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54 The Trial Chamber did not apply JCE theory, but rather convicted Stakić using a theory of co-perpetration based on joint control. See *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [438]-[442], [469]-[498]. The Appeals Chamber, however, determined that this theory had no basis in customary international law and instead applied JCE theory to the Trial Chamber's factual findings to uphold the convictions entered against Stakić. See *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber Case No IT-97-24-A, 22 March 2006) [58]-[85].

55 *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-97-24-A, 22 March 2006) [73].

56 *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [234]-[236], [240]-[241], [244], [791]-[806], [826].

57 *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [475], [477], [482], [488], [821], [823]; *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-97-24-A, 22 March 2006) [74]-[75], [81].

58 *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case No IT-97-24-T, 31 July 2003) [496].

59 See generally, *Prosecutor v Krajišnik (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006).

prevalence of sexual violence both in and out of detention. It also considered the fact that these crimes were reported to the Bosnian-Serb leadership, including Krajišnik, which nevertheless persisted in its forced displacement programme, territorial conquests and demographic recompositions.<sup>60</sup>

The *Krajišnik* Appeals Chamber, while accepting the theoretical possibility of an expanded JCE, overturned the Trial Chamber's findings due to insufficient detail.<sup>61</sup> The Appeals Chamber found that a JCE can come to embrace expanded criminal means, including sexual violence, as long as the evidence shows that the members of the JCE agreed on the expanded means.<sup>62</sup> While this agreement 'may materialise extemporaneously and be inferred from circumstantial evidence'<sup>63</sup> the Appeals Chamber signalled that it will require findings on precisely 'how and when the scope of the common objective broadened in order to impute individual criminal responsibility to Krajišnik for those crimes that were not included in the original plan, *i.e.* the expanded crimes'.<sup>64</sup> Although the Appeals Chamber overturned sexual violence convictions entered by the Trial Chamber under JCE (Category 1) due to insufficient findings by the Trial Chamber, the case provides an important precedent for prosecutors in the future seeking to link sexual violence crimes to senior officials.

#### 4. *Does Sexual Violence Have to Be Committed on a Large Scale or Systematic Basis to Be Regarded as Part of a Common Criminal Purpose?*

A question arises as to whether sexual violence must be proved on a large scale or systematic basis to be prosecuted as part of a common criminal plan pursuant to JCE (Category 1). Here, also, care must be taken not to treat sexual violence differently from other crime categories or to unwittingly import higher standards of proof. The benchmark for charging sexual violence as part of a common criminal plan should not be whether the sexual violence is *per se* large scale and/or systematic, but rather whether there is evidence that the sexual violence was an integral part of the methodology agreed upon by the JCE members. Showing that sexual violence was

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60 *Prosecutor v Krajišnik (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [789], [800], [804], [965]-[966], [972], [1034], [1089]-[1119].

61 *Prosecutor v Krajišnik (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-00-39-A, 17 March 2009) [163]-[178].

62 *Prosecutor v Krajišnik (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [163].

63 *Prosecutor v Krajišnik, (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [163].

64 *Prosecutor v Krajišnik (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [176] (emphasis in original).

committed on a large scale and/or systematic basis is one way of proving this, but it is not the only one. An obvious example is the scenario where there is evidence of direct or indirect statements of intent by the JCE members to inflict sexual violence as part of the implementation of the common criminal purpose. In these circumstances, even if the volume of sexual violence is small and does not form part of a discernible pattern of sexual violence, it would be appropriate to include it in the common criminal plan charged.

More generally, it should also be possible to prove that sexual violence is an integral part of a common criminal purpose by looking at the role that it played in achieving the objectives of the JCE members. The *Stakić* case provides an example. Neither the Trial Chamber nor the Appeals Chamber specifically referred to the scale or pattern of the sexual violence. Rather, they focused on the objective of the JCE members — namely to ethnically cleanse Prijedor municipality of non-Serbs — and the role that a range of violent persecutory acts, including sexual violence, played in achieving that objective. The detention camps in which the sexual violence and a range of other violent and discriminatory mistreatment took place was one of the JCE members' core methodologies for creating the coercive circumstances needed to force the targeted population to flee.<sup>65</sup> In context, it was appropriate to find that the sexual violence was an integral part of the common criminal purpose. Here, too, is an important lesson for prosecutors regarding the manner in which a common criminal purpose is described in the charging instrument. The formulation should be sufficiently flexible to capture the role that the full range of violent acts at issue played in bringing about the objective of the JCE members.<sup>66</sup>

##### 5. *Proving the Foreseeability of Sexual Violence for the Purposes of JCE (Category 3)*

When it comes to the application of JCE (Category 3) to sexual violence, ICTY cases again disclose fundamental insights for the future. These insights will also apply to any theory of liability which involves proof that the accused knew of a risk of the

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65 See the above discussion of the *Stakić* case.

66 This insight will also be relevant in the work of the ICC. The theory of co-perpetration being applied by the ICC requires proof of 'an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events'. See *Prosecutor v Lubanga*, (*Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against His Conviction*) (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 A5, 1 December 2014) [434]. See generally, Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence*, above n 22, ch 7.

crimes occurring.<sup>67</sup> To attribute responsibility for sexual violence pursuant to JCE (Category 3), the Prosecution must prove that the sexual violence was a foreseeable consequence of the JCE. That is, the accused person must have been able to foresee the possibility of sexual violence being committed as a result of implementing the common criminal purpose to which he or she subscribed.<sup>68</sup> A key insight is the importance of not automatically assuming that JCE (Category 3) is the only viable mode of liability for sexual violence crimes, without carefully considering whether there is sufficient evidence of the integral role that sexual violence played in the common criminal plan to sustain a JCE (Category 1 or Category 2) charge.

Another fundamental insight is the importance of taking a contextual approach to proving the foreseeability of sexual violence to the JCE member in question. The crimes must be viewed in the overall context in which they were committed and, particularly, in the context of the nature of the common criminal purpose agreed upon by the JCE members. While evidence that the accused knew that the same types of crimes had been previously committed might be one relevant contextual factor, it is not the only one and it is not an essential ingredient in proving foreseeability.

The Krstić case provides a clear example. Radislav Krstić was charged for events following the July 1995 Bosnian-Serb takeover of Srebrenica, when thousands of Bosnian Muslim men and boys were executed and upwards of 25 000 women, children and elderly persons were expelled from the Srebrenica area.<sup>69</sup> In the lead-up to the killings and expulsions, a large component of the Bosnian Muslim population was driven into the UN compound in Potočari, where a campaign of crimes, including sexual violence, was unleashed.<sup>70</sup>

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67 For example, for superior responsibility under ICTY case law, it is sufficient to show that the superior had reason to know of the 'possibility' that subordinates had committed, or were about to commit, sexual violence crimes. See *Prosecutor v Strugar (Judgement)* (Case No IT-01-42-A, Appeals Chamber, 17 July 2008) [304]. For aiding and abetting, the Prosecution must prove that the accused is aware that one of a number of crimes will 'probably' be committed. See *Prosecutor v Simić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-95-9-A, 28 November 2006) [86]. For planning and ordering, it is sufficient to show an awareness of the 'substantial likelihood' that the crime will occur in execution of the plan or order. See *Prosecutor v Kordić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [30]-[31]. For the co-perpetration theory applied by the ICC, the Prosecution must prove that the relevant crimes would happen 'in the ordinary course of events'; see *Prosecutor v Lubanga (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against His Conviction)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 A5, 1 December 2014) [434].

68 *Prosecutor v Đorđević (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) [906].

69 *Prosecutor v Krstić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [1].

70 *Prosecutor v Krstić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [150]-[154], [607]-[618].

In finding that sexual violence was foreseeable in the context of the humanitarian crisis in Potočari, the Trial Chamber did not require evidence that General Krstić knew that the Bosnian Serb Forces who committed the crimes had previously committed sexual violence. Instead, the Trial Chamber drew common sense inferences based on an ordinary understanding of human behaviour, given the prevailing contextual factors and the nature of the common criminal purpose of displacing the women, children and elderly persons from the area. The Trial Chamber emphasised 'the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient UN soldiers to provide protection'.<sup>71</sup> General Krstić knew enough about these prevailing contextual factors to make it foreseeable to him that rape might occur in this environment.<sup>72</sup> The Appeals Chamber endorsed the Trial Chamber's analysis.<sup>73</sup>

The *Kvočka et al* case is another example of a common sense contextual analysis in determining the foreseeability of sexual violence crimes for the purposes of JCE (Category 3) responsibility. In finding that rape was foreseeable in the context of the Omarska prison camp in Prijedor municipality, the Trial Chamber did not require evidence that the accused knew that women had been previously raped in the camp. Instead, the Trial Chamber drew common sense inferences based on an ordinary understanding of human behaviour, given the prevailing contextual factors and given the criminal plan to persecute and subjugate the non-Serb detainees. In particular, the Trial Chamber emphasised that fact that

[a]pproximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent and physically and mentally abusive and who were allowed to act with virtual impunity. Indeed it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence. This is particularly true in light of the clear intent of the criminal enterprise to subject the target group to persecution through such means as violence and humiliation.<sup>74</sup>

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71 *Prosecutor v Krstić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [616].

72 *Prosecutor v Krstić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [616]-[618].

73 *Prosecutor v Krstić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [149].

74 *Prosecutor v Kvočka (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-98-30/1-T, 2 November 2001) [327].

The *Milutinović et al*<sup>75</sup> and *Đorđević*<sup>76</sup> cases, however, provide a reminder of the potential pitfalls when assessing the foreseeability of sexual violence crimes and the risk that higher standards of proof may be applied than for other crimes, due to perceptions about the nature of sexual violence. Both cases involved crimes committed against Kosovo Albanians in Kosovo in 1999.

In the *Milutinović et al* case, the Trial Chamber accepted that there was a JCE to commit forcible displacement crimes.<sup>77</sup> The other crimes charged — namely, murder, sexual assault and destruction of cultural property — were then assessed using JCE (Category 3). For each of the relevant accused persons, the Chamber carried out an individualised assessment to determine whether they could be held liable for each type of crime.

Two of the accused, Šainović and Lukić, were convicted of murder and property damage — but not sexual assault — on the basis of JCE (Category 3).<sup>78</sup> This was despite the fact that the Trial Chamber accepted that sexual assaults had occurred in the course of the ethnic cleansing campaign.<sup>79</sup> For example, Šainović, who was the Deputy Prime Minister of the Federal Republic of Yugoslavia during the events in question, was convicted of destruction of religious property, which the Chamber found he could have reasonably foreseen during the forcible displacement of the Kosovo Albanian population. In reaching this conclusion, the Chamber noted that the conflict involved ethnic divisions and that the common purpose was to be achieved through a campaign of terror and violence against the Kosovo Albanian

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75 *Prosecutor v Milutinović (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009).

76 *Prosecutor v Đorđević (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II Case No IT-05-87/1-T, 23 February 2011).

77 *Prosecutor v Milutinović (Judgement Vol 3)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [94]-[95].

78 *Prosecutor v Milutinović, (Judgement Vol 3)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [470]-[473], [1134]-[1136]. Only in the case of Pavković did the Trial Chamber find responsibility for all of the JCE (Category 3) crimes including sexual assault. The Chamber was satisfied that, given Pavković's detailed knowledge of events on the ground in Kosovo, he was on notice that murders and sexual violence crimes would be committed by the VJ and MUP as a result of the displacements in 1999. There was also specific evidence that he knew that rapes were occurring prior to the sexual assault crimes with which he was charged. See paras 785-6.

79 For example, *Prosecutor v Milutinović (Judgement Vol 3)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [472], [1135]. See further *Prosecutor v Milutinović (Judgement Vol 2)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [622], [688], [874], [1187], [1224].

population.<sup>80</sup> For sexual assault, the Trial Chamber did not carry out the same contextual analysis, but simply noted the absence of any evidence that Šainović knew that sexual assaults were occurring.<sup>81</sup> The implication of the approach taken was that, in the midst of a violent, ethnically driven expulsion campaign, acts of violence like sexual assaults are not foreseeable, even as a possibility, where women and girls are expelled from their homes and separated from their male family members in a highly volatile atmosphere; where they are detained by armed military and police forces; and where there are no effective protective mechanisms in place.

The Prosecution successfully appealed the Trial Chamber's approach to sexual violence under JCE (Category 3).<sup>82</sup> In bringing the appeal, the Prosecution emphasised that the sexual assaults were violent crimes carried out as an integral part of a violent expulsion campaign. The regrettable truth is that we still live in a world where sexual violence against females is commonplace. In the chaos and aggression of conflict, when normal social structures have broken down, the risk is higher again. Certainly, in the midst of a violent ethnic cleansing campaign like the one in Kosovo in 1999, to say that sexual assault was not even a foreseeable possibility is to close our eyes to human experience. This experience confirms that the violent acts committed against females often take on different dimensions from those of the violent acts committed against males in a context like the 1999 expulsion campaign in Kosovo. It is important that the law recognises and responds appropriately to the experiences of all.

A similar issue arose in the *Dorđević* case, based on facts parallel to those in the *Milutinović et al* case.<sup>83</sup> In ruling on the Prosecution's grounds of appeal concerning sexual assault, the *Dorđević* Appeals Chamber underscored that sexual violence crimes

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80 *Prosecutor v Milutinović I (Judgement Vol 3)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [473].

81 *Prosecutor v Milutinović (Judgement Vol 3)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [472]. The reasoning regarding Lukić was similar; see *Prosecutor v Milutinović (Judgement Vol 3)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [1135]-[1136]. Judge Chowhan issued a partially dissenting opinion concerning the treatment of sexual assault as a JCE (Category 3) crime. In his view, in the context of the conflict under consideration and in the midst of carrying out an ethnic cleansing campaign, including the removal of women from their homes, it was foreseeable that sexual assaults would happen. Judge Chowhan considered this to be a matter of 'prudence and common sense, as well as the past history of conflicts in the region'; *Prosecutor v Milutinović (Judgement Vol 3)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [481].

82 *Prosecutor v Šainović (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [1550]-[1592].

83 *Prosecutor v Dorđević (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) [904]-[929].



'must not be treated differently from other violent acts simply because of their sexual component'.<sup>84</sup> This statement, issued twenty years after the ICTY first commenced its operations, constitutes one of the most fundamental components of ICTY case law regarding sexual violence crimes, and it provides a crucial platform for the future prosecution of this category of crimes.

### Some Other Priorities for the Future, Based on ICTY Experience

#### 1. *The Need for a More Co-Ordinated Approach to Building Global Capacity for Prosecuting Conflict-Related Sexual Violence Crimes*

When the ICTY was created and the Office of the Prosecutor began its work, few knew that it would form the foundations for a broader, enduring international criminal justice system, comprising other ad hoc and hybrid courts and tribunals and ultimately the ICC. Back in the mid-1990s, it was also difficult to foresee that, two decades later, there would be numerous national processes around the globe — from Bosnia and Herzegovina to Colombia, from Kenya to Uganda — seeking to establish accountability for conflict-related crimes, including sexual violence. To this we can also add the proliferation of international investigation commissions that have been created to document conflict-related atrocities — including sexual violence — over the past two decades.<sup>85</sup> This is a trend that looks set to continue.<sup>86</sup>

In retrospect, we could have paid more attention as we went along to setting up formalised structures for sharing information and expertise between practitioners working on the documentation and/or prosecution of conflict-related sexual violence crimes. Given the particular challenges associated with these crimes and the need for more progressive and developed approaches, having a forum for interested practitioners to collectively problem-solve, collate best practices and progress their legal strategies would afford many benefits. It would ensure that expertise developed at the international level can be effectively channelled to practitioners working on cases at the national level and vice versa. It would also ensure that practitioners at

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84 *Prosecutor v Đorđević (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) [887].

85 For example, Rob Grace and Claude Bruderlein, 'Building Effective Monitoring, Reporting and Fact-Finding Mechanisms' (HPCR Draft Working Paper: Program on Humanitarian Policy and Conflict Research, Harvard University, April 2012) <<http://www.hpcrresearch.org/publications/applied-research/hpcr-research-and-working-papers>>.

86 For example, the UN Human Rights Council has requested a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties to the conflict in Sri Lanka. See *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*, HRC Res 25/1, 25<sup>th</sup> sess, Agenda Item 2, UN Doc A/HRC/RES/25/1 (9 April 2014).

the national level in countries around the world could share their experiences with each other. Recognising the pressing need for such a forum, in September 2015, the International Association of Prosecutors, supported by the ICTY Office of the Prosecutor, established a Prosecuting Conflict-Related Sexual Violence (PSV) Network.<sup>87</sup> The PSV Network is working on a range of initiatives to facilitate the prosecution of conflict-related sexual violence around the world.

More generally, additional thought is needed about how to best build capacity at the national level for conflict-related sexual violence prosecutions in a co-ordinated way. National capacity-building efforts on transitional justice issues in general tend to suffer from a proliferation of ad hoc initiatives by a myriad of donors, often implemented in isolation from each other.<sup>88</sup> The problem can be exacerbated in the context of sexual violence crimes, given the specific challenges associated with these cases,<sup>89</sup> making co-ordinated approaches all the more important. Moreover, we now have a real opportunity both to collect and distil the experience of the ad hoc and hybrid courts and tribunals in prosecuting conflict-related sexual violence crimes over the past two decades and to transform this experience into concrete and practical guidance for the future.

## 2. *Preventing Sexual Violence — 'Command Responsibility in Real Time'*

Although the ICTY has focused on accountability for sexual violence crimes that have already occurred, our experience also provides glimpses into some creative options for preventing conflict-related sexual violence. In particular, the principle of command (or superior) responsibility could be better mobilised to breathe more life into the duties of commanders to prevent sexual violence as a conflict is unfolding — 'command responsibility in real time'.

Often, in our discussions of preventing conflict-related sexual violence — indeed of preventing all atrocities — we gloss over the crucial role that commanders should play. Lawyers tend to think about command responsibility after the fact and

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87 Prosecuting Conflict-related Sexual Violence Network <<http://www.iap-association.org/PSV/Home>>.

88 One initiative aiming to address this problem is the International Legal Assistance Consortium. See International Legal Assistance Consortium <<http://www.ilacnet.org/>>. (The Consortium notes: 'The international community plays a prominent role in assisting nations to rebuild their justice systems shattered by war and conflict. And while some of these efforts have been successful, all too often international organisations offering assistance arrive in countries uninvited, each acting independently of one another, often duplicating efforts or working at cross purposes'.)

89 For example, Prosecution of Wartime Sexualized Violence at the Court of Bosnia and Herzegovina: What Happened to the Interests of Justice? (Association Alumni of the Centre for Interdisciplinary Postgraduate Studies, 2012).

in the context of criminal prosecutions where an assessment is made about whether superiors have lived up to their obligations. However, we should not lose sight of the fact that the legal doctrine developed due to the unique capacity that commanders have to prevent violations of international humanitarian law. A 2004 International Committee of the Red Cross study dramatically underscores this point. After surveying some 15 000 civilians and combatants in fifteen war zones and reviewing the available literature, the ICRC concluded that

the main thing is not to persuade combatants that they must behave in a different way, or to win them over personally, but to influence the people who have ascendancy over them ...<sup>90</sup>

One simple idea from ICTY experience illustrates the potential benefits of focusing on 'command responsibility in real time'. The ICTY Office of the Prosecutor has been able to prove that commanders were on notice of crimes by showing that they were provided with external information documenting the crimes, such as Security Council Resolutions, media reports, NGO reports and so on.<sup>91</sup> In some cases, correspondence detailing crimes sent from the ICTY Prosecutor to senior officials in the midst of the conflict has been used to prove that they were on notice of the crimes.<sup>92</sup> This underscores the importance of ensuring that information about conflict-related sexual violence is contemporaneously collected and immediately dispatched to military commanders (and other superiors) mid-conflict, along with a demand for action in accordance with their legal obligations. In the best-case scenario, it may prompt them to take preventative action. In the worst-case scenario, it can be an evidentiary source for subsequently holding them accountable if they fail to act in accordance with their legal duties. We tend to assume that appealing to commanders in real time to stop violations will be futile. However, reports from the field suggest that, sometimes, simply educating commanders about the law and pointing out the consequences of failing to comply with their duties can yield positive

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90 Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' (ICRC, 2004) 16.

91 For example, *Prosecutor v Perišić (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-04-81-T, 6 September 2011) [1567]-[1579]. See further Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence*, above n 22, ch 7.

92 For example, *Prosecutor v Milutinović (Judgement Vol 3)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [464]. The Appeals Chamber confirmed the Trial Chamber's reliance on Louise Arbour's letter as evidence that Šainović received information that crimes were being committed. *Prosecutor v Šainović (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [1034].

results.<sup>93</sup> When it comes to sexual violence crimes, it is important to ensure that any such communications with commanders contain sufficient details to put them on notice that sexual violence crimes specifically might have been committed by their subordinates.

Another obvious avenue for moving towards a more robust notion of command responsibility would be for governments to condition support for any party to a conflict on a proper climate of command, control and compliance with the law. Once again, it would be important, first, to specify that such a command climate must be one that has zero tolerance for sexual violence crimes and, second, to take action to withdraw support if that standard is not met. This would provide a powerful incentive for the parties to the conflict to prevent sexual violence and other atrocities. It may also prove to be a prudent step in limiting potential criminal responsibility for assisting any crimes that do occur.<sup>94</sup>

### *3. Recognising the Far-Reaching Benefits of a Gender Analysis in International Criminal Law: Learning Lessons from Sexual Violence Cases*

The interests of fairness and justice require accountability for sexual violence crimes as for any other category of atrocities committed during conflict. However, beyond this fundamental objective of equal access to justice for victims of sexual violence, we are beginning to increasingly see how better approaches to sexual violence crimes can trigger improvements to the framework of international criminal law more broadly. For example, by appealing the sexual violence acquittals in the *Šainović et al* and *Djordjević* cases described above, the ICTY Office of the Prosecutor not only reversed damaging precedents for sexual violence cases, but also entrenched a contextual approach to assessing foreseeability which will be important for all categories of crimes in the future.

Another example arises in the context of genocide, where the challenge of reinterpreting the crime to include sexual violence has helped us to better understand

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93 For example, Peter Bouckaert, 'Face to Face with Colonel Zabadi', *New York Times*, 11 December 2013 <[http://www.nytimes.com/2013/12/12/opinion/face-to-face-with-colonel-zabadi.html?\\_r=0](http://www.nytimes.com/2013/12/12/opinion/face-to-face-with-colonel-zabadi.html?_r=0)>. Describing a conversation in which he confronted Colonel Zabadi, a rebel commander in the Central African Republic, with reports of crimes for which he was responsible, and the surprisingly positive reaction that followed.

94 According to the ICTY's case law, aiding and abetting liability does not depend upon the accused having 'specifically directed' assistance to the commission of a crime. It is sufficient if the accused has knowledge that the assistance will make a substantial contribution to the commission of the crime. *Prosecutor v Šainović (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [1649].

and articulate the legal framework of genocide more generally. In particular, this has helped us to dispel the misconception that genocide covers only cases where whole national groups — men, women and children alike — are targeted with killing.

More specifically, our perceptions of what falls within the legal framework of genocide have been very much bound up in the historical examples we associate with the crime of genocide — particularly the Holocaust, and more recently Rwanda, where killings were the overwhelming feature. However, a plain reading of the Genocide Convention (as reflected in ICTY Statute Article 4(2)(b)-(e)) confirms that genocide covers a range of destructive acts, such as serious bodily or mental harm, which do not necessarily result in the death of the individual members of the group.<sup>95</sup> Sexual violence, as confirmed in the ICTR line of authority starting with *Akayesu*,<sup>96</sup> is an example of an act other than killing that can be inflicted with genocidal intent. By bringing forward the first crucial cases in which sexual violence was presented as an underlying act of genocide, we had to fundamentally rethink our assumptions about genocide, ultimately arriving at an interpretation that would more accurately recognise the full range of acts that are directed towards both males and females as part of a campaign of destruction.<sup>97</sup>

Building on these precedents, the ICTY Office of the Prosecutor has crafted a more nuanced argument concerning genocide in its final cases of *Karadžić* and *Mladić*, in order to more accurately reflect the legal framework of genocide.<sup>98</sup> As the Prosecution has argued, the intent to destroy a community must be assessed against the total effect of the destructive acts that the accused intends to inflict on that community and cannot be parsed out into isolated and disconnected events. Viewing all destructive acts, including sexual violence, in their proper context has helped to refocus attention on the essence of the crime of genocide: the infliction of destructive acts designed to shatter the essential foundations of the life of the targeted group.<sup>99</sup>

95 See, for example, *Prosecutor v Tolimir (Judgement)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-05-88/2-T, 12 December 2012) [764] (emphasising that 'the physical or biological destruction of a group is not necessarily the death of the group members').

96 *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [731]-[733].

97 See further, Brammertz and Jarvis, *Prosecuting Conflict-Related Sexual Violence*, above n 22, ch 6.

98 For example, *Prosecutor v Karadžić (Prosecution's Final Trial Brief)* (International Criminal Tribunal for the former Yugoslavia, Case No IT-95-5/18-T, 29 August 2014) [573]-[577].

99 See also *Prosecutor v Karadžić (Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence)* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-95-18-R61, 11 July 1996) [95]. ('At this stage, the Trial Chamber considers that certain acts submitted for review could have been planned or ordered with a genocidal intent. This intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.')

CONCLUSION

It is a real measure of progress that one of the fundamental tenets to emerge from international criminal law over the past two decades is the importance of prosecuting sexual violence crimes. Having put accountability for sexual violence crimes on the agenda in a meaningful way, we now need to continue challenging our misconceptions around these crimes in order to develop more effective approaches, particularly when it comes to cases involving senior officials.

While the problematic misconceptions around sexual violence have sometimes led to double standards and the imposition of higher-proof thresholds, at least the issue has been visible. The challenge in moving the gender critique beyond sexual violence is that many other relevant issues remain hidden. We are yet to properly identify the full extent of women's distinctive experience in conflict and the relevance of this to international criminal law. Part of the problem is that women's voices are still not fully heard in international criminal justice processes, and so their experiences remain obscured.<sup>100</sup> Increasingly, though, a more detailed picture is emerging. We know, for example, that there are likely to be gender differentials when it comes to crimes like forcible transfer, deportation and unlawful attacks on civilians. It also seems likely that the types of fundamental rights violated as part of a persecution campaign will have a gender dimension.<sup>101</sup> These are places where international criminal law prosecutors should focus in the future. For the third wave of international justice, we should aspire to add to our growing list of fundamental tenets underpinning international criminal law a broader principal: that armed conflict and mass atrocity affects males and females differently and that the harms done to all should be equally recognised and addressed.

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100 For example, women have formed a minority of the witnesses called to testify in ICTY proceedings. See Jarvis, above n 17, 157, 188.

101 See, for example, Brammertz and Jarvis, 'Lessons Learned in Prosecuting Gender Crimes', above n 12, 96, 98-100.



# 6

## THE CONSTRUCTION OF KNOWLEDGE ABOUT WOMEN, WAR AND ACCESS TO JUSTICE

USTINIA DOLGOPOL<sup>1</sup>

### INTRODUCTION

How do academics and activists obtain their knowledge of the experiences of women and then utilise that knowledge to frame debates about the rights and interests of those who have been subjected to violence? As scholars, we engage in debates about the framing of legal rules and we critique and perhaps help to create the systems that claim to be responsive to the rights and interests of women. Although Emeritus Professor Judith Gardam [Professor Gardam] would describe herself as a scholar, it is possible to argue that she, like many others, by opening up areas of debate and challenging our conceptions about the structure of the law, fits into the category of individuals sometimes described as 'transboundary actors'.<sup>2</sup> Such individuals engage with international law and international politics, sometimes directly, sometimes through organisations and, it could be argued, through their publications. Scholarship has the capacity to influence the manner in which issues are debated nationally and internationally.<sup>3</sup>

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1 Associate Professor of Law, Flinders University of South Australia.

2 Cenap Çakmak, 'Civil Society Actors in International Law and World Politics: Definition, Conceptual Framework, Problems' (2008) 6 *International Journal of Civil Society Law* 7, 11.

3 Patricia Viseur Sellers, Keynote Address at the 'Gender Strategy is Not Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before Internationalized Criminal



International law and international relations scholars have focused on the role of non-state actors in the formulation of legal rules and in the delivery of services connected to development, human rights and gender equality.<sup>4</sup> Some authors have considered the manner in which groups and individuals who might be referred to as transboundary actors have challenged the state-centric ethos that has permeated international law and international institutions.<sup>5</sup> In part, these individuals and groups seek to participate in what might be termed international governance.<sup>6</sup> However, many also recognise and discuss the negative power of the law, both in terms of its content and the manner in which the language of the law shapes our understanding of world events and the experiences of individuals.<sup>7</sup> Academics are one of the groups that have contributed to, and will continue to develop, the content of international law and its application by international institutions.<sup>8</sup> The work of academics often contains challenges to the structure of the law, while at the same time demonstrating mastery of its rules.<sup>9</sup>

Through her writing on international humanitarian law (IHL), Professor Gardam has continuously worked to demonstrate both the failure of the present rules to protect and foster the interests of women<sup>10</sup> and the attitudes that influence

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Courts' [2009] 17 *Journal of Gender, Social Policy & the Law* 303, 306 (describing the work of those calling on the Secretary-General 'to enumerate crimes of sexual violence in the statute [for the International Tribunal for the Former Yugoslavia]'); Judith Gardam, 'A New Frontline for Feminism and International Humanitarian Law' in Margaret Davies and Vanessa E Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 217 (describing the 'partnership between scholarship and advocacy'). See also The Office of the Prosecutor, *Policy Paper on Sexual and Gender Based Crimes* (June 2014) International Criminal Court, 108 <<https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>> ('OTP Policy Paper').

4 Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004); Thomas G Weiss, Conor Seyle and Kelsey Coolidge, *The Rise of Non-State Actors in Global Governance: Opportunities and Limitations* (One Earth Future Foundation, 2013).

5 Çakmak, above n 2.

6 Weiss, Seyle and Coolidge, above n 4.

7 Michel Foucault, *The Archaeology of Knowledge & The Discourse on Language* (Pantheon Books, 1972) 318-19, 324-5; Ayça Çubukçu, 'On Cosmopolitan Occupations' (2011) 13(3) *Interventions: International Journal of Postcolonial Studies* 422, 434-8.

8 Sellers, above n 3, 6, 9; Mark Tushnet, 'Academics as Law Makers' (2010) *University of Queensland Law Journal* 19, 19-20.

9 For example, Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000).

10 Gardam, 'A New Frontline for Feminism and International Humanitarian Law', above n 3; Judith Gardam and Michelle Jarvis, 'Women and Armed Conflict: The International Response to the Beijing Platform for Action' (2000-01) 32 *Columbia Human Rights Law Review* 1; Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence' (1997) 46 *International and Comparative Law Quarterly* 55.

the manner in which those rules are interpreted and implemented.<sup>11</sup> Professor Gardam's insights, based on a feminist/gender-sensitive analysis, have served as an inspiration to many of us. Although she might not characterise her work in the same manner, my reading of her publications with respect to women and the experience of armed conflict indicates it has two overarching themes. The first is the necessity for institutions and individual actors in the international arena to develop a stronger, more nuanced understanding of the concept of equality — in particular, one that embraces the necessity of changing the stereotypic attitudes about the position of women in society<sup>12</sup> that affect the work of those engaged with the development and implementation of international law. Second, there is the importance of remaining somewhat skeptical about the language and power of the law, in particular, the manner in which it can exclude particular groups or voices.<sup>13</sup>

These themes are as relevant to the interplay between international human rights law (IHRL) and international criminal law (ICL) as they are to IHL. Despite the concepts of equality between men and women and equality before the law being considered basic tenets of the international legal system,<sup>14</sup> many of the actors that compromise the international community have not embraced the necessity of examining the extent to which their own practices discriminate against women and affect women's ability to be fully integrated and respected members of their communities. '[W]omen throughout the world remain amongst the poorest and most marginalised, with limited access to rights, resources and opportunities.'<sup>15</sup> In a recent piece, Professor Gardam queried whether the focus on the criminalisation of sexual violence in the feminist literature had distracted our attention from both the myriad forms of violence and discrimination which women face in their daily

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11 Gardam, 'A New Frontline for Feminism and International Humanitarian Law', above n 3.

12 *Convention on the Elimination of Discrimination Against Women* ('CEDAW'), signed 18 December 1979, 1249 UNTS 13; Elizabeth Sepper, 'Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns under the Women's Discrimination Treaty' (2008) 30(2) *University of Pennsylvania Journal of International Law* 93.

13 Gardam, 'A New Frontline for Feminism and International Humanitarian Law', above n 3; Gardam, 'Women and the Law of Armed Conflict: Why the Silence', above n 10; Ustinia Dolgopol, 'Knowledge and Responsibility: The Ongoing Consequences of Failing to Give Sufficient Attention to the Crimes against the Comfort Women in the Tokyo Trial' in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff Publishers, 2011).

14 *Charter of the United Nations* art 1(3); *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810, 71 (1948), arts 7, 10; Committee on the Elimination of Discrimination against Women (CEDAW), *Communication No 18/200*, 46<sup>th</sup> sess, CEDAW/C/46/D/18/2008, (16 July 2010) ('*Vertido v Philippines*').

15 Navanthem Pillay, 'Women's Rights in Human Rights Systems: Past, Present and Future' (2009) 13 *Law, Democracy & Development* 36, 38.

lives and the 'endemic discrimination' that feeds into the effect of armed conflict on women, including their access to food, health care, education, and their ability to participate in the life of the community.<sup>16</sup>

Whilst I agree that the underlying prejudices that precede a conflict compound the suffering and horror experienced by women during a war and negatively affect their ability to participate in peace negotiations as well as the transition to new political, social and legal orders,<sup>17</sup> where I would differ from Professor Gardam is her view that 'the topic [of sexual violence] is exhausted'.<sup>18</sup> To me, the continued difficulties that women who have experienced sexual violence face in obtaining access to justice both domestically and internationally are an indication that women continue to be marginalised by domestic and international legal systems, and that these systems are marred by the persistence of negative attitudes to women that undermine a woman's right to the physical integrity of her person. As noted by the former United Nations High Commissioner for Human Rights, '[i]nequality in the law exists in all regions of the world and in all legal traditions'.<sup>19</sup>

My views, whilst in many ways not different from Professor Gardam's, are based on the premise that attitudes to crimes of sexual violence are reflective of the continued deep-seated lack of equality for women, both within nation states and in the operation of international law and international institutions. It is also the case that if steps are taken to improve women's access to justice, then the changes to law, policy and practice that will have to take place as a result are likely to improve the chances that other marginalised or disadvantaged groups will be able to access a justice system that is more responsive to their needs.<sup>20</sup> In light of the effect that academic commentaries and critiques can have on the attitudes of those working in international institutions,<sup>21</sup> the following chapter puts forward the view that the work related to sexual and other forms of gendered violence is not finished. It

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16 Gardam, 'A New Frontline for Feminism and International Humanitarian Law', above n 3, 219. See also Judith Gardam, 'War, Law, Terror, Nothing New for Women' (2010) 32 *Australian Feminist Law Journal* 61, 71.

17 Fionnuala Ní Aoláin and Catherine Turner, 'Gender, Truth and Transition' (2007) 16 *UCLA Women's Law Journal* 229.

18 Gardam, 'A New Frontline for Feminism and International Humanitarian Law', above n 3, 219. I would agree with Professor Gardam's questioning of the concept of sexual agency being a useful analytical tool in the context of armed conflict. As she notes: 'to talk of sexual and political agency for anyone during such times of social disintegration takes on a somewhat unrealistic air'.

19 Pillay, above n 15, 39.

20 Various groups in society are in need of targeted health care services, shelters, investigators and law enforcement personnel trained to understand their specific needs and to act in a manner that is sensitive to their situation and respects their human rights.

21 Sellers, above n 3; Tushnet, above n 8.

continues to be vital that some international relations and international law scholars concerned with the effect of armed conflict on women examine and critique the manner in which such crimes are conceptualised and addressed by the international community.

The discussion below commences with an overview of the barriers that women face in seeking justice for crimes committed against them in the context of armed conflict. As the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) has responded to some of these concerns in its Policy Paper on Sexual and Gender Based Crimes,<sup>22</sup> this chapter includes a discussion of some of the key aspects of that paper. In the final section of the chapter, I argue that it is necessary to remind ourselves of the strengths and weaknesses in our legal structures and of the manner in which these structures can affect those who have been subjected to crimes of violence, including sexual violence, in times of conflict.

### THE EFFECT OF GENDERED ATTITUDES ON JUSTICE FOR WOMEN

The global failure of justice systems to provide equal access to justice is highlighted in the following observation by UN Women:

All over the world, the justice chain is characterized by high levels of attrition, whereby most cases drop out of the justice system before they reach court and very few result in a conviction. Attrition is a particular problem in rape cases ... Data on sexual violence and robbery show the extent of the problems of under-reporting and attrition. Across 57 countries, on average 10 percent of women say they have experienced sexual assault, but of these only 11 percent reported it. This compares to a similar incidence of robbery, on average 8 percent, but a reporting rate of 38 percent. This pattern is evident in countries across all regions.<sup>23</sup>

Systemic failures are compounded by community attitudes to women and the reporting of sexual violence crimes. 'Sexual violence is the only crime for which the victim is sometimes more stigmatized than the perpetrator, with women who report such crimes being shunned by their families and communities.'<sup>24</sup> A desire to promote women's empowerment and agency cannot benefit the interests of women if it ignores women's lived experience. It may be that some western feminists have

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22 *OTP Policy Paper*, above n 3.

23 UN Women in Pursuit of Justice, *Progress of the World's Women: In Pursuit of Justice* (UN Women, 2011) 49, 51.

24 *Ibid* 52.

utilised an essentialist notion of women and women's rights<sup>25</sup> in working for change at the international level. However, these shortcomings cannot blind us to the core of the problem that women globally are not able to trust the justice systems in their own countries or to the fact that for many women justice sector personnel are adding to the trauma they have experienced.

When individuals move from their domestic legal systems to international tribunals or the ICC, it cannot be assumed that they will leave behind the prejudices and negative assumptions about women who have experienced sexual violence. The manner in which gendered attitudes and practices can influence the investigation and prosecution of crimes is beautifully articulated by Patricia Sellers in her speech entitled 'Gender Strategy Is Not a Luxury for International Courts'.<sup>26</sup> She highlights the manner in which either a lack of appreciation of gender or an animosity to work emphasising gender has affected the trial process and working environment in the International Criminal Tribunal for the Former Yugoslavia (ICTY). She then goes on to describe how a gender strategy encompassing both the internal workings of an institution as well as its interactions with locally affected communities can have a profound effect on the scope and direction of investigations. When the ICTY adopted an internal policy document that made specific reference to the importance of having gender-integrated teams that was underscored by the belief that male colleagues

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25 Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Law School Human Rights Journal* 1. Ratna Kapur has critiqued some of the domestic campaigns related to violence against women (as distinct from issues associated with the International Criminal Court and crimes of sexual violence) because of their use of images of powerless 'native subjects' and the failure to comprehensively address the multifaceted reasons why particular women may become targets of violence. Her concerns about creating an image of women who lack any semblance of control over their lives is valid. However, the comments she makes do not detract from the importance of finding ways of making legal institutions more responsive to the rights and interests of women (although she encourages groups and individuals to engage in activities that go beyond an appeal to state power). Non-government organisations such as the Women's Initiatives for Gender Justice seek to empower women and ensure that their voices and concerns are included in assessments of the manner in which international law affects the lives of women. Both the Chair's Summary and the Statement of Action following the Global Summit to End Sexual Violence in Conflict refer to the power of the advocacy undertaken by those affected by such crimes in focusing the world's attention on the need to end impunity and to find ways of ensuring accountability for perpetrators. See Foreign & Commonwealth Office and the Rt Hon William Hague, *Chair's Summary — Global Summit to End Sexual Violence in Conflict* (13 June 2014) UK Government <<https://www.gov.uk/government/publications/chairs-summary-global-summit-to-end-sexual-violence-in-conflict/chairs-summary-global-summit-to-end-sexual-violence-in-conflict>>; see Foreign & Commonwealth Office and the Rt Hon William Hague, *The Statement of Action following the Global Summit to End Sexual Violence in Conflict* (13 June 2014) UK Government <<https://www.gov.uk/government/publications/statement-of-action-global-summit-to-end-sexual-violence-in-conflict>>.

26 Sellers, above n 3, 310-11.

should work in a manner that demonstrated respect for their female colleagues, the analysis of information available to investigators became more sensitive to the possibility that crimes of sexual violence were connected to the nature of command responsibilities and that connections could be made with the movement of particular troops. Previously, in contrast, some investigations had assumed that crimes of sexual violence were the result of a 'frolic and detour' by individual soldiers.<sup>27</sup>

Sellers's address also details some of the changes to practice and procedure which had a positive influence on the manner in which sexual and gender crimes were addressed, in particular the crime of rape.<sup>28</sup> These positive changes are examples of the types of issues that should be addressed at the domestic level at the time countries are considering ratification of the Rome Statute. They should also be made by all countries that are parties to the Statute, as they could have an ameliorating effect on the discriminatory processes now inherent in domestic justice systems. This is not to suggest that utilising the rules of procedures of the ICC or other tribunals will be sufficient, but eliminating rules of evidence that assume women are unreliable witnesses, training police in the utilisation of interviewing and investigative techniques that do not demean women, and creating support services for those affected by such crimes will at least allow for some progress in the treatment of women by the justice sector.<sup>29</sup>

The attitudes and assumptions that influenced the approaches of professionals working at the ICTY also are discussed in the work of Sharratt.<sup>30</sup> She found that many of them believed that their 'professionalism' provided them with a sufficient understanding of the issues they would have to deal with when prosecuting crimes of a sexual nature, and that training about gender and the needs and interests of victims who had endured these types of crimes was not necessary. One of the individuals surveyed had the following to say:

I don't think there is a difference between male and female judges. Do you know why? Because it's all about the skill. All occupations are the same, whether you are a dentist, gynaecologist, baker, butcher, or a bus driver, you have to know the essence, the core of that profession.<sup>31</sup>

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27 Ibid 310.

28 Ibid 306.

29 Ustinia Dolgopol, 'A role for the Rome Statute system in gender-focused reform of criminal laws and procedures in the Pacific Islands' (2012) 18(2) *Australian Journal of Human Rights* 109; UN Women In Pursuit of Justice, above n 23.

30 Sara Sharratt, *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals* (Ashgate, 2011).

31 Ibid 54 (Male Prosecutor, BiH).

In contrast one of the female judges had this to say:

I often found myself tutoring my male colleagues on what it means to a woman to be raped. You have to be insistent that this was a serious crime and they could not have consented under the situation that they were in [captivity].<sup>32</sup>

The focus of much of the literature cited by Professor Gardam critiquing the emphasis given to crimes of sexual violence<sup>33</sup> is on the international prosecution of crimes of sexual violence. What is being overlooked is that the vast majority of crimes committed against women (as well as crimes committed against men and boys which have a gender component) will be left to domestic legal systems.<sup>34</sup> The ICC's jurisdiction is 'limited to the most serious crimes of concern to the international community as a whole'.<sup>35</sup> In adopting the Rome Statute, the international community focused on the idea of complementarity — that is, that national legal systems would undertake the majority of prosecutions, and that, in determining whether or not to exercise its jurisdiction, the ICC should have regard to whether or not such prosecutions were taking place.<sup>36</sup> The phrase 'the Rome Statute system' has come to symbolise the relationship between the ICC and national legal institutions.<sup>37</sup> As noted above, the majority of the world's legal systems continue to fail women (and girls) in providing justice to those who have been subjected to crimes of sexual violence.<sup>38</sup> Chappell, Grey and Waller have utilised the phrase the 'gender justice shadow' to describe the gap between the more gender-sensitive provisions of the Rome Statute as well as the ICC's Rules of Evidence and Procedure and the national legal systems that will handle the majority of conflict related crimes.<sup>39</sup> They focus on the requirement of

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32 Ibid 57 (Female Senior Judge, ICTY).

33 Gardam, 'A New Frontline for Feminism and International Humanitarian Law', above n 3, 224-5.

34 Dolgopol, 'A role for the Rome Statute system', above n 29.

35 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 5 ('*Rome Statute*').

36 Ibid 1, 17.

37 The term 'Rome Statute system' is described in documents produced by the Bureau of the Assembly of States Parties, *Report of the Bureau on Complementarity*, Assembly of States Parties, 13<sup>th</sup> sess, The Hague, ICC-ASP/11/24 (7 November 2012) 5; International Criminal Court, *Report of the Court on Complementarity*, Assembly of States Parties, 13<sup>th</sup> sess, The Hague, ICC-ASP/11/39 (16 October 2012); International Criminal Court, *Report of the Court on Complementarity*, Assembly of States Parties, 13<sup>th</sup> sess, The Hague, ICC-ASP/11/39 (16 October 2012) 58.

38 The Office of the Prosecutor has highlighted the importance of States Parties adopting legislation as well as rules of procedure and evidence that encompass the full range of crimes and foster gender-sensitive investigations and prosecutions. See *OTP Policy Paper*, above n 3, 105. See also Chair's Summary — Global Summit, above n 25, section on Accountability.

39 Louise Chappell, Rosemary Grey and Emily Waller, 'The Gender Justice Shadow of Complementarity: Lessons for the International Criminal Court's Preliminary Examinations in Guinea and Colombia' (2013) 7 *The International Journal of Transitional Justice* 455.

the Rome Statute that, in determining whether or not a case is admissible, the Court should have regard to a state's ability or willingness to investigate or prosecute a case.<sup>40</sup> Thus far, the OTP has determined whether or not a state is unable or unwilling to prosecute by reviewing the efforts of the national legal system to investigate or bring proceedings against the 'same person' for the 'same conduct' that is of interest to the OTP. This test can be satisfied if the person is being prosecuted for 'an ordinary crime under the domestic penal code'.<sup>41</sup> However, the available evidence suggests that many national legal systems either do not contain the full range of crimes articulated in the Rome Statute or define such crimes in a manner that would be at odds with the Elements of Crimes Annex to the Statute.<sup>42</sup>

Chappell et al argue that when applying the 'Article 17 complementarity test' the OTP should consider 'the level of state-sponsored (or state-tolerating) gender discrimination in the criminal justice system'.<sup>43</sup> They also highlight the possible denigration of the seriousness of sexual violence crimes if a state chooses to charge them as ordinary crimes rather than as war crimes or crimes against humanity. If a state were to charge rape

as an ordinary crime ... [it would not] capture the systematic, policy-driven character of the rape that is implicit in a charge of crimes against humanity or the link between sexual violence and armed conflict that is implicit when rape is charged as a war crime ... [O]rdinary sexual violence crimes may be easier to prove ... [but] they do not necessarily locate the violence in its political context.<sup>44</sup>

As the authors note, this overlooks the manner in which commanders view the commission of such crimes as part of their strategy.<sup>45</sup>

When discussing crimes of sexual violence we cannot overlook the fact that such crimes, along with other forms of mass atrocities, may be viewed as tactics of warfare because they can instil fear in a population, assist in gaining control over territory, may assist in uniting troops of disparate backgrounds or because commanders are

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40 *Rome Statute*, above n 35, art 5; Chappell, Grey and Waller, above n 39, 459.

41 Chappell, Grey and Waller, above n 39, 459-60.

42 UN Women in Pursuit of Justice, above n 23; see also Dolgopol, 'A role for the Rome Statute system', above n 29; SC Res 2106, UN SCOR, 6984<sup>th</sup> mtg, UN Doc S/RES/2106 (24 June 2013) 2 ('which encourages Member States to include the full range of crimes of sexual violence in national penal legislation to enable prosecutions for such acts ...').

43 Chappell, Grey and Waller, above n 39, 462.

44 *Ibid.*

45 *Ibid.*



aware that recruits view them as one of the incentives to their participation in the armed conflict.<sup>46</sup>

It is useful to remember that the judgments of the various national and international tribunals with respect to war crimes, crimes against humanity and genocide become part of the historical record associated with a conflict.<sup>47</sup> These institutions can only make determinations based on the evidence before them. What view of a conflict will exist when witnesses subjected to sexual violence are not able to testify to that violence due to a failure to charge specific crimes which results in a trial chamber ruling that any evidence of such crimes is inadmissible?<sup>48</sup> Similarly, how does a society understand its history if domestic authorities cannot charge crimes such as sexual slavery or forced pregnancy because such crimes do not exist in the national penal code?<sup>49</sup>

There is a connection between these issues and the efforts to improve the rule of law in societies undergoing the transition from conflict to peace. The priorities of a new regime and the international community with respect to assistance are related, in part, to an understanding of both the factors contributing to a conflict and the harms that were inflicted during the conflict. Fionnuala Ní Aoláin has critiqued both national and international transitional justice mechanisms as part of a 'nexus of complementary patriarchies', and argues that there is an 'interplay between western and local masculinities' in the creation and delivery of justice and security sector services after conflict.<sup>50</sup>

As indicated above, the thesis of this contribution is that crimes of sexual violence are a manifestation of the status of women both within their own societies and, one could argue, globally.<sup>51</sup> If violence against women, including sexual and

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46 Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 *The International Journal of Transitional Justice* 434, 445-6.

47 Nicola Henry, 'The Fixation on Wartime Rape: Feminist Critique and International Criminal Law' (2014) 23 *Social & Legal Studies* 93, 96; see also Ustinia Dolgopol, 'Redressing Partial Justice — A Possible Role for Civil Society' in Ustinia Dolgopol and Judith Gardam (eds), *The Challenge of Conflict: International Law Responds* (Martinus Nijhoff, 2006); Martha Minow, *Between Vengeance and Forgiveness, Facing History after Genocide and Mass Violence* (Beacon Press, 1998).

48 See Sellers, Keynote Address, above n 3, 316. Sellers discusses the problems faced by witnesses testifying in the *Civil Defence Forces* case before the Special Court for Sierra Leone. The failure to charge crimes of sexual violence also placed the witnesses in the unenviable position of having to testify to a limited range of the crimes committed against them.

49 Chappell, Grey and Waller, above n 39, 474.

50 Fionnuala Ní Aoláin, 'Women, Security, and the Patriarchy of Internationalized Transitional Justice' (2009) 21 *Human Rights Quarterly* 1055, 1057.

51 See *OTP Policy Paper*, above n 3, 3-4. The connection between inequalities in the position of women and men and the nature of crimes committed against individuals is considered to be one of the

gender-based violence, remains endemic in the majority of countries around the world,<sup>52</sup> then it remains the case that women's search for equality in all spheres of their lives remains under threat. I do not want to be misunderstood as suggesting that our analysis of whether or not the international or a domestic legal system is functioning in a non-discriminatory manner should focus solely on crimes of sexual violence. However, as demonstrated by Sellers in her examples of issues that faced the ICTY and the types of harms that influenced her decision to work at an international tribunal, we cannot overlook the reality that many women's experience of armed conflict includes being subjected to acts of sexual violence.<sup>53</sup>

In a seminal work on the implementation of the Beijing Platform for Action, Professor Gardam along with her co-author Michelle Jarvis drew attention to the negative impact of conflict (both during and in the post-conflict period) on women's health and livelihoods, either due to their exposure to illnesses such as HIV/AIDS

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foundations of the gender analysis to be undertaken by the Office of the Prosecutor in the fulfilment of its mandate under the Rome Statute.

52 Rashida Manjoo, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequence*, UNHRC, 29<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/29/27 (10 June 2015).

53 Sellers, above n 3, 18-19; *OTP Policy Paper*, above n 3, 59. The OTP has demonstrated its understanding of the complex nature of armed conflict and its recognition that often multiple crimes will occur in a given situation or be experienced by a particular victim. Henry and Gardam have canvassed some of the literature critiquing the focus on crimes of sexual violence, and they highlight the concern that, first, this focus may contribute to an impression of women as being weak and vulnerable and, second, an emphasis on their victim status detracts from our ability to see women as actors and people who hold levels of personal power. Henry, above n 47; Gardam, 'A New Frontline for Feminism and International Humanitarian Law', above n 3. Whilst the concerns of such writers are understandable, they appear to overlook the history of the drafting of the Rome Statutes and the desire of non-government organisations and individuals to ensure that international criminal law would not continue to harbour the prejudices that allowed the majority of the perpetrators of such crimes to act with impunity. Jocelyn Campanaro, 'Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes' (2001) 89(8) *Georgetown Law Journal* 2557; Patricia Visseur Sellers, 'Individual(s) Liability for Collective Sexual Violence' in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press, 2004) 153. The author was a member of the Women's Caucus for Gender Justice and participated in the negotiations for the Rome Statute. Impunity in itself is a major human rights concern; see *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg, UN Doc A/RES/40/34 (29 November 1985); see Diane Orentlicher, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity, and Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, 61<sup>st</sup> sess, Agenda Item 17, E/CN.4/2005/102/Add.1 (8 February 2005). The fact that some individuals worked for a fuller articulation of the nature of sexual and gender-based crimes does not equate to a view on their part that other crimes should be overlooked or that women who were responsible for the commission of crimes should not be prosecuted. If these are concerns, then they should be addressed, but they are neither a cause nor a consequence of creating legal rules and principles that give crimes of a sexual or gendered nature equal status in the law.

or to the expectation that they would care for relatives affected by such diseases.<sup>54</sup> Unfortunately, it remains the case that HIV and AIDs result in a 'disproportionate burden' being placed on women and girls due to sexual violence during and post-conflict, and this remains 'a persistent obstacle and challenge to gender equality'.<sup>55</sup> Conflict may result in young women being forced into early marriages, which can have a negative impact on their health and economic wellbeing.<sup>56</sup> The targeting of women activists and professionals described by Gardam and Jarvis<sup>57</sup> continues today and remains a symptom of the ongoing challenges to women's equality across the globe.<sup>58</sup> The ongoing threat of sexual violence whilst engaging in ordinary activities, such as walking to communal ablution blocks, walking to markets or undertaking household tasks outdoors, violates a woman's right to the security of her person along with her right to be free from torture and to engage in activities that would assist her social and economic standing.<sup>59</sup> The international community, which includes regional security forces, is aware that more must be done to put in place strategies for the prevention of human rights violations and for the protection of those who may be subject to attack, but thus far efforts undertaken have been piecemeal and do not necessarily offer the level of protection required.<sup>60</sup>

As noted above, the OTP has responded to the concerns articulated about the gender-sensitivity of its investigations and its handling of evidence before the ICC, as well as its overall willingness to engage in a self-reflective gender analysis of its work. The OTP released its policy paper on Sexual and Gender-Based Crimes in June 2014.<sup>61</sup> Given the efforts of the OTP to engage with the debate about its work, some brief observations about the policy paper are necessary. The next section highlights key aspects of the policy paper and relates the newly adopted policies to the promotion of women's rights more generally.

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54 Gardam and Jarvis, above n 10, 33-8.

55 SC Res 2106, above n 42, 20.

56 *Report of the Secretary-General on Women and Peace and Security*, UN SCOR, UN Doc S/2013/525 (4 September 2013) 10.

57 Gardam and Jarvis, above n 10, 7-9.

58 *Report of the Secretary-General on Women and Peace and Security*, UN Doc S/2013/525, above n 56, 13.

59 *Report of the Secretary-General on Women and Peace and Security*, UN Doc S/2013/525, above n 56, 31; Dolgopol, 'A role for the Rome Statute system', above n 29, 121-6; Gardam and Jarvis, above n 10, 8, 29-32.

60 Shahana Dharmapuri, 'Implementing UN Security Council Resolution 1325: Putting the Responsibility to Protect into Practice' (2012) 4 *Global Responsibility to Protect* 241.

61 See *OTP Policy Paper*, above n 3.

THE OTP AND GENDER JUSTICE

The policy paper is evidence of the link between the emphasis of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) on substantive equality and Article 21(3) of the Rome Statute, which obliges all organs of the court to apply recognised human rights norms in the fulfilment of the ICC's mandate.<sup>62</sup> The observations contained in Paragraph 4 of the Executive Summary highlight the multifaceted nature of the barriers to women's equal access to justice:

In addition to the general challenges to investigations conducted by the Office, such as security issues related to investigations in situations of ongoing conflict, and a lack of cooperation, the investigation of sexual and gender-based crimes presents its own specific challenges. These include the under- or non-reporting owing to societal, cultural, or religious factors; stigma for victims; limited domestic investigations, and the associated lack of readily available evidence; lack of forensic or other documentary evidence, owing, inter alia, to the passage of time; and inadequate or limited support services at the national level.<sup>63</sup>

It is important that we remind ourselves that the operation of domestic justice systems which either add to the trauma of those subjected to sexual violence or continue to discourage victims from seeking redress for those crimes can affect the manner in which the international community responds to conflict. All international institutions put in place structures that engage with individuals from local communities in order to assist them with their work. If those individuals either actively discourage victims from coming forward or do not assist international investigators to uncover the evidence that would support the bringing of charges, then the full range of crimes committed during an armed conflict will not come before an international tribunal.

The OTP policy paper in effect recognises that the due diligence standard applied to national governments with respect to the elimination of discrimination against women should be applied to the work of international institutions and to the manner in which those institutions engage with local actors. Article 4(c) of the Declaration of the Elimination of Violence against Women requires states to 'exercise due diligence to prevent, investigate and ... punish acts of violence against

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62 *Rome Statute*, above n 35.

63 See *OTP Policy Paper*, above n 3, 4. See also para 65: 'The Office is mindful that victims of sexual and gender-based crimes may face the additional risks of discrimination, social stigma, exclusion from their family and community, physical harm, or other reprisals. In order to minimise their exposure and possible retraumatisation, the Office will enhance its efforts to collect other types of evidence ...'

women, whether those acts are perpetrated by the State or by private persons'.<sup>64</sup> Failure to adequately train judicial and law enforcement personnel and allowing negative stereotypes of women to influence decision-making processes are considered to be breaches of both the due diligence standard and women's right to equality.<sup>65</sup> In recognition of the importance of ensuring that investigations are thorough and gender-sensitive,<sup>66</sup> the OTP has undertaken to train intermediaries and to monitor their behaviour so that it does not affect the nature and quality of the investigations being carried out by the office.<sup>67</sup> In some societies there is a reluctance to discuss crimes of sexual violence; this may be connected to a sense of shame that the community was unable to stop such crimes, or it may result from a belief that these crimes are not as important as the crimes of murder or torture (narrowly defined). 'If few resources are given to the prosecution of crimes of sexual violence and if women face a criminal justice system that is unsympathetic to their concerns then it is likely that such attitude will carry forward when discussions are held about the possibility of bring prosecutions before the ICC.'<sup>68</sup>

The policy paper also draws the link between the crimes experienced during conflict and the post-conflict stage, when people are rebuilding their lives. Failure to acknowledge the full range of crimes committed against a population may result in reparations that do not acknowledge particular groups of victims, and given the

64 *Declaration of the Elimination of Violence against Women*, GA Res 48/104, 48<sup>th</sup> sess, 85<sup>th</sup> mtg, Agenda Item 111, UN Doc A/RES/48/104 (20 December 1993).

65 Yakin Ertürk, *Special Rapporteur on Violence against Women, Its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective: Violence against Women — The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, UN ESCOR, 62<sup>nd</sup> sess, Agenda Item 12, UN Doc E/CN.4/2006/61 (20 January 2006); *Vertido v Philippines*, above n 14; Committee on the Elimination of Discrimination against Women (CEDAW), *Goekce (deceased) v Austria*, CEDAW/C/39/D/5/2005 (6 August 2007).

66 The connection between effective investigations, gender sensitive justice sector reform and access to justice is highlighted in SC Res 2106, above n 42, 2, 16(c).

67 'An intermediary is someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other. Describing an individual or organisation as an intermediary does not necessarily imply that the organ or unit of the Court or Counsel has requested the individual or organisation to assist. An intermediary might be chosen by a victim or another person to assist them in making contact with an organ or unit of the Court or Counsel. He or she may also be self-appointed.' See International Criminal Court, *Guidelines Governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel Working with Intermediaries* (March 2014; see also International Criminal Court, *Code of Conduct for Intermediaries* (March 2014)).

68 Ustinia Dolgopol, 'Gender, Ethics and The Discretion not to Prosecute in the "Interests Of Justice" under the Rome Statute for the International Criminal Court' in Reid Mortensen, Francesca Bartlett and Kieran Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (Routledge, 2011) 177.

persisting inequality in many societies, those failing to receive acknowledgement are more likely to be women.<sup>69</sup> The OTP, whilst acknowledging that it is not part of its mandate to seek reparations for victims, has recognised that the court may seek its advice about the nature of the harms that occurred and the suffering experienced by victims.<sup>70</sup> In addition to noting the importance of consulting with victims 'in order to determine the most effective and appropriate forms of reparation within a particular community', the OTP has stated its commitment to 'reparations that are transformative and contribute to advancing gender equality'.<sup>71</sup>

Whilst the work of the OTP is to be applauded, it is important that legal and international relations scholars remain aware of the limits of the law. Legal discourse can inhibit those unfamiliar with the language and structure of the law from engaging with the trial process<sup>72</sup> and, in addition, trials only cover a limited range of crimes and events associated with a conflict.<sup>73</sup> This inevitably means that the complexity of the experiences of those affected by conflict may never be fully understood by those of us who are outsiders to conflict. However, ignoring the connection between sexual violence and other forms of torture is not a viable position and does little to promote the rights of women. There are no simple or straightforward answers to how we

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69 The 2013 *Report of the Secretary-General on Women, Peace and Security* refers to the situation of Kosovo survivors of sexual violence having to wait until 2013 to be recognised as 'civilian victims of war so that they would qualify for pensions and financial support'. *Report of the Secretary-General on Women and Peace and Security*, SC, UN Doc S/2013/525 (4 September 2013), above n 56.

70 See *OTP Policy Paper*, above n 3, 102; The identification of victims subjected to sexual violence crimes is crucial to the work of the Trust Fund for victims established by Article 79 of the Rome Statute as the Trust Fund's mandate is limited to victims of crimes within the jurisdiction of the ICC. *Rome Statute*, above n 35; This limitation on the reach of the work of the Trust Fund is reiterated in Rule 85 of the Rules of Evidence and Procedure. International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002); The Trust Fund is aware of the need to take a gender perspective in the design of its programmes and the delivery of services that it finances. See Changing Lives, overcoming stigma, disability and discrimination, *Programme Progress Report* (2013) Trust Fund for Victims <[http://www.trustfundforvictims.org/sites/default/files/media\\_library/documents/pdf/TFVSummer2013PPR\\_FINAL\\_VERSION\\_\\_rev\\_060913.pdf](http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/TFVSummer2013PPR_FINAL_VERSION__rev_060913.pdf)>: The importance of gender in designing reparations is discussed in *Guidance Note of The Secretary-General: Reparations For Conflict-Related Sexual Violence* (United Nations June, 2014).

71 See *OTP Policy Paper*, above n 3, 102.

72 Ustinia Dolgopol, 'The Tokyo Women's Tribunal — Transboundary Activists and the Use of Law's Power', (paper delivered at the International Seminar on Peoples' Tribunals and International Law, University of New South Wales, Sydney), Rome 27-28 September 2013 (forthcoming), referring to the work of Foucault, above n 7; See also, Ayça Çubukçu, 'On Cosmopolitan Occupations' (2011) 13(3) *Interventions: International Journal of Postcolonial Studies* 422.

73 Gerry J Simpson, 'War Crimes: A Critical Introduction' in Timothy LH McCormack and Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997).

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resolve the tensions inherent in women's search for justice. Set out below are some reflections on issues that should not be overlooked.

### CONCLUDING REMARKS

Professor Gardam has demonstrated sympathy for, and a desire to understand, the complexity of women's lives. She has also tried to stay away from internal debates about how feminist theory should construct women.<sup>74</sup> Her publications are often thought-provoking, and the attention to detail, both with respect to legal rules and the factual assertions she makes, have resulted in her being a well-respected expert in her field. As she has so amply demonstrated, violence in all of its forms prior to, during and after conflict can have a profound influence on the manner in which women construct their lives.<sup>75</sup> For some, the desire to challenge gendered stereotypes can be the catalyst for reactionary forces within a society to find new and often cruel ways to target women.<sup>76</sup> The chaos brought about by a conflict may lead to a generalised increase in crimes of violence against women,<sup>77</sup> and the proliferation of small arms in conflict-ridden states can lead to a sustained level of crimes of violence against women during the transitional period.<sup>78</sup>

International tribunals create a story for future generations. Their seeming legal legitimacy allows us to think that they tell us the full story, yet those working in the fields of ICL, transitional justice and women's rights understand that judgments reflect the evidence put before the court and are a product of the legal traditions of those sitting on the bench, and therefore the stories contained in any international judgment are incomplete.<sup>79</sup> For these legal histories to more accurately reflect the nature of the conflict that took place and the effect of a conflict on the civilian population, greater efforts need to be made to collect and produce evidence of the full range of crimes that were committed by all sides to the conflict.

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74 Gardam, 'A New Frontline for Feminism and International Humanitarian Law', above n 3, 219.

75 Gardam and Jarvis, above n 10.

76 Ibid 8.

77 *Special Report of the Secretary-General on the United Nations Operation in Burundi*, UN SCOR, UN Doc S/2005/586 (14 September 2005); *Fifth Report of the Secretary-General on the United Nations Operation in Burundi*, UN SCOR, UN Doc S/2005/728 (21 November 2005); International Criminal Court, *Position Paper: Views of Women from North and North Eastern Uganda on the Peace Talks, Mechanisms for Accountability and Reconciliation* (August 2007).

78 Ibid; see Fionnuala F Ní Aoláin, 'Political Violence and Gender during Times of Transitional Justice' [2005] 15 *Columbia Journal of Gender and Law* 829, 838.

79 For the influence of legal 'storytelling', see generally Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (Transaction Publishers, 1997).

I would agree with some critics that the law's construction of women can be problematic.<sup>80</sup> If interactions with the international community (whether through investigators, outreach services or via the local intermediaries who assist international tribunals) result in fostering a sense of shame amongst women who have been subjected to crimes of sexual violence, in exacerbating emotions they may already be experiencing, or in portraying women solely as victims, then this is highly damaging to the interests of women. However, it is important that we do not lose sight of the fact that these crimes, along with other forms of torture, can have a profound effect on a person's sense of self. The dignity of the person<sup>81</sup> lies at the heart of IHRL and is one of the foundation principles of ICL. All forms of torture can destroy a person's sense of self. One of the myriad organisations working with torture victims has captured the essence of the nature of the crime in the following statement: 'Torture is the deliberate and systematic dismantling of a person's identity and humanity'.<sup>82</sup>

As noted by the International Rehabilitation Council for Torture Victims:

Torture victims often feel guilt and shame, triggered by the humiliation they have endured. Many feel that they have betrayed themselves or their friends and family. All such symptoms are normal human responses to abnormal and inhuman treatment.<sup>83</sup>

This is not to suggest that all torture victims react in a similar fashion.

The context of torture, for both pain and psychological difficulties, is very important and the meanings of the experience differ enormously among torture survivors, from feelings of defeat and despair to pride in survival and resilience.<sup>84</sup>

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80 Some of the articles querying the portrayal of women as 'victims' and the effect this has on undermining women's sense of agency are cited in Judith Gardam and Dale Stephens, 'Concluding Remarks: Establishing Common Ground between Feminism and the Military' in Gina Heathcote and Dianne Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security* (Palgrave Macmillan, 2014) 4; See Henry, above n 47, 97-106.

81 'All human beings are born free and equal in dignity and rights.' Universal Declaration of Human Rights, above n 14, art 1. See also the first and fifth preambular paragraphs.

82 The Centre for Victims of Torture, *Effects of Psychological Torture* (20 October 2012) <[http://www.cvt.org/sites/cvt.org/files/downloads/CVT\\_PsychologicalTorture\\_%20Oct2012.pdf](http://www.cvt.org/sites/cvt.org/files/downloads/CVT_PsychologicalTorture_%20Oct2012.pdf)>.

83 International Rehabilitation Council for Torture Victims, *Effects of Torture* (2012) International Rehabilitation Council for Torture Victims <<http://www.irct.org/what-is-torture/effects-of-torture.aspx>>.

84 Amanda C de C Williams and Jannie van der Merwe, 'The Psychological Impact of Torture' (2013) 7 *The British Journal of Pain* 101, 102.



These statements are applicable to women and girls who have survived crimes of sexual violence. For some, the context of their lives<sup>85</sup> may make it more likely that they develop a sense of shame or alternatively recognise that they must remain silent about their experiences. Although testifying can be a source of empowerment for some women,<sup>86</sup> it will not necessarily achieve this purpose for all of those who come forward.<sup>87</sup> To some extent, this relates to inherent difficulties with the legal system and the role of the witness in that system, but not all of the after-effects of testifying are due to the limited space for victims and witnesses. The language and discipline of the law creates structures for what is acceptable discourse,<sup>88</sup> and its rituals and modes of communication may prevent witnesses from recounting the full effect the conflict has had on their lives.<sup>89</sup> Alternatively, for some it may represent an attempt to contribute to the reassertion of morality in public life and to contribute to the creation of a record of the events in their country, so that those who have died or who cannot find the inner strength to testify are not forgotten.<sup>90</sup> They understand that their testimony may allow others to gain a better understanding of the chaos and violence that affected the lives of their community during the conflict.<sup>91</sup>

Some authors refer to this issue as the 'gap between law in rhetoric versus law in action',<sup>92</sup> which entails understanding the limits of both the legal rules and the institutions we have created to apply those rules or to supervise their implementation. The mere fact that we name a crime does not inevitably lead to prosecutions of those crimes or even to the identification of the full range of individuals who have been subjected to such crimes.<sup>93</sup> One of the reasons for emphasising the continuing importance of naming and prosecuting crimes of sexual violence is their connection to other crimes. It is not sufficient to prosecute a leader for the crime of recruiting child soldiers if we do not recognise that children, both girls and boys, were sexually

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85 We know that women in many countries feel reluctant to speak about crimes of a sexual nature; therefore it is difficult to ascribe the notion of culture to their unwillingness to report or speak about their experiences.

86 Henry, above n 47, 104.

87 Sharratt, above n 30.

88 Foucault, above n 7, 324-5.

89 The Women's Initiatives for Gender Justice has produced a range of documents, statements and reports about the experiences of women affected by armed conflict and their engagement with the ICC. A complete overview of the organisations work in this area can be obtained from their website.

90 Henry, above n 47, 104.

91 See Michael Scharf, 'The Case for a Permanent International Truth Commission' (1997) 7 *Duke Journal of Comparative and International Law* 37, 87-8 for a discussion of the importance of individual testimonies.

92 Henry, above n 47, 94.

93 Ibid 94-5.

assaulted and raped during the period that they were combatants. The nature of their experience cannot be fully appreciated unless the full range of horrors they endured are comprehensively articulated. To ignore this aspect of their experience will result in reintegration and recovery programmes that are not addressing the causes of their physical and psychological trauma, and thus will not be able to offer the assistance required.

In a piece I wrote about the efforts of civil society to provide one form of justice to the Comfort Women (those women put into a system of sexualised slavery by the Japanese armed forces during the Second World War), I quoted the following observation by Bertrand Russell: '[t]he dilemma is the same in every country. There are great injustices and laws fail'.<sup>94</sup> Justice and law are not synonymous terms. However, the failure of the law at any given moment in time should not be the end of our discussion about the structure of the law or the possibility that it might be able to provide justice. Our role as scholars is to continue to debate the manner in which the experiences of women are to be integrated into our collective understanding of armed conflict and to continue to push for a constant 'revision of justice'<sup>95</sup> so that our international legal systems are made meaningful to women living in Bogora (Democratic Republic of Congo), Abidjan (Ivory Coast), and Bangui (Central African Republic).

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94 Dolgopoul, 'Redressing Partial Justice', above n 47, 481.

95 'Justice is always a revision of justice and the expectation of a better justice'. Emmanuel Levinas, *Entre Nous: On Thinking-of-the-Other* (Michael B Smith and Barbara Harshav trans, Athelone Press, 1998) 196 [trans of: *Entre Nous: Essais sur le penser-à-l'autre* (first published 1991)]; see also Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing, 2000).



# 7

## LAWS, UFOS AND UAVS: FEMINIST ENCOUNTERS WITH THE LAW OF ARMED CONFLICT

GINA HEATHCOTE

In May 2014, the state parties to the Convention on Certain Conventional Weapons debated the regulation of lethal autonomous weapon systems,<sup>1</sup> even though the technology to produce these 'killer robots' did not exist at the time of the meeting. Reading the news coverage<sup>2</sup> of this development reminded me of Judith Gardam's seminal piece in Naffine and Owen's book *Sexing the Subject of Law*, which imagined how the law of armed conflict might be understood from the point of view of an alien.<sup>3</sup> At the time, Gardam reflected on the role of states, the implicit gendering of the law of armed conflict through the recognition of 'natural' and 'constructed' players, and the importance of honour within the international legal structure. In 1997, when the book was published, the notion of an actually constructed player

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1 The full title on the convention is the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW). The meeting on lethal autonomous weapon systems took place between 13 and 16 May 2014 at the United Nations in Geneva; see <<http://www.unog.ch/ccw>>.

2 See "'Killer robots' to be debated at UN", *BBC News*, 9 May 2014 <<http://www.bbc.co.uk/news/technology-27343076>>.

3 Judith Gardam, 'An Alien's Encounter with the Law of Armed Conflict' in Ngaire Naffine and Margaret Owens, *Sexing the Subject of Law* (LBC Information Services, 1997).

— that is, a non-human player — was the stuff of science fiction. Likewise, the capacity for remote weapon systems, such as unmanned aerial vehicles, or drones, was still within the realm of science fiction. A few years before Gardam's piece, Celina Romany authored a piece on women as aliens within international law.<sup>4</sup> In this chapter, drones are the unidentified flying objects and women the aliens as, inspired by the scholarship of Judith Gardam, I revisit stories of honour and subjectivity in the international law of armed conflict.

I use Gardam's 'Alien's Encounter' as a starting point to consider the adaptations and developments in international law, particularly with respect to the regulation of weapons and the construction of subjectivity within the law of armed conflict as well as the shifts in perspectives regarding women's subjectivity within international legal discourses. I argue that women remain 'aliens' in international legal discourse, and that the regulation of weaponry has remained static in the intervening fifteen years. The latter conclusion is illustrated through the United Nations approach to the regulation of drones and lethal autonomous weapon systems. Because, somewhat confusingly, the acronym of the term 'lethal autonomous weapons systems' is 'LAWS', I refer to these as lethal autonomous robots — or LARs — throughout the chapter. My purpose is to argue for feminist legal approaches and feminist disarmament politics within our approaches to international law, armed conflict and subjectivity that complicate our approach to the law of armed conflict. In making this claim, I also turn to the work of Donna Haraway to further complicate our understandings of subjectivities, the role of affect and tensions between the universal and particular, all of which are submerged in the law of armed conflict and would benefit from renewed feminist analysis.

### AN ALIEN'S ENCOUNTER

In 'An Alien's Encounter with Armed Conflict', the reader is asked to suspend their assumed knowledge with respect to the law of armed conflict and take the position of extreme objectivity in order to better understand the existing legal arrangements. In this way, Gardam's starting point is a response to the Western legal theory that has imagined a place of nowhere to examine and understand the law, be it the reasonable man on the Clapham omnibus<sup>5</sup> or a place where subjects are stripped of their assumptions and bias to enter, in the words of Rawls, the original position.<sup>6</sup> In taking up the legal positivist's imaginary of a world where individuals are stripped of their

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4 Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harvard Human Rights Journal* 87.

5 Richard Room (ed), *Brewer's Dictionary of Phrase and Fable* (Cassell, 15<sup>th</sup> ed, 1996) 761.

6 John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

subjectivity, Gardam reminds us that objectivity is a 'much criticised tool' and 'clearly an imperfect method, particularly when unacknowledged'.<sup>7</sup> Gardam commits herself to objectivity as a tool for exposing bias and assumptions in the law of armed conflict.

Gardam's use of an exercise in objectivity to reveal subjective bias in 1997 resonates with more recent feminist legal developments within the international legal architecture. Feminist policy initiatives have facilitated a series of legal moves that attempt to formalise women's rights, in particular within the collective security structure and international criminal law, both having a nexus to international humanitarian law of armed conflict. In addition, critical feminist and structural bias feminist approaches often revert to an emphasis on formalism over instrumentalist solutions to persistent international issues.<sup>8</sup> As such, the acknowledged tension between formalism and instrumentalism in international law<sup>9</sup> plays out within feminist approaches as a tension between resistance and compliance<sup>10</sup> and is foreshadowed in 'An Alien's Encounter'. That is, Gardam plays with a tension between objectivity and subjectivity, which demonstrates the tensions between the formal rendering of legal rules and the necessary subjectivity of their interpretation. She acknowledges the flexibility of objectivity because 'it can in fact provide a range of perspectives and ... there are some viewpoints that have not been given the attention that they warrant in this area of law'.<sup>11</sup>

Similarly, Romany analyses the impossibility of 'extreme objectivity' and promotes an understanding of 'embodied objectivity' which comprehends the temporal and shifting meanings of gendered lives to 'recognise the impossibility of reaching the impossibility of abstract objectivity'.<sup>12</sup> Romany's embodied objectivity requires a feminist methodology that is mindful of the tensions within international law between normative and formalist projects<sup>13</sup> and, in line with Gardam's writing, a need to understand the gendered contours of legal rules. As such, the subjectivity of the law of armed conflict requires attention in terms of the assumptions it makes and

7 Gardam, 'An Alien's Encounter with the Law of Armed Conflict', above n 3, 234.

8 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000); Anne Orford, 'The Gift of Formalism' (2004) 15 *European Journal of International Law* 179; Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 *American Journal of International Law* 379; Christine Chinkin, 'The State that Acts Alone: Bully, Good Samaritan or Iconoclast?' (2000) 11 *European Journal of International Law* 31.

9 Martti Koskeniemmi, *From Apology to Utopia: The Structure of Legal Argument*. Reissue with a New Epilogue (Cambridge University Press, 2005).

10 See Sari Kouvo and Zoe Pearson, *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart Publishing, 2011).

11 Gardam, 'An Alien's Encounter with the Law of Armed Conflict', above n 3, 235.

12 Romany, above n 4, 121.

13 See Romany, above n 4.

reinforces regarding gendered bodies. Gardam's method of using the alien encounter to question categories within the law of armed conflict functions if objectivity is understood as conditional and dependent on the power relations that render sensible the laws of armed conflict within a specific temporal and geographic moment.

In her chapter, Gardam describes her imaginary<sup>14</sup> alien's confusion at the rules that compose the law of armed conflict in 1997. In particular, Gardam illustrates an inability on the part of the outsider/alien to clearly render the normativity that great power politics and patriarchal traditions embed within the rules. Gardam both exposes the core legal tensions within a strict positivist account and reminds us that objectivity is 'an imperfect method, particularly when it is unacknowledged'.<sup>15</sup> Gardam further asserts that '[t]he complex and detailed rules in fact provide a picture of a society that can only be found in Western states. The important point for me is that this does not come through in the rules'.<sup>16</sup> She also demonstrates the construction of male actors as the standard subject through an analysis of natural and constructed players within the law of armed conflict, which sees her conclude, 'the law of armed conflict perpetuates, in a condensed and strikingly visible way, all the assumptions of Western femininity and masculinity'.<sup>17</sup>

Gardam uses the alien as a tool to demonstrate the failure of objectivity, in terms of gendered laws and Eurocentric perspectives espoused as the universal within the law of armed conflict. In doing so, Gardam demonstrates the artificial legal qualities of the combatant and the civilian, and the constructed and inferred gendering of these terms, as well as the assumed natural qualities of women and mothers, and their consideration as a special class 'due to their sex'. Alongside these natural and constructed players, Gardam's alien finds that '[m]en must represent the norm for the player in the game'.<sup>18</sup> The sexing and gendering of combatants and men and women that Gardam recognised in the law of armed conflict in 1997 has been further developed in the work of contemporary writers,<sup>19</sup> and Gardam's more recent work,<sup>20</sup> and emerges as a key mechanism for structural bias engagements with

14 As opposed to aliens as non-nationals; see Carmen Tiburcio, *The Human Rights of Aliens under International Law and Comparative Law* (Nijhoff, 2001).

15 Gardam, 'An Alien's Encounter with the Law of Armed Conflict', above n 3, 234.

16 Gardam, 'An Alien's Encounter with the Law of Armed Conflict', above n 3, 248.

17 Ibid 249.

18 Ibid 241.

19 See Helen Kinsella, 'Gendering Grotius' (2006) 34 *Political Theory* 161; Laura Sjoberg, 'The Paradox of the Double Effect: How Feminism Can Save the Immunity Principle' Working Paper #301, *Boston Consortium on Gender, Security and Human Rights* (2006) <<http://genderandsecurity.umb.edu/Laura.pdf>>.

20 See Judith Gardam, 'War, Law, Terror, Nothing New for Women' (2010) 32 *Australian Feminist Law Journal* 61.

international law and the law of armed conflict. In this chapter, I return to the process of analysing the sex and gender of law with specific reflections on the constructed and natural 'roles' assigned to women through contemporary understandings of the law of armed conflict.

Key to the revisiting of Gardam's approach is the need for a detached description of the law of armed conflict, which I develop in the following section of the chapter. Prior to encountering the law of armed conflict as an alien (as I do in the following section), Romany's account of women as aliens within international law requires revisiting.<sup>21</sup> Even in a period of history where feminist 'successes' within international law are both celebrated<sup>22</sup> and challenged,<sup>23</sup> Romany's description of women as aliens in international human rights law has continued purchase in the context of the law of armed conflict: 'Women are the paradigmatic alien subject of international law. To be alien is to be other, an outsider. Women are aliens within their states and aliens within an exclusive club of states which constitutes international society'.<sup>24</sup>

To describe women as aliens is, then, to see women as that which is not male, acknowledging at the same time that to be male is to be, in the words of Gardam, a constructed player or the assumed norm, rather than to be an actual, multidimensional, multi-sexed, embodied and multi-gendered being. This rendering of women as unknown, alien or other draws on Gardam's contribution that women are constructed players in the law of armed conflict, who are added to the main categories of players.

To revisit Gardam's work does, however, first require the recognition of a series of concrete legal transformations within international law which have the potential to impact on the rendering of a sexed and gendered law of armed conflict. Two complex series of developments, alongside a series of smaller, yet significant, legal and policy transformations, indicate a vastly different understanding and space for gender perspectives on international law than existed when Gardam's alien landed her spacecraft in Adelaide in 1997. The first key transformation was considerably underway in 1997: the production of both jurisprudence and treaty provisions on gendered crimes in international criminal law. The second is often perceived as having commenced in 2000: the production of eight resolutions on women, peace and security by the Security Council, which include specific provisions that touch on the law of armed conflict.

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21 Romany, above n 4.

22 Debra Bergoffen, 'Toward a Politics of the Vulnerable Body' 18 *Hypatia* (2003) 116.

23 Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (2008) 30 *Michigan Journal of International Law* 1.

24 Romany, above n 4, 87.



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In addition to these two large disciplinary changes, the creation of UN Women in 2010, as well as situation-specific and additional thematic resolutions from the Security Council, has influenced international legal approaches to women's experiences, as has the changing understanding of the role of women and the need for gender training within military institutions themselves.<sup>25</sup> From a feminist perspective, the contours of armed conflict and international law have changed since 1997: sites for feminist contributions to legal structures now exist and militaries utilise the language of gender. However, the feminist potential and possibility for transformation remains latent rather than realised in these developments. As I demonstrate in this chapter, despite these changes the law of armed conflict remains unchanged over the same period. This is particularly disturbing given the readiness of the United Nations to focus on the as-yet-unrealised but currently imagined player of the LARs, alongside the wealth of Security Council directives that re-establish the constructed nature of players marked feminine and, at the same time, the very real engagement with armed conflict that women encounter in conflict zones.

Regardless of developments in terms of the increased recognition both of women as combatants from states, militaries and international institutions and of the gendered nature of crimes that occur during armed conflict, feminist analysis of international humanitarian law has rarely broached topics beyond the regulation of sexual violence during armed conflict. Ironically, feminist attention to sexual violence as *the* gendered experience of war has somewhat skewed the discipline, giving the appearance that women's honour remains central to women's protection during armed conflict. Women's agency is rendered silent, as a woman must accept either the constructed role of a combatant or a civilian or the gendered meaning applied to each as a consequence. As such, I wish to test the continued relevance of Gardam's recognition that

woman, beside all her gendered characteristics such as modesty and passivity, is assumed to be heterosexual and child bearing. This is the female norm that is considered worth protecting, to some extent, by the law of armed conflict. She is perceived only in terms of her body as a sexual object.<sup>26</sup>

This requires a review of the construction of female subjectivity within the provisions of the women, peace and security resolutions that specifically pertain to the law of armed conflict. This project also coalesces with Gardam's more recent scholarship, where she questions the limited feminist engagement with legal provisions beyond

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25 On the creation of UN Women, see: Hilary Charlesworth and Christine Chinkin, 'The creation of UN Women' (2013) *RegNet Research Paper Series* 2013/7.

26 Gardam, 'An Alien's Encounter with the Law of Armed Conflict', above n 3, 250.

sexual violence regulation within armed conflict, in particular the absence of critical feminist writing on the legal narratives on terrorism after the 9/11 attacks on the US.<sup>27</sup>

In addition to reviewing the contribution that the Security Council's resolutions bring to the law of armed conflict, I will review the changing understanding of conflict in international legal texts, in particular with respect to weaponry. Over the period in which the Security Council issued the eight women, peace and security resolutions, the development of weaponry capabilities and weapon delivery has seen the deployment of unmanned aerial drones to conflict zones,<sup>28</sup> the potential for cyberattacks<sup>29</sup> and biological and chemical weapons as real threats to populations and military actors<sup>30</sup> alike, as well as the normalisation of asymmetrical battlefields that spread across state boundaries.<sup>31</sup> Feminist scholarship focused on new technologies, in particular the use of drones on the battlefield, has not, however, emerged over this period. The capacity of the law of armed conflict to respond to 'new threats' has received considerable attention elsewhere and the various tenets of the 'global war against terror' have received sporadic feminist engagement,<sup>32</sup> compounding the sense that women's sexual vulnerability is the key feminist issue with respect to gender perspectives on security. Amongst this literature, Gardam's work on the structures of international humanitarian law continues to act as a constant pushing at the structures and categories of the law rather than as a pushing for the inclusion of crimes of sexual violence within specific arenas.<sup>33</sup> Within this literature, attention to the role of the law of armed conflict has not been a central feminist topic, leading Gardam to note,

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27 Gardam, 'War, Law, Terror, Nothing New for Women', above n 20.

28 For discussion, see Christine Gray, 'Targeted Killings: Recent US Attempts to Create a Legal Framework' (2013) 66 *Current Legal Problems* 1.

29 Michael Schmitt, *Tallin Manual on the International Law Applicable to Cyber Warfare* (Cambridge University Press, 2013); Rain Liivvoja and Tim McCormack, 'Law in the Virtual Battlespace: The Tallin Manual and the *Jus in bello*' (2012) 15 *Yearbook of International Humanitarian Law* 45.

30 Kai Ilchmann and James Revill, 'Chemical and Biological Weapons in the "New Wars"' (October 2013) *Science and Engineering Ethics* 1.

31 See Wolff Heintschel von Heineg and Volker Epping (eds), *International Humanitarian Law Facing New Challenges* (Springer, 2007) 11-144.

32 In particular see Susan Hawthorne and Bronwyn Winter, *September 11, 2001: Feminist Perspectives* (Spinifex Press, 2002); Gina Heathcote, 'Feminist Reflections on the "End" of the War on Terror' (2010) 11 *Melbourne Journal of International Law* ch 6.

33 For example, Judith Gardam, 'A Role for Proportionality in the War on Terror' (2005) 74 *Nordic Journal of International Law* 3; Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 *International Comparative Law Quarterly* 1; Judith Gardam, 'Legal Restraints on Military Enforcement Action' (1996) 17 *Michigan Journal of International Law* 285; Judith Gardam, 'Proportionality and Force in International Law' (1993) 87 *American Journal of International Law* 391; Judith Gardam, 'Non-combatant Immunity and the Gulf Conflict' (1992) 33 *Vanderbilt Journal of International Law* 813; Judith Gardam, 'Proportionality as a Restraint on the Use of Force' (1992) 20 *Australian Yearbook of International Law* 161.

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in 2013, that 'looking back over the years since the initial feminist engagement with IHL, I am disappointed to see how the topic of IHL and women has been avoided by scholars, apart from a seemingly endless focus on sexual violence'.<sup>34</sup>

The advent of the Arms Trade Treaty or the Cluster Munitions Treaty has likewise not been pursued as an issue that is of relevance to the women, peace and security agenda or feminist approaches to international law.<sup>35</sup> This chapter, therefore, maps out where and why a feminist analysis of drones, LARs and the changing nature of warfare is pertinent to contemporary understandings of the law of armed conflict. The final section concludes that, despite this need for feminist debate and engagement, women remain aliens, or at best constructed subjects, within the law of armed conflict, and feminist encounters will remain sporadic while this remains the case. Furthermore, the segregation of emotion from regulation in the law of armed conflict perpetuates a subtle gendering of the structures of the law, which casts the feminine as the site of honour and harm, as distinct from the honour and empowerment that is gendered male. A preferred feminist method centres on understanding what it means to have objectivity of laws centred on a Western and male perspective of subjectivity, and calls for both embodied objectivity as practice and, following Haraway, for the invocation of women as cyborgs rather than aliens.<sup>36</sup>

## LEGAL DEVELOPMENTS

A return to Gardam's 'Alien's Encounter' requires both technological and legal advances in the post-millennium period to be subject to examination. That is, Gardam's claims were premised on an international legal system that had very limited mechanisms for identifying and understanding the specific harms that women experience during armed conflict. I describe and analyse the developments in this area, driven primarily through the production of eight resolutions on women, peace and security by the Security Council.<sup>37</sup> I then conclude this section with a review of contemporary weapon delivery systems, in particular UAVs and LARs.<sup>38</sup>

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34 Gardam, 'War, Law, Terror, Nothing New for Women', above n 20, 61.

35 There has been significant activism, as opposed to academic work, however; see Peacewomen <<http://www.peacewomen.org/pages/att>>.

36 Donna Haraway, 'A Cyborg Manifesto Science, Technology, and Socialist-Feminism in the Late Twentieth Century' in Donna Haraway, *Simians, Cyborgs and Women: The Reinvention of Nature* (Routledge, 1991) 149-81.

37 Also see the work of the Special Rapporteur on Sexual Violence in Armed Conflict, the Reports of the Secretary-General and the CEDAW committee to note <<http://www.securitycouncilreport.org/women-peace-and-security/>>.

38 Due to space limitations, this chapter does not review cyberwarfare or the new weapons treaties on cyberwarfare: see Heintschel von Heineg and Epping, above n 31.

The law of armed conflict has seen little change since 'An Alien's Encounter'. As in 1997, the law of armed conflict is found in both customary and treaty law with the primary documentation being the Hague Conventions, as well as a range of specific treaty regimes that govern the use of specific weapons. Post-2000 developments with respect to land mines, small arms and cluster munitions include the creation of specific treaty regimes,<sup>39</sup> although the take-up by member states has been varied. In addition, enhanced understanding of the application of both human rights and international humanitarian law emerges in response to contemporary conflicts, including the use of force by the US and its allies in Iraq in 2003 and the Israeli attacks on Palestine in 2009.<sup>40</sup> Very little feminist engagement with these development has occurred and it is possible to see a continuation of the status quo with respect to assumptions regarding the distinction between 'natural' players (men and women) and 'constructed' players (civilians and combatants).

Throughout this period, the Security Council issued eight resolutions on women, peace and security which contained the following provisions that can be regarded as having specific relevance to the law of armed conflict. Engle situates the women, peace and security resolutions within the broader human security resolutions issued by the Security Council and argues that '[t]hey largely embody international humanitarian law, and increasingly seek to apply the rules not only to states and non-state actors, but to the UN as well in its peacekeeping operations'.<sup>41</sup> Within this framework, seven of the eight resolutions affirm in the preamble 'the need to fully implement international humanitarian and human rights law that protects the rights of women and girls during and after armed conflict'.<sup>42</sup> In addition, Security Council Resolution 1820 adds the following clause:

[n]oting that civilians account for the vast majority of those adversely affected by armed conflict; that women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group.<sup>43</sup>

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39 This discussion is influenced by Felicity Ruby, 'Security Council Resolution 1325: A Tool for Conflict Resolution?' in Gina Heathcote and Dianne Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security* (Palgrave, 2014) 173.

40 Aeyal Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 *European Journal of International Law* 1.

41 Karen Engle, 'The Grip of Sexual Violence' in Heathcote and Otto, above n 39, 25.

42 This is from the preamble of resolutions 1325, 1820, 1888. Similar wording is found in the preamble of resolutions 1889, 1960, 2106, although narrowed to the context of sexual violence: 'international humanitarian law prohibits rape and other forms of sexual violence'. There is no explicit reference to international humanitarian law in the preamble of resolution 2122, which identifies human rights violations instead.

43 SCRes 1820, preamble.

## IMAGINING LAW

These provisions juxtapose international humanitarian law with a perceived need to centre on women's and girls' vulnerability to sexual violence as the space where a women, peace and security strategy is to be integrated. This model is then replicated in the preambles to Security Council resolutions 1888, 1960 and 2106.<sup>44</sup> Specific paragraphs within these resolutions further connect and construct women as vulnerable to specific acts of violence occurring during armed conflict. These acts are assumed to be perpetrated by men and are irregular acts in war because of the specifically sexual nature of the crimes. As such, the Security Council resolutions on women, peace and security are replete with references to the law of armed conflict.<sup>45</sup>

Throughout the eight resolutions, the overwhelming representation of women's honour as understood through a woman's need to be protected from sexual violence and her general sexual vulnerability reiterates rather than removes the constructed nature of women as civilian and outside of the central set of players within armed conflict. Indeed, women are specifically perceived as a type of player that might need to be 'added' to conflict and post-conflict environments, including as UN personnel who might help reduce sexual violence through their presence as combatants. This is in contrast to Gardam's conclusion, in 2005, when she studied existing provisions within international humanitarian law<sup>46</sup> to conclude that the 'silence on so many of the wartime experiences of women poses a continuing challenge to IHL to fulfil its humanitarian mandate'.<sup>47</sup> As such, there remains a space between the invocation of international humanitarian law of armed conflict in the women, peace and security resolutions and the contours of the laws themselves, which are re-asserted rather than re-developed by the Security Council's approach to gender.

The Security Council resolutions on women, peace and security, it seems, perhaps not surprisingly, at the same time are and are not about international humanitarian law. The eight resolutions both explicitly and implicitly register as focused on international humanitarian law, and yet international humanitarian law as both discipline and practice remains largely untouched by the content of the resolutions. There are a couple of potential reasons for this. First, at one level the resolutions articulate very little that is new with respect to international humanitarian

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44 SCRes 1888/1960/2106.

45 See further: SC Res 1325 paras 6, 9, 10 and 11; SC Res 1820 paras 2, 3, 4, 6; SC Res 1888 paras 7 and 8(a); SC Res 1889 paras 2, 3 and 12; SC Res 1960 para 5; SC Res 1960 which repeats resolution 1820 and adds para 5; SC Res 2106 which repeats many of the provisions of 1960 and 1820 and adds para 2; SC Res 2122, which marks a shift to international human rights law and women's participation yet acknowledges needs for military training in para 9, and investigation and prosecution for sexual violence crimes in para 12.

46 Judith Gardam, 'The Neglected Aspect of Women and Armed Conflict-Progressive Development of the Law' (2005) 52 *Netherlands Law Review* 197.

47 Ibid 219.

law, which has always included provisions against sexual violence — in particular, rape in armed conflict — and constituted this as a war crime. Developments with respect to genocide and crimes against humanity are in effect components of international criminal law and match broader international developments. Second, international humanitarian law evolves through the practice of states. The degree to which the women, peace and security resolutions have been incorporated at state level differs across states, regions and military structures. Whether specific military codes have been transformed in the post-1325 period is outside the scope of this chapter. It is clear, however, that military training has been influenced by the women, peace and security framework but such influence on military training is distinct from developments in international humanitarian law. Third, the space between the resolutions on women, peace and security and accounts of the discipline by international humanitarian lawyers brings to my mind the imagery of women as aliens within the law of armed conflict. As such, the alien that Gardam conjures in 1997 might be re-developed as the story of women's engagement with the law of armed conflict.

The latter claim requires some elaboration and returns me to Gardam's own invocation of women, represented as the feminine in legal texts, and ultimately positioned as a constructed subject, her space as acting subject being diminished as a result. She is implicitly the other — both part of law's regulation but never privy to the rules that structure the system of knowledge. The Security Council resolutions become an example of this, as they both speak of international humanitarian law and yet remain other to the disciplinary accounts of the law of armed conflict. Key international legal texts that engage with the law of armed conflict produce a hermeneutic account that does not, at any point, engage with these resolutions, or with women, gender or the Security Council more broadly.<sup>48</sup> A return to Gardam's 'Alien's Encounter' asks us to question the parallel developments and the impact of the women, peace and security resolutions on the key legal mechanism for the regulation of armed conflict. It also asks us to question how women's subjectivity is constructed in the resolutions, as in international humanitarian law.

It is possible to argue that while feminist actors have centred their energies on the Security Council and production of thematic resolutions, legal minds within the field of the law of armed conflict have centred their energies on the regulation of new technologies, including drones, LARs and cyberattacks. The disciplinary 'othering' of women as subjects who are relevant to the Security Council's thematic work but

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48 See, for example, Yoram Dinstein, *The Conduct of Hostilities under the Law of Armed Conflict* (Cambridge University Press, 2<sup>nd</sup> ed, 2010); Dieter Fleck, *The Handbook of International Law*, (Oxford University Press, 2013); David Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010); David Thurer, *International Humanitarian Law: Theory, Practice, Context* (Brill, 2011).

who do not have either standing or representation within the field of international humanitarian law thus alienates both women as subject and feminist knowledge from the space where law and armed conflict meet. That space is the law of armed conflict. I return to this point below.

The specific legal arena where feminist initiatives on the regulation of armed conflict play out in terms of actual legal transformation and recognition instead occurs prominently within international criminal law. Once conflicts, ceasefires and peace negotiations end, it seems that a space has been made for recognising and responding to the harms women experience during armed conflict, in particular conflict-related sexual violence. As such, feminist initiatives to transform understandings of women, peace and security, although situated within the work of the Security Council and articulated as concerns of the international law of armed conflict, appear to have little impact on the way that the actors regulating both the battlefield and military behaviour understand the law of armed conflict. Women remain, then, limited in terms of the subjectivity afforded by the law of armed conflict and remain a constructed player whose sexual and bodily vulnerability remains the key feature justifying the limited attention given to women's experiences of armed conflict. This real and disciplinary othering maintains the alien encounter that situates women as removed from the norm, which remains a male player, soldier, actor.

### ON ALIEN EMOTIONS AND DISEMBODIED POLITICS

It is possible to argue that one reason that Gardam's arguments regarding constructed, natural and normal players in the law of armed conflict persists is due to the relatively little change to the laws under review, as the Geneva and Hague conventions remain the central focus of any understanding of the law of armed conflict. Yet even with the general consistency of the rules, new developments in terms of warfare and weaponry have raised new challenges for these rules and developed considerable scholarship and practice pertinent to contemporary understandings of the law. In this section, I focus on the development of drones and LARs and the international responses to these advances in weapon delivery systems. I conclude the section with an alien's feminist analysis of these developments.

The Special Rapporteur Reports on targeted killings make clear that the law of armed conflict is not substantially changed by the emergence of drones. In the 2010 Report, the Special Rapporteur Philip Alston confirmed that "[t]argeted killing is only lawful when the target is a "combatant" or "fighter" or, in the case of a civilian, only for such time as the person "directly participates in hostilities".<sup>49</sup> The killing must

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<sup>49</sup> Philip Alston, *Report of The Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions*, Human Rights Council, UN Doc A/HRC/14/24/Add. 6, 28 May 2010, para 30.

also be necessary and proportionate,<sup>50</sup> while harm to civilians must be minimised 'regardless of whether the armed conflict is between States (an international armed conflict) or between a State and a non-state armed group (non-international armed conflict), including alleged terrorists'.<sup>51</sup>

When the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, published his 2013 report for the UN Human Rights Council, he specifically addressed the potential for the future development of LARs as requiring legal attention in advance of the technology. In the preliminary study, Heyns found not only that a legal structure to regulate the potential deployment of LARs is necessary, but also that there would be clear advantages to the development of LARs for the battlefield. In fact, Heyns raises both the protection of civilians and the perpetration of crimes of sexual violence in armed conflict as areas of concern that might be ameliorated via the introduction of LARs to conflict zones. Heyns states:

LARs will not be susceptible to some of the human shortcomings that may undermine the protection of life. Typically they would not act out of revenge, panic, anger, spite, prejudice or fear. Moreover, unless specifically programmed to do so, robots would not cause intentional suffering on civilian populations, for example through torture. Robots also do not rape.<sup>52</sup>

Heyns, however, goes on to highlight that human error is the flip side of human judgment and common sense: characteristics that are not, as yet, considered to be able to be programmed into the behaviour of non-human participants in armed conflict. The move to construct a regulative framework for LARs while the deployment of drones remains unregulated also highlights a gap between concern for those who are currently targeted by armed drones, in particular civilians, and the potential protection of civilians via the imaginary player of the LARs. The Special Rapporteur acknowledges that

[w]hile robots are especially effective at dealing with quantitative issues, they have limited abilities to make the qualitative assessments that are often called for when dealing with human life. Machine calculations are rendered difficult by some of the contradictions often underlying battlefield choices. A further concern relates to the ability of robots to distinguish legal from illegal orders.<sup>53</sup>

The lack of regulation, or more correctly the continued assertion that armed drones are adequately regulated by existing rules within the international humanitarian law

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50 Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004).

51 Alston, above n 49, para 30.

52 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions*, Human Rights Council, UN Doc A/HRC/23/47, 9 April 2013, para 54.

53 Ibid, para 55.



of armed conflict, alongside the call for consideration of the new challenges raised by LARs indicate a range of concerns that link back to Gardam's oeuvre of work on international humanitarian law.

First, the lack of new rules for drones and the pursuit of new rules for LARs return us to Gardam's analysis of the role of subjectivity as a constructed category within the law of armed conflict. Second, the preoccupation with crimes of sexual violence as an issue of an honour is reconfigured in the perception that LARs do not rape. Third, the assumption that civilians and non-combatants are killed during armed conflict due to human error rather than the wide application of proportionality and necessity tests is re-asserted in the articulation of LARs as 'safer' for civilians. As a result, women are thus alienated twice from the international law of armed conflict: as constructed players whose engagement with armed conflict is confined to their gendered vulnerability as sexualised bodies, and as discursively removed from the central organisation and development of the discipline.

#### WOMEN AS THE PARADIGMATIC ALIEN<sup>54</sup>

A post-millennium alien might draw precisely the same claims as Gardam did in 1997 because, despite eight resolutions on women, peace and security, the law of armed conflict with respect to women in armed conflict has not changed. Study of contemporary debates within the international law of armed conflict, however, highlights a preoccupation with a new type of constructed player: LARs. Although they are widely believed to be currently beyond the technological possibility of any state, there is a push for a regulatory regime for these future 'players' on the battlefield. At the same time, and often in the same reports, inquiries into the regulation of drones via the law of armed conflict continue to support the better application of existing rules rather than the development of any new rules. At this point, women become aliens. Women are killed, along with all others, in regions where drones strike. It is clear that the current legal regime does not contain or restrain states with drone technologies. However, the position of the Special Rapporteur has been to request greater clarification<sup>55</sup> from states on the status of the current legal regime, rather than to call for any new law. This recalls Gardam's analysis of the invisible hand of the state, which she discusses in 'An Alien's Encounter', as the unregulated player *par excellence*.

In addition, the key criticisms of drone attacks have come from human rights approaches that challenge the transparency, necessity and proportionality of attacks

<sup>54</sup> Romany, above n 4, 87.

<sup>55</sup> Ben Emerson, *Report of the Special Rapporteur on Counter Terrorism and Human Rights*, Human Rights Council A/HRC/25/59, 11 March 2014, para 70-74.

by unmanned aerial vehicles. Feminist engagements with the limitations of human rights law, however, are sidelined by these arguments, which propel international human rights law into the discussion of drones, like the discussion of international humanitarian law as an unproblematic global legal structure with agreed rules and meaning. The contested sites of meaning in international humanitarian law and international human rights law evaporate in the discussion. The international responses to drones result in women's rights, and their contested meaning within feminist and international discourse, being reproduced as spaces of contained laws that are alien, it seems, to discussions of targeted killings. This is a production of international humanitarian and human rights law which epitomises Gardam's unexamined objectivity and, following Romany, needs to shift toward

[e]mbodied objectivity [that] would require that women engage in a dialogue where the intersections between patriarchy and other sites of oppression come to the fore, where each claim to knowledge is open to revision.<sup>56</sup>

Throughout the chapter, I have incorporated discussion of the Security Council resolutions on women, peace and security into the analysis of the law of armed conflict. This a self-evident approach — all eight resolutions directly address international humanitarian law and situations of conflict. It is also clear that international humanitarian lawyers and scholars rarely, if ever, consider the Security Council's women, peace and security framework as having any impact on the law itself. This can in part be explained through the considerable re-assertion of the existing rules that the Security Council conducts. The consequence is a post-1325 law of armed conflict that greatly mirrors the laws that existed in 1997 when Gardam authored 'An Alien's Encounter'. The 'hard-won' feminist gains from the Security Council resolutions on women, peace and security come to look less like gains and more like a reiteration of the status quo. This reiteration constructs women through notions of community honour and bodily integrity, and these notions fail to account for women's diversity across and within communities. They also fail to address the assumption that the natural player in armed conflict is always male.

In particular, the focus on women as victims of sexual violence in armed conflict has done little to shift the preoccupation with women's honour in the law of armed conflict. The multiplicity of women's sexual encounters and experiences, as well as the multiple roles that women take on in conflict, including as combatants, peace makers and perpetrators, is rendered invisible or extraordinary by a system. During conflict, a woman is assumed to be a victim, a civilian and a spectator and thus a player with constructed attributes that deepen her relational status and detract from her autonomy and her embeddedness in the 'everydayness' of conflict. The

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56 Romany, above n 4, 122.

Security Council reasserts the contours of international humanitarian law in order to justify sanctions, to justify naming and shaming of men, and to authorise force under protection of civilians' mantras.<sup>57</sup> However, the Security Council has consistently failed to respond to women's embodied objectivity which, in intersection with other power relations, renders women distant from decision making, women's voices unheard and women's needs relegated to local, social and economic debates.

At the same time, the preoccupation of international lawyers with the tensions raised by the stretching and obscuring of the law of armed conflict in the justification for targeted killings and the deployment of drones to halt terrorism both constructs the new player of the non-combatant and re-imagines the normal and othered military actor in the process. Debates about women's rights seem not to intersect with these accounts, which centre on, first, the intersection of international humanitarian law and international human rights law, and second, the intersection and overlap of the law on the use of force and international humanitarian law. The feminist critiques of the intersected power relations replicated in these three regimes are forgotten, unheard, alienated.

The alien's encounter with armed conflict remains, then, the feminist's encounter with armed conflict. Few signposts emerge to engage with the structures of a regime that designates women as bodies whose honour may be violated, and who require protection and rest far from the spaces of decision making regarding the contours of the law of armed conflict. At a time in history when international actors are concurrently deciding to speak about another constructed, or yet-to-be-constructed but imagined, player — that is, the lethal automated weapon — women are again silenced through the assumption that a woman's protection may be better if combatants are LARs rather than humans because, at least in one man's view, LARs cannot rape. It seems the Special Rapporteur has been reading Haraway, who states:

The cyborg is a creature in a post-gender world; it has no truck with bisexuality, pre-oedipal symbiosis, unalienated labour, or other seductions to organic wholeness through a final appropriation of all the powers of the parts into a higher unity. In a sense, the cyborg has no origin story in the Western sense — a 'final' irony since the cyborg is also the awful apocalyptic telos of the 'West's' escalating dominations of abstract individuation, an ultimate self untied at last from all dependency, a man in space.<sup>58</sup>

The tension Haraway describes is replete in the current UN position with respect to LARs. The assumption is that LARs have a cyborg-like autonomy from the

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57 See further, Gina Heathcote, 'Robust Peacekeeping, Gender and the Protection of Civilians' in Hilary Charlesworth and Jeremy Farrell, *Strengthening the Rule of Law through the United Nations Security Council* (Cambridge University Press, 2016).

58 Haraway, above n 36.

constructed nature of the masculine norm which is able to be born into a post-gender world. Overlooking the somewhat naïve assumption behind the claim that LARs cannot rape, the fact that this is the only reference to women within the reports on targeted killings (and in this the reference is only implicit) recasts women as other to the battlefield, as alien. The alien body that is women is then constructed as 'rape-able', vulnerable, bodily penetrable — instantly conjuring a robot that is shaped in the form of a male human and reinscribing the gendered politics and power relations of Western politics onto a series of laws that are yet to be cast for a subject that is, literally, yet to be constructed. Women, meanwhile, experience real sexual violence in conflict zones and in peace times, as do non-women, yet no legal regime has affected, eliminated or reduced crimes of sexual violence or any other type of gender-based violence. And thus the idea of women as alien and as the paradigmatic other re-emerges, or never went away, in the law of armed conflict.

Missing are the feminist politics of disarmament which would question the need for a conference on regulating LARs rather than a treaty banning lethal automated weapons. Missing are the feminist politics of peace activism which cross states and engage in a dialogue with intersecting power relationships in order to understand, as Romany writes, the embodied objectivity that demands the constant revision of our perceptions of humanness and subjectivity. A feminist critique of law needs to 'engage in a dialogue which forces the anti-subordination thrust of feminism through the filter of cultural diversity'.<sup>59</sup> Thus when we analyse and think about drones, we see not violations of the law of armed conflict but the global structural violence that parallels and reinforces the space between a woman in Washington DC and a woman in Parachinar. The distance between Washington DC and Parachinar might be measured via embodied objectivity.

The separation of feeling from the law of armed conflict maintains the gendering of the structures of the law, which casts the feminine as the site of honour and harm, as distinct from the honour and empowerment that is gendered as male and associated with soldiering. The experience of anguish, pride, shame, joy, anxiety and sadness which accompanies the various temporal and geographic connections aids understanding of embodied objectivity. I may be gendered woman, or man, yet I will not experience the impact of the law of armed conflict in the same ways as those gendered female in, for example, Parachinar. However, the anxiety of gendered structures that impose themselves on my engagements in public spaces may differ in magnitude yet benefit from an objective recognition of the gendered narratives that maintain limitations on women's access to public space, as well as a recognition of how that fuses into private spaces. The differences between women globally demand that

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59 Romany, above n 4, 121.

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this be an embodied, changeable, temporally and geographically transient objectivity, yet they also produce its very possibility. To feel and to know the meaning of gender as power structures interwoven with other power structures — across histories and landscapes — requires an affective attention to the politics of our everyday that can infuse our understandings of the global. Yet international law, and international law on armed conflict in particular, writes out the passionate meanings of lived, embodied and fluid lives, demanding either a story of woman as universal legal category or particularised such that she is localised with no home in the international.

Constructed players and male norms, the invisible hand of the state and the alien's encounter with the law of armed conflict become infinitely more complex when feminist politics and the understanding of diversity and power that they preface are used as analytical tools. And in that complexity a woman's encounter remains as urgent as it was in 1997 so that she might conjure, in the words of Haraway, 'a cyborg world [that] might be about lived social and bodily realities in which people are not afraid of their joint kinship with animals and machines, not afraid of permanently partial identities and contradictory standpoints'.<sup>60</sup> In this way, the law of armed conflict might acknowledge and challenge 'all the assumptions of Western femininity and masculinity'<sup>61</sup> that remain the central contours of the discipline.

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60 Haraway, above n 36, 189.

61 Gardam, 'An Alien's Encounter with the Law of Armed Conflict', above n 3, 249.

# 8

## AN ALIEN'S REVIEW OF WOMEN AND ARMED CONFLICT

HILARY CHARLESWORTH AND CHRISTINE CHINKIN

### INTRODUCTION

Almost twenty years ago, our friend and colleague Judith Gardam offered an original and illuminating perspective on the law of armed conflict. She deployed the persona of an alien — filling in time during an intergalactic storm — for the purposes of reading the laws of armed conflict. Back in the person of a scholar of international humanitarian law (IHL), Judith then engaged in a conversation with the alien, comparing its observations on the texts alone with her understanding of how the law operates in practice. Judith's alien-scholar dialogue allowed her to illustrate the malleability of the legal concept of objectivity and the way that the law constructs particular realities while obscuring others.<sup>1</sup> This striking approach was both playful and disconcerting. It revealed, among other things, the gendered nature of the law of armed conflict and its incorporation of Western images of femininity and masculinity.

Inspired by Judith's imaginative method, we reflect in this chapter on international developments over the last two decades which address the lives of women in the area of armed conflict. In 1997, when Judith was in dialogue with the

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<sup>1</sup> Judith Gardam, 'An Alien's Encounter with the Law of Armed Conflict' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (LBC Information Services, 1997) 233, 234-5.

alien, the primary relevant legal framework was that of IHL — notably the Hague<sup>2</sup> and Geneva Conventions and Protocols.<sup>3</sup> In the intervening years, the number of international legal lenses has multiplied. Human rights law, international security law and international criminal law now also regulate the situation of women in armed conflict. Moreover, the plight of women in conflict and its aftermath has achieved much greater political prominence. After sketching a range of issues that shape the situation of women in conflict, we focus on two international documents on this topic, adopted in 2013 by different United Nations institutions, and speculate on what Judith's alien might make of them.

### WOMEN AND CONFLICT

Discussion of women and conflict invokes categories such as 'conflict', 'armed conflict' and 'post-conflict'. The difference between these terms is, however, difficult to establish in any particular situation — violence typically seeps from periods of formal conflict into the 'post-conflict' phase. The term 'post-conflict', in particular, can mislead in the context of women's lives. It suggests a neat transition from a state of conflict to peace and implies that 'post-conflict' societies are distinct from other conflict scenarios. The evidence suggests, however, that all forms of violence against women escalate in apparently 'post-conflict' settings.<sup>4</sup>

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2 *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*, signed 29 July 1899, 32 Stat. 1803, 1 Bevans 247 (entered into force 4 September 1900) art 46; *Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations*, signed 18 October 1907, 36 Stat. 2277, 1 Bevans 631 (entered into force 26 January 1910).

3 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, opened for signature 8 December 2005, 2404 UNTS 19 (entered into force 14 January 2007).

4 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, UN Doc CEDAW/C/GC/30 (18 October 2013) [35] ('General Recommendation No. 30'). See also Sheila Meintjes, Anu Pillay

Women's experiences of conflict and its aftermath vary greatly depending upon factors such as whether they are civilians or combatants and whether they have become displaced, as well as on their national identity, race, class, socioeconomic circumstances, urban or rural location, family situation, age, employment, sexuality and health. It is nevertheless possible to describe some common experiences.<sup>5</sup> At a general level, Karima Bennouna has noted that '[c]onflict creates a free-fire zone, a sort of free for all in which pre-existing ideas about women as inferior, and other discriminatory ... ideas may be given free expression by frequently all male groups of soldiers and other combatants'.<sup>6</sup>

Widespread violence against women has been documented in many recent and current conflicts, including in Afghanistan, Burundi, Chad, Columbia, Côte D'Ivoire, Democratic Republic of the Congo (DRC), Liberia, Peru, Rwanda, Sierra Leone, Chechnya/Russian Federation, Darfur, Sudan, Northern Uganda, and the former Yugoslavia.<sup>7</sup> The Independent Commission of Inquiry on Syria reported in 2013 that

sexual violence ... occurs during raids, at checkpoints and in detention centres and prisons across the country. The threat of rape is used as a tool to terrorize and punish women, men and children perceived as being associated with the opposition. Underreporting and delayed reported of sexual violence is endemic, making an assessment of its magnitude difficult.<sup>8</sup>

In 2014, two UN special representatives condemned the 'explicit targeting of women and children', sexual violence and 'savage rapes' occurring against women, girls and boys, especially those coming from ethnic minorities, committed by the 'Islamic State of Iraq and the Levant' (ISIL or ISIS).<sup>9</sup>

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and Meredith Turshen (eds), *The Aftermath Women in Post-Conflict Transformation* (Zed Books, 2001); United Nations Assistance Mission in Afghanistan, *Still a Long Way to Go: Implementation of the Law on Elimination of Violence against Women in Afghanistan* (December 2012) <<http://unama.unmissions.org/LinkClick.aspx?fileticket=Qy9mDiEa5Rw%3D&ta>>.

5 Margaret Urban Walker, 'Gender and Violence in Focus: A Background for Gender Justice in Reparations' in Ruth Rubio-Marin (ed), *The Gender of Reparations* (Cambridge University Press, 2009) 18.

6 Karima Bennouna, 'Do We Need New International Law to Protect Women in Armed Conflict?' (2006) 38 *Case Western Reserve Journal of International Law* 363, 370.

7 *In-depth Study on All Forms of Violence against Women: Report of the Secretary-General*, 61<sup>st</sup> sess, UN Doc A/61/122/Add.1 (6 July 2006) [145].

8 *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc A/HRC/24/46 (16 August 2013) [95]; see also *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc A/HRC/27/60 (13 August 2014) [75]-[83].

9 United Nations Iraq, 'SRSG Bangura and SRSG Mladenov Gravely Concerned by Reports of Sexual Violence Against Internally Displaced Persons' (Press Release, 13 August 2014) <[http://www.uniraq.org/index.php?option=com\\_k2&view=item&d=2373:srsg-bangura-and-srsg-mladenov-gravely-](http://www.uniraq.org/index.php?option=com_k2&view=item&d=2373:srsg-bangura-and-srsg-mladenov-gravely-)



Another source of information about violence against women in conflict is witness testimony in proceedings before international criminal tribunals. For example, cases have chronicled violence in the form of abductions, forced domestic work, forced marriage, sexual assaults, sexual humiliation through forced nudity, and rape and forced pregnancy.<sup>10</sup> The UN Secretary-General has, however, noted that sexual violence is significantly underreported 'because of the risks and trauma faced by survivors and witnesses, including severe stigmatization, and the limited availability of services ... Such challenges make it all the more difficult to assess the scale, scope and character of conflict-related sexual violence'.<sup>11</sup> The Secretary-General's Special Representative on Sexual Violence in Armed Conflict has also emphasised the risk of reprisal encountered by survivors and witnesses as well as those who report the crimes.<sup>12</sup>

Women cannot easily flee combat areas when they are pregnant, responsible for children or restrained by social mores that inhibit their presence in public spaces or demand restrictive dress. If they do escape the immediate violence, women are vulnerable to further abuse in refugee camps or camps for internally displaced persons (IDPs). Refugee and internally displaced women face an increased risk of sexual and gender-based violence, unequal access to training and economic opportunities, as well as little or poor reproductive health care. Indeed, ongoing existing discrimination against women in these areas is intensified during conflict and diminishes women's rights to housing, land and property.<sup>13</sup> There are multiple perpetrators of these rights violations: members of government armed forces, non-state armed groups and militias, private military contractors, peacekeepers and civilians.<sup>14</sup> It is striking that, of the ten countries with the highest lifetime risk of maternal death, most are, or

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concerned-by-reports-of-sexual-violence-against-internally-displaced-persons&Itemid=605&lang=en>; see also Aki Peritz and Tara Maller, 'The Islamic State of Sexual Violence', *Foreign Policy* (online), 16 September 2014 <<http://foreignpolicy.com/2014/09/16/the-islamic-state-of-sexual-violence/>>.

10 *Prosecutor v Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [165]; *Prosecutor v Lubanga (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) [890]-[896]; *Prosecutor v Brima, Kamara, Borbor (Appeals Judgment)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-16-A, 22 February 2008) [190]; *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Chamber I, Case No ICTR-96-4, 2 September 1998) [688].

11 *Report of the Secretary-General on Women and Peace and Security*, UN Doc S/2014/693 (23 September 2014) [12], [13].

12 *Sexual Violence in Conflict: Report of the Secretary-General*, 67<sup>th</sup> sess, Agenda Item 33, UN Doc A/67/792-S/2013/149 (14 March 2013) [13].

13 *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani*, UN Doc A/HRC/23/44 (18 March 2013) [21], [22].

14 *General Recommendation No. 30*, UN Doc CEDAW/C/GC/30 [34].

have been, in a state of conflict, including Afghanistan, Sierra Leone, Chad, Angola, Liberia, Somalia and the DRC.<sup>15</sup>

Rape and sexual violence are not the only forms of violence in armed conflict, although these have become the focus of the international legal system.<sup>16</sup> Civilians face economic and social hardships, increased by the threat of an attack that occurs when they are leaving the home for routine activities such as finding food, water and fuel. Women's traditional domestic responsibilities mean that these tasks fall most heavily on them, as does caring for physically and psychologically injured fighters, the elderly and children. Women without male relatives with them face other hardships. The Commission of Inquiry in Syria reported that

Syrian men are often absent, because they are fighting, detained or have been disappeared or killed, forcing women to become the primary caretakers of their families. Given the limited employment available, both inside the Syrian Arab Republic and in refugee camps, women are struggling to support their families economically. With Syrian women isolated and under immense strain, reports of depression among them have skyrocketed.<sup>17</sup>

The collapse of governmental agencies, including those for maintaining law and order, exacerbates human rights abuses.

The report of the UN Fact Finding Mission to Gaza in 2009 illustrates other gender-based consequences of conflict for women. The Mission observed that the blockade and the military operations had aggravated poverty, which particularly affected women, who must find food and other essentials for their families. Women were often the sole breadwinners ... but jobs were hard to come by ... [W]omen bore a greater social burden, having to deal with daily life made harsher by the crisis and, at the same time, provide security and care for injured family members and children, their own and others who have lost their parents.<sup>18</sup>

Living in tents was particularly difficult for women, for example at times of menstruation, when they lacked adequate sanitary facilities. Moreover, the

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15 Nadine Puechguirbal, *Greater Need, Fewer Resources: Ensuring Adequate Health Care for Women during Armed Conflict* (3 March 2009) International Committee of the Red Cross <<http://www.icrc.org/web/eng/siteeng0.nsf/html/women-health-interview-010309>>.

16 Charlotte Lindsey, 'Women and War — An Overview' (2000) 839 *International Review of the Red Cross* 561 lists issues relating to women combatants, missing persons and widowhood, displaced women and women in detention as well as sexual violence in armed conflict.

17 *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc A/HRC/27/60 (13 August 2014) [83].

18 *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc A/HRC/12/48 (25 September 2009) [1275]-[1279].

conflict-related psychological damage for both men and women, together with financial pressures, contributed to the breakdown of family life.<sup>19</sup>

Matters of violence against women in conflict have, then, become almost staple items on the agenda of United Nations' organs, agencies and special procedures. They have prompted resolutions, declarations, reports, the appointment of high-level experts and attention from human rights treaty bodies. Indeed, countries have invoked the oppression of women as a rationale for military intervention in, for example, Afghanistan and Iraq.<sup>20</sup> The flurry of international activity, however, has had little effect on the incidence of violence against women in times of conflict. So, Judith's alien revisiting Earth after twenty years might be impressed by the high level of rhetoric and normative development in this area, although puzzled by the small difference it has made.

We focus here on two particular international documents adopted by institutions of the United Nations on 18 October 2013: UN Security Council Resolution 2122<sup>21</sup> and the UN Committee on the Elimination of Discrimination against Women's (CEDAW) General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations.<sup>22</sup> Despite the coincidence of the date of their adoption, these documents emerge from separate international legal traditions and manifest different approaches to the position of women in armed conflict.

### 'WOMEN, PEACE AND SECURITY' IN THE UN SECURITY COUNCIL

Since 2000, the Security Council has become an important forum for the development of normative standards with respect to women in armed conflict. The adoption of Resolution 1325<sup>23</sup> in October 2000 launched the theme of 'Women, Peace and Security' (often abbreviated to WPS) in the Security Council.<sup>24</sup> The resolution

19 Ibid.

20 Karen Engle, "'Calling in the Troops": The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention' (2007) 20 *Harvard Human Rights Journal* 189.

21 SC Res 2122, UN SCOR, 7044<sup>th</sup> mtg, UN Doc S/RES/2122 (18 October 2013) ('*Resolution 2122*'); see also SC Res 2106, UN SCOR, 6984<sup>th</sup> mtg, UN Doc S/RES/2106 (24 June 2013) on women, peace and security.

22 *General Recommendation No. 30*, UN Doc CEDAW/C/GC/30. We do not address here the significant developments in international criminal law in relation to women. See generally Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court: 2014 Anniversary Edition* (December 2014) <<http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>>.

23 SC Res 1325, UN SCOR, 4213<sup>th</sup> mtg, UN Doc S/RES/1325 (31 October 2000).

24 On the background to Resolution 1325 see Felicity Hill, 'Nongovernmental Organizations' Role in the Buildup and Implementation of Security Council Resolution 1325' (2003) 28 *Signs: Journal of*

drew attention, first, to women's participation in peace processes and, second, to the inclusion of a 'gender perspective'<sup>25</sup> 'in all efforts for the maintenance and promotion of peace and security'.<sup>26</sup> The first aim was directed towards governments and the Secretary-General, and urged greater representation of women in all stages of conflict prevention, management and resolution.<sup>27</sup> The second aim defined a gender perspective as taking account of the 'special needs of women and girls' in post-conflict processes and state-building. Men were referred to only in the context of disarmament where 'all those involved' were encouraged 'to consider the different needs of female and male ex-combatants'. The Resolution also called for compliance with existing international humanitarian and human rights law and for the protection of women and girls 'from gender-based violence, particularly rape and other forms of sexual abuse'. Finally, the Resolution called for 'a study on the impact of armed conflict on women and girls, the role of women in peace-building and the gender dimensions of peace processes and conflict resolution'.<sup>28</sup>

Security Council Resolution 1325 was groundbreaking in that it was the first time that the Council had formally endorsed an issue relating to women, and it set a new standard for the Security Council, UN member states and the United Nations system as a whole.<sup>29</sup> The Resolution was the product of significant activism by women's groups, supported by the United Nations Development Fund for Women (UNIFEM) and certain governments, notably Bangladesh and Namibia.<sup>30</sup> While it placed the issue of women's security within the Security Council's primary responsibility for the maintenance of international peace and security,<sup>31</sup> Resolution 1325 was not

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*Women in Culture and Society* 1255; see also Dianne Otto, 'The Security Council's Alliance of Gender Legitimacy' in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Fault Lines of International Legitimacy* (Cambridge University Press, 2010) 239, 256-8.

25 SC Res 1325, UN SCOR, 4213<sup>th</sup> mtg, UN Doc S/RES/1325 (31 October 2000) Preamble para 8.

26 Ibid Preamble para 5.

27 These themes had been incorporated in the Beijing Platform for Action as Strategic Objective E.1, which called for increased participation of women in conflict resolution at decision-making levels and for the integration of a gender perspective in the resolution of armed or other conflicts: *Report of the Fourth World Conference on Women: Beijing, 4-15 September 1995*, UN Doc A/CONF.177/20/REV.1 (1996) ch I annex II ('Platform for Action') para 144.

28 In fact, there were two studies: United Nations, 'Women, Peace and Security: Study Submitted by the Secretary-General Pursuant to Security Council Resolution 1325 (2000)' (2002); Elisabeth Rehn and Ellen Johnson Sirleaf, 'Women, War, Peace: *The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building*' (United Nations Development Fund for Women, 2002).

29 Natalie Hudson, *Gender, Human Security and the United Nations: Security Language as a Political Framework for Women* (Routledge, 2009) 44.

30 Ibid 14.

31 *Charter of the United Nations* art 24.

adopted under Chapter VII of the UN Charter, and thus does not formally bind UN member states.<sup>32</sup> It has nevertheless prompted considerable institutional activity: the UN launched training programs and developed a plethora of policies, action plans and guidelines.<sup>33</sup> In 2007, the UN created an inter-agency forum, 'United Nations Action against Sexual Violence in Conflict', bringing together thirteen agencies as a 'critical joint UN system-wide initiative to guide advocacy, knowledge-building, resource mobilisation, and joint programming around sexual violence in conflict'.<sup>34</sup> The Security Council has held annual open debates and 'Arria formula' meetings<sup>35</sup> on women and peace and security. The Secretary-General's 2004 report to the Security Council on transitional justice replicated much of the language of Resolution 1325.<sup>36</sup> UN member states have adopted national action plans.<sup>37</sup> Civil society, in particular women's NGOs, have used the resolution in conflict areas to formulate demands for political and disarmament processes.<sup>38</sup> Despite this focused institutional and normative activity, the Secretary-General acknowledged in 2014 that 'aspirations fall short of reality'.<sup>39</sup>

Resolution 1325 established four themes that characterise the women, peace and security agenda: women's participation in the resolution of conflict; the need to protect women from conflict-related violence; the integration of questions of gender throughout the UN system; and the accountability of perpetrators of sexual violence, or ending impunity. A suite of further Security Council resolutions has built on particular aspects of Resolution 1325, although none have yet replicated its broad compass. While they are expressed to apply to civilians generally, the resolutions assert that 'women and children account for the vast majority of those adversely affected

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32 The *Charter of the United Nations* states that UN member states 'agree to accept and carry out the decisions of the Security Council': at art 25.

33 *Women and Peace and Security: Report of the Secretary-General*, UN Doc S/2010/498 (28 September 2010) [122].

34 See UN Action Against Sexual Violence in Conflict, *Strategic Framework 2011-12* (January 2011) <[http://nobelwomensinitiative.org/wp-content/uploads/2011/05/UN\\_Strategic\\_Framework.pdf](http://nobelwomensinitiative.org/wp-content/uploads/2011/05/UN_Strategic_Framework.pdf)> 3.

35 The Arria Formula is an informal arrangement that allows the Security Council greater flexibility to be briefed about international peace and security issues. See James Paul, *The Arria Formula* (October 2003) Global Policy Forum <<https://www.globalpolicy.org/component/content/article/185/40088.html>>.

36 *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc S/2004/616 (23 August 2004) [15], [17], [25], [33], [35], [64].

37 In early 2015, there were forty-eight national action plans: see PeaceWomen, *List of National Action Plans* <<http://www.peacewomen.org/naps/list-of-naps>>.

38 The development of normative standards and institutional practices is discussed in the UN Secretary-General's Annual Reports on Women and Peace and Security: for example, see *Report of the Secretary-General on Women and Peace and Security*, UN Doc S/2014/693 (23 September 2014).

39 *Ibid* [76].

by armed conflict', and thus emphasise 'the egregious and inhumane treatment of women and girls'.<sup>40</sup>

The resolutions in one group have focused almost exclusively on the issue of sexual violence. For example, Resolution 1820, adopted on 19 June 2008 and the first on the women, peace and security theme since 2000, linked the eradication of sexual violence to the primary purpose of the Security Council in the maintenance of international peace and security. It noted the jurisprudential developments in the international criminal tribunals, confirming that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide. The Resolution demanded that parties to armed conflicts take appropriate measures 'to protect civilians, including women and girls, from all forms of sexual violence'.<sup>41</sup> It identified measures such as enforcing appropriate military discipline, upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting armed and security forces to take into account past actions of rape and other forms of sexual violence, and evacuating women and children under imminent threat of sexual violence to safety.

Resolution 1888, adopted on 30 September 2009, followed a similar pattern and called on the Secretary-General to appoint a Special Representative 'to provide coherent and strategic leadership ... to address, at both headquarters and country level, sexual violence in armed conflict, while promoting cooperation and coordination of efforts among all relevant stakeholders'.<sup>42</sup> It also requested that the Secretary-General 'deploy rapidly a team of experts to situations of particular concern with respect to sexual violence in armed conflict, working through the United Nations presence on the ground and with the consent of the host government, to assist national authorities to strengthen the rule of law'.<sup>43</sup> Resolution 1960 of 16 December 2010 sharpened the notion of accountability by requesting the Secretary-General to compile lists of those who are 'credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict'.<sup>44</sup> It

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40 *Women and Peace and Security: Report of the Secretary-General*, UN Doc S/2010/498 (28 September 2010) [1]. The Security Council has also adopted thematic resolutions on the protection of civilians in armed conflict and on children in armed conflict: see, for example, SC Res 2175, UN SCOR, 7256<sup>th</sup> mtg, UN Doc S/RES/2175 (29 August 2014) on the former and SC Res 2143, UN SCOR, 7129<sup>th</sup> mtg, UN Doc S/RES/2143 (7 March 2014) on the latter.

41 SC Res 1820, UN SCOR, 5916<sup>th</sup> mtg, UN Doc S/RES/1820 (19 June 2008) para 3.

42 SC Res 1888, UN SCOR, 6195<sup>th</sup> mtg, UN Doc S/RES/1888 (30 September 2009) para 4. In February 2010, Margot Wallström from Sweden was appointed to this post; in 2012, she was succeeded by Zainab Hawa Bangura from Sierra Leone.

43 Ibid para 8.

44 SC Res 1960, UN SCOR, 6453<sup>rd</sup> mtg, UN Doc S/RES/1960 (16 December 2010) para 18(c).

indicated that the use of these lists is for 'more focused United Nations engagement with those parties', including potentially through sanctions.<sup>45</sup> The Security Council reiterated the importance of command responsibility and called for the 'issuance of clear orders through chains of command prohibiting sexual violence'.<sup>46</sup> A further Security Council resolution in 2013, Resolution 2106, linked prosecution of sexual violence with deterrence, although it also called for the root causes of sexual violence to be addressed.

A second aspect of this family of resolutions on women, peace and security is centred on women's participation in peace processes. Thus Resolution 1889, adopted 5 October 2009, called for women's participation in 'all stages of peace processes, particularly in conflict resolution, post-conflict planning and peacebuilding'. It acknowledged the Security Council's concern with sexual violence by encouraging states to 'increase access to health care, psychosocial support, legal assistance and socio-economic reintegration services for victims of sexual violence, in particular in rural areas'.

Responding to incidents of sexual exploitation by peacekeepers, the Security Council has also instituted a 'zero tolerance' policy of sexual exploitation and abuse in all UN peacekeeping operations.<sup>47</sup> In addition, the women, peace and security resolutions have encouraged the Security Council to acknowledge the issue of sexual violence in specific situations. For example, in March 2013 the Council broke new ground in extending the mandate of the peacekeeping force, MONUSCO, operating in the DRC, to include an 'Intervention Brigade'. This was prompted by the Council's concern about the humanitarian crisis in North Kivu and the widespread sexual and gender-based violence, including mass rapes, in the region. The Brigade was assigned the responsibility 'of neutralizing armed groups ... and the objective of contributing to reducing the threat posed by armed groups to State authority and civilian security in eastern DRC and to make space for stabilization activities'.<sup>48</sup>

Against this background, what is the significance of Resolution 2122, adopted by the Security Council on 18 October 2013? It opens with an announcement of its pedigree, reaffirming the six previous Security Council resolutions on women, peace and security discussed above. It also refers to the Beijing Declaration and Platform for Action and the commitments undertaken by states parties to the Convention

45 This more coercive approach follows that adopted for children; see Hudson, above n 29, ch 4.

46 *Sexual Violence in Conflict: Report of the Secretary-General*, 67<sup>th</sup> sess, Agenda Item 33, UN Doc A/67/792-S/2013/149 (14 March 2013) [115] and annexed list.

47 *Letter Dated 24 March 2005 from the Secretary-General to the President of the General Assembly*, UN GAOR, 59<sup>th</sup> sess, Agenda Item 77, UN Doc A/59/710 (24 March 2005) [44]. The policy of zero tolerance was reaffirmed in UN Doc S/RES2272 (11 March 2016).

48 SC Res 2098, UN SCOR, 6943<sup>rd</sup> mtg, UN Doc S/RES/2098 (28 March 2013).

on the Elimination of All Forms of Discrimination against Women (the Women's Convention)<sup>49</sup> and its Optional Protocol of 2000.<sup>50</sup> Resolution 2122 returns to many of the issues identified in Resolution 1325, rather than focusing on either women's participation or responses to sexual violence in conflict. The resolution is framed as a response to 'persistent implementation deficits in the women, peace and security agenda'.<sup>51</sup> These gaps are manifest in the level of human rights abuses, the limited opportunities for women to take on leadership roles in peace processes, the nature of the support for women's needs and the commitment of all actors to the implementation of Resolution 1325.

In one sense, Resolution 2122 reads as an *apologia* about the failure to implement the promises of Resolution 1325 and as a renewal of vows. The Preamble refers to 'persistent implementation deficits in the women, peace and security agenda'.<sup>52</sup> These include failures by states to protect women from human rights abuses, provide opportunities for women to assume leadership roles, resource women's needs and enable them to exercise their rights, and commit to implementing Resolution 1325. The Security Council also offers an institutional *mea culpa*, recognising 'the need for more systematic attention to the implementation of women, peace and security commitments in its own work, particularly to ensure the enhancement of women's engagement in conflict prevention, resolution and peacebuilding'.<sup>53</sup> It announces its intention to 'focus more attention on women's leadership and participation in conflict resolution and peacebuilding'.<sup>54</sup> As with the previous resolutions on women, peace and security, Resolution 2122 does not have the binding force of being adopted under UN Charter Chapter VII. Moreover the language throughout the Resolution is permissive, for instance *requesting* the Secretary-General, UN bodies and states to undertake various actions and simply *encouraging* states to develop funding streams, rather than 'requiring' the allocation of resources.

The primary tools for the renewal of commitment identified in Resolution 2122 are technocratic. These include the improved collection of information and timely analysis;<sup>55</sup> regular briefings from UN officials on women,

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49 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*Women's Convention*').

50 *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 10 October 1999, 2131 UNTS 83 (entered into force 22 December 2000).

51 *Resolution 2122*, UN Doc S/RES/2122, Preamble para 5.

52 *Ibid.*

53 *Ibid* Preamble para 12.

54 *Ibid* para 1.

55 *Ibid* para 2.



peace and security;<sup>56</sup> increasing information and recommendations from the UN Secretariat to the Council;<sup>57</sup> monitoring progress in implementation;<sup>58</sup> and integration ('mainstreaming') of women, peace and security as an issue throughout all UN activities, including peacekeeping and peacebuilding missions,<sup>59</sup> commissions of inquiry,<sup>60</sup> and the work of special envoys and special representatives.<sup>61</sup>

Resolution 2122 offers some modest substantive developments on the previous Security Council resolutions. It firmly yokes women's and girls' empowerment and gender equality with international peace and security and underlines the dedication and concerted action required for this.<sup>62</sup> Mandates of UN missions must include provisions on promoting gender equality and empowering women, and provisions 'to facilitate women's full participation and protection'<sup>63</sup> in electoral and political processes, disarmament, judicial reform and other tasks of the mission. Member states involved in post-conflict processes also have this obligation.<sup>64</sup> This measure consolidates more fleeting references to women's equality in earlier resolutions.<sup>65</sup>

Resolution 2122 also extends the scope of the Security Council's interest in violence against women. The earlier resolutions had centred on sexual violence, displacing other dangers that women experience during armed conflict, such as the disappearance of family members and the destruction of property and food sources.<sup>66</sup> In its Preamble, although not in its operative paragraphs, the Resolution acknowledges threats such as the destruction of infrastructure<sup>67</sup> and 'forced displacement, as

56 Ibid paras 2(a), (b), (c).

57 Ibid para 2(d).

58 Ibid para 1.

59 Ibid paras 4, 5.

60 Ibid para 2(e).

61 Ibid para 7.

62 Ibid Preamble paras 4, 11.

63 Ibid para 4.

64 Ibid paras 8, 9, 10.

65 For example, SC Res 1889, UN SCOR, 6196<sup>th</sup> mtg, UN Doc S/RES/1889 (5 October 2009). There were, however, preambular references to the outcome document of Beijing + 5, 'Women 2000: Gender Equality, Development and Peace for the Twenty-First Century', in Resolutions 1820 and 1888 and to OSAGI's role in promoting gender equality in Resolution 1888. See SC Res 1820, UN SCOR, 5916<sup>th</sup> mtg, UN Doc S/RES/1820 (19 June 2008) Preamble para 3; SC Res 1888, UN SCOR, 6195<sup>th</sup> mtg, UN Doc S/RES/1888 (30 September 2009) Preamble paras 4, 19; the outcome document of Beijing + 5: *Report of the Ad Hoc Committee of the Whole of the Twenty-Third Special Session of the General Assembly*, UN GAOR, 23<sup>rd</sup> special sess, Supp No 3, UN Doc A/S-23/10/Rev.1 (2000).

66 Dianne Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade' (2009) 10 *Melbourne Journal of International Law* 11.

67 *Resolution 2122*, UN Doc S/RES/2122, Preamble para 7.

a result of unequal citizenship rights, gender-biased application of asylum laws, and obstacles to registering and accessing identity documents'.<sup>68</sup> It also urges that transitional justice mechanisms 'address the full range of violations and abuses of women's human rights'.<sup>69</sup>

What might Judith Gardam's alien observe of these developments? The alien might note that the Security Council resolutions of the 2000s depend on sometimes contradictory images of women and men, and of gender roles.<sup>70</sup> On the one hand, women are depicted as agents of political change through preventing and resolving conflicts and engaging in peacebuilding, somewhat essentialising women as 'peacemakers'.<sup>71</sup> On the other hand, the resolutions present women, girls and children as a group with 'special needs', requiring protection by a strong (male) authority to determine the proper measures for their security.<sup>72</sup> The alien might also remark on the elision of the terms 'women and girls' and 'gender' in the resolutions. There is no suggestion that these terms have a distinct meaning, or that gender might encompass expectations of masculinity as well as of femininity. Despite references *inter alia* to gender-based violence, gender advisers and experts, the resolutions focus 'in particular' on sexual violence against women and children, sidestepping the issue of sexual violence against men and boys, a significant phenomenon in armed conflict.<sup>73</sup> Indeed, the implication is that men and boys are only involved as perpetrators of sexual violence and as protectors against the commission by other men of such acts.<sup>74</sup> The alien could further observe that the directing of specific Security Council

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68 Ibid Preamble para 6.

69 Ibid Preamble para 7.

70 For the context of these resolutions, see Dianne Otto, 'Power and Danger: Feminist Engagement with International Law through the UN Security Council' (2010) 32 *Australian Feminist Law Journal* 97, 100-3.

71 For example, 'Reaffirming the important role of women in the prevention and resolution of conflicts and in peace-building': SC Res 1325, UN SCOR, 4213<sup>th</sup> mtg, UN Doc S/RES/1325 (31 October 2000) Preamble (emphasis in original); 'given their vital role in the prevention and resolution of conflict and peacebuilding': SC Res 1889, UN SCOR, 6196<sup>th</sup> mtg, UN Doc S/RES/1889 (5 October 2009) Preamble.

72 Iris Marion Young, 'The Logic of Masculinist Protection: Reflections on the Current Security State' (2003) 29 *Signs: Journal of Women in Culture and Society* 1.

73 Sandesh Sivakumaran, 'Sexual Violence against Men in Armed Conflict' (2007) 18 *European Journal of International Law* 253. See also Chloe Lewis, 'Systematic Silencing: Addressing Sexual Violence against Men and Boys in Armed Conflict and its Aftermath' in Gina Heathcote and Dianne Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security* (Palgrave, 2014) 203.

74 In this regard, Resolution 2106 (SC Res 2106, UN SCOR, 6984<sup>th</sup> mtg, UN Doc S/RES/2106 (24 June 2013)), adopted four months prior to Resolution 2122, goes further. It references the Declaration on Preventing Sexual Violence in Conflict adopted by G8 foreign ministers in London, 11 April 2013, which recognises 'the importance of responding to the needs of men and boys who are victims of sexual violence in armed conflict' and notes that sexual violence in armed conflict also affects

resolutions against certain countries suggests that the threat of sexual violence is located particularly in the global South and that the 'muscular humanitarianism' of the international community is a vital source of protection.<sup>75</sup> This maintains two constructed hierarchies: one between the global North and South; and one between the protectors and the protected.

The alien might be struck by the fact that, following the tradition of the earlier women, peace and security resolutions of the Security Council, Resolution 2122 does not address the links between violence against women in armed conflict and structural bases such as militarisation, the political economy of conflict or the struggle for control of economic resources.<sup>76</sup> Unlike the 1995 Beijing Platform for Action, the resolutions do not make recommendations with respect to the reduction of military expenditures and the availability of armaments,<sup>77</sup> although Resolution 2122 does acknowledge the adoption of the Arms Trade Treaty in March 2013<sup>78</sup> and looks forward to its contribution to reducing violence against women and girls in times of conflict. Beyond this, however, broader feminist agendas of disarmament, reduction of military expenditure or restrictions on arms production appear to have had no impact.<sup>79</sup>

Resolution 2122 can be read as cementing issues of women's insecurity on the agenda of the Security Council. However, linking concerns about women's security with the political agenda of the Council gives priority to coercive action through military power. This overlooks the deeply gendered nature of security discourse and practice.<sup>80</sup>

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men and boys: G8 United Kingdom 2013, 'Declaration on Preventing Sexual Violence in Conflict' (Foreign and Commonwealth Office, 11 April 2013) [3].

75 See also Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 *European Journal of International Law* 679.

76 See, for example, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Ertürk: Political Economy and Violence against Women*, UN Doc A/HRC/11/6 (18 May 2009) [62].

77 *Platform for Action*, UN Doc A/CONF.177/20/REV.1, ch I annex II para 143.

78 *Arms Trade Treaty*, opened for signature 3 June 2013, [2013] ATNIF 18 (entered into force 24 December 2014). Article 7(4) states: 'The exporting State Party, in making this [risk] assessment, shall take into account the risk of the conventional arms covered under Article 2(1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children'. See also *Women, Disarmament, Non-Proliferation and Arms Control*, GA Res 69/61, UN GAOR, 69<sup>th</sup> sess, Agenda Item 96(r), UN Doc A/RES/69/61 (11 December 2014), which *inter alia* calls for the full and meaningful participation of women in efforts to prevent, combat and eradicate the illicit transfer of small arms.

79 Otto, *The Security Council's Alliance*, above n 24, 255.

80 Carol Cohn, *Women and Wars* (Polity Press, 2013). For an overview see Hudson, above n 29, ch 2. The UN Security Council adopted a further resolution on women, peace and security in 2015:

## CEDAW'S GENERAL RECOMMENDATION NO. 30

General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations is the most recent compilation of jurisprudence from CEDAW. CEDAW comprises twenty-three experts elected by the UN General Assembly, and its task is to monitor the implementation of the Women's Convention through reviewing states parties' reports, undertaking inquiries, and adopting views on communications made under the Optional Protocol. The role of general recommendations is to collect and codify CEDAW's views on a topic in order to provide 'authoritative guidance to States parties' on legislative and other measures to fulfil their international obligations.<sup>81</sup> General Recommendation No. 30 states that it is also designed to guide states parties in their obligations with respect to non-state actors that breach the rights set out in the Women's Convention. General recommendation No. 30 is thus placed squarely within the framework of international human rights law. This is reinforced by references to other human rights treaties such as the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child<sup>82</sup> and the Convention on the Rights of Persons with Disabilities.<sup>83</sup>

The Women's Convention is centred on the elimination of discrimination against women. It contains a broad definition of discrimination in Article 1, covering both equality of treatment and equality of outcome. The Convention requires states to take legal and other measures to ensure the practical realisation of the principle of sex equality.<sup>84</sup> It covers a range of areas where state parties must work to eliminate discrimination against women, including political and public life,<sup>85</sup> international organisations,<sup>86</sup> education,<sup>87</sup> employment,<sup>88</sup> healthcare,<sup>89</sup> financial credit,<sup>90</sup> cultural

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SC Res 2242, UN Doc S/RES/2242 (13 October 2015).

81 *General Recommendation No. 30*, UN Doc CEDAW/C/GC/30 [1].

82 *General Recommendation No. 30* recalls the 'life cycle' approach of the Women's Convention and asserts that states must 'address the rights and distinct needs of conflict-affected girls': *ibid* [7].

83 *Ibid* para 11.

84 Women's Convention art 2.

85 *Ibid* art 7.

86 *Ibid* art 8.

87 *Ibid* art 10.

88 *Ibid* art 11.

89 *Ibid* art 12.

90 *Ibid* art 13(b).

life,<sup>91</sup> the rural sector,<sup>92</sup> and the law.<sup>93</sup> Although the Convention is not made explicitly applicable in armed conflict, CEDAW's General Recommendation 19 (1992) noted that '[w]ars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures'.<sup>94</sup> The following year, in 1993, the World Conference on Human Rights in Vienna went further in its recognition that '[v]iolations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response'.<sup>95</sup>

CEDAW has since made it clear that states' obligations under the Women's Convention continue during periods of armed conflict<sup>96</sup> and in states of emergency because such situations 'have a deep impact on and broad consequences for the equal enjoyment and exercise by women of their fundamental rights'.<sup>97</sup> States should thus devise measures that take into account the particular requirements of women in times of armed conflict and states of emergency.

General Recommendation No. 30 is a lengthy and detailed document, identifying states parties' obligations in three different situations: conflict prevention (in much greater specificity than in Resolution 2122); conflict; and post-conflict. It contains a considerable number of recommendations to states parties, and links its analysis to the human rights framework of the Women's Convention.

The alien would note that General Recommendation No. 30 offers a more complex picture of the diverse effects of conflict on women's lives than does Resolution 2122. It addresses in sophisticated terms a wider range of issues — for instance, access to justice, nationality and statelessness, marriage and family

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91 Ibid art 13(c).

92 Ibid art 14.

93 Ibid art 15.

94 Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation No.19: Violence against Women*, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.7 (12 May 2004) 249 [16].

95 World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993) pt II para 38.

96 *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, opened for signature 11 May 2011, CETS No 210 (entered into force 1 August 2014) art 2(3) makes the Convention applicable in peace and in armed conflict.

97 Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC28 (16 December 2010) [11].

relations, economic hardship, and education. This reflects its provenance as the product of an expert committee building upon existing Convention rights and obligations, unlike Resolution 2122, in which state interests — in particular those of the P5 — impose negotiating constraints. For example, while Resolution 2122 refers to situations of 'armed conflict' and 'post-conflict' as if they were distinct, General Recommendation No. 30 recognises the porosity of these terms through setting out a broad area of application. It covers conflict prevention, international and non-international armed conflict, cases of foreign occupation and post-conflict situations, as well as 'other situations of concern'. This last category includes 'internal disturbances, protracted and low-intensity civil strife, political strife, ethnic and community violence, states of emergency and suppression of mass uprisings, war against terrorism and organized crime'.<sup>98</sup> The Recommendation observes:

[T]he phases of conflict and post-conflict have at times been divided as they can encompass different challenges and opportunities for addressing the rights of women and girls. However, the Committee notes that the transition from conflict to post-conflict is often not linear and can involve cessations of conflict and then slippages back into conflict — a cycle that can continue for long periods of time.<sup>99</sup>

The Recommendation nevertheless uses the categories of 'conflict' and 'post-conflict' in its analysis, for the purpose of emphasising that the transition from conflict to post-conflict can in fact exacerbate violence against women. It notes research that shows that 'while the forms and sites of violence change, which means that there may no longer be State-sponsored violence, all forms of gender-based violence, in particular sexual violence escalate in the post-conflict setting'.<sup>100</sup>

The alien would observe that General Recommendation No. 30 addresses the root causes of armed conflict, which is largely ignored in Resolution 2122. The former accepts that violence against women is a form of discrimination and that conflict exacerbates existing inequalities. Throughout the text, the General Recommendation links discriminatory policies — for example with respect to migration, access to land, justice and nationality — to the objectives of the Recommendation: 'Protecting women's human rights at all times, advancing substantive gender equality before, during and after conflict and ensuring that women's diverse experiences are fully integrated into all peacebuilding, peacemaking, and reconstruction processes'.<sup>101</sup> Power imbalances and harmful gender norms are recognised as factors creating disproportionate risk,

98 Ibid [4]. This listing captures the essence of 'new wars': see Christine Chinkin and Mary Kaldor, 'Gender and New Wars' (2013) 67(1) *Journal of International Affairs* 167.

99 *General Recommendation No. 30*, UN Doc CEDAW/C/GC/30 [4].

100 Ibid [35].

101 Ibid [2].

for instance of HIV infection. Accordingly, transitional mechanisms must redress underlying sex- and gender-based discrimination and reparation measures must seek to rectify structural inequalities.<sup>102</sup> By contrast, Resolution 2122 references the right to reparations for violations of individual rights,<sup>103</sup> an approach that undermines the transformative function of rights.<sup>104</sup>

The alien might discern that General Recommendation No. 30 provides a more nuanced account of the category 'women' than Resolution 2122. The former notes that women do not form a homogenous group: they have diverse experiences and needs, and may be subject to intersecting forms of discrimination.<sup>105</sup> It rejects the image of women as inevitable victims or 'passive bystanders' to conflict, pointing out that women act as 'combatants, as part of organized civil society, human rights defenders, members of resistance movements and as active agents in both formal and informal peacebuilding and recovery processes'.<sup>106</sup> Nevertheless, like Resolution 2122, General Recommendation No. 30 often elides the categories of women and gender.<sup>107</sup> One illustration of this elision is its offer of the use of female police officers as an example of a 'gender-sensitive practice' in investigating human rights violations.<sup>108</sup>

The General Recommendation confirms the complementarity of human rights law, IHL, refugee and criminal law in all crisis situations.<sup>109</sup> Together, these legal regimes provide guidance with respect to the obligations of states and non-state actors for the prevention, protection, prosecution and punishment of gender-based crimes against women in armed conflict. In accordance with its status as a human rights instrument, the Recommendation emphasises the extraterritorial application of the Women's Convention to all persons within a state's effective control.<sup>110</sup> It points out that states are required to prevent discrimination conducted by non-state actors, such as corporations, which may be operating extraterritorially but are within the state's effective control, and gives the example of companies that provide loans in conflict-affected areas which may trigger forced evictions.<sup>111</sup> The alien could compare this to Resolution 2122, which recognises the applicability of states' human rights

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102 Ibid [77].

103 *Resolution 2122*, UN Doc S/RES/2122, para 13.

104 See, for example, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo*, UN Doc A/HRC/14/22 (19 April 2010).

105 *General Recommendation No. 30*, UN Doc CEDAW/C/GC/30 [7].

106 Ibid [6].

107 See, for example, *ibid* [2].

108 Ibid [17(d)].

109 Ibid [9], [19], [20].

110 Ibid [8].

111 Ibid [10].

obligations only to persons 'within their territory and subject to their jurisdiction as provided for by international law'. Such a formula, requiring both territoriality and jurisdiction, has, for example, underpinned the United States' rejection of the extraterritorial applicability of the International Covenant on Civil and Political Rights,<sup>112</sup> this no doubt influencing the Security Council's approach. General Recommendation No. 30 is also much more explicit than Resolution 2122 with respect to state obligations, reaffirming that states must respect, protect and fulfil women's human rights, and exercise due diligence with respect to the acts of non-state actors which violate Convention rights.<sup>113</sup>

General Recommendation No. 30 reiterates that violence against women is a form of discrimination under the Convention and leads to multiple other human rights violations, including those relating to delivery of economic and social rights: healthcare, education and social services. The alien might note that, while affirming at various points in the Resolution the importance of women's human rights, Resolution 2122 makes no reference to women's economic and social rights, categorising medical, legal, psychosocial and livelihood matters in the language of 'services', rather than in the language of rights. CEDAW, by contrast, makes numerous recommendations to states parties about providing adequate resources to protect women's rights, and calls on them to report on their legal framework, policies and programmes to ensure the human rights of women during and post-conflict. It addresses a number of matters, too controversial for the Security Council, such as the rolling-back of guarantees of women's rights in order to gain the co-operation of non-state actors, including 'terrorists, private individuals or armed groups'.<sup>114</sup>

## CONCLUSION

Judith Gardam's alien revisiting Earth after twenty years might be surprised by the level of activity with respect to the situation of women in armed conflict, given its earlier observation of the sparse normative framework, but it would also note the

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112 The UN Human Rights Committee has stated in relation to the United States that it 'regrets that the State party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice': Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, UN Doc CCPR/C/USA/CO/4 (23 April 2014) [4]. The US is, however, more nuanced with respect to the extraterritorial applicability of the Torture Convention: Committee against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America*, UN Doc CAT/C/USA/CO/3-5 (19 December 2014) [10].

113 *General Recommendation No. 30*, UN Doc CEDAW/C/GC/30, [15], [17(b)].

114 *Ibid* [17(b)].



high level of strategic activism towards this end by women's groups. The coincidence of the adoption of two major documents on this topic on the same day in different parts of the UN system suggests that the women, peace and security agenda has become a serious institutional concern. The alien might observe, however, that a close reading of the two documents illustrates the disparities that arise between an approach emanating from a tradition of rights and one based in the preservation of international security.

The perceptive alien might also find some common limitations in the two documents. First, the documents continue to present the major harm for women caught up in conflict as sexual violence. Concentration on crimes of sexual violence obscures the many other ways in which women experience armed conflict, such as the disappearance of male family members and the destruction of property and food sources for women who are the primary carers within family and community.<sup>115</sup> Resolution 2122 refers to the 'full range of threats and human rights violations and abuses' that women face in armed conflict, but provides none of the rich descriptions found in General Recommendation No. 30 of the locations, manifestations and consequences of such abuses.

A related concern is that the focus on crimes of sexual violence against women minimises similar crimes against men. Sexual violence against men in times of conflict is an aspect of the role that gender plays in violence during conflict, which depends on particular constructions of femininity and masculinity.<sup>116</sup> There is comparatively little research and information on sexual and gender-based violence against men and boys, a gap that has been emphasised in recent studies of conflict-related violence.<sup>117</sup>

The alien might also detect that both documents assume that women are innately vulnerable,<sup>118</sup> or, in the case of General Recommendation No. 30, are made vulnerable by circumstances such as economic hardship and structural disadvantage.

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115 The alien might be interested to learn that this focus has prompted energetic scholarly debates about whether concentrating on criminal prosecution as a response to sexual violence defines women solely through their sexuality and also undermines women's political and sexual agency. See Karen Engle, 'Feminism and its (Dis)contents: Criminalizing Wartime Rape' (2005) 99 *American Journal of International Law* 778. Indeed, Janet Halley has suggested that such representations could promote sexual violence through the 'weaponisation' of rape: Janet Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law International Armed Conflict' (2008) 9 *Melbourne Journal of International Law* 1, 37.

116 Sivakumaran, above n 73, 260; Lewis, above n 73.

117 See, for example, the UK PSVI initiative: G8 United Kingdom 2013, 'Declaration on Preventing Sexual Violence in Conflict' (Foreign and Commonwealth Office, 11 April 2013); the UN Special Rapporteur on Sexual Violence in Armed Conflict has called for better information on sexual violence against boys and men: *Sexual Violence in Conflict: Report of the Secretary-General*, 67<sup>th</sup> sess, Agenda Item 33, UN Doc A/67/792-S/2013/149 (14 March 2013) [10].

118 See, for example, *Resolution 2122*, UN Doc S/RES/2122, Preamble paras 6, 7.

This is exacerbated by references to the category of 'women-and-children'. Other manifestations include the assumption that women can never freely consent to sexual relationships with particular categories of people in periods of conflict and post-conflict. The image of vulnerability rather than agency is illustrated in the Secretary-General's policy of 'zero tolerance' towards sexual relationships between UN peacekeepers and local people in conflict situations, which is referenced in General Recommendation No. 30<sup>119</sup> and various Security Council resolutions. Dianne Otto has argued that this policy gives insufficient attention to 'the grinding poverty or the poorly resourced charity-based models of aid that produce economies of survival sex', diverting attention from the politics of social justice in order to 'save the UN's humanitarianism from scandal. It makes the survival of the "victims" it claims to protect even more precarious'.<sup>120</sup>

At a broader level, the alien might be puzzled by the dissonance between the bold aims and prescriptions of the Security Council resolutions and General Recommendation No. 30 and their impact on states. Indeed, there is evidence that the fact of the adoption of the Security Council resolutions has provided a smokescreen for inaction in some post-conflict contexts. For example, the UN's Senior Gender Advisor in Nepal in 2007-08, Ratna Kapur, reported that Resolution 1325 was used as a mechanism to limit the scope of her work. Misreading the Resolution, the UN Mission regarded Nepali women as objects of welfare, and their roles as combatants and political actors were overlooked. Kapur noted that '[a]dvice sought from the gender section by senior management was often limited to providing statistics or recommending token women to invite as speakers on panels, or providing inputs into speeches by the [UNMIN] leadership that were largely watered down or transformed into insipid remarks on gender'. In her view, Resolution 1325 'project[ed] an illusion of *something being done* in the area of gender by the international community, including UNMIN, without very much actually being done on the ground'.<sup>121</sup>

The call in the Security Council resolutions to include more women in peace processes has also had little practical effect. A study of twenty-four major peace processes since 1992 revealed a small number of women acting as negotiators, as

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119 *General Recommendation No. 30*, UN Doc CEDAW/C/GC/30, [38(b)], [41(b)].

120 Dianne Otto, 'Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies' in Vanessa E Munro and Carl F Stychin (eds), *Sexuality and the Law: Feminist Engagements* (GlassHouse Press, 2007) 259.

121 Ratna Kapur, Senior Gender Advisor/Chief of Section, 'End-of-Assignment Report' (UNMIN, 4 July 2008) (document on file with authors) (emphasis in original). See also Nadine Puechguirbal, 'Discourses on Gender, Patriarchy and Resolution 1325: A Textual Analysis of UN Documents' (2010) 17 *International Peacekeeping* 172.

delegates of negotiating parties, or as signatories to peace agreements.<sup>122</sup> Until 2013, the UN itself had not appointed a woman to be a chief mediator in a peace process.<sup>123</sup> Indeed, the Security Council has never taken the step of drawing attention to the absence of women in a particular peace process. CEDAW, however, has taken this up with respect to specific conflicts.<sup>124</sup> A review of the UN Peacebuilding Commission in 2010 found that it had failed to live up to its explicit mandate to take women and gender into account in its work.<sup>125</sup> Perhaps as a response to this criticism, the Peacebuilding Commission adopted a Declaration on Women's Economic Empowerment for Peacebuilding in 2014.<sup>126</sup>

A 2010 study of the terms of peace agreements found that only 16 per cent of peace agreements contained any references to women, beyond a general equality clause, although it noted that the adoption of Security Council Resolution 1325 prompted an increase, especially if the UN was involved in the process.<sup>127</sup> This trend appears to be continuing, and in his 2014 Report, the Secretary-General reported

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122 UNIFEM, 'Women's Participation in Peace Negotiations: Connections between Presence and Influence' (August 2010) United Nations Development Fund for Women <[http://www.unwomen.org/-/media/headquarters/media/publications/unifem/0302\\_womensparticipationinpeacenegotiations\\_en.pdf](http://www.unwomen.org/-/media/headquarters/media/publications/unifem/0302_womensparticipationinpeacenegotiations_en.pdf)>. The Global Study on the Implementation of United Nations Security Council Resolution 1325, *Preventing Conflict Transforming Justice Securing the Peace* (New York, 2015) 41-4, details research showing the benefits of inclusivity in peace negotiations.

123 Ibid 5. Ms Aïchatou Mindaoudou Souleymane was appointed by the UN as acting Joint Chief Mediator in Darfur in 2013: see UN Women, 'UN Security Council Adopts New Resolution, Urges Women's Full Inclusion in Peace Talks and Transitional Justice' (Press Release, 18 October 2013) <<http://www.unwomen.org/en/news/stories/2013/10/press-release-on-adoption-of-wps-resolution>>.

124 See, for example, Committee on the Elimination of Discrimination against Women, *Concluding Comments: Israel*, 33<sup>rd</sup> sess, UN Doc CEDAW/C/ISR/CO/3 (22 July 2005) [22]; *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Cyprus*, 35<sup>th</sup> sess, UN Doc CEDAW/C/CYP/CO/5 (30 May 2006) [34]; *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 64<sup>th</sup> sess, Supp No 38, UN Doc A/64/38 (2009) annex II ('Decision 43/III: Statement by the Committee on the Elimination of Discrimination against Women on the Situation in Gaza').

125 *Identical Letters Dated 2010/07/19 from the Permanent Representatives of Ireland, Mexico and South Africa to the United Nations addressed to the President of the General Assembly and the President of the Security Council*, UN GAOR, 64<sup>th</sup> sess, Agenda Item s 48 and 114, UN Doc A/64/868-S/2010/393 (21 July 2010) [3].

126 Peacebuilding Commission, *Declaration: Women's Economic Empowerment for Peacebuilding*, UN Doc PBC/7/OC/3 (26 September 2013).

127 Christine Bell and Catherine O'Rourke, 'Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and their Agreements' (2010) 59 *International and Comparative Law Quarterly* 941, 942. See also Security Council Report, 'Women, Peace and Security: Sexual Violence in Conflict and Sanctions' (Cross-Cutting Report, 2013) <<http://www.securitycouncilreport.org/cross-cutting-report/women-peace-and-security-sexual-violence-in-conflict-and-sanctions.php?print=true>>.

'significant progress' in this regard since 2010, although he conceded that this has not yet become 'standard practice'.<sup>128</sup>

The alien might, finally, be curious about the relationship between Resolution 2122 and General Recommendation No. 30. A major disparity exists in the formal power of their respective institutional homes: the Security Council is the pinnacle of collective coercive power within the international system, dominated by the P5 or even the P3, while CEDAW is a non-governmental human rights body with monitoring powers over a single treaty, to which states have made extensive reservations. In UN terms, it is New York versus Geneva. Resolution 2122 acknowledges the Women's Convention and urges non-parties to ratify or to accede to it.<sup>129</sup> General Recommendation No. 30 offers a much more detailed theorisation of the relationship. It devotes a whole section to the suite of Security Council resolutions on women, peace and security and indeed insists that 'their implementation must be premised on a model of substantive equality'.<sup>130</sup> The Recommendation urges states to ensure that their implementation strategies for the Security Council resolutions are consistent with the Women's Convention. It seeks to enhance the synergy between the agendas of the two institutions and to 'broaden, strengthen and operationalize gender equality' by recommending that states parties provide information on their implementation of Security Council commitments in their reports under Article 18 of the Convention. In this way, despite its lower institutional status, CEDAW has deployed its position as an authoritative interpreter of the Women's Convention in order to attempt to influence the Security Council.<sup>131</sup>

The alien's analysis of Resolution 2122 and General Recommendation No. 30 raises a more general issue for feminist approaches to international law — that of fragmentation. How has the generation of principles and norms on women and gender in different parts of the UN affected the possibilities for feminist transformations at the international level? While some have seen the cascade of references to women in international documents as a sign of success, there have also been more skeptical assessments. For example, Fionnuala Ní Aoláin has deplored the 'scattered landscape of international legal regulation for women, in which there is no evident hierarchy, a lack of substantive enforcement capacity, disjointed expertise, and ongoing norm

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128 *Report of the Secretary-General on Women and Peace and Security*, UN Doc S/2014/693 (23 September 2014) [21]-[24].

129 *Resolution 2122*, UN Doc S/RES/2122, Preamble para 1.

130 *General Recommendation No. 30*, UN Doc CEDAW/C/GC/30, [26].

131 The preamble to Resolution 2122 reaffirms the obligations of states parties — not all states — to the Women's Convention. It is significant that the United States, one of the P5 in the Security Council, is not a party to the Convention.

splintering'.<sup>132</sup> And Gina Heathcote has observed that the plethora of statements about women illustrates the fact that 'gender issues remain occasional and special interest topics rather than knitted into the structures of international law'. She argues that the international turn to gender is more likely to legitimate specific actors and institutions, rather than promote feminist law.<sup>133</sup> This has also been a continuing concern for Judith Gardam, who has, in her own elegant way, embraced the ambivalence of insisting on attention to women's lives in international law, while illuminating the law's limited representations of female and male actors and their worlds.<sup>134</sup>

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132 Fionnuala Ní Aoláin, 'International Law, Gender Regimes and Fragmentation: 1325 and Beyond' in Cecilia M Bailliet (ed), *Non-State Actors, Soft Law and Protective Regimes: From the Margins* (Cambridge University Press, 2012) 53, 68.

133 Gina Heathcote, 'Fragmented Feminisms: Critical Feminist Thinking in the Post-Millennium Era' (Paper presented at the 2014 European Society of International Law Conference, Vienna, 4-6 September 2014).

134 See also Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law* (Kluwer Law International, 2001); Judith Gardam, 'The Neglected Aspect of Women and Armed Conflict: Progressive Development of the Law' (2005) 52 *Netherlands International Law Review* 197; Judith Gardam, 'War, Law, Terror, Nothing New for Women' (2010) 32 *Australian Feminist Law Journal* 61; Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence' (1997) 46 *International and Comparative Law Quarterly* 55; Judith Gardam and Hilary Charlesworth, 'Protection of Women in Armed Conflict' (2000) 22 *Human Rights Quarterly* 148; Judith Gardam and Michelle Jarvis, 'Women and Armed Conflict: The International Response to the Beijing Platform for Action' (2000) 32 *Columbia Human Rights Law Review* 1; Judith Gardam, 'The Law of Armed Conflict: A Gendered Regime' (1993) 25 *Studies in Transnational Legal Policy* 171.

# 9

## THE LAW OF ARMED CONFLICT AND THE OPERATIONAL RELEVANCE OF GENDER: THE AUSTRALIAN DEFENCE FORCE'S IMPLEMENTATION OF THE AUSTRALIAN NATIONAL ACTION PLAN

JODY PRESCOTT

### INTRODUCTION

It was not until a tour of duty in Afghanistan as a legal advisor with the International Security Assistance Force (ISAF) that I began to sense a disconnect between the different areas of operational law regarding the significance of women in armed conflict, both as combatants and civilians. On any given day, my rule of law officer, a female lieutenant colonel, and I might be meeting with members of women's rights international and non-governmental organisations. Under the effects-based approach to operations method of operational analysis<sup>1</sup> being used at that time in the headquarters, the legal office had been assigned responsibility for developing an effective and holistic assessment of the progress of the international community's rule

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1 See Colonel Jody M Prescott, 'The Development of NATO EBAO Doctrine: Clausewitz's Theories and the Role of Law in an Evolving Approach to Operations' (2008) 27 *Penn State International Law Review* 125, 126-7, 131-5 (description of NATO EBAO methodology and its relationship to the Comprehensive Approach).

of law development efforts, and my role of law officer had convinced me that metrics regarding the treatment of women in the Afghan judicial and corrections systems could provide a particularly valuable and relevant measure of progress.

On another day, I might find myself engaged in a dynamic targeting situation if the legal advisor who ordinarily provided real-time law of armed conflict (LOAC) advice was otherwise occupied. Not surprisingly, the targets in that theatre were generally individual men, but the civilians who were to be protected during the engagements seemed an amorphous group — civilians are civilians, and the direct effects of a kinetic weapon upon a person are not easily differentiated on the basis of sex or gender. Frankly, although I was aware of UN Security Council Resolution 1325 on Women, Peace and Security,<sup>2</sup> women's and gender issues had in the past appeared to me to be largely human rights issues even in a combat theatre, and human rights issues seemed to have little to do with core LOAC tasks, such as a commander appropriately assessing proportionality before deciding to engage with armed force. This was a 'war amongst the people',<sup>3</sup> however, and I began to sense that we were neglecting half of them.

To sense a disconnect is one thing; to be able to articulate it for one's self in terms of one's experiences and training is often quite another. After I had returned from Afghanistan and started teaching at the US Military Academy, I was given the opportunity to research and present on NATO gender mainstreaming efforts at the Law Department's conference on gender justice. For the first time, I read the work of a number of feminist international law writers, including Hilary Charlesworth, Michelle Jarvis, and most particularly, Judith Gardam. Somewhat uncomfortably, I read detailed deconstructions of LOAC that challenged my baseline assessment of its impartiality and its even-handed application to both soldiers and civilians in armed conflict — people whom I had previously distinguished between solely on the basis of combatancy, and no further. I became aware that armed conflict had gender-differentiated impacts, and that its different effects upon women likely had operational significance in military operations such as counterinsurgencies and stability missions. Most importantly from my perspective, I now began to understand that sex and gender were directly relevant to the core norms under LOAC in deciding when to engage in the use of armed force and against whom.

Since then, Australia, like many other nations, has now promulgated a national action plan (*NAP*) to implement UNSCR 1325 across the whole of its government's

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<sup>2</sup> SC Res 1325, UNSCOR 5 916<sup>th</sup> mtg UN Doc S/RES/1325 (31 October 2000) (UNSCR 1325).

<sup>3</sup> Toni Pfanner, 'Interview with General Sir Rupert Smith' (2006) 88 *International Review of the Red Cross* 719, 719-22.

activities.<sup>4</sup> Unlike other nations' militaries, however, the speed and the thoroughness with which the Australian Defence Force (ADF) has moved to incorporate the requirements of UNSCR 1325 and related Security Council resolutions as reflected in the Australian *NAP* into its activities and operations is both heartening and amazing.<sup>5</sup> What is not clear at this point is whether the ADF's implementation of the *NAP* will culminate in dealing only with the aspects of LOAC and human rights law where they coincide, such as preventing, investigating and prosecuting instances of sex- and gender-based violence (SGBV) in operations.

In arguing that the ADF needs to follow the path set out by Professor Gardam and her colleagues regarding the operational relevance of gender to LOAC to its logical and fundamentally transforming conclusion, this chapter will first briefly describe how the differentiated impact of armed conflict and climate change upon women and girls might influence the modern international security environment in which the ADF operates. Mindful of these operational facts, and consistent with the *NAP*'s requirement to enhance normative mechanisms related to the greater protection of women and girls in armed conflict, this chapter will explore the status of women under the LOAC. Next, it will explore ADF doctrine as it exists at the time of this writing, in order to set a baseline against which to measure the ADF's implementation progress. This chapter will then examine the tasks assigned to the ADF by the *NAP* which are particularly operational in nature, and the way in which these tasks have been translated into action as ADF implementation has progressed. Against this factual, policy and legal backdrop, how the ADF might more fully deal with the broad application of UNSCR 1325 to operational issues involving LOAC will be explored, and certain measures that might foster this result will be recommended.

## THE IMPACT OF CLIMATE CHANGE AND ARMED CONFLICT UPON WOMEN

The international development community has long recognised that climate change has disproportionate effects on women as compared to men.<sup>6</sup> Likewise, UNSCR 1325 documents the international community's understanding of the disproportionate

<sup>4</sup> Government of Australia, *Australian National Action Plan on Women, Peace and Security 2012-2018* (2012) <<https://www.dss.gov.au/our-responsibilities/women/publications-articles/government-international/australian-national-action-plan-on-women-peace-and-security-2012-2018>> ('*NAP*').

<sup>5</sup> Department of the Prime Minister and Cabinet, *Progress Report, Australian National Action Plan on Women, Peace and Security 2012-2018* (2014) <<https://www.dpmc.gov.au/sites/default/files/publications/progress-report-2014-nap-women-peace-security-2012-2018.pdf>> ('*Progress Report*').

<sup>6</sup> Fatma Denton, 'Climate change vulnerability, impacts, and adaptation: Why does gender matter?' (July 2002) 10 *Gender & Development* 10, 11-12.



effects of armed conflict upon women as compared to men.<sup>7</sup> It is also understood that armed conflict and natural disasters have gender-differentiated impacts on populations that are not identical.<sup>8</sup> Finally, there is an increasing recognition on the part of national governments that climate change (including more frequent natural disasters caused by extreme weather events) will likely exacerbate the occurrence and impact of armed conflict.<sup>9</sup> What is not currently as well appreciated, however, is the dynamic intersection of climate change, armed conflict and the gender-differentiated effects of these two phenomena upon women.

### Climate Change

Climate change has gender-differentiated impacts upon women in general, particularly those in developing countries.<sup>10</sup> This is in large part the result of women's disadvantaged status in many countries and cultures. For rural women in developing countries, their vulnerability appears to be grounded largely in three interrelated factors: unequal access to resources, unequal opportunities to change or enhance their livelihoods, and unequal participation in decision-making processes regarding resource use and allocation.<sup>11</sup> In terms of unequal access to resources, rural women often find themselves performing such time-consuming, and generally non-remunerative, tasks as animal husbandry and subsistence agriculture,<sup>12</sup> and drawing water to support these important activities as well as for their families' use in their households.<sup>13</sup> Because of their social and economic inequality vis-à-vis men, however, rural women in developing countries might have restricted access to these resources even though they in fact might be the primary users of the land and water resources utilised to support these activities.<sup>14</sup> This situation is also reflected in the consumption of energy

7 SC Res 1325, UNSCOR 5 916<sup>th</sup> mtg UN Doc S/RES/1325 (31 October 2000) (UNSCR 1325) 1-3.

8 Sarah Shteir, 'Gendered Crises, Gendered Responses' Civil Military Occasional Paper 01/2013 (Australian Civil Military Centre, 2013) 4-5, <<http://acmc.gov.au/wp-content/uploads/2013/09/Gendered-Crises-Gendered-Responses.pdf>>.

9 US Department of Defense, *Quadrennial Defense Review Report* (February 2010) iv.

10 Gotelind Alber, *Gender, Cities and Climate Change. Thematic Report Prepared for Cities and Climate Change, Global Report on Human Settlements* (2011) 33 <<http://www.unhabitat.org/wp-content/uploads/2012/06/GRHS2011ThematicStudyGender.pdf>>.

11 Dorte Verner (ed), *Adaptation to a Changing Climate in the Arab Countries* (The World Bank, 2012) 279.

12 Ibid 281.

13 Ibid 282.

14 Anne Marie Goetz et al, *Who Answers to Women? Gender & Accountability* (UNIFEM, 2009) 37 <[http://www.unifem.org/progress/2008/media/POWW08\\_Report\\_Full\\_Text.pdf](http://www.unifem.org/progress/2008/media/POWW08_Report_Full_Text.pdf)>.

resources in developing countries. Women are often responsible for the gathering of biomass energy sources such as firewood, but do not necessarily enjoy the degree of access to these resources they would have were they men.<sup>15</sup>

One study has calculated the amount of time spent by women and children (primarily girls) in Africa drawing water to be as much as 40 billion hours a year.<sup>16</sup> Gathering biomass energy resources is similarly time-consuming, and unbalanced rates of consumption and regeneration mean that women must often range ever farther to secure necessary supplies of firewood to be burned directly or converted to charcoal.<sup>17</sup> Because of the time spent in gathering and using water and energy resources, as well as other household chores, women and girls generally have less time available to become educated, or to undertake economic activity that could generate cash earnings.<sup>18</sup> As the men in their families migrate to other areas in search of work, women also find themselves taking on additional chores, further reducing the time available for educational or income-producing activity.

The lack of title to land in their own names in many areas complicates women's participation in decision-making processes as to resource use and allocation. For example, women who do not own land might be unable to secure credit for seeds and improvements on the land they work, and might find that their access to water for use on the land is insecure.<sup>19</sup> Unless they are recognised as land owners, and therefore as clear stakeholders, women might also find themselves unable to become full members in rural organisations that make decisions that affect resource use.<sup>20</sup> The combination of all these factors tends to make women a more vulnerable and less resilient population cohort to the effects of climate change, a vulnerability exacerbated by armed conflict in many areas.

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15 Ibid. In Bangladesh, for example, gendered norms regarding asset control lead to 'an assumption that women in agriculture are concerned with subsistence only' — an assumption which reinforces institutional and policy biases that 'worsen[ ] women's disadvantages in accessing markets, credit, technology and services, and perpetuate[ ] the lack of recognition surrounding women's role in farming'. Emily Hillenbrand, 'Transforming Gender in Homestead Food Production' (November 2010) 18 *Gender & Development* 411, 413.

16 Goetz, above n 14, 37.

17 Judith Gardam, 'A Role for International Law in Achieving a Gender Aware Energy Policy' in Paul Babie and Paul Leadbeter (eds), *Law as Change: Engaging with the Life and Scholarship of Adrian Bradbrook* (University of Adelaide Press, 2014) 51.

18 Goetz, above n 14, 37.

19 Verner, above n 11, 287.

20 Ibid.

## Armed Conflict

Today, in general, armed conflict tends to occur in areas which are less economically developed. As previously noted, women in these areas have a relatively inferior social and economic status as compared to men, and this gender discrimination and its effects make women more vulnerable to the impacts of armed conflict.<sup>21</sup> These negative effects occur whether women are in the roles of civilians, refugees or even combatants. As civilians, women often find themselves suffering increased physical insecurity. They are more likely to be victims of rape, sexual assault, enslavement and even torture as a result of armed conflict<sup>22</sup> — forms of violence over which they have little control. As to sexual violence itself, women are also more vulnerable to 'forced prostitution ... forced impregnation, forced maternity, forced termination of pregnancy, forced sterilization ... strip searches, and inappropriate medical examinations'.<sup>23</sup> This increased physical insecurity has ripple-effects through villages and societies — the threat of violence impedes women's ability to leave their homes and grow and market agricultural and herding products, and thereby diminishes their capability to feed their families and earn hard cash.<sup>24</sup> Further, women civilians are negatively impacted by armed conflict even if they are not caught up directly in the fighting. Given their generally inferior status in these areas, they are often dependent upon the men of their families to provide a livelihood, and the absence of men often means that women must step up to the roles of provider and protector in addition to the caregiving and household duties they already perform.<sup>25</sup> Finally, because they likely are unable to equitably access economic resources even during times of relative peace, women often lack the ability to withstand the hardships caused by armed conflict or rebuild quickly once the fighting is done.<sup>26</sup>

The lot of women who are refugees from armed conflict is particularly trying. Living conditions in camps are often inadequate, and women therefore find themselves without appropriate hygienic facilities or basic medical care. Because means of contraception are not generally readily available, they are at risk of increased

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21 Judith Gardam and Michelle Jarvis, *Women, Armed Conflict And International Law* (Kluwer Law International, 2001) 8-9.

22 Ann Jones, *War Is Not Over When It's Over* (Henry Holt & Co., 2010), 19-20, 58, 84, 101, 134-5, 143, 150-1, 161-2, 172.

23 Johanna Valenius, 'Gender Mainstreaming in ESDP Missions' (Chailot Paper No. 101, May 2007) 20.

24 Sahana Dharmapuri, 'Just Add Women and Stir?' (Spring 2011) 41 *Parameters* 56, 64.

25 Judith Gardam and Hilary Charlesworth, 'The Need for New Directions in the Protection of Women in Armed Conflict' (2000) 22 *Human Rights Quarterly* 148, 153; Valenius, above n 23, 23.

26 Gardam and Charlesworth, above n 25, 151, 153.

pregnancy during times of increased stress.<sup>27</sup> Women are at increased risk of sexual violence in refugee camps as well, but the specialised medical services to treat victims of sexual assault might be in very short supply.<sup>28</sup> Depending on the culture, women and girls might eat last in a family, and in times of food scarcity, this could mean that they do not eat at all.<sup>29</sup> Because of their generally inferior status, women often find themselves without marketable skills as they try to survive as refugees,<sup>30</sup> and even if they are able to return to their homes, they are often marginalised in the rebuilding and reconciliation efforts.

Particularly as nations in the developed world have increased the opportunities for women to serve in military positions that were once exclusively the province of men, it is more common now to find women in these armed forces serving as both leaders<sup>31</sup> and ordinary combatants.<sup>32</sup> Australia officially removed gender restrictions on combat positions effective 1 January 2013,<sup>33</sup> joining other Western nations such as Denmark, Norway and Canada. While women in these countries can now look forward to greater leadership and career opportunities, the position of women combatants in less developed countries, particularly in the conduct of non-international armed conflict,<sup>34</sup> is not enviable. These women sometimes achieve leadership roles in irregular military units,<sup>35</sup> but often even those who serve as frontline fighters have markedly different experiences than their male counterparts.<sup>36</sup> These women fighters also function in many logistical roles, such as setting up camp and

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27 Judith Gardam and Hilary Charlesworth, 'Protection of Women in Armed Conflict', Section 2, Workbook Readings, 124, Gender and Peacekeeping Online Training Course, available at <<http://www.genderandpeacekeeping.org>>.

28 'UN Official Voices Concern over Reports of Rape of Somali Women Fleeing Famine' (UN News Centre, 11 August 2011), <<http://www.un.org/apps/news/story.asp?NewsID=39282>>.

29 Gardam and Charlesworth, above n 25, 155.

30 Jones, above n 22, 172, 202-28.

31 See Dean Davis, 'Female Engagement Team commander speaks about mission in Afghanistan' (DVIDS, 16 October 2010) <<http://www.dvidshub.net/video/97875/female-engagement-team-commander-speaks-about-mission-afghanistan>> (First Lieutenant Quincy Washa discussed her team's operations in Afghanistan).

32 See, for example, Sergeant Warren Wright, 'Two members of Cultural Support Team receive Combat Action Badges' (US Special Operations Command, 12 September 2011) <<http://www.soc.mil/uns/Releases/2011/September/110912-06.htm>> (Sergeant Shelly Amborn and Specialist Sonja Prentiss awarded badges for actions during combat with insurgents in Afghanistan).

33 Department of Defence, 'Removal of Gender Restrictions from ADF Combat Roles' <<http://www.defence.gov.au/women>>.

34 Dharmapuri, above n 24, 62.

35 See, for example, the story of 'Black Diamond', a Liberian rebel soldier who became prominent for her ferocity in the Liberian Civil War, in Alan Huffman, *Here I Am* (Grove Press, 2013) 7-8, 20-2.

36 Dharmapuri, above n 24, 62.

moving equipment and materiel, and as bush-wives for the men, cooks and spies.<sup>37</sup> Often, they will have children as the result of either rape or relationships with the men, and they face significant challenges as they seek to reintegrate into post-war societies.<sup>38</sup> Disarmament, demobilisation and reintegration provisions in post-war settlements often fail to recognise their special needs.<sup>39</sup>

In sum, like climate change, armed conflict in many areas has a gender-differentiated impact, and, sadly, the potential exists for the two to accentuate the other. Women in such situations are disproportionately affected because of their inferior economic and social status and their roles as the primary caregivers to their families. The significance of this operational reality becomes crucial when one notes the number of modern conflicts that, even though they might have started primarily as hostilities of military force on military force, have become 'wars amongst the people'. In these civilian-centric conflicts, there might be no decisive engagements, and instead of neutralising the enemy military units, the focus of military effort moves to building stability through influencing the perceptions, attitudes and behaviours of the population. A campaign plan to win such a war is unlikely to succeed if it fails to understand that the effects of a particular kinetic action will cause greater harm to one half of the population than the other. In light of the importance in the *NAP* of normative measures to achieve better outcomes for women and girls in conflict-affected areas, how, then, does LOAC deal with this gender-differentiation of the impacts of armed conflict?

### THE STATUS OF WOMEN UNDER LOAC

The 1949 Geneva Conventions explicitly state in Common Article 3 that '[p]ersons taking no active part in ... hostilities ... shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth, or wealth, or any other similar distinction'.<sup>40</sup> This principle of impartiality, of treating

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37 Ibid.

38 Valenius, above n 23, 23.

39 Ibid.

40 Comm. art 3, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 6 UST 3114, 75 UNTS 31 ('GC I'); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 6 UST 3217, 75 UNTS 85 ('GC II'); Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 UST 3316, 75 UNTS 135 ('GC III'); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516, 75 UNTS 287 ('GC IV'). Of these treaties, GC IV provides the greatest number of measures specifically designed to afford women consideration due to their special requirements as pregnant mothers and caregivers to children (see arts 16-18, 20-3); but in so doing it tends to essentialise

all protected persons in the same way, is understood as a cornerstone of customary international law. Unfortunately, when the Geneva Conventions and the Additional Protocols that followed them in 1977 are scrutinised, the rules that implement these treaties are not premised on the notion that men and women are equal; nor do they recognise the operational reality of gender-differentiated effects of armed conflict upon women.

*Geneva Conventions (GC) I and II* note that 'women will be treated with all consideration due to their sex'.<sup>41</sup> The Commentaries to the Geneva Conventions, recognised as the authoritative interpretations of the treaties, defines 'consideration' as that which is afforded in every country to beings who are weaker than one's self and whose honour and modesty call for respect'.<sup>42</sup> Accordingly, the protection that women receive is premised on traditional social constructs placing women in an inferior position<sup>43</sup> rather than on the operational reality of armed conflict's effects upon them. *GC III*, dealing with prisoners of war, contains important provisions requiring equal treatment of men and women in many instances, such as housing them in separate dormitories<sup>44</sup> and requiring separate hygienic facilities.<sup>45</sup> Like *GC I* and *GC II*, however, the rationale for differentiating between men and women prisoners of war is women's inherent weakness, and the need in a prison camp setting to protect them from sexual violence and 'forced'<sup>46</sup> prostitution, and the effects of pregnancy and childbirth.<sup>47</sup>

Despite these concerns, *GC III* does not require that women's dormitories be supervised by women,<sup>48</sup> nor that women's reproductive health issues be addressed.

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women in these roles. Interestingly, despite common Article 3, it allows no 'adverse distinction based, in particular, on race, nationality, religion, or political opinion' — but not sex (ibid art 13).

41 *GC I* and *GC II*, above n 40, art 12.

42 Jean S Pictet (ed), *Commentary: The Geneva Conventions Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, 1952) 202.

43 Gardam and Jarvis, above n 21, 10-11.

44 *GC III*, above n 40, art 25.

45 Ibid, art 80.

46 It is questionable whether there is really a difference between 'forced' and 'voluntary' prostitution in a prisoner-of-war camp setting.

47 Jean S Pictet (ed), *Commentary: The Geneva Conventions Relative to the Treatment of Prisoners of War* (International Committee of the Red Cross, 1960) 277 ('GC III Commentary').

48 As compared to the quarters in which women who have been convicted of penal offenses are housed. *GC III*, above n 40, art 108. ADF LOAC doctrine, however, specifically includes all women detainees within this protective measure. Chief of Joint Operations, Headquarters Joint Operations Command, *Australian Defence Doctrine Publication (ADDP) 06.4, Law of Armed Conflict* (11 May 2006) 9-7. This approach reflects customary LOAC ('ADDP 06.4').

Contraception is not provided; nor are sanitary supplies for women.<sup>49</sup> This omission is particularly significant in light of the treatment of pregnant prisoners of war. The Commentary notes that '[p]articular "regard" is required in the case of women prisoners who are pregnant when captured or *become pregnant in captivity despite the precautions taken*'.<sup>50</sup> Such regard apparently consists of providing separate dormitories not under the supervision of women, and separate latrines. Finally, women prisoners' medical and physical security needs are not adequately addressed, and enlisted women prisoners of war are not given the right to elect women representatives to address their concerns in the representation of the prisoners to the capturing country or external organisations.<sup>51</sup>

The 1977 Additional Protocols<sup>52</sup> were promulgated almost thirty years after the Geneva Conventions, and they clarify and amplify important protections for both civilians and combatants. However, the Commentary to AP I makes it obvious that protections for women against sexual violence are based on outdated notions of women's 'honour',<sup>53</sup> a social construct, rather than sexual violence being seen as a crime against their persons. Perhaps the most significant defect of AP I from the perspective of armed conflict's gender-differentiated impact is in its formulation of the principle of proportionality. AP I prohibits attacks 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.<sup>54</sup> Based upon information reasonably available at the time, the question of whether the incidental damage is excessive is a matter for the individual commander to decide.<sup>55</sup> This rule as stated does not contemplate that different civilians might suffer different and significant indirect effects of a particular

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49 Gardam and Jarvis, above n 21, 104.

50 *GC III Commentary*, above n 47, 148 (emphasis added).

51 In camps without officers, for instance, prisoners of war will elect such representatives by secret ballot. *GC III*, above n 40, art 79.

52 *Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 ('AP I'); *Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflict*, 8 June 1977, 1125 UNTS 609.

53 International Committee of the Red Cross, 'Commentary to Additional Protocol I' [892] <<http://www.icrc.org/ihl.nsf/COM/470-750098?OpenDocument>>.

54 *AP I*, above n 52, art 76(2).

55 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation under International Humanitarian Law* (International Committee of the Red Cross, 2009) 76. It was compiled on the basis of reports generated from meetings of international experts in the law of armed conflict (LOAC) held between 2003 and 2008; *ibid* at 8.

## IMAGINING LAW

kinetic action on the basis of their gender — a bomb is a bomb, and a civilian is a civilian under this analysis.

Although proponents of customary international law appear to have overstated the degree to which it recognises the protections to which women are entitled,<sup>56</sup> it must be recognised that as a matter of customary international law and state practice many of the deficiencies of LOAC from a modern gender equality perspective have likely been ameliorated to a degree. For example, it is not clear that a typical soldier today would know that the different protections women might receive in military operations as to sexual violence or pregnancy are premised upon women's inherent weakness and modesty, or upon their essentialised role as caregivers — nor is it likely that the soldier would care, so long as the required treatment was afforded as ordered. Despite this positive evolution, however, the fact remains that the underlying treaty law likely tends to reinforce a male-normative view of LOAC's application which is both discriminatory and at odds with the gender-differentiated impact of armed conflict upon women. Evidence of this subtle influence is disclosed through examination of ADF doctrine as it exists at the time of this writing, as to both the types of operations most likely to be civilian-centric, and LOAC and targeting doctrine specifically.

### ADF DOCTRINE

#### ADF Operations Doctrine

At the time of this writing, the ADF is conducting a significant review and revision process of its doctrine to ensure that concepts related to women, peace and security are properly embedded within it. For example, peace operations doctrine has already completed this process, and the new version published in 2015 reflects extensive revisions in this regard.<sup>57</sup> In general, however, it is fair to say that ADF doctrine that has not yet undergone this review and revision process does not deal with the operational reality of gender in a meaningful way. This is also reflected in supporting doctrine, such as targeting, and to a large extent, LOAC doctrine. At the time of this writing, ADF multinational doctrine mentions women only twice, both times in the

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56 Jody M Prescott, 'NATO Gender Mainstreaming and the Feminist Critique of the Law of Armed Conflict' (2013) 14 *Georgetown Journal of Gender and the Law* 83, 102-3.

57 Email from Mr Christopher Ross, Doctrine Desk Officer, Joint Doctrine Centre, to Jody M Prescott (4 January 2016). Previously, Chief of Joint Operations, Headquarters Joint Operations Command, ADDP 3.8, Peace Operations (3 June 2011) had only noted that Australia is a party to the UN Convention against Transnational Organised Crime's People Trafficking Protocol, 2-14.



context of the composition of different armed forces.<sup>58</sup> There is no mention of gender or UNSCR 1325.

Of all the types of operations, one might logically assume that civil-military operations, with their civilian-centric focus, would meaningfully deal with the operational relevance of gender. In fact, at the time of this writing, ADF civil-military operations doctrine is being reviewed and revised to include content relevant to gender and the protection of civilians. To understand the scope of the ADF's undertaking in this regard, it is useful to review the current version of the doctrine. Civil-military operations support the entire spectrum of Australian military operations, from the most kinetic offensive operations to the relatively tamer post-conflict peacebuilding actions. The ADF defines civil-military operations as 'any measures, activities, or planning undertaken by the military which both facilitates the conduct of military operations, and builds support, legitimacy and consent, within the civil population in furtherance of the mission'.<sup>59</sup> Although Australian Defence Doctrine Publication (ADDP) 3.11 is very detailed and comprehensive, it addresses women only twice, noting that they might be a vulnerable population in host nations and that, when they are detained in the course of an armed conflict, they 'are to be quartered separately from men and supervised by women'.<sup>60</sup> Gender is mentioned once, in that humanitarian assistance is to be rendered impartially irrespective of gender,<sup>61</sup> and climate change not at all.

In the conflicts which are likely to arise as stressed populations scramble and compete for limited natural resources, the lines between humanitarian crisis and armed conflict will further continue to blur, and neither the international development community nor the military are likely to find themselves in nice, neat operational boxes. The ADF will need to find a way to integrate gender and climate change in its operations, at least to a certain degree, because ignoring these aspects of operations in civilian-centric environments will not simply make them stop affecting the stability of these environments. It is fortunate to have an institution as capable as the Australian Civil-Military Centre (ACMC) to assist in this effort, and it may be useful to the ADF to consider the semi-official work done at the doctrinal level by the Civil Military Cooperation Centre of Excellence (CCOE) in the Netherlands.

CCOE is a NATO-accredited centre of excellence located in the Netherlands. It has a multinational staff from seven different NATO nations, and the nationality

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58 Chief of Joint Operations, Headquarters Joint Operations Command, *ADDP 00.3, Multinational Operations* (3 June 2011) 1-5, 3-18.

59 Chief of Joint Operations, Headquarters Joint Operations Command, *ADDP 3.11, Civil-Military Operations* (1 April 2009) 1-2.

60 Ibid 1-11, 2B-2.

61 Ibid 1-11.

of its commander rotates between Germany and the Netherlands.<sup>62</sup> Although its general handbook on civil-military operations (CMO) does not mention climate change specifically, it does highlight the importance of understanding the physical environment and ecosystems in the area of operations.<sup>63</sup> It also contains a detailed section on the importance of gender awareness in the conduct of CMO.<sup>64</sup> Importantly, the general handbook is supplemented by a gender guide that addresses the practicalities of working with gender issues in operations, and provides planning guidance and case studies to help better understand how to incorporate gender considerations into operations.<sup>65</sup> Most importantly for the purposes of this chapter, these two publications are complemented by a third, dealing with the operational significance of the physical environment and its importance to stability operations. The environmental handbook not only deals with the process of climate change and how units can avoid degrading local environments through their activities, but it also explicitly links gender to climate change.<sup>66</sup>

Given the ADF's extensive peacekeeping and humanitarian experience, the CCOE's work could usefully inform the ADF's implementation of the Australian *NAP* in these sorts of missions, so as to more closely align doctrinal understandings of these operational environments with the actual processes at play on the ground. For the purposes of this chapter, however, it is important not just to review this operational doctrine, but instead to push on and deal with the supporting doctrine that might need to be significantly transformed in order to realise Professor Gardam's objectives in achieving greater protection of women and girls in armed conflict.

### ADF Supporting Doctrine

For the purposes of this chapter, the two most important supporting ADF doctrinal publications are perhaps those dealing with LOAC and targeting. In general, although ADF doctrine on LOAC does meaningfully mention women and the 'special' protections they receive under LOAC, this occurs predominately in the context of

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62 Civil-Military Cooperation Centre of Excellence, 'About CCOE' <<http://www.cimic-coe.org/home/about.php>>.

63 Civil Military Cooperation Centre of Excellence, *CIMIC Field Handbook* (3<sup>rd</sup> ed, 2012) III-5-3-III-55-4 <<http://www.cimic-coe.org/download/cfh/CIMIC-Handbook.pdf>>.

64 Ibid III-6-1-6-6.

65 Captain Stephanie Groothedde, *CIMIC Centre of Excellence, Gender Makes Sense: A Way to Improve Your Mission* (2013) 2, 15, 17-23, 24-7 (2013) <[http://www.cimiccoe.org/download/gender\\_brochure\\_web.pdf](http://www.cimiccoe.org/download/gender_brochure_web.pdf)>.

66 CMDR N Gallagher & MAJ P Wit, *Society Stabilization by Winning the Environment: Ecosystems Assessment Makes Sense ... Full Situational Awareness in CIMIC* (2012) 27, 35, 37, 52, 53-7, 71-5 <[http://www.cimic-coe.org/download/Ecosystems\\_Assessment.pdf](http://www.cimic-coe.org/download/Ecosystems_Assessment.pdf)>.

safeguarding women from 'rape, forced prostitution and any other form of indecent assault'.<sup>67</sup> These protections are exceedingly important in terms of implementing UNSCR 1325, and they reflect the Australian *NAP*'s focus in the thematic area of protection on the protection of women and girls from gender-based violence.<sup>68</sup> Unfortunately, they also reflect the Geneva Conventions' premise of female modesty and status based on relationships with others, or as ADDP 06.4 phrases it, attacks on their honour.<sup>69</sup>

ADDP 06.4 provides an extensive discussion of the principle of proportionality.<sup>70</sup> Although the two are sometimes conflated by certain writers, the principle of proportionality under LOAC is quite different than that which would be applicable in a self-defence context under human rights law<sup>71</sup> or in a *jus ad bello* situation.<sup>72</sup> Under LOAC, a commander may use the force necessary to accomplish the mission so long as the direct, anticipated military advantage is not outweighed by excessive incidental injury to civilians or damage to civilian property.<sup>73</sup> Because Australia understands that those 'responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time',<sup>74</sup> the requirement that any injury to civilians or damage to their property not be excessive grants a significant degree of latitude to the commander in making the decision to use a particular type or amount of force. Further, it is also consistent with the standard of reasonable certainty applied by a commander in deciding whether a targeted individual is a combatant or a protected civilian not taking a direct part in hostilities.<sup>75</sup>

67 *ADD 06.4*, above n 48, 9-7, 9-14. *ADDP 06.4* also notes the importance of providing subsistence articles to civilian women and children in particular, and notes that women are to receive medical treatment with all consideration due to their sex, although medical treatment priority is based on need. *Ibid* 6-15 — 6-16, 9-24.

68 *NAP*, above n 4, 14.

69 *ADDP 06.4*, above n 48, 12-8.

70 *Ibid* 2-1, 2-2, 2-4, 2-6, 4-1, 4-14, 5-1, 5-4, 5-7, 5-11, 7-1, 8-10, 8-11, 9-11.

71 See, for example, James Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford University Press, 2010) 108-9.

72 Michael N Schmitt (ed), *Tallinn Manual on The International Law Applicable to Cyber Warfare* (Cambridge University Press, 2013) R.14, ¶1, 61-62.

73 *Ibid* R.50, ¶3, 131-2.

74 Chief of Joint Operations, Headquarters Joint Operations Command, *ADDP 3.14, Targeting* (2 February 2009) 3A-1 (Australia's Declarations of Understanding to the Additional Protocols) ('*ADDP 3.14*').

75 See, for example, DoD General Counsel, *Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM)* (10 November 2009) 26 <[http://www.aclu.org/files/assets/Manes\\_Declaration\\_Exhibits.100810.pdf](http://www.aclu.org/files/assets/Manes_Declaration_Exhibits.100810.pdf)> (Briefing on US targeting methodology).

Consistent with current ADF doctrine on LOAC, it does not appear that Australian targeting doctrine at the time of this writing distinguishes between civilians on the basis of sex or gender. For example, collateral damage is described in terms of civilians and civilian property, and the principle of proportionality is likewise explained in the same fashion.<sup>76</sup> Similarly, because targeting doctrine does not require the analysis of sex- or gender-disaggregated data, or the operationally oriented gender analysis that could flow from it, it is not likely that this information is collected as part of standard ADF intelligence gathering operations. Importantly, though, as noted earlier, the ADF has undertaken a thorough and wide-ranging review of its doctrine to determine where it might best incorporate gender perspectives. To better appreciate whether these doctrinal revisions might address some of the challenges identified above, it is now most useful to consider the Australian *NAP* itself, the ADF's implementation of the Australian *NAP* in general, and the implementation measures most relevant to operational aspects in particular.

THE PROGRESS OF THE ADF'S IMPLEMENTATION OF THE *AUSTRALIAN NATIONAL ACTION PLAN (NAP)*

The Australian *NAP*

Under the *NAP*, the Australian government intends to improve outcomes for women and girls in conflict-affected areas in five specific thematic areas: conflict prevention, increased participation of women in political processes related to conflict, greater protection during all phases of armed conflict, heightened consideration in the implementation of relief and recovery efforts afterwards, and the promotion of normative measures. The *NAP* then sets out strategies to improve outcomes, and lists numerous actions that benchmark how these strategies will be implemented. Of the strategies set out in the *NAP* in which the ADF has a role, three in particular would appear to be relevant to the ADF implementing UNSCR 1325 in an operational sense: integrating 'a gender perspective into Australia's policies on peace and security', promoting implementation internationally, and taking a co-ordinated and holistic approach domestically and internationally to women, peace and security.<sup>77</sup> As to the use of a gender perspective, the ADF is required to 'develop guidelines for the protection of civilians, including women and girls'.<sup>78</sup> Importantly, any review of the ADF's incorporation of a gender perspective in its activities and operations must recognise that it is occurring alongside very significant government actions to ensure

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76 *ADDP* 3.14, above n 74, 1-11, 3-3.

77 *Ibid* 19.

78 *Ibid*.

equal treatment of women ADF service members and to improve gender diversity in the ADF from a capability perspective.<sup>79</sup>

In terms of promoting international implementation in conflict-affected areas, the ADF will promote 'opportunities for women's leadership and participation in decision-making' at the country level, consider the use of specific capabilities such as 'female engagement teams and the use of gender advisors', and 'promote women's involvement in the development of institutions, including national judiciary, security and governance structures'.<sup>80</sup> The *NAP* sets out a number of activity benchmarks to gauge the progress of the ADF in accomplishing its tasks, and the ADF has established a Defence Implementation Plan (DIP) to further develop the specific actions that must be taken to meet the *NAP*'s requirements. The DIP is described as a flexible matrix that provides for the inclusion of new tasks as they arise in the course of the ADF's implementation of its *NAP* tasks, and it is reviewed on a quarterly basis by an implementation working group.<sup>81</sup>

### Progress on the Defence Implementation Plan: Meeting the Benchmarks

In its executive management of gender-perspective incorporation in the ADF, ADF leadership appears to be undertaking an effort that is nothing short of profound institutional change. For example, a Gender Equality Advisory Board (GEAB) has been established. The Australian government's recently published *Progress Report* on the implementation of the *NAP* describes the GEAB as a direction-setting advisory body that drives and shapes the direction of the 'Secretary of Defence's and Chief of Defence Force's gender equality priorities within the broader Defence cultural reform agenda'.<sup>82</sup> The GEAB is jointly chaired by the Secretary of Defence and the

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79 In describing the impact of the continuing government review of the ADF and its treatment of women service members, set out in Human Rights Commission, *Report on the Review into the Treatment of Women at the Australian Defence Force Academy, Phase 1 of the Review into the Treatment of Women in the Australian Defence Force* (2011) and Human Rights Commission, *Review into the Treatment of Women in the Australian Defence Force, Phase 2 Report* (2012). The *Progress Report* notes that these reviews specifically describe 'how the National Action Plan intersects with the work and recommendations of the Review, which is designed to enhance military capability and contributions to peace and security efforts through increased participation of women in the ADF, on deployments, and in senior decision-making roles', *Progress Report*, above n 5.

80 Ibid 23.

81 Department of Defence, *Defence Implementation Plan* <<http://www.defence.gov.au/vcdf/initiatives/NAP-DefenceImplementationPlan.htm>>. Unfortunately, the DIP is not available to the public at this point.

82 *Progress Report*, above n 5, 72.

Chief of Defence Forces, indicating institutional championing of this effort.<sup>83</sup> GEAB members include 'Defence officials, ADF Women's advisors, senior private sector and civil society representatives and a Special Advisor (Sex Discrimination Commissioner, Australian Human Rights Commission)'.<sup>84</sup> The GEAB meets quarterly, and, since December 2013, it has included women, peace and security and National Action Plan implementation as a standing agenda item.<sup>85</sup> The activities of the GEAB are complemented by the Defence National Action Plan Implementation Working Group (also known more simply as the Implementation Working Group), consisting of representatives from the different Services and other groups within Defence, which is tasked with facilitating progress on the *NAP*.<sup>86</sup>

Under this umbrella of executive-level change management, certain international implementation benchmarks are specifically intended to protect women through concrete actions to prevent, investigate and support prosecution of instances of SGBV.<sup>87</sup> Of these important actions, the prevention efforts, which include multilateral discussions on the protection of civilians and particularly the need to combat gender-based violence,<sup>88</sup> are likely to be the easiest to accomplish and continue. Formalising complaint mechanisms to foster the safe reporting of allegations of gender-based violence<sup>89</sup> is likely to be more complex, depending on the status of ADF units in the host nation, the multilateral nature of the military organisation with which ADF units might be deployed, and the nationalities of the actors involved. These same factors could complicate ADF support for prosecution efforts as well.

Regarding the co-ordinated and holistic approach to be taken by the ADF, one benchmark activity that shows great promise for implementing this strategy is the fostering of continuing 'civil-military cooperation and information sharing in operations'.<sup>90</sup> Given the capability of the Australian Civil Military Centre (ACMC) and its longstanding relationship with the ADF regarding the civil-military aspects of responding to natural disasters,<sup>91</sup> this broadened perspective appears quite suitable

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83 Email from Captain Jennifer Wittwer, Director, National Action Plan for Women, Peace and Security, to Jody M Prescott (20 January 2015) ('Wittwer email').

84 *Progress Report*, above n 5.

85 *Ibid* 72-3.

86 *Ibid* 73.

87 *NAP*, above n 4, 24.

88 *Ibid*.

89 *Ibid*.

90 *Ibid* 25.

91 Australian Civil-Military Centre, 'Disaster Management and Humanitarian' <<http://acmc.gov.au/our-work-and-focus/disaster-management-and-humanitarian/>>.

for incorporation into the ADF's *NAP* implementation efforts. In this context, consideration of an example of a specialised US civil-military interface unit might be useful to increase the effectiveness of ADF missions in operational environments afflicted by armed conflict and climate change — the Agriculture Development Team (ADT). Since 2007, the US military has deployed ADTs to Afghanistan to assist Afghans in revitalising their agricultural practice and commerce.<sup>92</sup> These teams are composed of National Guard (state reserve) personnel experienced in agriculture, animal husbandry and associated scientific fields, and the latest deployments have focused on promoting techniques and practices that will be sustainable within the Afghan economy after the withdrawal of ISAF forces.<sup>93</sup> Importantly, they have also taken a gendered approach in using Female Engagement Teams (FETs) — that is, detachments of soldiers composed solely of women soldiers, to connect with Afghan women and girls and help train them in sustainable practices that help them improve their local environments and earn hard cash at the same time.<sup>94</sup> Such an approach is a useful example of moving beyond engagement with host-nation women as potential victims, and instead working with them as agents of positive and enduring change. The potential significance of FETs as drivers of institutional change rather than just additional capabilities becomes clearer when the ADF's implementation efforts regarding doctrine are explored.

The *NAP* recognises the importance of embedding gender-perspective considerations in doctrine in order to accomplish their incorporation across the spectrum of ADF activities and operations. Accordingly, the *NAP* identifies as an implementation metric 'the number, title and description of relevant policy and guidance documents that contain reference to the Women, Peace and Security Agenda or Resolutions 1325, 1820, 1888, 1889 and 1960'.<sup>95</sup> The *Progress Report* notes that these references are being included 'in key strategic guidance documents', including the 2014 version of the 'Defence Corporate Plan, the 2014 Defence Annual Plan, the Defence International Engagement Strategy and the Defence Regional Engagement Strategy'.<sup>96</sup> Furthermore, '[o]perational guidance on Women, Peace and Security

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92 Rachel Knight, 'Missouri National Guard served as starting point for Afghanistan agribusiness teams, *National Guard* homepage <<http://www.nationalguard.mil/News/ArticleView/tabid/5563/Article/576019/missouri-national-guard-served-as-starting-point-for-afghanistan-agribusiness-t.aspx>>.

93 Telephone interview of Lieutenant Colonel Jeffrey Farrell, deputy commander, Georgia (GA) ADT II, by Jody M Prescott (16 August 2013).

94 Ibid; telephone interview of Colonel Eric Ahlness, commander, Minnesota (MN) ADT III, by Jody M Prescott (2 August 2013).

95 *NAP*, above n 21, 28.

96 *Progress Report*, above n 5, 15.

will be included in the Chief of the Defence Force Planning Directives which inform strategic direction and planning for operations'.<sup>97</sup>

These actions by themselves would be significant, but importantly the ADF is undertaking an even wider doctrinal assessment than that described in the *Progress Report*. In tandem with the comprehensive inclusion of gender considerations in the Joint Doctrine Development Guide,<sup>98</sup> this should lay the groundwork for truly embedding UNSCR 1325-related concepts in doctrine. Complementing the coverage of gender-perspective issues in doctrine, in March 2014 the Secretary of Defence and Chief of Defence Forces directed that all current and future operations planning include gender considerations, and a Women, Peace and Security advisor has been appointed to the Commander Joint Task Force 633 for Middle East operation.<sup>99</sup> Over time, these changes should have a very positive effect on the ADF as an operational institution — by demanding the creation of requirements to consider gender perspectives in operations, the ADF will create the demand among planners and operators for gender- and sex-disaggregated information and analysis to support their mission activities.<sup>100</sup> What, then, is the best way to collect the basic data so that they can be rendered into actionable intelligence for commanders? I suggest that FETs, properly resourced and integrated into the intelligence development process, might be the most efficient and cost-effective way to accomplish this task.

FETs, first used informally in Iraq by US Marine Corps infantry units,<sup>101</sup> and then by Australian, British and US Army and Marine Corps forces<sup>102</sup> in Afghanistan, are composed ordinarily of women officers and soldiers. The FETs' purpose has primarily been to interact with Afghan women, who, given their status in that generally conservative Muslim country, are not permitted to meet with men outside their families.<sup>103</sup> FETs have served important roles in searching Afghan women at

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97 Ibid.

98 Wittwer email, above n 83.

99 Ibid.

100 Jody M Prescott, 'NATO Gender Mainstreaming: A New Approach to War amongst the People?' (October-November 2013) 158 *Royal United Services Institute Journal* 56, 59.

101 Dharmapuri, above n 24, 60.

102 Remarks by Air Marshal Mark Binskin, Annual Civil Society Dialogue on Women, Peace and Security 2013 <<http://www.defence.gov.au/vcdf/Demo2/media/Annual%20Civil%20Society%20Dialogue%20on%20Women,%20Peace%20and%20Security%202013.pdf>> ('Binskin Remarks'); see Ministry of Defence, 'Female team prepares to engage with Afghanistan's women' (6 April 2011) <<http://www.gov.uk/government/news/female-team-prepares-to-engage-with-afghanistans-women>> Twenty-two women troops receive FET training from the Military Stabilisation Support Group and the stabilisation unit prior to Afghan deployment.

103 Elisabeth Bumiller, 'In Camouflage or Veil, a Fragile Bond', *NYTimes.com*, 29 May 2010 <<http://www.nytimes.com/2010/05/30/world/asia/30marines.html>>. Certain nations have experimented with



checkpoints and during kinetic operations, and in gathering information from both Afghan women and men about the operational environment.<sup>104</sup>

The Australian experience with FETs in Afghanistan has been recognised as a positive one,<sup>105</sup> and the *NAP* recognises FETs as capabilities that are useful in fulfilling implementation tasks, as they 'meet with local women and discuss their security needs'.<sup>106</sup> The *Progress Report* favourably notes the role played by Australian FETs in the engagement with and protection of Afghan women in Uruzgan Province.<sup>107</sup> The perspective on the role of the FETs appears to be primarily a peacekeeping perspective, however, noting that Australian FETs 'also support education programmes, economic development, and the provision of health services, medicine and school supplies to the local population'.<sup>108</sup> This emphasis could marginalise any efforts to find an enduring role in the kinetic aspects of combat operations for the FETs.<sup>109</sup>

The mere discussion of women's physical security needs, without an information collection and analysis process to buttress it, and without a better understanding of women's food, water and energy security needs, is likely to be of modest help in a campaign. This suggests that civil-military operations doctrine and practice should move beyond just reference of the UNSCR 1325 agenda and consider devoting greater training resources to institutionalising the FETs and making them more capable.<sup>110</sup> I suggest this enhanced capability should include greater utilisation of the FETs as collectors of sex- and gender-disaggregated data in order to provide analysis that would support the full spectrum of ADF operations. This level of capability would allow the ADF to operationalise gender in the context of the use of armed

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mixed sex FETS. Robert Egnell, 'Women in Battle: Gender Perspectives and Fighting' (2013) 43 *Parameters* 33, 40.

104 *Ibid.*

105 Binskin Remarks, above n 102.

106 *Progress Report*, above n 5, 34, 42.

107 *Ibid* 48.

108 *Ibid.*

109 In this vein, the *Progress Report* states: 'Australia promotes Women, Peace and Security internationally by specifically supporting initiatives related to the implementation of UNSCR 1325 and the Women, Peace and Security agenda more broadly. The Government's efforts include supporting women's participation in formal peace negotiations, working to prevent and respond to sexual violence in conflict, and supporting women's roles in conflict prevention and peace-building', *ibid* 74. Although kinetic applications are not excluded *per se*, they are not mentioned.

110 Lieutenant Colonel Janet R Holliday, 'Female Engagement Teams — The Need to Standardize Training and Employment' (March/April 2012) 92 *Military Review* 90, 94 (describing the steps necessary to institutionalise FET training and operational use of them); Master Sergeant Julia L Watson, 'Female Engagement Teams: The Case for More Female Civil Affairs Marines' *The Marine Corps Gazette* (July 2011) 20, 23 <<http://www.mca-marines.org/gazette/article/female-engagement-teams-case-more-female-civil-affairs-marines>>.

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force, because it would provide commanders with useful information that they could reasonably include in their analyses of engagement situations as they decide whether to use armed force and how much.

### CONCLUSION

Over the course of the last decade, important advances have taken place to implement UNSCR 1325 on Women, Peace and Security across the world, including the recognition of sexual violence in armed conflict as a crime within the jurisdiction of international criminal tribunals,<sup>111</sup> and the promulgation of national action plans such as Australia's. Hopefully, given the high degree of military collaboration between the US and Australia, the speed and thoroughness of the ADF's efforts could inform the US's rather laggard implementation of the defence aspects of the US NAP.<sup>112</sup> Although work in some areas of doctrine applicable to operations in which the ADF and US forces might work together has begun, such as stability operations, US military doctrine currently is almost silent on the operational relevance of gender. For example, the most recent iteration of US counterinsurgency doctrine, the focus of which is the civilian population, mentions women just once and gender just once.<sup>113</sup> Given the security relationship between Australia and the US,<sup>114</sup> this absence of discussion regarding the relevance of gender in operations is concerning.

Much of this work, however, appears to have happened largely in a human rights context, particularly in a context of preventing, investigating and prosecuting SGBV. Consequently, the fostering of an understanding of the operational relevance of gender in a LOAC context appears to have lagged behind. In order for scarce resources to be devoted to the task of addressing the kinetic aspects of gender perspectives in ADF operations, rather than just having gender perspectives as a general consideration in all operations, intelligence-gathering priorities, methodologies and end-uses would likely need to change in very significant ways. First, intelligence doctrine would need to be written which established the requirement to gather and analyse this

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111 See Kelly Askin, 'Bemba Trial: The International Criminal Court Takes on Gender Crimes', *The Guardian* (online), 24 November 2010 <<http://www.theguardian.com/law/2010/nov/24/international-criminal-court-international-criminal-justice>> (command responsibility trial of civilian leader for rapes constituting war crimes and crimes against humanity).

112 Jody M Prescott et al, 'Gender, Law and Policy: Japan's National Action Plan on Women, Peace and Security' (2016) 17 *Asian-Pacific Law and Policy Journal* 1, 5-7.

113 Chairman, Joint Chiefs of Staff, *JP 3-24, Counterinsurgency*, (22 November 2013) III-8, VIII-13 <[http://www.dtic.mil/doctrine/new\\_pubs/jp3\\_24.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_24.pdf)>.

114 See, for example, 'Outcomes from Exercise TALISMAN SABER 13', *Australian Civil-Military Centre Newsletter* (November 2013) 8 <<http://acmc.gov.au/wp-content/uploads/2013/12/ACMC-November-Newsletter.pdf>> (bilateral military exercise involving ADF and US personnel).

type of information. Second, training would need to be developed on the basis of the improved doctrine to allow soldiers to learn how to work with and understand this type of information. Third, changes would likely be required in the means and methods of gathering and analysing this information, in terms of hardware, software and, most importantly, personnel. Fourth, changes would need to occur in supporting ADF doctrine which is crucial to the informed application of armed force, such as targeting and LOAC doctrine. Only then could reliable information, both data and analysis, be made reasonably available to the commanders who would be expected to consider it in the course of their proportionality analyses.

War, despite its horrors, is likely with us for the foreseeable future, and therefore LOAC will continue to be a relevant and distinct body of law for some time to come. From a feminist perspective, we cannot ignore that women commanders will be making assessments under LOAC in which they might very well determine that the loss of civilian women's and girls' lives is not excessive in relation to the direct and concrete military advantage to be gained through the use of armed force. This is the essence and the reality of proportionality — and these decisions cannot be compliant with UNSCR 1325's requirements unless they are informed as to the significance of gender in the engagement. Appreciating Professor Gardam's work when addressing gender from a LOAC perspective is crucial to seeking progress in this area, for it sets a baseline for the critical reassessment of the normative principles governing armed conflict, the gender impartiality of which have perhaps largely been taken for granted. Further, and perhaps more importantly, her work suggests practical paths forward in seeking a fuller understanding of the operational reality of women in an international security environment marked by armed conflict and climate change.

# Gender and Feminist Concepts



# 10

## WOMEN'S ROLE IN RECONSTITUTING THE POST-CONFLICT STATE

LAURA GRENFELL

### INTRODUCTION

The end of the Cold War in 1989 heralded in the drafting of a new wave of constitutions, particularly in post-conflict states, as many Cold-War-related conflicts came to a gradual end. Since this time, more than 110 constitutions have been written or revised<sup>1</sup> — and one discernible global trend in this process of constitutional reform has been to entrench the right to equality between men and women as a constitutional principle.<sup>2</sup> This widespread acceptance of gender equality as an international norm of constitutionalism is in large part due to pressure from the international community as well as the influence of international and regional human rights treaties generally.<sup>3</sup>

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1 Susan H Williams, 'Introduction: Comparative Constitutional Law, Gender Equality and Constitutional Design' in Susan H Williams (ed), *Constituting Equality: Gender Equality and Comparative Constitutional Law* (Cambridge University Press, 2009) 1.

2 To date, 139 constitutions guarantee gender equality. See Laura Turquet et al, *Progress of the World's Women: In Pursuit of Justice* (UN Women, 2011) 24.

3 See, for example, *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW') art 2; *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (adopted by the Meeting of Ministers 28 March 2003, and the Assembly of the African Union 21 July 2003), art 2. Both these treaties specifically direct state parties to incorporate the principle of equality into their constitutions.

At the same time, constitution making has become increasingly participatory and inclusive and less understood as a process for elite groups. In this period, the United Nations (UN), mostly through the work of peacekeeping missions authorised by the UN Security Council,<sup>4</sup> has assisted many post-conflict states such as Timor-Leste, Afghanistan and Nepal with the process of drafting their constitutions. This assistance has included support with public participation programmes and, in some more recent cases, encouraging women's inclusion in the constitution-making process.

The year 1989 also marks the beginning of Judith Gardam's pioneering work into feminist approaches to international humanitarian law,<sup>5</sup> which has led to the UN Security Council's unfolding Women, Peace and Security (WPS) agenda. Along with peers such as Hilary Charlesworth and Christine Chinkin, with whom she ventured in 1989,<sup>6</sup> Gardam is at the vanguard of feminist legal scholarship in international law: together, in the passing of a quarter of a century, they have led the way in highlighting, challenging and even shifting important paradigms facing women in conflict and post-conflict settings, many of which had previously seemed largely invisible and intractable.

There are a number of paradigms operating in the post-conflict context which have a significant effect on the lives of women. First and foremost is the cultural and social pressure to perform the 'patriotic duty' of reconstituting the state through childbearing. For example, five years after independence, in 2007, Timor-Leste had the highest fertility rate in the world. A decade on since independence, each Timorese woman has on average six live births in her lifetime; as at 2012, Afghan women have five.<sup>7</sup> In post-conflict states, this patriotic duty poses serious risks: the maternal mortality rates in post-conflict states such as Timor-Leste and Afghanistan are respectively triple and double the average for the Asia-Pacific region.<sup>8</sup> For women in post-conflict states, childbearing and childrearing duties are borne in difficult

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4 These include Afghanistan, Angola, Benin, Cambodia, Central African Republic, Congo, Cote-d'Ivoire, Egypt, Eritrea, Guatemala, Guinea Bissau, Iraq, Kosovo, Morocco, Mozambique, Namibia, Liberia, Libya, Nepal, Sierra Leone, Sudan, Somalia, South Sudan, Timor-Leste and Tunisia.

5 Judith Gardam, 'A Feminist Analysis of Certain Aspects of International Humanitarian Law' (1989) 12 *Australian Yearbook of International Law* 265.

6 Hilary Charlesworth, 'The Public/Private Distinction and the Right to Development in International Law' (1989) 12 *Australian Yearbook of International Law* 190; Christine Chinkin, 'A Gendered Perspective to the International Use of Force' (1989) 12 *Australian Yearbook of International Law* 279.

7 Afghanistan and Timor-Leste have by far the highest rates of live births per woman, with Timor-Leste's rate triple that of the regional average and Afghanistan more than double. Not surprisingly, both post-conflict states have the lowest rate of contraceptive prevalence in the Asia-Pacific region. See UN Economic and Social Commission for Asia and the Pacific ('ESCAP'), 'Statistical Yearbook for Asia and the Pacific 2013' (Statistical Yearbook, ESCAP, 3 December 2013) 41.

8 Ibid 40.

environments where state services are scarce, given the fragility and embryonic nature of the state.<sup>9</sup>

A second paradigm for women in post-conflict settings is that violence against women is often heightened. According to Megan Bastick, Karin Grimm and Rahel Kunz, 'a number of countries emerging from armed conflict report a very high and/or increasing incidence of criminal and family violence, including sexual and other forms of violence against women'.<sup>10</sup> The UN Committee for the Convention on the Elimination of Discrimination Against Women (CEDAW Committee) argues that this escalation of gender-based violence in post-conflict states has a knock-on effect in that it 'undermine[s] women's equal and meaningful participation in political and public life'.<sup>11</sup> Such violence and intimidation often overshadow women's participation in constitution-making processes. For example, 70 per cent of women participating in Nepal's first Constituent Assembly (2008-12), established to draft Nepal's Constitution, reported facing violence as a result of their participation in politics.<sup>12</sup> In Afghanistan, women delegates were welcomed to the 2004 Constitutional Loya Jirga by the following statement made by the Chairman: 'Don't try to put yourself on the same level with men ... God has not given you equal rights ... [T]wo women are counted as equal to one man'.<sup>13</sup> Cultural attitudes regarding the roles of women in society, combined with significant domestic responsibilities and high rates of violence and intimidation, mean that women face numerous obstacles in participating in public forums, especially high-profile forums where the political stakes are high, such as constitution-making forums.

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9 Ibid 115, 17. As at 2012, half of Timor-Leste's population was living below the national poverty line. More than 70 per cent of the population lives in rural areas in both Timor-Leste and Afghanistan.

10 Megan Bastick, Karin Grimm and Rahel Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector* (Geneva Centre for the Democratic Control of Armed Forces, 2007) 15. Such surveys support the statement made by the CEDAW Committee in regard to the challenges facing women in post-conflict states: 'For most women in post-conflict environments, the violence does not stop with the official ceasefire or the signing of the peace agreement and often increases in the post-conflict setting ... [A]ll forms of gender-based violence, in particular sexual violence, escalate in the post-conflict setting'. CEDAW Committee, *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, 47<sup>th</sup> sess, UN Doc CEDAW/C/GC/30 (18 October 2013) [35].

11 Ibid [37].

12 International Institute for Democracy and Electoral Assistance et al., *Women Members of the Constituent Assembly: A Summary of a Study on Contribution of Women in Constitution Making in Nepal* (International Institute for Democracy and Electoral Assistance, Women's Caucus, Constituent Assembly Secretariat, Nepal Law Society, 2013) 53.

13 Opening Statement quoted in Mir Hermatullah Sadat, 'The Implementation of Constitutional Human Rights in Afghanistan' (2004) 11(2) *Human Rights Brief* 48, 48.



Constitution-making promises change: it is a time for 'big questions' to be raised because it is a moment in which the foundation and ground rules for the state as well as the legal system are designed. Until the 1970s, constitutions were predominantly drafted by elite groups of men. Since this time, the paradigm of constitution making has shifted to be more inclusive, participatory, representative and transparent. In post-conflict settings, women increasingly understand the promise of the constitution-making process as a means of social and cultural change and hence they are ever more calling on constitutions to address endemic problems in their daily lives such as domestic violence. While the international community has been successful in encouraging the widespread constitutional entrenchment of the principle of the equality of men and women, this has not been translated into a clear articulation that women's equal and meaningful participation in constitution-making processes is necessary to ensure the 'creat[ion of] a common vision of the future of a state',<sup>14</sup> particularly in post-conflict states where finding a common vision is especially critical and fraught. Sharing a role in designing the ground rules by which a state should operate in the future is an important step toward substantive equality for women in post-conflict states, as it opens up the possibility of addressing and changing structures of inequality.

In the twenty-first century, there is a widely held view that for new constitutions to enjoy democratic legitimacy they must be the product of some process of public participation process that reflects the composition of the population. For this reason, women are increasingly demanding that they make up approximately 50 per cent of constitutional drafters and those consulted. This was one of the first demands of a 2011 Egyptian Women's Charter, drawn up by local women's NGOs: that women 'be represented in the committee that will be entrusted with drafting the constitution' and that this representation be in proportion to women's makeup of the population as well as 'their past, present and future role in building the society'.<sup>15</sup> Unfortunately, no women were included on Egypt's Expert Committee, which prepared recommendations on constitutional amendments, while women and youth shared only 10 per cent of reserved seats on Egypt's fifty-member Constitutional Committee. In contrast, in 2011, women in Tunisia gained about a quarter of all seats in its National Constituent Assembly, a number which analysts say represents the largest proportion of female representatives in the Arab world.<sup>16</sup> In large part, this

14 UN Secretary-General Ban-Ki Moon, 'Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes' (Guidance Note, April 2009) 3.

15 See Alliance for Arab Women and the Egyptian Women's Coalition, *Egyptian Women's Charter: Partners in the Revolution and in Building Democratic Egypt* (July 2011) <<http://www.unwomen.org/-/media/Headquarters/Media/Stories/en/charteregyptianwomenenpdf.pdf>>.

16 Freedom House, *Tunisia: Freedom in the World 2013* <<http://www.freedomhouse.org/report/freedom-world/2013/tunisia>>.

was thanks to an election law that stipulated parity for women on electoral lists as well as a mixed proportional election system. In late 2013, Tunisia's National Constituent Assembly successfully finalised the country's new constitution, a document which has been described as a progressive step for women's rights in the Arab world.

In 2013, the UN Secretary-General claimed that UN entities have provided support for women's participation in constitution-making processes,<sup>17</sup> referring no doubt to UN activities in Egypt, Tunisia and Nepal, where the UN has been supporting women members to participate in constitution-making bodies as well as assisting civil society in engaging with these bodies through, for example, preparing women's charters. As this chapter argues, despite the UN's activities, one of the difficulties in encouraging women's increased participation in constitution making is that few UN bodies have clearly articulated women's right to participate in constitution making. For example, UN Security Council Resolution 1325 (2000), which began the Security Council's WPS agenda, speaks broadly and vaguely about women's 'full and equal' participation in post-conflict decision making, but none of the WPS resolutions which have followed have gone so far as the UN CEDAW Committee which, in 2013, explicitly articulated the need for women's 'equal and meaningful' participation in post-conflict *constitution* making.

In the Asia-Pacific region, the rate of women's formal participation in political institutions is surprisingly high in post-conflict states such as Afghanistan, Nepal and Timor-Leste: as at 2012, Nepal and Timor-Leste respectively have the highest proportion of women participating in national parliaments in the region, with Afghanistan not far behind, largely due to gender quotas imposed either through legislation or constitutional provisions.<sup>18</sup> This proportion of women in parliament far exceeds the world average of 21 per cent.<sup>19</sup> This is consistent with UN data showing that transitional countries represent a third of all countries that have achieved at least 33 per cent women's representation in parliament.<sup>20</sup> In the first decade of the early

17 *Measures Taken and Progress Achieved in the Promotion of Women and Political Participation — Report of the Secretary-General*, 68<sup>th</sup> sess, Provisional Agenda Item 28, UN Doc A/68/184 (24 July 2013) [33].

18 Nepal 33 per cent, Timor-Leste 32 per cent and Afghanistan 28 per cent: ESCAP, 'Statistical Yearbook for Asia and the Pacific 2013' (Statistical Yearbook, ESCAP, 3 December 2013) 160. Both Nepal and Timor-Leste have legislated quotas: Constituent Assembly Ordinance 2013 (Nepal); *Law on the Elections of the National Parliament 2006* (Timor-Leste) as amended in 2011. *The Constitution of the Islamic Republic of Afghanistan* arts 83, 84 entrench gender quotas.

19 *Measures Taken and Progress Achieved in the Promotion of Women and Political Participation — Report of the Secretary-General*, 68<sup>th</sup> sess, Provisional Agenda Item 28, UN Doc A/68/184 (24 July 2013) 5, Figure 1.

20 Human Rights Council, *Report of the Working Group on The Issue of Discrimination against Women in Law and in Practice*, 23<sup>rd</sup> sess, Agenda Item 3, UN Doc A/HRC/23/50 (19 April 2013), fn 19. In terms of women's share in ministerial positions, Timor-Leste is second in the region with 23 per cent, which exceeds the world average of 17 per cent. In Nepal, women make up 16 per cent of the Ministry,

twenty-first century, all three post-conflict states received constitutional assistance from the UN: Timor-Leste (2001-02), Afghanistan (2002-04) and Nepal (2008-14). While the rate of women's participation in constitution making has varied in each country, it is useful to examine the constitutional assistance offered by the UN and to assess its impact on women's inclusion in these constitution-making processes.

In this volume celebrating Professor Gardam's work, I examine whether international norms extend to a right of women to participate in post-conflict constitution-making processes. I trace the emergence of international norms relating to women's participation in constitution making in post-conflict states and analyse the international practice, particularly in regard to UN constitutional assistance. This chapter begins with an example of women's equal participation in constitution making, found in South Africa in the early 1990s, and it uses this example to sketch some of the tensions and trends apparent in participatory constitution making. It maps out the UN approach to encouraging women's participation in constitution making by analysing both UN documents and UN practice as seen in Timor-Leste, Afghanistan, and Nepal. It observes an increasing acceptance of using temporary special measures and calibrating electoral systems to be 'gender-responsive', so that more women can participate in elected constitution-drafting bodies, as well as an understanding that where political elites have a role in constitution-making bodies, elite women must also be appointed.

Given the frequency of constitutional reform in the post-Cold War era and the potential of such processes to assist in transforming post-conflict states, it is necessary that the international community clearly articulate women's right to participate in constitution-making processes. In the past, the focus has been solely on post-conflict elections rather than on facilitating women's participation in long-term, foundational design. Women need to have a role in shaping institutions and structures, rather than simply participating in parliaments when the ground rules have already been drawn up.

### WOMEN'S PARTICIPATION IN POST-CONFLICT CONSTITUTION MAKING

#### New Constitutionalism: Equal and Meaningful Participation and Democratic Processes

At the beginning of the post-Cold-War era, for the first (and perhaps only) time in modern constitution making, women's equal participation was achieved via South Africa's post-apartheid constitution-making process. 'South Africa is the first country in which a constitution-making body has consisted of an equal number of

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while in Afghanistan this figure is 12 per cent: see ESCAP, 'Statistical Yearbook for Asia and the Pacific 2013' (Statistical Yearbook, ESCAP, 3 December 2013) 161.

men and women.<sup>21</sup> This may not surprise many commentators given that, of all constitution-making processes in the post-Cold-War era, South Africa's has received the most praise.

But it is important to pause before hailing this as a huge milestone: while this body was involved in drafting South Africa's first post-apartheid constitution, the 1994 Interim Constitution, it did not draft the much celebrated 1996 Constitution, which was drafted through an elected body. South Africa's Interim Constitution of 1994 was a result of negotiations and minimal democratic legitimacy; in other words, the process in which women enjoyed 'equal participation' was an elite process.<sup>22</sup> In South Africa's first democratic elections in 1994, which elected the Constituent Assembly that drafted the 1996 Final Constitution, women won slightly under a quarter of the seats. However, the 1994 Interim Constitution was important, as it set out 34 constitutional principles, including guarantees of gender equality, with which the 1996 Final Constitution had to comply before receiving official certification by the Constitutional Court.<sup>23</sup> Thus the only experience to date of women's 'equal participation' in constitution making, in terms of the number of delegates at the Negotiating Council, has been through an elite process that did not directly lead to the democratic constitution that South Africans enjoy today, although it did lay the critical foundations of that constitution. Furthermore, the international community offered little direct constitutional assistance in this process and, in particular, the UN had no direct involvement.

South Africa's 1996 Constitution is praised worldwide as having played a key role in the country's successful transition to democracy. And yet its constitution-making process shows that a mix of elected bodies and elite bodies was involved — a factor often forgotten. This mix sits in tension with the twenty-first-century drive for a more inclusive, participatory, representative and transparent process of constitution making.<sup>24</sup> The shift from political elites to an inclusive process is often attributed in part to the broader trend of democratisation that has swept around the world since

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21 Heinz Klug, 'Participating in the Design: Constitution-Making in South Africa' in Penelope Andrews and Stephen Ellmann (eds), *Post-Apartheid Constitutions: Perspectives on South Africa's Basic Laws* (Witwatersrand University Press, Ohio University Press, 2001) 128, 142.

22 Women's equal participation as delegates was only made possible through extensive lobbying by civil society: see *ibid.* See also, in particular, Catherine Albertyn, 'Women and the Transition to Democracy in South Africa' in Christina Murray (ed), *Gender and the New South African Legal Order* (Juta, 1994) 39, 54-7.

23 Klug, above n 21, 128. According to Klug, women's equal participation in South Africa's interim constitution-making process was achieved by the lobbying of civil society through a multi-party Women's National Coalition and, more specifically, the ANC's Women's League.

24 Vivien Hart, *Democratic Constitution Making* (Special Report No 107, United States Institute of Peace, July 2003).

the end of the Cold War, a trend which has led to increasing demands for inclusion and participation by marginalised groups. This participatory form of constitution making has been dubbed 'new constitutionalism' by Vivien Hart in her seminal report on participatory constitution making.<sup>25</sup> Under traditional constitutionalism, constitution making was considered an act of completion to be performed by elites so as to ensure future stability.<sup>26</sup> Under new constitutionalism, the *process* of constitution making is critical in order for the constitution to attain legitimacy on the domestic and international fronts. In Hart's view, this process is 'conversational' in that it is conducted 'by all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable'.<sup>27</sup>

In the post-conflict context, participatory processes offer many benefits: they assist in forging reconciliation through facilitating societal dialogue, and they may lead to lasting peace through building a shared vision of the future of the state. Such processes are considered to lead to greater empowerment of the population, as they can be a means of kickstarting an increase in participation in political life of various formerly marginalised sections of society such as women.<sup>28</sup> Elizabeth Katz argues that 'women's participation substantively changes constitutional text, brings unique and often taboo issues into the national spotlight [such as divorce and abortion], and empowers women participants'.<sup>29</sup> This is consistent with a study of twelve constitution-making processes in the post-Cold-War era, conducted by the Institute for Democracy and Electoral Assistance (IDEA), which claims that participatory processes 'tended to result in constitutional drafts which provided rights to those groups which had not up to then gained political protection or recognition, and addressed issues of social and economic justice'.<sup>30</sup> Furthermore, the use of such processes 'were shown to broaden the constitutional agenda'.<sup>31</sup>

In 2007, in the early days of Nepal's constitution-making process, the UN Secretary-General employed the language of new constitutionalism to argue

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25 Ibid.

26 Ibid 3.

27 Ibid.

28 Kirsti Samuels, 'Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies' (Second Draft, International IDEA — Democracy-Building and Conflict Management, 2006) 11.

29 Elizabeth Katz, 'Women's Involvement in International Constitution-Making' in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2012) 204, 205.

30 Kirsti Samuels, 'Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies' (Second Draft, International IDEA — Democracy-Building and Conflict Management, 2006) 29.

31 Ibid.

that the constitution-making process offers the 'foundation for a more inclusive democratic system able to address the country's persistent problems of social exclusion'.<sup>32</sup> Furthermore, he articulated the high hopes riding on this participatory process:

The Constituent Assembly is seen as the opportunity to create a 'new Nepal', and both the election that determines representation in this body and the constitution-making process that follows must be fashioned in such a way that those Nepalese who have too often been without a voice will be heard.<sup>33</sup>

The mantra of inclusion, participation and transparency is not the whole story for new constitutionalism. Hart reminded us that 'constitution making is essentially about the distribution of power', which means that political elites find ways to control the process, as is shown through South Africa's example.<sup>34</sup> This tension between political elites and participatory processes is highlighted by the IDEA report, which states that where political elites feel that a participatory process threatens established power structures, their reaction has been to undermine the constitution, to amend it, or to prevent its adoption, implementation or enforcement.<sup>35</sup> While these power dynamics provide something of an antidote to the romanticism that could be attributed to the participatory drive of new constitutionalism, they do not counter the need for broad participation in constitution-making processes. These factors need to be weighed by those actors who exert influence over the design of constitution-making processes in post-conflict states.

In 2003, Hart argued that in this paradigm of new constitutionalism 'a right to participate in making a constitution' has emerged, and that it has both a moral and legal foundation. By moral foundation, Hart was referring to international norms of democracy. The legal foundation of an emerging right to participate in constitution making begins with Article 25 of the International Covenant on Civil and Political Rights (ICCPR) which provides: 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [such as sex] ... : (a) To *take part in the conduct of public affairs*, directly or through

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32 *Report of the Secretary-General on the Request of Nepal for United Nations Assistance in Support of its Peace Process*, UN Doc S/2007/17 (9 January 2007) [8]. At least in its discourse, the UN has invested heavily in the promise of new constitutionalism, as is illustrated, for example, by the naming of the UN Development Programme's (UNDP) 'Support to Participatory Constitution Building in Nepal'.

33 *Ibid* [20].

34 Vivien Hart, *Democratic Constitution Making* (Special Report No 107, United States Institute of Peace, July 2003) 9.

35 Kirsti Samuels, 'Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies' (Second Draft, International IDEA — Democracy-Building and Conflict Management, 2006) 29.

freely chosen representatives'.<sup>36</sup> The UN Human Rights Committee (HRC) has interpreted these words broadly to include constitution making, by stating: 'Citizens also participate directly in the conduct of public affairs when they choose or change their constitution'.<sup>37</sup> Given the non-discrimination principle articulated in Article 2 of the ICCPR, this right to participate in choosing or changing the constitution is clearly to be enjoyed equally by women.

CEDAW adds to this legal foundation, although it does not use the same phrase as the ICCPR and its language is narrower.<sup>38</sup> Under Article 7 of CEDAW, states parties are required to

take all appropriate measures to eliminate discrimination against women in the *political and public life* of the country and, in particular, shall ensure to women, on equal terms with men, the right: ... (b) To participate in the *formulation of government policy* and the implementation thereof and to hold *public office* and perform all public functions at all levels of government.<sup>39</sup>

The initial 1997 jurisprudence of the CEDAW Committee did not interpret this provision to specifically include constitution-making processes,<sup>40</sup> although it states that 'the obligation specified in article 7 extends to all areas of public and political life and is not limited to those areas specified' in the subparagraphs.<sup>41</sup> Furthermore, the CEDAW Committee advises that Article 7 should be read in conjunction with Article 25 of the ICCPR and the HRC's jurisprudence, mentioned above. Thus while CEDAW does not explicitly state that women have the right to participate in constitution-making processes, the CEDAW Committee recognised the scope for such an interpretation. This shows that, as at 2003, when Hart claimed that a right to

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36 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (emphasis added).

37 Human Rights Committee, *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 57<sup>th</sup> sess, 1510<sup>th</sup> mtg, UN Doc CCPR/C/21/Rev.1/Add.7 (1996) [6].

38 Since the 1940s and 1950s, women's political rights have been a matter of UN attention, culminating in the *Convention on the Political Rights of Women*, adopted by the UN General Assembly in 1952 (*Convention on the Political Rights of Women*), opened for signature 31 March 1953, 193 UNTS 135 (entered into force 7 July 1954), and *CEDAW*, adopted by the General Assembly in 1972. The former focused narrowly on women's entitlement to vote and hold public office and eligibility for election to all publicly elected bodies.

39 *Convention on the Elimination of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (emphasis added).

40 Only *CEDAW*, art 2 refers to constitutions in stating that states parties agree to 'condemn discrimination against women ... and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions'.

41 CEDAW Committee, *General Recommendation No 23: Political and Public Life*, 16<sup>th</sup> sess, UN Doc A/52/38, (1997) [5].

participate in constitution making had emerged, there was scope to argue that a right of women to participate in constitution making was emerging, although, as shown below, it was not until a decade later that the CEDAW Committee articulated this right.

With these moral and legal foundations in mind, it is useful to turn to consider the constitutional assistance offered by the international community, in particular the UN, since the beginning of the twenty-first century. This assistance has had a significant impact on such constitution-making processes in post-conflict states across the world.

### UN Constitutional Assistance and International Norms

The era of 'new constitutionalism' coincides with the trend of international constitutional assistance for post-conflict states. The constitutional assistance offered by the international community understandably has an agenda that often reflects the assistance provider's sometimes idiosyncratic conception of regional and global security. One widely accepted means to achieving such security is encouraging regional and global compliance with international norms such as democracy, the rule of law and human rights.<sup>42</sup> This means that constitutional assistance is designed, at least in part, to encourage a process which would further such international norms and ease the entry of failed or fragile post-conflict states towards membership of the international community. Two examples of this ritual of entry are the ratification of human rights treaties, such as the ICCPR and CEDAW, and the constitutional entrenchment of core principles such as gender equality.

Since the end of the Cold War, the UN has led the constitutional assistance being offered to post-conflict states such as Timor-Leste, Afghanistan and Nepal. This highlights the importance of those international norms being produced by UN bodies in relation to constitution making. Beginning with Namibia and Cambodia in the early 1990s, the UN has provided constitutional assistance as part of peacekeeping missions and political missions authorised by the UN Security Council in almost two dozen post-conflict states. Indeed, the UN claims that 'UN engagement in and assistance to constitution-making increasingly is a core component of the Organization's peacebuilding and state-building strategy'.<sup>43</sup>

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42 See, for example, the Organisation for Security and Cooperation in Europe, *Charter of Paris for a New Europe* (Paris, 19-21 November 1990); Danilo Turk, 'Recognition of States: A Comment' (1993) 4 *European Journal of International Law* 66.

43 UN Secretary-General Ban-Ki Moon, 'Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes' (Guidance Note, April 2009) 3.



Within the UN, the UN Development Programme (UNDP) has led most direct constitutional assistance projects in post-conflict states, including support to women candidates and women members of drafting bodies. For example, in 2013 in Tunisia, UNDP set up workshops to support women candidates contesting the elections to the National Constituent Assembly (NCA); and, following the elections, it trained elected members on how to hold public consultations, and supported a national dialogue on drafting the new constitution. UN Women and its predecessor UNIFEM have also been involved in constitutional assistance, but their approach is more indirect. They have assisted women's NGOs to advocate for gender-responsive electoral systems and supported them to engage with, and make contributions to, constitution-drafting bodies such as Tunisia's NCA, often through preparing women's charters. For example, prior to 2011, UNIFEM worked with women's groups in Ecuador (2006-07) and in Nepal (2007-10) to bear indirect influence on constitution making and to advocate for electoral quotas for women.

To understand the UN's approach to constitution making, it is useful to consider a series of Guidance Notes of the Secretary General, which are aimed at offering 'strategic guidance' to UN bodies and agencies in their efforts as part of UN missions. The 2009 *Guidance Note on Assistance to Constitution-Making Processes* acknowledges the ad hoc nature of past UN constitutional assistance and it aims to offer coherent guidance for all UN agencies as to 'how to support national actors during the design and implementation of a constitution-making exercise'.<sup>44</sup> The Note sets out six principles on the drafting and contents of constitutions, such as to '[e]ncourage compliance with international norms and standards'.<sup>45</sup> While the principles relating to process include '[s]upport inclusivity, participation and transparency', they do not explicitly encompass any articulation of women's right to fully participate in the drafting process.<sup>46</sup>

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44 Ibid 3.

45 Ibid 1 (Guiding Principle No 2). In 2014, UNDP published the *UNDP Guidance Note on Constitution-Making Support*, which 'aims to provide a framework for the application' of the six principles articulated in the 2009 Guidance Note on Assistance to Constitution-Making Processes, p 7.

46 Note that the UN Guidance Note on the Rule of Law sets out that a framework for strengthening the rule of law includes '[a]n electoral system, which, *inter alia* ... [a]ssures the right of everyone to take part in the government of his or her country, either directly or through freely chosen representatives, including through the application of temporary special measures'. (See UN Secretary-General Ban-Ki Moon, 'Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes' (Guidance Note, April 2009) 6.) The trifecta of inclusiveness, participation and transparency found in the 2009 Guidance Note echoes the advice of four constitutional experts, who authored Interpeace's *Constitution-Making Handbook*, all of whom have experience in providing constitutional assistance in a series of post-conflict settings. However, unlike the UN Note on Constitution-Making, the *Handbook* specifically recognises the importance of gender equity on constitution making, in particular ensuring

While women's inclusion in the constitution-making process appears to be a blindspot in the UN's 2009 *Guidance Note on Assistance to Constitution-Making Processes*, in strong contrast, the UN *Guidance Note on Democracy* (2009) makes special mention of the need for women's participation in democracy building and the need to 'explicitly address the effects of discrimination against women' which 'contributes to women's exclusion and the marginalization of their concerns'.<sup>47</sup> Furthermore, the Note 'recogniz[es] the centrality of constitution-making to democratic transitions', but it stops short of spelling out that the gender discrimination which 'prevents women from engaging effectively in democratic processes' equally impedes women from participating in constitution making.<sup>48</sup>

Another relevant stream of international norms relate to women, conflict and peace agreements. Since the beginning of the twenty-first century, coinciding with the period in which the UN has ramped up its constitutional assistance, the UN Security Council has become 'the primary norm-producing site on issues of women and armed conflict'<sup>49</sup> through its Women, Peace and Security (WPS) agenda which, from 2000-14, includes seven Security Council resolutions, beginning with Resolution 1325 in 2000.<sup>50</sup> These resolutions are primarily aimed at protecting women during armed conflict and encouraging women's full participation in the writing of peace agreements; unfortunately, the complexities of the post-conflict setting appear largely tangential to the WPS agenda. Resolution 1325 stresses 'the importance of [women's] equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution'.<sup>51</sup> While it addresses women's participation in post-conflict decision making, which implicitly includes constitution making, as constitutions generally aim to avert conflict and

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women's full participation 'at all stages' (see Michele Brandt, Jill Cottrell, Yash Ghai and Anthony Regan, *Constitution-Making and Reform: Options for the Process* (Handbook, Interpeace, 9 September 2011) 10).

47 UN Secretary-General Ban-Ki Moon, 'Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes' (Guidance Note, April 2009) 4.

48 Ibid 6.

49 Aisling Swaine, 'Substantive New Normative Provisions on Women and Armed Conflict Concurrently Adopted by the UN Security Council and the CEDAW Committee' (2014) 18(5) *American Society of International Law* 2.

50 SC Res 1325, UN SCOR, 55<sup>th</sup> sess, 4213<sup>th</sup> mtg, UN Doc S/RES/1325 (31 October 2000); SC Res 1820, UN SCOR, 63<sup>rd</sup> sess, 5916<sup>th</sup> mtg, UN Doc S/RES/1820 (19 June 2008); SC Res 1888, UN SCOR, 64<sup>th</sup> sess, 6195<sup>th</sup> mtg, UN Doc S/RES/1888 (30 September 2009); SC Res 1889, UN SCOR, 64<sup>th</sup> sess, 6196<sup>th</sup> mtg, UN Doc S/RES/1889 (5 October 2009); SC Res 1960, UN SCOR, 65<sup>th</sup> sess, 6453<sup>rd</sup> mtg, UN Doc S/RES/1960 (16 December 2010); SC Res 2106, UN SCOR, 68<sup>th</sup> sess, 6984<sup>th</sup> mtg, UN Doc S/RES/2106 (24 June 2013); SC Res 2122, UN SCOR, 68<sup>th</sup> sess, 7044<sup>th</sup> mtg, UN Doc S/RES/2122 (18 October 2013).

51 SC Res 1325, UN SCOR, 4213<sup>th</sup> mtg, UN Doc S/RES/1325 (31 October 2000).

to secure peace,<sup>52</sup> it does not explicitly refer to the process of constitution making. Constitutions are explicitly mentioned only obliquely in Resolution 1325 in regard to the need to protect women's human rights through various mechanisms including constitutions.<sup>53</sup>

The 2013 WPS Security Council Resolution 2122, which focuses on women's leadership, comes tantalisingly close to articulating the need for women's full and equal participation in constitutional processes. In it, the Security Council

[s]tresses the importance of those Member States conducting post-conflict *electoral processes and constitutional reform* continuing their efforts, with support from United Nations entities, *to ensure women's full and equal participation in all phases of electoral processes*, noting that specific attention must be paid to women's safety prior to, and during, elections.<sup>54</sup>

This omission of women's full and equal participation in constitutional reform is curious, given that the issue was raised in a 2002 study entitled *Women, Peace and Security* submitted by the UN Secretary-General pursuant to Resolution 1325, which states: 'Constitutional reform processes during [post-conflict] reconstruction should include the participation of women and take account of gender perspectives'.<sup>55</sup> Furthermore, at the end of 2011, the UN General Assembly passed a resolution on Women and Political Participation which encourages states to ensure an expanded role for women in peacebuilding efforts in line with the SC's WPS resolutions,<sup>56</sup> and, to further this purpose, it encourages states to appoint women to 'bodies responsible for designing constitutional ... reforms'.<sup>57</sup> Indeed, if one refers to the Guidelines of UN Department of Peacekeeping Operations in regard to post-conflict electoral process, it is possible to find some specific advice: 'Make sure that women are included on constitutional drafting committees'.<sup>58</sup> Despite this, the UNSC's WPS resolutions fall short of

52 While constitutions can be part of peace processes, the prevailing view is that the two should not be conflated — see Jamal Benomar, *Constitution-Making and Peace Building: Lessons Learned from the Constitution-Making Processes of Post-Conflict Countries* (UNDP, August 2003) 3.

53 SC Res 1325, UN SCOR, 4213<sup>th</sup> mtg, UN Doc S/RES/1325 (31 October 2000) [8(c)].

54 SC Res 1325, UN SCOR, 4213<sup>th</sup> mtg, UN Doc S/RES/1325 (31 October 2000) [8] (emphasis added).

55 Christine Chinkin, 'Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women' (Background Paper for Expert Group Meeting on 'Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women — A Framework of Model Provisions', UN Division for the Advancement of Women, 31 October 2003) 112.

56 *Women and Political Participation*, GA Res 66/130, UN GAOR, 66<sup>th</sup> sess, Agenda Item 28(a), UN Doc A/RES/66/130 (19 March 2012) [7].

57 Ibid [8] (emphasis added).

58 Gabrielle Russo, *DPKO/DFS — DPA Joint Guidelines on Women in Post-Conflict Electoral Processes* (Guidelines, UN Department of Peacekeeping Operations/ UN Department of Political Affairs, October 2007) 16.

directly advocating that women have a right to participate in constitution-building processes and the reason for this gap is not clear.

A couple of months after Resolution 2122 in 2013, CEDAW issued a general comment on women and post-conflict settings, which articulated the gap in the WPS agenda. It states: 'During the constitution-drafting process, the equal and meaningful participation of women is fundamental for the inclusion of constitutional guarantees of women's rights'.<sup>59</sup> In this, it frames women's participation as a policy outcome rather than as a matter of access. The CEDAW Committee broadly attempts to pin its source on Articles 1-5(a), 7 and 15 of CEDAW as well as, more tangentially, the WPS agenda, stating: 'The importance of a gender perspective in post-conflict electoral and constitutional reform is also emphasized in Security Council resolution 1325 (2000)'.<sup>60</sup> Overall, the Committee recommends that states parties '[e]nsure women's equal participation in constitution-drafting processes and adopt gender-sensitive mechanisms for public participation and input into constitution-drafting processes'.<sup>61</sup>

The CEDAW Committee is one of the few UN bodies that explicitly recognises women's right to participate in constitution making and one of the few whose approach understands the nexus between constitution drafting and electoral processes. In 2013, it set out some of the reasons underlying the low level of women's participation in constitution making, pointing out that the design of electoral systems, particularly the electoral rules and procedures, 'are not always gender-neutral'. It explains:

Decisions on the choice of electoral systems are important to overcome the traditional gender bias that undermines women's participation. Substantive progress towards the equal participation of women as candidates and voters as well as the holding of free and fair elections will not be possible unless a number of appropriate measures are taken, including a *gender-responsive electoral system and the adoption of temporary special measures* to enhance women's participation as candidates ... and ensure that women voters and female political candidates are not subject to violence either by State or private actors.<sup>62</sup>

The CEDAW Committee describes 'the introduction of temporary special measures' such as gender quotas as one of the 'essential prerequisites to true equality in political life'.<sup>63</sup> At the UN level, the question of women's equal participation in the conduct of public affairs and the need for quotas to achieve this purpose were first raised in 1990

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<sup>59</sup> CEDAW Committee, *General Comment No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, 47<sup>th</sup> sess, UN Doc CEDAW/C/GC/30 (1 November 2013) [71].

<sup>60</sup> Ibid [70].

<sup>61</sup> Ibid [73(a)].

<sup>62</sup> Ibid [72] (emphasis added).

<sup>63</sup> Ibid [15].

by a resolution of the UN's Economic and Social Council, which set out a target of 30 per cent for women in leadership positions by 1995 and equal representation by 2000.<sup>64</sup> Such measures were reiterated in the 1995 Beijing Platform for Action,<sup>65</sup> but it does not appear that the UN Secretariat endorsed these measures until 2010.<sup>66</sup>

Since 2010, the UN has clearly embraced the idea of electoral quotas and other temporary special measures to ensure that women participate more fully in political decision making, including constitution making.<sup>67</sup> It has adopted the position that, to ensure women hold public office, international best practice involves the use of electoral systems that incorporate proportional representation.<sup>68</sup> In 2013, the Secretary-General offered global data on the significant number of states that have adopted constitutional provisions or legislation regarding such measures.<sup>69</sup> The report sets out that those countries with electoral quotas elected 25 per cent women members of parliament compared with 19 per cent without quotas.<sup>70</sup> Furthermore, the report explains that the choice of electoral system is critical to women's chances of being elected, as 'larger numbers of women are elected under proportional electoral systems (24.6 per cent) than under First-Past-the-Post majority or plurality systems (18.5 per cent)'.<sup>71</sup>

At the same time, there is international recognition that, in order to ensure that constitutions are implemented and enforced, constitution-making bodies must inevitably include appointed members, presumably from either civil society or the

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64 *Recommendations and Conclusions Arising from the First Review and Appraisal of the Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women to the Year 2000*, ESC Res 1990/15, UN ESCOR, 13<sup>th</sup> plen mtg, Supp No 1, UN Doc E/1990/90 (24 May 1990) Recommendation IV.

65 Fourth World Conference on Women, 4-5 September 1995, *Beijing Declaration and Platform for Action*, UN Doc A/CONF.177/20 (15 September 1995) [184], [189].

66 *Women's Participation in Peacebuilding — Report of the Secretary-General*, 65<sup>th</sup> sess, Provisional Agenda Item s 28(a) and 122, UN Doc A/65/354-S/2010/466 (7 September 2010) [41]-[44].

67 *Ibid.* In 2004, Women and Political Participation featured on the GA's agenda but it made no specific reference to women's participation in constitutional design or reform despite the UN's role in post-conflict states such as Afghanistan and Timor-Leste. Such matters were not mentioned until the GA's second resolution on this issue in late 2011 — see *Women and Political Participation*, GA Res 66/130, UN GAOR, 66<sup>th</sup> sess, Agenda Item 28(a), UN Doc A/RES/66/130 (19 March 2012).

68 *Strengthening the role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization — Report of the Secretary-General*, 66<sup>th</sup> sess, Provisional Agenda Item 69(b), UN Doc A/66/314 (19 August 2011) [41]-[42].

69 *Measures Taken and Progress Achieved in the Promotion of Women and Political Participation — Report of the Secretary-General*, 68<sup>th</sup> sess, Provisional Agenda Item 28, UN Doc A/68/184 (24 July 2013) [31]-[32].

70 *Ibid* [36]. It recognises that to be effective, these quota systems must be carefully calibrated and implemented.

71 *Ibid* [34].

political elite, and that women should figure among these appointments. This is indicated in the 2011 UN General Assembly Resolution on Women and Political Participation, which addresses the need for states to ensure an expanded role for women in peacebuilding efforts, and thus it 'encourages states to *appoint women* to posts within all levels of their Governments, including, where applicable, *bodies responsible for designing constitutional ... reforms*'.<sup>72</sup> While this may be counter to the ideals of inclusiveness and participation associated with new constitutionalism, it may lead to the appointment of women members who are not as indebted to party structures as those women who are elected through the party system. The next section of this chapter thus traces the experiences of women delegates in Timor-Leste and Afghanistan in order to examine whether it is arguable that appointed women may be better placed than women who have been elected through the electoral system to respond to the women's charters presented by civil society.<sup>73</sup>

### UN Practice in Timor-Leste and Afghanistan

The need for temporary special measures to ensure women's participation in elections and hence constitution drafting has been contested over time. This is highlighted by the UN's experiences in offering constitutional assistance in Timor-Leste (2001-02) and Afghanistan (2002-04).

In 2001, at the time of the UN Transitional Administration in East Timor (UNTAET), there was a disagreement between various UN agencies as to whether the UN Transitional Administrator (TA) for Timor-Leste should adopt a regulation imposing a mandatory 30 per cent quota for women on the political party lists for the UN-run elections for the Constituent Assembly (CA). This body was tasked with drafting and adopting the state's first constitution, and with conducting a week-long public participation programme, before becoming Timor-Leste's first elected parliament. Prior to this, the TA had imposed various quotas for women's representation in Timor-Leste: for example, the TA had imposed a 50 per cent quota for women in development councils at the village and sub-district level and a 30 per cent quota for women in public administration. The proposal for a quota system for the CA was initially advocated by the Timorese National Council, a quasi-legislature appointed by the TA, as well as Rede Fete, a network of Timorese

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72 *Women and Political Participation*, GA Res 66/130, UN GAOR, 66<sup>th</sup> sess, Agenda Item 28(a), UN Doc A/RES/66/130 (19 March 2012) [7]-[8] (emphasis added).

73 This dual focus on the need to ensure that women can be elected and appointed to public bodies is evident in some constitutional texts such as that of Ecuador, which in 2007 entrenched a principle of parity in order to ensure women's equal participation in public bodies. Like Tunisia, Ecuador has legislated candidate quotas in which a strict alternation between female and male candidates at national and/or sub-national levels is required by law.

women's organisations. It was to operate in relation only to seventy-five of the eighty-eight seats which were to be contested through a proportional system; it would not affect the other thirteen seats contested on a First-Past-The-Post basis. It appears that the proposal was supported by the Office of the High Commissioner for Human Rights, UNIFEM and UN Division on the Advancement of Women, but it was blocked by the Electoral Affairs Division of UNTAET on advice from the Political Affairs Division at UN headquarters. The latter argued:

UNTAET has exclusive responsibility for holding free and fair elections in East Timor ... [and] ... while some countries do have quotas for women (and for other groups), other democratic countries vehemently oppose the practise. This would include some members of the Security Council ... *Electoral quotas for women (or any other group) do not constitute international best practice for elections.*<sup>74</sup>

In the end, the Timorese National Council backed down from its position. Despite the absence of any formal quotas imposed by the TA for the CA, Timorese women won 27 per cent of the seats. While most parties placed women in winnable positions, the second-largest political party failed to include any women on its candidate list. According to expert Michele Brandt, strict party-line voting meant that 'few [elected women in the CA] attempted to advance provisions that women's groups had put forward in a charter submitted to the Constituent Assembly'.<sup>75</sup> As a consequence, the Women's Charter,<sup>76</sup> prepared by Timorese women's NGOs as a means of engaging with the constitutional process, was largely ignored.

While the UN's involvement in Afghanistan, from 2002 onwards, was much lighter than its territorial administration of Timor-Leste, its constitutional assistance was arguably more targeted and effective in Afghanistan, in particular with respect to its advice regarding the constitution-making process.<sup>77</sup> In contrast to Timor-Leste, in Afghanistan's constitution-making process a quota was imposed for women's inclusion in all three of its constitution-making bodies. Afghan women comprised approximately 20 per cent of the nine-member Drafting Committee (an appointed body which produced the first draft), the thirty-five-member Constitutional Commission (an appointed body which was tasked with conducting public

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<sup>74</sup> Quoted in Milena Pires, 'East Timor and the Debate on Quotas' in International IDEA, *The Implementation of Quotas: Asian Experiences* (Quota Workshop Report Series, No 1, International IDEA, 25 September 2002) 36, 38 (emphasis added).

<sup>75</sup> Michele Brandt, *Constitutional Assistance in Post-Conflict Countries. The UN Experience: Cambodia, East Timor and Afghanistan* (United Nations Development Program, 2005) 16.

<sup>76</sup> See 'Women's Charter of Rights in East Timor', *The La'o Hamutuk Bulletin* (Dili, East Timor, August 2001) 2 <<http://www.laohamutuk.org/Bulletin/2001/Aug/bullv2n5.pdf>>.

<sup>77</sup> Michele Brandt, *Constitutional Assistance in Post-Conflict Countries. The UN Experience: Cambodia, East Timor and Afghanistan* (United Nations Development Program, 2005) 25-7.

consultations) and the Constitutional Loya Jirga (CLJ) (a predominantly elected body which had the role of deciding on, and adopting, the final draft). A Presidential Decree set a quota for women's representation on the CLJ: its composition included 5 per cent appointed women (half of the appointed members) as well as sixty-four women elected by women.<sup>78</sup>

Although this number fell below the demand for 'equal representation of women' made by a group of Afghan women's NGOs in a Women's Charter,<sup>79</sup> a document which was used to lobby the President and CLJ, it was nevertheless a significant achievement. In making such demands, Afghan women's NGOs enjoyed support from the international community. In the lead-up to the CLJ, in 2002, the UN Secretary-General flagged that Afghan authorities may be called upon to 'ensure full support for the participation of women' in the Loya Jirga and 'apply temporary special measures, including targets and quotas, targeted at Afghan women to accelerate the de facto equality of women and men in decision-making'.<sup>80</sup> This advocacy of gender quotas may have also influenced the constitutional entrenchment of gender quotas for Afghanistan's two legislative houses.

Overall, Afghanistan's constitutional process has been generally perceived as a success, in particular for women. For example, Brandt argues:

The representative nature of the CLJ is in part, what allows most Afghans to view the final constitution as a positive step toward democratic governance despite flaws in the participatory process. While diverse voices and opinions, including those of minority groups, may not have been reflected in the draft constitution, *the representation of minorities and women in the Constitutional Loya Jirga led to revisions to the draft that reflected their concerns* (such as quotas for women's representation in the legislature and recognition of minority languages). These groups, to a certain degree, were perhaps better able to advocate for the aspirations of their constituencies because the civic education and consultation process facilitated the delegates to be better informed about constitutional issues and how they related to their rights.<sup>81</sup>

Brandt is one of the experts who authored Interpeace's *Constitution-Making Handbook*, which, among other things, offers a comparison of the constitution-making processes in Timor-Leste and Afghanistan and is broadly critical of the efforts of

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78 Ibid 20.

79 This Charter was entitled 'Afghan Women's Bill of Rights' see Item 13 (on file with author).

80 *Discrimination against Women and Girls in Afghanistan — Report of the Secretary-General* [to the Commission on the Status of Women], 46<sup>th</sup> sess, Provisional Agenda Item 3(a), UN Doc E/CN.6/2002/5 (28 January 2002) 17, para 69(a), (i).

81 Michele Brandt, *Constitutional Assistance in Post-Conflict Countries. The UN Experience: Cambodia, East Timor and Afghanistan* (United Nations Development Program, 2005) 21 (emphasis added).



the international community.<sup>82</sup> One factor identified by the *Handbook* is the international community's tendency to view elected bodies as the most legitimate bodies to prepare and adopt a constitution. This is illustrated through Timor-Leste's constitution-making experience, which, at the urging of UN officials, was performed by an elected body. Unfortunately, these elections were dominated by one political party and the outcome was that the elected body adopted a pre-prepared draft which has been viewed as a one-party constitution. Thus, the *Handbook* argues, the large percentage of women delegates in the Timorese Constituent Assembly had little impact on the final outcome.<sup>83</sup> In contrast the *Handbook* refers to the constitution-making process in Afghanistan where an appointed constitutional commission developed a draft constitution which was subsequently considered by a predominantly elected assembly, the CLJ, whose role was to decide on, and adopt, the Constitution. The *Handbook* argues that women had a greater influence on this constitution-making process in Afghanistan than was the case with the Timorese process.<sup>84</sup> Brandt attributes this elsewhere to the fact that the Afghan women delegates were not ' beholden to patriarchal party structures',<sup>85</sup> in that they were either appointed or they were voted for by women, outside party lines. In contrast, in Timor-Leste, women were placed on candidate lists by the largesse of political parties, and thus party loyalties meant that they were less able to act independently to advance the appeals articulated in the Women's Charter.

### UN Practice in Nepal

The UN record of constitutional assistance in relation to women's inclusion is checkered. However, since the constitutions of Timor-Leste and Afghanistan were drafted, greater consensus has emerged in the international community, and the UN has developed a more coherent and facilitative approach. Nepal is one post-conflict state where this UN approach is apparent. It is possible that the UN's experience in Nepal has assisted the organisation to formulate a more consistent and nuanced approach to women's participation in constitution making.

In May 2006, six months before Nepal's Comprehensive Peace Agreement in late 2006, Nepal's House of Representatives adopted a resolution calling for at least 33 per cent representation of women in all parts of the state structure.

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82 Michele Brandt, Jill Cottrell, Yash Ghai and Anthony Regan, *Constitution-Making and Reform: Options for the Process* (Handbook, Interpeace, 9 September 2011) 324-5.

83 Ibid 326.

84 Ibid.

85 Michele Brandt, *Constitutional Assistance in Post-Conflict Countries. The UN Experience: Cambodia, East Timor and Afghanistan* (United Nations Development Program, 2005) 35, fn xxxix.

In January 2007, the UN Secretary-General reported to the UN Security Council that despite this resolution

*the exclusion of women from participation in public life, and so far from the peace process, has been almost total. The promise of 33 per cent representation for women in all decision making structures has not been realized in existing peace process structures such as the Peace Committee and the Interim Constitution Drafting Committee. It is urgent that the Nepalese parties open the door to the role that women can and should play in the process, as reflected in Security Council resolution 1325 (2000).*<sup>86</sup>

It is possible that this international influence ensured that the resolution of Nepal's House of Representatives was transformed into real terms. A gender quota for women's candidature in the 2008 elections to Nepal's first Constituent Assembly was subsequently set in both the 2007 Interim Constitution<sup>87</sup> and electoral legislation, and this enabled women's representation to reach 33 per cent. In particular, women were successful in winning half of the 335 proportional representation seats, while they had less success in relation to the First-Past-The-Post electoral system in which they won only 30 of 240 seats. The 601-member Constituent Assembly (CA), 95 per cent of which was elected in 2008, was 'hailed as one of the most representative institutions of its kind around the world'.<sup>88</sup> The CA was tasked with drafting the Constitution for Nepal as a 'secular, inclusive and fully democratic state', while also operating as Nepal's legislature. An official booklet on Nepal's participatory constitution-making process, produced by international and local constitutional experts with the support of UNDP, shows the desire to emphasise this as an inclusive and participatory process distinct from previous elite processes:

This is Nepal's fifth time drafting a constitution. Previous attempts were written by experts. They did not utilize a constituent assembly and were not written in an inclusive manner. This may be why they did not last.<sup>89</sup>

One aspect of Nepal's 'inclusive' process was that it encompassed a significant number of women from marginalised and lower castes, whose lives are far removed from Nepal's political elite. However, after four years of deliberation the body failed to finalise a constitution and hence it was disbanded in 2012. A second Constituent

86 *Report of the Secretary-General on the Request of Nepal for United Nations Assistance in Support of its Peace Process*, UN Doc S/2007/17 (9 January 2007) [20] (emphasis added).

87 *Interim Constitution of Nepal* (2007), art 63.

88 See CEDAW Committee, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women — Combined Fourth and Fifth Reports of States Parties — Nepal*, UN Doc CEDAW/C/NPL/4-5 (9 November 2010) 9.

89 Centre for Constitutional Dialogue, *Participatory Constitution-Making Process: Participatory Constitution Building in Nepal* (Booklet Series, No 10, Centre for Constitutional Dialogue and UNDP, 2009) 6.

Assembly was elected in 2013, with women once again gaining 30 per cent of the contested seats.<sup>90</sup>

According to UNDP's analysis, the highly representative nature of the first Constituent Assembly 'added complications to the constitution drafting process', as 'getting consensus on the constitution became next to impossible'.<sup>91</sup> The failure of the first Constituent Assembly led to some 'scepticism about the process of constitution-making through an elected and inclusive process'.<sup>92</sup> While the main bone of contention related to federalism, there were other issues that also made consensus difficult, at least one of which related to gender. According to the US State Department, '[d]uring the constitution-drafting process, equal citizenship rights for women was one of the most contentious and highly politicized problems, with no final decisions made'.<sup>93</sup>

UNDP's constitutional assistance project reflects on women's inclusion in Nepal's first Constituent Assembly:

The mere fact of holding seats does not automatically mean that women participate equally, or even that they have any significant influence at all ... [I]t was found that male Constituent Assembly members made many decisions during informal sessions that very seldom involved women.<sup>94</sup>

One of the positive outcomes was the formation of a women's caucus across party lines, which contributed to putting women's interests on the political agenda.<sup>95</sup> Overall, the experience made clear that women's inclusion was beneficial even if it did not automatically translate into women's full and meaningful participation. While these revelations are by no means groundbreaking, as they largely mirror the difficulties faced by women delegates in other constitution-making processes,<sup>96</sup> the fact that UNDP has articulated and documented them provides hope that the UN will use the experience to help create conditions more conducive to women's equal and meaningful participation.

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90 Women won 172 of the contested 575 seats. See National Democratic Institute, *In Nepal, Women Fight to Maintain Seats in the Constituent Assembly* (13 March 2014) <<https://www.ndi.org/nepal-women-fight-to-maintain-seats-in-parliament>>.

91 UNDP in Nepal, *Annual Report 2013* (UNDP, February 2014) 30.

92 Ibid 29.

93 United States Department of State, Bureau of Democracy, Human Rights and Labor, *Nepal 2013 Human Rights Report, Executive Summary* (Country Reports on Human Rights Practices for 2013 — Nepal, US Department of State, 27 February 2014) 16.

94 UNDP in Nepal, *Annual Report 2013* (UNDP, February 2014) 26.

95 Ibid 27.

96 See, for example, Catherine Albertyn, 'Women and the Transition to Democracy in South Africa' in Christina Murray (ed), *Gender and the New South African Legal Order* (Juta, 1994) 39, 54-7.

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## CONCLUSION

Despite the introduction in some countries such as Tunisia of gender parity laws that attempt to address the equal participation of women in legislatures and, in some cases, constitution-making bodies, in modern times South Africa's negotiated Interim Constitution represents the first — and only — time so far that a constitution has been drafted by equal numbers of men and women. UN discourse and practice indicate that there is an emerging international understanding that not only is there a need for women to participate in post-conflict constitution-making processes, but also that structural changes must be put in place to ensure that women can enjoy this right. One example of such change is the increasing use of proportional electoral systems as a means to elect a majority of members for a constitutional drafting body. Such systems have been used to elect constitution-making bodies in Nepal, Tunisia and Timor-Leste, and, as the first two countries show, a combination of electoral gender quotas with a system of proportional representation is most likely to ensure women's election to such bodies.

This chapter has briefly traced constitution-making experiences in Timor-Leste, Afghanistan and Nepal. The experience of Timor-Leste shows that initiatives for women's participation in constitution making arose from the ground up, via civil society, only to be pushed back by a lack of consensus within the UN and the international community more broadly. This was not the approach taken by the UN in relation to Afghanistan's constitution-making process, where the arrangement to allow some women to become members of constitution-making processes outside party structures, through being elected only by women or by being appointed, may have enabled women members to engage more actively with civil society and women's charters. One of the reasons underlying this difference is that the international community framed its intervention in Afghanistan in relation to reclaiming women's rights following the Taliban's regime of gender apartheid. This framework was assisted in part by the UN Security Council's evolving WPS agenda.

In the case of Nepal, the integrity of the Security Council's WPS agenda, which by 2006 was gaining some global momentum (at least in rhetoric), was being undermined by women's 'almost total'<sup>97</sup> exclusion from the Nepalese peace process. Thus the UN was under pressure to ensure that Nepalese leaders fulfilled their promise regarding women's participation in the Constituent Assembly, and the experience has enabled UNDP to gain a stronger understanding of some of the dynamics that hamper women's participation, even within constitution-making bodies. Thus the challenge for UNDP is to develop and offer strategies to post-conflict states which

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97 *Report of the Secretary-General on the Request of Nepal for United Nations Assistance in Support of Its Peace Process*, UN Doc S/2007/17 (9 January 2007) [20].

assist them in ensuring not only that women are included in constitution-making bodies but also that they are able to participate meaningfully within such bodies.

Following its experiences in Timor-Leste, Afghanistan and Nepal, the UN has, since 2010, begun to broadly articulate the need for gender-responsive electoral laws, gender quotas and the need to appoint women when it comes to constitution-making processes. These strategies need to be reflected in its *Guidance Note on Assistance to Constitution-Making Processes*, which, unless updated, offers inadequate guidance for constitutional assistance performed by UN agencies in post-conflict states. Overall, it is difficult to argue that the UN has consistently provided leadership in assisting women to participating equally and meaningfully in constitution-making processes. This mantle of leadership is often demonstrated by civil society, which is informed in some part by feminist scholarship.

Although constitutional assistance is a 'core component of the UN's peacebuilding and state-building strategy',<sup>98</sup> UN constitutional assistance has evolved very slowly: it has taken more than a quarter of a century for UN agencies to begin to understand the symbolic and substantive importance of women's participation in constitution making and the obstacles that hinder it. While the work of feminist international scholars such as Gardam, as well as Charlesworth and Chinkin, has shown much breadth in highlighting the paradigms and challenges women experience in conflict and in post-conflict settings, the Security Council has conceived its WPS agenda narrowly, so that it fails to take into account some of the critical dynamics operating in post-conflict settings when the foundations of states are being reformed through constitution-making processes. The next step for the UN Security Council's WPS agenda should be to explicitly set out women's right to participate in constitution-making processes and to articulate strategies to ensure that this participation is equal and meaningful.

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98 UN Secretary-General Ban-Ki Moon, 'Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes' (Guidance Note, April 2009) 3.

# 11

## LAW UNDER THE INFLUENCE OF RELIGION: THE LIMITING OF BIRTH AND DEATH DECISIONS

NGAIRE NAFFINE

### PREFACE

This chapter is written in the spirit of Judith's scholarship and style of inquiry. It endeavours to provoke discussion; it is polemical but also indicates the manner in which strong argument might be supported by measured research; it is written in a spirit of rationalism and is against the forces of irrationalism, especially as they undermine the interests of two vulnerable groups: women who wish to terminate a pregnancy and those who are extremely ill and wish to end their lives. Its arguments and concerns have an international reach. It takes on a large subject, which ultimately affects us all. And it employs a slightly experimental approach, as Judith has done in her own work.

In 'An Alien's Encounter with the Law of Armed Conflict', Judith responded creatively to a request to characterise the law of armed conflict in terms of the sex of its subjects.<sup>1</sup> She supplied an account of this body of law from the point of view of an alien, trying to make sense of these regulations as if they were the rules of a ghastly game, but without prior knowledge of their purposes or intended subjects.

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1 In Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (LBC Information Services and Sweet and Maxwell, 1997) 233.

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What would this creature from another world make of the people conjured up by these rules? Judith thus disclosed the presuppositions and biases of humanitarian law, and its understandings of its male and female subjects: the dominant male players, or combatants, with their natural affinity for arms and their peculiar codes of honour, and the preyed-upon female players, beings of natural modesty and weakness.

My chapter borrows from Judith and her exercise with the alien. It creates two distinct viewing points from which to examine afresh another body of law: the medico-legal rules governing basic birth and death decisions. From quite a high perch (though perhaps not from the great heights of the alien),<sup>2</sup> I examine the broad diplomatic and rhetorical moves and strategies of the main protagonists in the legal/religious debates which have shaped these laws. I consider also how these protagonists have themselves manipulated and played with perspective and point of view in order to achieve their ends. I then propose a shift of observational position to allow a close-up scrutiny of the disputants and their specific practical tactics: of the religious, who seek to control these decisions, and of the secular legal liberals, who respond to the religious with laws of compromise.

### INTRODUCTION

Why conduct this exercise? Why revisit the great debates between the religious and the secular legal? One of the most pressing national and international concerns of the new century is the strengthening of religion, as a social and political force, and its movement into the public sphere.<sup>3</sup> And yet the institutional effects of this religious flourishing are poorly understood.<sup>4</sup> This is especially true of the institutions of law, which are a major target of religious organisations.<sup>5</sup> Conservative elements of a variety of proselytising Christian Churches in Australia, the United Kingdom and the United States share a pronounced interest in certain basic life and death matters.<sup>6</sup> Their representatives often proclaim in public forums on the morality of contraception and abortion, assisted reproduction, the use of embryos and organs, pregnant women's refusal of medical treatment, the formation of intimate union and

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2 Though Judith breathed life into the alien and so its eyes were really hers on planet Earth.

3 AC Grayling, *Towards the Light: The Story of the Struggles for Liberty and Rights that Made the Modern West* (Bloomsbury, 2007).

4 Marion Maddox, 'An Argument for More, Not Less, Religion in Australian Politics' (2009) 22(3) *Australian Religious Studies Review* 345-67.

5 Peter Cane, Carolyn Evans and Zoe Robinson (eds), *Law and Religion in Theoretical Context* (Cambridge University Press, 2008).

6 Ngaire Naffine 'Varieties of Religious Intolerance' (2006) 8 *University of Technology Sydney Law Review* 103-17; 'Law's Sacred and Secular Subjects' in Peter Cane, Carolyn Evans and Zoe Robinson (eds), *Law and Religion in Theoretical Context* (Cambridge University Press, 2008) 268.

the positive ending of life, especially euthanasia.<sup>7</sup> Such religious interest groups also endeavour to influence directly the content and direction of relevant law, so that it marries with theological doctrine.<sup>8</sup> For example, they may seek leave to intervene in law cases dealing with matters of their concern, or make submissions to relevant government inquiries into law reform.

As and when such religiously sensitive matters are formally translated into legal norms, and so enter the realm of law, the responsible legal officials are likely to be placed under a variety of intellectual, political, social and moral strains. These strains may occur as the law is being developed and formulated or when the resulting doctrine is applied and requires interpretation. There may be pressures to supply both legal and moral justifications; to exercise diplomacy to avoid offence to the religious and the secular, without straying too far from accepted legal principles. The result is a mixed body of law often marked by conceptual tension.<sup>9</sup>

This chapter comes in two parts. The first part ascends to a high perch and endeavours to discern the broad forms and character of the debate between the legal and the religious communities, especially in relation to birth and death decisions, and reflects on the reasons that legal officials have found themselves so vulnerable to the claims of the religious within these debates. This, I suggest, tends to be bad for women and bad for the vulnerable more generally. The second part changes the viewing position: it urges a move to the detailed, the technical and the practical. It proposes a programme of close research into the particular ways law has specifically responded to such religious pressure: when and how it has resisted such pressure and when and how it has succumbed. The avowed purpose of such an inquiry is to improve our legal understanding of the nature and extent of the imprint of religion on law and thus equip law better to resist religion.

### THE CANONICAL DEBATE — HOW THE RELIGIOUS AND THE LEGAL COMMUNITIES TEND TO ENGAGE WITH ONE ANOTHER ON THE BIG ISSUES

The moral, political and legal terrains of abortion and euthanasia are important meeting grounds of the religious and the secular. There are highly public and well-rehearsed

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7 David Marr, *The High Price of Heaven* (Allen and Unwin, 2000); John Portmann, *Sex and Heaven: Catholics in Bed and at Prayer* (Palgrave Macmillan, 2003).

8 D Eisenberg, 'Lessons of the Schiavo Battle: What the Bitter Fight over a Woman's Right to Die Tells Us about Politics, Religion, the Courts and Life Itself' *Time*, 4 April 2005, 21.

9 Jane Weaver, 'Court Ordered Caesarean Sections' in Andrew Bainham, Shelley Day Schlater and Martin Richards (eds), *Body Law and Laws* (Hart Publishing, 2002) 229; Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001); Emily Jackson, Fatemeh Ebtehaj, Martin Richards and Shelley Day Sclater (eds), *Regulating Autonomy: Sex, Reproduction and the Family* (Hart Publishing, 2009).



moral and legal debates between the religious believer and the secular liberal, which tend to be cast in a certain manner: as a struggle between two oppositional principles — the sanctity of human life versus the autonomy of the human individual — and those principles are linked with fundamentally different systems of thought. This canonical debate between the religious and the secular on the appropriate mode of regulating the fundamental life matters of abortion and euthanasia is typically cast as one of 'pro-life' versus 'pro-choice'. By way of this shorthand, the sanctity of the life of the foetus is pitted against the reproductive autonomy of the pregnant woman, and the sanctity of the life of the suffering person is pitted against their preference for their life to end.

The believer advances the principle of the sanctity of human life and argues that it should directly sound in law such that, for example, abortion should be fully criminalised and euthanasia should remain the crime of murder. The foetus and the adult at death's door are said to have ineliminable value; they are sacred and inviolable; nothing and no-one should deliberately harm them or end their life.<sup>10</sup> The secular liberal argues that choice should reside with the rational chooser: with the woman who may or may not wish to reproduce and with the person who wishes to die.<sup>11</sup>

This debate is conventionally portrayed as one of stark oppositional disagreement between those of fundamentally different, even incommensurable, worldviews or mentalities or ways of seeing. Repeatedly, it is stated that the disagreements between the religious 'pro-life' view and the secular liberal 'pro-choice' position are intractable; that they entail fundamentally different comprehensive systems of thought; that controversy and hence regulative difficulty is inevitable. For example, a general review of Australian efforts to decriminalise euthanasia described the 'euthanasia debate' as 'indeterminable and intractable' and as 'a controversial subject on which many people hold strong views'.<sup>12</sup> Similarly, the debate about the regulation of reproduction has been described as one of 'profound moral disagreement about the propriety of human intervention', such that 'there will ... never be consensus about the moral status of

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10 See, for example, the extensive writings of John Finnis on this subject, especially 'The Legal Status of the Unborn Baby' (1992) 43 *Catholic Medical Quarterly* 5-11; 'Bland: Crossing the Rubicon?' (1993) 109 *Law Quarterly Review* 329-37; 'A Philosophical Case against Euthanasia' in John Keown (ed), *Euthanasia: Ethical, Legal and Clinical Perspectives* (Cambridge University Press, 1995) 32; 'Euthanasia, Morality, and Law' (1996) 31 *Loy. LA Law Review* 1123, 1143; 'Public Reason, Abortion and Cloning' (1998) *Valparaiso University Law Review* 32; 'Abortion, Natural Law and Public Reason' in Robert P George and Christopher Wolfe (eds), *Natural Law and Public Reason* (Georgetown University Press, 2000) 71-105.

11 The most prominent liberal in this area is Ronald Dworkin; see especially his *Life's Dominion: An Argument about Abortion and Euthanasia* (Harper Collins, 1993) 82-3; and 'Tyranny at the Two Edges of Life: A Liberal View' (Winter 1994) *New Perspectives Quarterly* 16, 19.

12 Lorana Bartels and Margaret Otlowski, 'A Right to Die? Euthanasia and the Law in Australia' (2010) 17 *Journal of Law and Medicine* 532, 550.

the foetus'.<sup>13</sup> '[T]he predominant construction of the issue of abortion regulation' has also been described 'as an irresolvable conflict between a foetal right to life and a maternal right to privacy or bodily autonomy'.<sup>14</sup>

Because of this seemingly dug-in oppositional stance, it is often said that legal development, legal reasoning and analysis in this field are inherently hard work, legal principles strained and compromised, and consensual law making impossible.<sup>15</sup> To Emily Jackson, for example, 'in working out how to regulate abortion, pursuit of a compromise that reaches even a minimal level of universal acceptability is almost certainly futile'.<sup>16</sup> This canonical debate is, in essence, a particular (Christian) religious view pitted against a secular liberal view, and — incidentally and importantly — it is the preferred orthodox Roman Catholic method of framing the debate, as opposed to that of religious liberals.<sup>17</sup>

Why and how does the debate continue to be cast and recast in these stark terms?<sup>18</sup> What work is being done by this casting or framing of the debate, and what does it leave in place, uninspected and unresolved? And most importantly, perhaps, what are its utilities and its disutilities — especially for pregnant women and the dying? Here my intention is to observe, from a high perch, the large moves of the protagonists and their manipulation and negotiation of perspective.

### Declaring Incommensurable Visions: The Duck/Rabbit

Something that is exceedingly confusing about the big debates on abortion and euthanasia is that, starkly drawn as they are (typically said to be) in their canonical forms, both debates seem to entail an assertion of incommensurable ways of seeing the relevant subjects and their regulation and even the source of law; and such incommensurability would seem to suggest that conversation or negotiation is impossible. It is said repeatedly that the conflicts are irresolvable, but, as we know, conversation does occur. After all, it is a debate — one of the biggest and best known.

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13 Emily Jackson, *Regulating Reproduction* (Hart Publishing, 2001) 1.

14 Charlotte Lesslie, 'The Psychiatric Masquerade' (2010) 18 *Feminist Legal Studies* 1, 3.

15 See Ngairé Naffine, 'How Religion Constrains Choice' in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012).

16 Emily Jackson, *Regulating Reproduction* (Hart Publishing, 2001) 1.

17 Of course, the Christian Church also encompasses moderates, liberals and the truly ecumenical. There are many tolerant liberal Christians who do not cast the debate in such stark oppositional terms. Such religious tolerance is particularly evident in the work of liberal Australian Christian ethicist Max Charlesworth. See, for example, his *Bioethics in a Liberal Society* (Cambridge University Press, 1993).

18 Even by feminists, such as Jackson and Lesslie.

Though the form in which this debate is cast, between the religious and the secular, is one of complete conflict, it contains paradoxical elements of agreement and bipartisanship. These elements of agreement have important utilities for those on both side of the divide, but they are particularly beneficial to the religious, as they entail such large concessions. The form, I suggest, in which the debate is cast is very like that of the duck/rabbit made famous by Wittgenstein. The duck/rabbit is a perceptual puzzle which enables two fundamentally and incommensurable ways of seeing the one object, both of which cannot exist at the same time. Wittgenstein employed the duck/rabbit to demonstrate that we see the one object (here the one human being) 'according to an interpretation', and that we can see it as entirely different objects.<sup>19</sup> If we employ the idea of the duck/rabbit here, one way of seeing is religious — call it the rabbit; the other way of seeing is that of the secular liberal — call this the duck. The two visions, the rabbit (the religious view) and the duck (the secular liberal view) are irreconcilable: they are two utterly different views or systems of thought which result in entirely different ways of seeing what is there. In a sense, the seeing produces a completely different object or subject.

If and while you see it one way, you cannot see it the other way. Thus when it comes to seeing the pregnant woman, a strong religious 'rabbit' way of seeing her (from the moment of the fertilisation of her egg) is as the bearer of her own and another's soul, a sacred innocent being of unalloyed value who must be protected from intentional killing at all costs. Now she is not one, but two, and now she may represent the greatest threat to the embryonic soul. There is a Divine Supernatural source of the value of both. By contrast, a strong secular liberal 'duck' way of seeing the pregnant woman is as one being: one rational human individual who is the woman and the only responsible chooser. Now human value derives from human reason and there is no such thing as the Divine. These are incommensurable ways of seeing the same human being.

With the sick or dying person who positively wishes to hasten death, the religious view is that the only relevant will is the perceived will of God. The religious view invokes a higher law than human law. For the secular liberal, the relevant will is that of the dying person whose life it is. With the debate thus starkly drawn, entailing utterly different visions, we seem to be at an impasse.

The duck/rabbit is the extreme and yet common cast of the debate. This is how the debate is typically described: as entailing incommensurable ways of seeing the problem which cannot be held simultaneously. This necessarily means that, at any given moment, either the rabbit or the duck must trump — we cannot have both, or a mix of the two. It can only be the rabbit (say, the soul/life of the foetus, which is

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19 Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell, 1953) 200.

infinitely precious and must not be intentionally killed) or the duck (say, the woman as human chooser, as sovereign controller of her body). Binocular vision cannot be achieved. Resolution is impossible. The religious faithful will see only the twin souls of the pregnant woman, and the secular rationalist will see no soul at all: only a single human rational chooser. Thus cast, we have non-negotiability of position and so intransigence.

However, this cast of the debate, which I suggest is the received one, also has a number of important paradoxical implications and effects. The duck/rabbit cast of the debate entails a basic concession by rationalists to those on the other side of the debate — that is, the rationalists concede that the religious adherents genuinely, absolutely see the matter differently, for reasons which must be respected. It can also connote that the image or meaning is in the eye of the beholder and that neither the duck nor the rabbit are right or wrong:<sup>20</sup> it is a matter of perception.<sup>21</sup>

Secular rationalists may thus concede too much from the outset. They concede the supposed difficulty of the subject matter — after all, it is a duck/rabbit. They concede that it is useless to argue in duck terms to the rabbit people. They may further agree not to argue the nature of the problem because the two understandings are fundamentally incompatible.

The secular rationalist will speak of the importance of the choice of the individual but also, in a spirit of compromise, of the inherent value of the individual, regardless of the individual's ability to make rational choices. Legal liberals are unlikely to challenge directly what are taken by the religious to be supernatural truths. There may even be a judicial or scholarly recognition that what once had a Biblical justification (say, the principle of the sanctity of life) now has a secular justification (humanism). But judges and law makers and even legal scholars are reluctant to go further and say, in true atheistic humanistic spirit, that there is no basis for belief in God and that its tenets can be positively harmful. Direct, and one could say intellectually honest, confrontation is avoided. Respect and restraint and even solicitude may be displayed. Deep and true differences are veiled.

Indeed, as one skeptical commentator has observed, 'religious tolerance is largely a creature of secular humanism, and in its spirit the majority of critics manqué

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20 The rabbit people will not concede this among themselves because, after all, they see a rabbit and take the rabbit to be the position.

21 It is not the essential or true nature of the object or human being which is being seen and described by the duck people or the rabbit people (whatever that may be), but an interpretation of that object or being; however, that interpretation is so compelling and critical to the particular worldview that it is experienced as a true and accurate perception of the nature of the object and it is neither negotiable nor subject to change.

have simply declined to fire'.<sup>22</sup> Thus secular rationalists, in liberal spirit, out of respect for the religious, often decline to criticise the contents of religious belief; and, indeed, some have treated such belief as intellectually respectable and have been willing to draw upon it when the need is thought to arise.

### Concession that Legal Resolution Will Be Hard or even Impossible

The duck/rabbit casting of the debate can also entail a declaration by law makers and lawyers that in these areas of legal life there can be no real resolution; those of belief will simply not see it the same way as the secular; these differences of seeing necessarily put the matters in the 'hard basket'; they are inherently difficult or tricky matters, which will inevitably produce hard cases for law. They must be bracketed from the mainstream of good, sound, principled law. Law cannot make them different. They will remain legally difficult and probably unsatisfactory, but that is just how things are. These are the matters that will be non-standard, exceptional, at the penumbra of legal meaning. And thus they will not threaten the core of legal meaning or represent a test of it. Strategically, the duck/rabbit is important. It says that what might appear to be a legal or political compromise or failure actually resides in the different ways of seeing the problem, which will not and cannot change.

### Parcelling Out the Problem

This cast of the debate can entail the further implication that the religious-rabbit cast of the debate might be right in some circumstances (entailing a concession to religious moral authority) while the secular-duck cast might be right in others. This is what Stephen Jay Gould has referred to as 'non-overlapping and thus non-competing magisteria, where a magisterium is "a domain where one form of teaching holds the tools for meaningful discourse and resolution"'.<sup>23</sup> This can conduce to a parcelling and division of the problem, so that the religious get some bits of law while the secular get others. If we look very briefly at the resultant law, one could conclude that euthanasia has been given over to the religious, while the formally criminal, but practically liberal, law of abortion remains somewhere between magisteria; neither rabbit nor duck; neither fish nor fowl.<sup>24</sup>

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22 Tamas Pataki, *Against Religion* (Scribe Short Books, Melbourne, 2007) 11.

23 Owen Flanagan, *The Problem of the Soul* (Basic Books, 2002), quoting Jay Gould in *Rock of Ages: Science and Religion in the Fullness of Life* (Ballantine Books, 1999) 47.

24 In those Australian jurisdictions (such as Victoria) where early-term abortion has been decriminalised, it would seem that the secular-duck position has prevailed.

The duck/rabbit cast of the debate draws attention away from the compromises of secular liberalism, where it is willing for autonomy not to be fully applied, despite the presence of a rational chooser: where liberals begin to exceptionalise and even move towards mysticism and begin to concede the special mysterious nature of that which must be regulated.

Thus the duck/rabbit is an extreme cast of the debate which is widely accepted and has a number of practical and strategic implications and utilities. It licenses ongoing negotiations about who is going to control meaning (and the law). Finally, and perhaps most importantly, the duck/rabbit cast of the debate deflects attention away from the terms, concepts and meanings that the two sides share. There is a great deal of bipartisan thinking which tends not to be openly discussed, evaluated or criticised.

### The Common Measure: The Content of the Agreement

I now want to consider more closely just what the two sides have in common. First, the inevitability of a two-sex system as a basic ordering category of social and legal thought is fundamentally agreed.<sup>25</sup> The distinction between man and woman is utterly assumed and shared, even though there are differences in the conception of each. Both sides share a history in which the personification of women is qualified. Certainly, the problems in conceiving of women as sovereign individuals whose symbolic meaning does not derive from man are shared. Both sides assume some sort of reciprocity of the sexes.<sup>26</sup> For both, men (understood in a certain manner) remain the true unproblematic individuals.<sup>27</sup>

Second, both accept a bodily form in which this individual value is uncompromised (the non-pregnant healthy individual). Both have a sense of

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25 For a sustained analysis of the two-sex system in law, see Katherine O'Donovan, *Sexual Divisions of Law* (Weidenfeld and Nicolson, 1985). See also Margaret Davies, 'Taking the Inside Out: Sex and Gender in the Legal Subject' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (Sweet and Maxwell, 1997).

26 According to the Catholic Catechism: 'God himself is the author of marriage' and marriage is to be between one man and one woman. Here the guiding idea is that the sexes have a correlative nature. Rather than functioning as distinct choosing individuals, forming intimate associations unrelated to our sex, we are expected to form intimate relations only across the sexes and then, ideally, to reproduce naturally and so produce a family. In other words, there is a wholesome honourable God-given form to the heterosexual family. It is paradoxically both the natural and required unit of being: the man, his woman and their offspring. Catechism of the Catholic Church (Society of St Paul, 1994), par 1603.

27 On the difficulties of accounting for women as true legal individuals, see Ngaire Naffine, 'Our Legal Lives as Men, Women and Persons' (2004) 24 *Legal Studies* 621.

'physical completeness'.<sup>28</sup> The problematic or marginal status of the pregnant woman is common to each ordering system: the pregnant woman poses a fundamental categorical problem to both religion and law.<sup>29</sup> However, the system of thought is not shaken by this problem of ordering.<sup>30</sup>

The very sick and the dying person are also problematic to both. Both the religious and the secular rationalist question the autonomy rights of the dying person, though on different grounds. The secular rationalist, with their idea of a competent autonomous bounded individual, divines the loss of these qualities in the dying and begins to question their ability to function as choosing individuals; the religious person looks to God's will for the appropriate source of decision making.

There are agreements between Christian theology and Liberal philosophy on principle and conceptual division, and there are bipartisan agreements about how power should be shared in law. When a person unproblematically satisfies the requirements of the liberal individual, as an autonomous discrete rational chooser, there is no quarrel with the religious: the person is governed by the autonomy principle, and law supports their choices without interference from religion. When a person is pregnant or dying and religion acquires an interest, liberal philosophy tends to retreat and begins to cede authority to the Church. The preconditions of liberal individualism are no longer clearly satisfied; religion acquires a stake and is positively permitted to do so.

It can often appear that law is striving valiantly to reach a regulative compromise, to find points of common agreement within a pluralistic society<sup>31</sup> comprising groups with very different worldviews (and doing so badly, according to cogent feminist critiques): 'to reconcile the inevitable conflicts inherent in pluralism and liberal democracy'.<sup>32</sup> But I suggest that law is not a sort of neutral external

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28 Mary Douglas, *Purity and Danger* (Routledge and Kegan Paul, 1966) 64. See also the extensive feminist literature on the 'bounded' nature of the human body in law, especially the work of Jennifer Nedelsky.

29 See Mary Ford, 'A Property Model of Pregnancy' (2005) 1 *International Journal of Law in Context* 261; and 'Evans v United Kingdom: What Implications for the Jurisprudence of Pregnancy?' (2008) 8(1) *Human Rights Law Review* 171.

30 Rather, the problem is found to lie with that which does not fit the order — with the pregnant woman herself.

31 As Peter Cane expounds this view of law: 'Law can underwrite value-pluralism. If disagreements about values become so serious that they threaten social stability and harmony, the law may be able to maintain social cohesion by laying down a norm that people are prepared to accept'. Peter Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2006) 10 *The Journal of Ethics* 21, 49.

32 This was how the Lockhart Committee inquiry into the regulation of human cloning conceived its task. Loane Skene et al, 'The Lockhart Committee: Developing Policy through Commitment to Moral Values, Community and Democratic Processes' (2008) 16 *Journal of Law and Medicine* 132, 134.

umpire arbitrating fundamental differences across comprehensive systems of belief. Law does not stand outside these two ways of seeing, impartially parcelling out competing claims. Rather, law is deeply implicated in both ways of thinking, and thus plays an important role in shoring up both positions. What we have is a law of compromise: both the competing views find their way into law, thereby setting up tensions within law as well as silent agreements about terms, principles and divisions — the uninspected. Law is fully implicated.

The conceptual divisions I have identified are reflected in law. The conceptual machinery that is already in place in law, particularly its basic divisions, has been developed in a certain religious climate by people of influence within that culture according to their understandings. Religion and then political liberalism have been strong twin conditioning influences on the development and hence the nature of those divisions. One can say that these twin influences have helped to establish basic conceptual legal divisions imbued with particular metaphysical understandings which work poorly for reproducing women and for the weak and dying.

The perceived strength of this dichotomous casting of the problem — the duck/rabbit — arises because both religion and secular political liberalism reach into, and connect with, law's general principles and its very conceptual foundations. Consequently, law does not stand above these metaphysical debates, as dispassionate arbiter between antagonists; nor does law exist in its own distinctively legal domain, unaffected by the ideas which are promulgated on both sides. Instead, I suggest, law is deeply implicated in both ways of thinking. Thus it helps to sustain the debate: it helps to reproduce it, to give it legal meaning, to give it practical legal work to do, and indeed to generate the tensions and create the very intellectual problems it strives to solve. Because of this deep implication of law in both ways of thinking, law itself is often confusing and confused, and the subject matters come to seem to be hard areas of regulation.

### The Making of Hard Cases (which Serve the Directly Affected Poorly)

A number of things follow from this analysis. The canonical debate between supposed opposites — the religious and the secular liberal — is misleading because in truth it is founded on a broad base of agreement. Because this broad base is agreed, much of it goes uninspected. And yet it is here in the conceptual foundations that some of the most troubling elements of each position reside, notably the problematic status of the protagonists of both debates: pregnant women and the dying. The practical result is that both are the chief subjects of concern and yet both are poorly conceptualised in the prevailing systems of belief. This helps neither subject to get justice through law because law helps to reproduce each position with all its contradictions.



## IMAGINING LAW

Another concerning effect of the strong oppositional nature of the received debate is that law making in these areas occurs in its shadow. Indeed, legal officials are often acutely aware of these religious debates and of the religiously sensitive nature of certain legal issues, and so their reasoning is developed with a sly eye to these debates, especially when it seems that they are moving into religious territory. The canonical debate causes law makers and judicial officials to tread carefully. These are the subjects of conscience votes rather than clearly developed public policy, and they result in law which has been heavily criticised for its failure to address fully the concerns of either side. Legal officials may also begin to adopt metaphysical and theological thinking themselves, to stray into the discourse of the other, to the extent that they come to conceive their task as religious in nature and as touching on the very meaning of life.

Indeed, the great debate appears to produce a law of compromise, but not in the best political sense of that term, nor as a law that comports with justice. Abortion laws have typically entailed the use of criminal law — that is, the setting up of a serious criminal offence — and have then supplied what is effectively a medical defence of necessity if the woman can establish the threat that the pregnancy poses to her health. Formally, the choice to terminate resides with the doctor, not with the woman. Only very recently have a few Australian jurisdictions removed abortion from the criminal law. At the end of life, withdrawal of life support in hopeless cases is lawful (effectively making lawful slow death by dehydration) as is the doctrine of double effect, but voluntary euthanasia remains murder. Repeated attempts to make euthanasia lawful have failed. In both cases, the vulnerable person, who is either the pregnant woman or the dying person, is deprived of individual choice, and religious principles are imposed on the secular.

Feminists, for some time now, have noted the exceptionalising and bracketing of normal female conditions in law making and legal analysis. Indeed, this could be said to be the most important proposition of feminists: that women still do not represent the human norm (though feminists have also questioned the very idea of such a norm). Pregnant women, in particular, have been construed as hard cases for both liberal legal individualists and for the religious, who have such an interest in the twin souls they are thought to represent. They have therefore often been treated as hard legal cases calling for exceptional legal treatment.<sup>33</sup>

The pregnant woman is wrenched between belief systems and represents a problematic case for both. As the subject of religious discourse, she finds that she bears a sacred foetus. To the extent that law subscribes to the same way of thinking and invokes the religious-legal principle of the sanctity of life, she will find that she

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33 See, for example, Mary Ford, 'A Property Model of Pregnancy' (2005) 1 *International Journal of Law in Context* 261.

cannot therefore terminate a pregnancy, unless her own wellbeing is threatened. Thus a termination remains a serious criminal offence, but there is a defence of necessity supplied to her doctor.<sup>34</sup> As subject of the secular liberal discourse, the pregnant woman may find that she is effectively not pregnant at all. She is an autonomous individual whose rights as a choice maker are undiminished by her pregnancy. Alternatively, she may find that she is not regarded as eligible for the status of rational choice maker because this implicitly calls for non-pregnant status. In short, she does not qualify as a liberal individual.

The dying are more obviously the subjects of religious thinking. The religious view gives them a soul that is God's, which is something that neither they nor the doctors have the right to destroy. The liberal secular view endows them with choice. Law resolves the difference with the doctrine of double effect and the criminalisation of voluntary euthanasia.

The duck/rabbit cast of the great debates is subtle, confusing and conducive to spin. It enables sophisticated and tactical disagreement and a good deal of unstated and unquestioned agreement. My practical concern, however, is with the people who are caught up in these great debates where there is so much smoke and mirrors, particularly pregnant women and the sick and dying — people at their most vulnerable times — and the laws they get left with and the manner in which their lives are regulated as a consequence. My concern is that religious principles, in particular, are being imposed on the secular in order to limit both reproductive autonomy and the way that we are permitted to die.

### A RESEARCH PROGRAMME

Thus far, I have examined the broad terms and casting of the debate between the religious and the legal from a high perch. But such general observations would gain strength from a sustained and rigorous investigation into the specific and particular ways in which religion has pressed on to law and the ways in which law has differentially responded. This would be the work of a major investigation, which is badly needed in view of the rising forces of religion. Within the brief of this chapter, my task is only to sketch out a programme of research, not to undertake it.

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<sup>34</sup> Feminists have been especially critical of the medicalisation of women in abortion law and the denial of their right to decide what is done with their bodies — a right asserted as fundamental to liberalism in the classic statement by John Stuart Mill in *On Liberty* (1869). If anything, in abortion law, autonomy rights reside with the doctor rather than with the woman. See especially Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (Pluto, 1997); Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001); Emily Jackson, *Medical Law: Text, Cases and Materials* (Oxford University Press, 2<sup>nd</sup> ed, 2009) and Jackson, Ebtehaj, Richards and Sclater, above n 9.

## IMAGINING LAW

The programme I propose is one that examines critically just how, why and when legal officials have asserted their disciplinary autonomy, their conceptual authority and competence, over the intimate life matters, and eschewed religious influence; how, when and why they have struck a regulative compromise with the religious; and when and why they have been positively receptive to religious influence and even ceded moral and legal authority to the Church. In short, what makes for a willingness of law's representatives to join forces with religion? And when is disciplinary separation more likely to be asserted, and what sort of laws and law result?

The project would examine the interplay between religion and law, with a particular emphasis on the legal institutional responses: the effects on legal principle, concepts and doctrine and, perhaps most importantly, on how the task and role of the legal official is conceived by that official. This calls for close legal analysis of the complex diplomatic negotiations between religious and legal officials, as representatives of two disciplinary positions in which a law of cross-disciplinary compromise is often achieved.

The potential scope of this inquiry is considerable and so to secure its intellectual boundaries and establish a sensible framework for specific investigation it would take as its focus certain laws and certain forms of law making in particular jurisdictions. The legal world that forms the focus of this project would be that of modern centralised Anglo-American-Australasian state law. The scope of the project would be further delimited by the choice of legal subject matter.

The two major life decisions which could sensibly form the substantive legal subject matter of this project are, first, the decision to start a life (and conversely to stop life starting), and second, the decision to end a life (and conversely to demand its continuation). As I have already observed, birth and death are parts of life, and their associated decisions are subject to legal regulation, over which the Church asserts its particular competence and authority, and with which it is particularly exercised. They relate to important parts of Christian theology. In these parts of life, the religious story is particularly rich.<sup>35</sup> The case and statute law pertaining to these life decisions could therefore supply an excellent source of material about relations between law and religion.

A cluster of laws regulating the start of life attracts the interest of the Church. They include laws governing contraception, abortion, assisted reproduction, the rights of pregnant women in relation to refusal of medical treatment, sterilisation

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35 This has been noted by Ian McEwan in 'End of the World Blues' in Christopher Hitchens (ed), *The Portable Atheist* (Da Capo Press, 2007).

of the disabled, and the uses of embryos produced by assisted reproduction. These religiously sensitive areas of law are particularly marked by their conceptual tensions.

There is another cluster of laws concerning dying and death which attract the interest of the religious and aspects of which seem to reflect religious understandings. The courts have openly endorsed a common law principle of the sanctity of human life (a direct borrowing of religious language): voluntary euthanasia remains murder and assisted suicide a separate serious crime. However, there is also to be found in these areas of law a jurisprudence of compromise which acknowledges the autonomy rights of the individual to issue directives, in advance of their dying, for medical support to be discontinued.

These complex relations between law and religion are conducted within government inquiries into law, in the parliament and its associated processes, in the courts and on the Bench, at the highest judicial levels, and also in legal scholarship in learned journals and monographs. These are the sources upon which this project could rely. There should be a selection of superior court decisions related to these religiously sensitive matters of making and ending life. The point of these case analyses would not be to labour or rehearse the religious nature of these matters. Rather, their point would be to reveal the techniques employed to justify, deflect or deny the recognition of religious arguments and interpretations. There could also be a close study of a selection of reports of government inquiries on religiously sensitive matters which anticipate changes to legislation in the two areas and the means adopted to engage with and bypass moral/religious inquiry.<sup>36</sup> Again, the point would be, first, to show the techniques of engagement with religious representatives and second, to explore the legal mechanisms of compromise.

This inquiry would shed new light on the very nature of law as it absorbs religious pressures and is constitutionally altered in complex ways that are, to date, poorly understood. It would show how law both changes and sustains its very nature, as a discipline, as it assimilates strong pressures from another discipline. It would

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36 The project could consider, for example, Mary Warnock's report of the government inquiry into the regulation of human fertilisation and embryology (Mary Warnock, *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* (Basil Blackwell, 1985); the Lockhart report on the regulation of human cloning: Loane Skene, Ian Kerridge, Barry Marshall, Pamela McCombe and Peter Schofield, 'The Lockhart Committee: Developing Policy Through Commitment to Moral Values, Community and Democratic Processes' (2008) 16(1) *Journal of Law and Medicine* 132; and the Nuffield Council of Bioethics' Working Party on Human Bodies in Medicine and Research chaired by Marilyn Strathern, published on the Council's site: Nuffield Council on Bioethics, Working Party on Human Bodies in Medicine and Research, *Give and Take? Human Bodies in Medicine and Research: Consultation Paper* (April 2010) <<http://nuffieldbioethics.org/wp-content/uploads/Human-bodies-in-medicine-and-research-consultation-paper.pdf>>. These critical analyses of the reasoning employed in the reports could be supplemented with interviews of Committee consultants and Chairs.

explain the fundamental tensions that are generated within law as it confronts a profoundly different discipline (which is, at least in part, incommensurable with law, due to its reliance on faith rather than reason), and the means by which those tensions are accommodated, resolved, deflected or ignored. Such a study would greatly deepen our understanding of law's intellectual responses to religious pressure, and of the fundamental tensions which ensue within jurisprudence. It might well also show the way to a more coherent, more intelligible more principled and hence more just law governing the decisions which are most basic to our lives.

There is already solid preliminary evidence of three broad legal institutional responses to religiously sensitive matters, and these support the formulation of a strong hypothesis that could guide such an investigation.<sup>37</sup> Perhaps the most orthodox institutional response to religion is legalistic in nature, in that the sensitive matter needing regulation is treated as assimilable to, and appropriately governed by, existing conventional legal principles, concepts and reasoning. It entails an assertion of disciplinary autonomy and the invocation of distinctively legal concepts, principles and purposes to preserve that autonomy. This is a jurisprudential assertion of both law's separability and of its actual separation from other bodies of knowledge and thought, and it is likely to entail explicit opposition to religious intervention and a refusal to treat the sensitive matter as exceptional. It entails an assertion of full disciplinary competence and resistance to religious argument and metaphysical speculation. There may also be a tendency to emphasise the abstract, inventive and artificial nature of law. In this mode, law is often turned in on itself, mainly addressed to legal officials, committed to a technical language often not intended for general understanding, relatively autonomous, non-naturalistic, and increasingly statutory.

The second, less influential but still manifest, legal response to religion is effectively its polar opposite: it entails an explicit legal receptivity to religious argument, deference to the authority of the religious and possibly a legal 'exceptionalising' of the religiously sensitive matter, so that it is treated as a special case in need of extra-legal reasoning and principles. This is a jurisprudence which comes close to a variety of religious law. It occurs when legal officials profess that law has exceeded its conceptual competence, that the matter to be regulated is not fully susceptible to legal treatment and hence that there is a ceding of moral and legal authority to the Church and a merging of law with religion. Here, there is a tendency to see law as continuous with a natural or supernatural morality outside of law, and so to import metaphysical understandings into law (such as what is the value and meaning of a life) and also to

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<sup>37</sup> See Ngairé Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009); and 'How Religion Constrains Law and the Idea of Choice' (2009) 30 *Adelaide Law Review* 15.

regard the religious as expert in these areas. In its starkest mode, it entails a surrender of disciplinary autonomy.<sup>38</sup>

The third response seems to entail a pragmatic middle position, an endeavour to juggle legal and religious principles, to defer to and respect both, and even to hold the two in balance. Such reasoning is evident in a good deal of the case law on beginning and end of life decision making. This involves a complex exercise in legal diplomacy in an area where competing views can be strongly articulated and potentially legally destabilising, and where there are high levels of public scrutiny. It entails concessions to the disciplinary authority of the Church, but for certain supposedly metaphysical purposes only, and then not completely so. It invokes a mix of orthodox legal and religious principle.

Here we see legal officials partly engaged in a process of compromise, acknowledging the strain between religious and legal principle, but still asserting the importance or even priority of distinctively legal principles and methods. This response entails a departure from legalism and so a change of law's artificial character, such that the sense of law's abstracting and inventive quality is modified and diminished. This is a law of practical compromise, strategically addressed both to the religious as well as to the legal and broader community.<sup>39</sup>

While preliminary inquiry strongly suggests the presence of these three legal responses to religion, more sustained investigation may well reveal greater complexity of disciplinary response and overlapping positions, and indeed it may identify other disciplinary positions. The full range and complexity of institutional legal responses to religion need to be closely examined and tested for their relative influence, their precise nature, their interplay, and the manner in which they shape legal doctrine. For each legal response, one can anticipate a particular and distinctive understanding of the general nature and role of law, the specific nature of the legal task, the sufficiency of legal concepts, and the suitability of intervention by religious representatives and religious principle in legal matters.

The project should pose a variety of questions designed to probe the nature of the legal response to religious intervention. For example, how does the official construe the nature of the problem or dispute before it? Is the problem cast in an assiduously legal manner, focusing on the specific purposes of the governing laws and the consequent legal rights and duties thus arising, or is it interpreted in a manner which admits metaphysical arguments? Is it treated as a central, standard case for

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38 See, for example, the writings in these areas of Leon Kass, John Keown and John Finnis.

39 For example, there was close public scrutiny of the decisions of the English Court of Appeal in the case of *A Children* [2004] 4 All ER 148 (on the legality of separating conjoined twins, thereby killing one of them), and the Law Lords engaged in extensive highly public justifications of their reasoning, which appealed to a broad variety of positions.

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which there are apposite principles, or as exceptional? Does the official assert full disciplinary competence or concede the relevance of religious argument? Is there a conscious use of legal techniques such as presumptions, fictions and deemings, or abstract rights analysis, to thereby circumvent moral categorisation and metaphysics? Is expressive moral/religious language employed or avoided? The use of the term 'sanctity of life', for example, is highly expressive and bears religious connotations. Is standing granted to religious bodies in the relevant cases? If so, first, on what basis is it granted (why are they seen to have a material interest)? Second, how does the court interpret and respond to their arguments?

The project should examine the ways in which religion influences law making and legal interpretation. The strong guiding hypothesis is that there are three distinct jurisprudential responses to religion: one legalist, another religionist and a third pragmatic. Sources should be investigated and tested for the presence of these responses. However, investigation should remain open to the possibilities of other more complex relationships between law and religion. The anticipated benefit of such a programme of research is a more reflective law, which is either less vulnerable to metaphysics (especially theology) or which employs metaphysics consciously and strategically and in conformity with the needs of justice.

## AFTERWORD

The manipulation of perspective is a useful heuristic technique. As Judith found with her alien's view of humanitarian law, it can offer a new way of seeing something that has become too readily accepted, or that is seen in a standard way, because of excessive familiarity. It can jolt one out of easy assumptions.

With the great religious and legal debates about the making and ending of life, there has been a standard set of arguments and counterarguments; my aim has been to expose and evaluate these practised moral and intellectual manoeuvres. From my high perch, I have observed the large moves of the players within this moral and legal game as it is played over and again. I have then suggested how we might move closer in on the disputants and work out what is going on in greater detail, with a finer focus. But the project proposed is not for the faint-hearted. It is still large in scale and it is riven with contention: the practised players are very likely to want to exert their effects and to press us into all the old moves.

# Theoretical Issues





# 12

## GIVEN THE FREEDOM TO ASK ANYTHING, WHAT QUESTIONS OUGHT THE INTERNATIONAL LEGAL SCHOLAR EXPLORE? USING GARDAM'S 'ALIEN' TO EXAMINE THIS QUESTION

REBECCA LAFORGIA

### INTRODUCTION

Although Judith Gardam's work dealt with some of the most serious and poignant areas of international law, that of international humanitarian law and aspects of proportionality and gender, her writing was also creative and exploratory. An example of this creativity was her chapter in *Sexing the Subject of Law*, in which she used the device of an alien to investigate what international humanitarian law looks like from the outside. Gardam's chapter was entitled 'An Alien's Encounter with the Law of Armed Conflict'. Her device of using a fantasy character of an alien to investigate what law looks like is adopted in this chapter. I have chosen this as the organising idea of my chapter in honour of Gardam for two reasons: first, in conversation, Gardam said that she enjoyed writing her chapter; and second, she created an intriguing idea that I strongly believe merits exploration and, indeed, reapplying in the twenty-first century. The idea that Gardam created is to understand the players in international

law — the subjects of international law — by examining the 'distinguishing features of these players' and thereby elucidating their 'distinguishing features'.<sup>1</sup>

So, if you like, I am attempting to place myself in the role of an alien with nothing to do during an intergalactic storm but to browse through the law of armed conflict. This alien of mine desires to know something of the beings or the subject(s) described by these documents. What do they look like? What do they value? Are they all the same or are there various types? And, if so, what are their distinguishing features?<sup>2</sup>

My chapter will use this device of the 'alien' as a form of personified objectivity,<sup>3</sup> but rather than examining international humanitarian law, I will take Gardam's alien and consider the question: What is the role of the scholar of international law? The alien will travel through space, first viewing the world from afar,<sup>4</sup> and then coming into law's orbit, landing and speaking to an individual. At each point, the alien will reflect on the various levels of analysis which scholars could employ in their scholarship. So, for example, the scholar could ask questions that consider the relationship of international law with the whole world, or its relationship with the state or particular individuals. The purpose of this chapter is to consider through the alien's eyes whether there is any obligation for the international legal scholar to approach international law from a particular perspective. It narrows down the question of the international legal scholar's identity through the medium of space and geography, and asks: Is there any particular level of analysis in which international scholars should be engaging — and if so, why?

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1 Judith Gardam, 'An Alien's Encounter with the Law of Armed Conflict' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (LBC Information Services, 1997) 233, 233.

2 Ibid 233-4.

3 Ibid 234: 'Objectivity is a much-criticised tool of lawyers as it allows the identity of the commentator to be hidden. It leads to the sharp distinction between theory and practice, which has been criticised by, amongst others, Margaret Davies in her contribution to this book of essays. Although clearly an imperfect method, particularly when it is unacknowledged, I decided to take objectivity to the extreme and create from myself two separate commentators to see what new insights I might discover'.

4 Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1986).

This is a relevant question, but it is not an original one. The question has been considered by others. For example, Koskenniemi explored the identity of the international legal academic as hovering between the identities of 'the advisor' and 'the activist'.<sup>5</sup> This chapter contributes to the identity of the international scholar, which comes from facing the question that anything can be written about when we contemplate the 'vista'. Given that freedom, from which level of analysis should international scholars investigate the law? This is an acute paradox for the international legal academic: if everything is possible, is there any way of choosing a particular level of analysis which is an ideal position for the international legal academic? Others, such as Charlesworth, have argued that particular roles for academic inquiry should include the 'international law of everyday life'.<sup>6</sup> However, this chapter is somewhat more agnostic; it is written in a tone of detached curiosity in which judgment is suspended. The methodology of this chapter follows that of Gardam's original construction of 'the alien'. The alien travels and observes, and the reflections emerge through the rhetorical device of a conversation between me and the alien at the end of the article. Then the observations are 'revealed'. Therefore, this chapter uses not only the imagery but also the method developed by Gardam in her original work.

The argument and the action of this chapter unfold in four sections. The first section orientates and expands on the device of 'the alien', briefly considering writers who have also dealt with organising ideas of space and geography in international law. The question of the level of analysis, regarding the perspective from which international scholars should or might conceive of their discipline, has been surveyed by international scholars.<sup>7</sup> These surveys will be reviewed. Therefore, the purpose of the first section is to give normalcy to the idea of the alien travelling. It is a useful and vivid idea; however, the concepts of space, geography and level of analysis on which the journey depends have been dealt with by others, and their work will be introduced.<sup>8</sup>

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5 Martii Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011) 291-3. On geographical dimensions and internal analysis of the identity of the legal practitioner as an 'academic', see Hari M Osofsky, 'A Law and Geography Perspective on the New Haven School' (2007) 32 *Yale Journal of International Law* 421, 448-50.

6 Hilary Charlesworth, 'International Law: A Discipline in Crisis' (2002) 65 *Modern Law Review* 377, 391.

7 On the 'level of analysis' question, see generally J David Singer, 'The Level-of-Analysis Problem in International Relations' (1961) 14 *World Politics* 77, 77-92.

8 For new legal realism, see Howard S Erlanger et al, 'New Legal Realism Symposium: Is it Time for a New Legal Realism?' (2005) 2 *Wisconsin Law Review* 335; Joel Handler et al, 'A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and

The next section is entitled 'The Travels' and is divided into four thematic explorations. I begin by explaining how the alien sees the world from afar. Indeed, the broadest question the international legal academic can ask and investigate in terms of international law is: what is international law as a whole?<sup>9</sup> At the second thematic level, the alien travels, still seeing the world from a distance and not landing in any particular place, but nevertheless detecting pattern with some clarity — for example, patterns of deforestation, or of access to wealth and housing, or of development. This detection of patterns is the next point at which the international scholar can operate:<sup>10</sup> exploring historically inherited patterns of inequality and distribution, questioning how and why it occurs. At the third level, the alien lands — perhaps, for the purposes of this chapter, within Adelaide, Australia. This is the nation state. Finally, at the fourth thematic level, the alien comes up to speak to the individual, me, within the office: this is the most particular of the international legal analyses, the 'micro-legal analysis'.<sup>11</sup> The last section of this chapter, entitled 'Reversals', arises from this conversation, making observations on the international academic's role.<sup>12</sup>

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Differences' (2005) 2 *Wisconsin Law Review* 479. As Handler et al explain, 'This microanalytic approach to institutions offers a solution to the famous macro-micro problem that has long bedeviled social science, that is, the problem of creating explanatory linkages between individual action and collective behavior. It acknowledges that some emergent institutional behaviors arise because similar forces act upon each individual ...': at 491, citing, *inter alia*, James S Coleman, *Foundations of Social Theory* (Harvard University Press, 1990) 21-3; Randall Collins, 'On the Microfoundations of Macrosociology' (1981) 86 *American Journal of Sociology* 984; Edward L Rubin, 'The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions' (1996) 109 *Harvard Law Review* 1393. See also Gregory Fox, 'Book Review: *Diversity and Self-Determination in International Law* by Karen Knop' (2004) 98 *American Journal of International Law* 229, 230, in which Fox explains that Knop approaches the examination of law and self-determination through the exploration of the 'micro-history' (quoting from Knop's text at 11). Michael Reisman's notion of micro jurisprudence distinguishes between 'the role that *state law* plays in the everyday social interactions of people, i.e., in the way state law participates in shaping the way ordinary people perceive their social situations and their conduct in them', instead opting for a 'micro jurisprudence ... premised on ... the nature of everyday, mundane social interactions ... [as having an] element of legality that is inherently embedded in them': Menachem Mautner, 'Michael Reisman's Jurisprudence of Suspicion' (2009) 34 *Yale Journal of International Law* 505, 513 (emphasis in original).

9 Moshe Hirsch, 'The Sociology of International Law: Invitation to Study International Rules in Their Social Context' (2005) 55 *University of Toronto Law Journal* 891, 897.

10 Ibid 906, 907, 926.

11 Ibid 896.

12 Gardam, above n 1, 244: 'How does the description that I have provided above from my alien match the information that I have about the way the world is peopled, what various societies look like and how armed conflict manifests itself? The alien informs me that its overwhelming impression is of confusion'.

SPACE, TIME AND LEVEL OF ANALYSIS

The use of geography in international law is not new;<sup>13</sup> nor, indeed, is the level of analysis<sup>14</sup> employed in this chapter.<sup>15</sup> The use of geography and 'space' (very loosely, a geographical term) in this chapter is more in line with that of Osofsky, who contends that geography and space need to be conceptualised in both global and pluralistic ways. Osofsky quotes the humanist geographer Yi-Fu Tuan in order to bring geography to bear on the notion of exploring in greater detail this concept of 'place' and 'space': 'In experience, the meaning of space often merges with that of place ... Furthermore, if we think of space as that which allows movement, then place is pause; each pause in movement makes it possible for location to be transformed into place'.<sup>16</sup> The idea of pausing transforms space into place. The alien is 'pausing' at each geographical location, and in doing so, the stopping then becomes a place.<sup>17</sup>

The level of analysis that was briefly alluded to in the above introduction is also not a new concept. It has been considered from different perspectives by a variety of authors. The most famous article, by Singer, speaks about the level of analysis generally.<sup>18</sup> According to Singer, '[i]n any area of scholarly inquiry, there are always

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13 Osofsky, above n 5, 440, quoting Myres S McDougal, W Michael Reisman and Andrew R Willard, 'The World Community: A Planetary Social Process' (1988) 21 *University of California Davis Law Review* 807, 808: 'The specialized process of interaction commonly designated international law is part of a larger world social process that comprehends all the interpenetrating and interstimulating communities on the planet. In the aggregate, these lesser communities comprise a planetary community'. See also Osofsky at 442, where the point is made that geography is interwoven with 'politico-legal arrangements': 'Although their analysis focuses on decision-making by the world community, the New Haven School scholarship acknowledges the conception of territorial space — and, in particular, the space of the nation-state — that undergirds current politico-legal arrangements'. Osofsky at 452: 'Just as interdisciplinary inquiry more generally thickens our perspective on legal problems, law and geography analysis allows us to understand the geographic ideas that we use more completely'. But see David S Koller, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law: A Reply to Daniel Bethlehem' (2014) 25 *European Journal of International Law* 25, 27-8: 'Fundamentally, law is not rooted in geography. Rather, law, international law in particular, creates its own geography. While international law may make reference to physical characteristics of the world, its geography is that of a world of ideas which is imposed upon the physical world'.

14 Osofsky, above n 5, 440: 'the New Haven School has a thoughtful analysis of the import of scale, but does not fundamentally define or interrogate what scale is. In particular, its vision of world community engages scale in two senses. First, the "world" is a relevant level worthy of focus. In order to understand international lawmaking, we have to grapple with interactions happening at a planetary level. Second, the "world" scale is inherently multiscale'.

15 On the 'level of analysis', see generally Singer, above n 7, 77-92.

16 Osofsky, above n 5, 445 (the ellipsis is mine), quoting Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (University of Minnesota Press, 1977) 6.

17 Osofsky, above n 5, 445-7.

18 Singer, above n 7.

several ways in which the phenomena under study may be sorted and arranged for the purpose of systematic analysis'.<sup>19</sup> He continues:

Whether in the physical or social sciences, the observer may choose to focus upon the parts or upon the whole, upon the components or upon the system. He may, for example, choose between the flowers or the gardens, the rocks or the quarry, the trees or the forest, the houses or the neighbourhood, the cars or the traffic jam, the delinquents or the gang, the legislature or the legislative, and so on. Whether he selects the micro- or macro-level of analysis is ostensibly a mere matter of methodological or conceptual convenience. Yet the choice often turns out to be quite difficult, and may well become a central issue within the discipline concerned. The complexity and significance of these level-of-analysis decisions are readily suggested by the long-standing controversy between social psychology and sociology, personality-oriented and culture-oriented anthropology, or micro- and macro-economics, to mention but a few.<sup>20</sup>

Furthermore, the advantages and disadvantages of the above decisions are presented neutrally by Singer, who states that we should own these advantages and disadvantages, depending upon the level of analysis that we choose. Singer's work can be contrasted with writings that are invested in the level of analysis as a theoretical battleground — for example, discussions on the universal and the particular within the context of legal reasoning.<sup>21</sup> In these works, there is strong disagreement as to the role of the particular or universal.<sup>22</sup>

That is not the approach taken in this chapter. Rather, in this section, the advantages and disadvantages of each level of analysis are described as neutrally as possible. The purpose of this chapter is not to resolve a philosophical disagreement, but to link how we write with our identity as international legal academics. If each of the levels of analysis is equally on offer, if each of them is equally defensible philosophically, if we are agnostic to that point, is there anything about our purposes as academics which would sway us to choose one level rather than another?

Sociological approaches to international law have also employed the level-of-analysis method. For instance, we see Hirsch usefully employing the

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19 Ibid 77.

20 Ibid.

21 Zenon Bańkowski and James MacLean (eds), *The Universal and the Particular in Legal Reasoning* (Ashgate, 2006); Rubin, above n 8. See also Rubin at 1425, where he argues for 'a synthesis of scholarly discourse', and at 1437, where he argues for a 'microanalysis of institutions'.

22 Michael Detmold, 'The End of Morality: Radical and Descriptive Particularity' in Zenon Bańkowski and James MacLean (eds), *The Universal and the Particular in Legal Reasoning* (Ashgate, 2006) 83, 94: 'In *The Unity of Law and Morality* I argued that law reduced to morality. I now think that whilst the unity is right, the truth is that morality reduces to law. All questions that now pass for moral questions really are legal questions. The reason for this is that Hegel was quite wrong: law is particular, not universal'.

level-of-analysis approach in his sociological work.<sup>23</sup> Here, Hirsch offers a similarly detached view to that of Singer, reviewing the advantages of each. This chapter approaches the question in a similar manner, distancing itself from a theoretical claim of resolving the level of analysis,<sup>24</sup> examining the practical function of the international legal academic who writes on international law and offers reflections on what is the best level to undertake and why.

The last introductory concept discussed in this section is the idea of considering the identity of the legal academic. This idea was considered by Koskenniemi.<sup>25</sup> In *The Politics of International Law*, Koskenniemi outlined a number of roles in which international law operates, and evaluated the identities of the players within those roles, including the role of the 'academic'.<sup>26</sup> Here, Koskenniemi examined Bourdieu's use of the concept of the 'juridical' field and explored the various identities that arose within and from this field. Underscoring the contested quality of the role of the academic, Koskenniemi noted:

The academic's position is much less stable than that of the activist or the advisor, hovering as it does between the two: a commitment to a relational and, if possible, scientifically argued vision of rule of law; and a wish to be associated with those positions of influence that are available to government advisors.<sup>27</sup>

Koskenniemi's exploration of the academic's role in this chapter referred to the academic as lacking responsibility in terms of actual political judgment, and suggested that if they decided to engage with advising the government, they would be 'howl[ing] with the wolfs'.<sup>28</sup> This places the international academic in a very precarious setting. Indeed, the work is a criticism of the international legal scholar as

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23 Hirsch, above n 9; Moshe Hirsch, 'The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System' (2008) 19 *European Journal of International Law* 277.

24 Detmold, above n 22.

25 The idea has been taken on by Bowring. See Bill Bowring, 'What is Radical in 'Radical International Law?' (2011) 22 *Finnish Yearbook of International Law* 23 <<http://ssrn.com/abstract=1982159>>: 'However, it is to be hoped that the scholar or for that matter practitioner, freed of illusion, eyes wide open, will not simply relapse into the armchair, but will find ways to employ her legal competence and skills modestly in the service of collective resistance and struggle. If not, she will fall into a striking performative contradiction'. Bowring's observations are cogent, but I do not consider the idea of the 'armchair' as offensive; my objective is to reflect rather than to critique. Therefore, the approach of this article does not even subscribe to an ethos of pluralism; it is more detached than that. See generally Margaret Davies, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87.

26 Koskenniemi, above n 5, 271-93.

27 Ibid 291.

28 Ibid 292.



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'being without responsibility to anyone about his or her statements'.<sup>29</sup> Koskenniemi continues:

For both the activist and the advisor, the academic may seem like the true cynic, falling short of a commitment to ideals or to power, enjoying both the privilege of academic freedom, which elevates the academic to the status of the truth-speaker, and occasional counselling work that satisfies the academic's quest for practical relevance.<sup>30</sup>

Koskenniemi is making generalities about how we can move to critique, advise and use indeterminacy to proffer our interpretations. But in the end, we know, always and completely, that we can withdraw back to academic isolation. The purpose of this chapter is to embrace that academic isolation. We are not actors, or soldiers, or aid workers; we do not run orphanages, or clear land mines, or create foreign policy. We have been given a type of secular freedom — a role in education that, while not perfect, does not answer to generals, to business, or to human needs for food and care. Given this freedom and isolation, is there something that we should be writing about as international academics? The purpose of this chapter is in part to face a paradox of the international legal academic — namely, that if everything is possible, is there any way of absolving or living up to a more responsible identity as an international academic?

## THE TRAVELS

### The Alien Sees the World from Afar

The travels are put in one section because this is not an attempt to critique or to reconcile the level of analysis. It is an overview of the alien and what she sees. This section contains a broad overview of what the level of analysis does, and presents an indicative scholar from each section. The first issue to consider is the broad level — the alien enters the orbit and sees our planet from afar. At this point, she might ask: What is international law for? What does international law do for this planet? This level of analysis, asking what international law is for from the perspective of all, is rarefied and conceptually difficult. This level is asking the scholar to humanly conceive what an international order could do. Any answer to the proposition of what international law can do for the whole (that is, deliver stability, peace, justice, a world society) has always been subject to ready critique.<sup>31</sup> Yet there is a pressing reality to the

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29 Ibid 293.

30 Ibid.

31 Paul Schiff Berman, 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law* 301, 301-2: 'The New Haven School of International Law offered a significant, process-based rejoinder to the realism and positivism that had dominated international relations theory

idea, geographically, spatially, that we can imagine 'the whole'.<sup>32</sup> If we can imagine it — if we know the world exists — necessarily, asking what international law is for has a compelling practical logic to it. Indeed, the useful function of asking this very question is exhibited by Dworkin's last work.<sup>33</sup>

The logic of asking the 'big question' is impeccable, yet the answer is almost always flawed. Scholars who look at the whole have to accept the paradox of their position: that they have the benefit of a real and pressing question that has, with almost certainty, a deeply contested answer.

### The Alien Detects Patterns of Inequality

The alien continues the descent, begins to see patterns of difference and naturally asks questions relating to these emerging differences.<sup>34</sup> Perhaps she sees deforestation in certain areas, some people having more housing than others, pollution in one area and not in another, differences in terms of gender from one area to another, differences in work patterns, different levels of development and population density across different continents.<sup>35</sup>

The alien can still see connections and comparisons between societies because she has not landed within one particular state. She can ask questions such as: Why is this here?, and: Why is this pattern here and not elsewhere? This is the level of analysis in which the 'why' question is prominent. Yet the question of which 'why' is chosen is in the eye of the observer.<sup>36</sup> Many relational questions could be asked at this level

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in the United States since the close of World War II. Whereas international relations realists viewed international law as merely a product of state power relations, and positivists dismissed international law entirely because it lacked both sovereign commands and a rule of recognition, scholars of the New Haven School studied law as a social process of authoritative decision making'.

32 Osofsky, above n 5, 440, quoting McDougal, Reisman and Willard, above n 13, 808.

33 Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41 *Philosophy and Public Affairs* 1, 31.

34 See Osofsky, above n 5, 444: 'The New Haven School approach, as articulated in *Jurisprudence for a Free Society* and the works that precede it, provides a means for engaging the transforming dynamics amongst space, time, institution, and crisis ... Territory and place still matter deeply, according to the New Haven School proponents, but they have to be put into a simultaneously global and pluralistic context'.

35 This area is represented here as a visual imagery of travel by the alien; however, it is a well-traversed category. See, for example, Hirsch, above n 9, 906, where he describes this as the social conflict perspective, drawing on the writing of Wallerstein, at 907-9, and feminist scholars. Hirsch goes on to translate this to international law, for example, treaty interpretation: at 928. This article is concerned with the role of the scholar who undertakes this role.

36 Charlesworth states the matter in a succinct manner: 'An initial problem with the crisis model of international law is that it assumes that the elements of the crisis are uncontroversial, that the "facts" are ripe for picking by an analyst': Charlesworth, above n 6, 382.

of analysis — for example, questions about wealth distribution, gender, environment or poverty.<sup>37</sup> In fact, the questions are flowing thick and fast for the alien, and so she could ask of international law: Did it cause this? Did it create this? This level involves a critique of international law's role in naturalisation or creation of patterns, as Charlesworth puts it, in the context of gender, although the comment could also be applicable to a range of categories: 'Other forms of systematic violence, or structural discrimination against women, do not constitute a crisis for international lawyers. This is rather seen as part of the status quo and not truly the business of international law'.<sup>38</sup> Can international law contribute to changing the patterns that the alien sees? Is modifying these patterns even a reasonable aim of international law? The overarching sense of the 'why' question is dominant at this level. International law, in some ways, will be implicated in asking and answering 'why' we have patterns that are different and unequal.

The scholar at this level has much work to do. Answering the 'why' question involves contextual sociolegal scholarship, and it is difficult work because of the fluidity and patterns of overlapping relations in social life. As Cotterrell explains, 'it should be unsurprising that new regulatory forms have been shaped to frame these kinds of relations. Sociolegal scholarship is already extensively mapping and analysing these new forms of regulation in environmental, commercial, human rights, information technology, and many other fields'. In the face of regulatory flux and underlying social dynamics, '[s]ociolegal studies can help to redraw the legal map, emphasising how and why the changing character of the social in transnational and intranational contexts forces change in structures of regulation'.<sup>39</sup>

However, the patterns have a degree of subjectivity. Why choose patterns of deforestation? Why not choose patterns of gender?<sup>40</sup> So, in the first instance, scholars must think of why they have chosen those particular relational ideas. Then, the 'why' question is never going to deliver a certain answer (or a set range of answers). Not surprisingly, then, the scholar will be left with further 'whys'. At this level, scholars have the advantage of knowing that they are looking at what can be broadly called 'inequality'.

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37 Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *New York University Journal of International Law and Politics* 243; Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77; Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613.

38 Charlesworth, above n 6, 389.

39 Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies' (2002) 29 *Journal of Law and Society* 632, 641.

40 Charlesworth, above n 6, 382.

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Imperialism is, however [as Chimni explains], not simply the function of a certain conception of the political but equally of a certain kind of economics. Entrenched modernity has always been allied with capitalism driven by the logic of accumulation. Capital cannot rest until it has annihilated space.<sup>41</sup>

The scholar can be buoyed by the idea that patterns do exist, so there is a degree of reality. But what is reality? Noting the omission of a 'Third World Approaches to International Law (TWAIL)' paradigm from a symposium on method in international law published in the *American Journal of International Law* in 1999, Anghie and Chimni point out:

For TWAIL scholars, international law makes sense only in the context of the lived history of the peoples of the Third World. Two important characteristics of TWAIL thinking emerge from this. First, the experience of colonialism and neo-colonialism has made Third World peoples acutely sensitive to power relations among states.<sup>42</sup>

In the second instance, the task here for the international legal scholar is to be aware of the impact of power relations and to evaluate international law accordingly.<sup>43</sup> Such awareness, as Anghie notes, 'is surely a crucial task for any discipline that claims, however problematically and tenuously, to be concerned about the promotion of justice'.<sup>44</sup>

International legal scholars at this level may be energised by the idea that patterns are not inevitable, and therefore feel a degree of activism and constructivism in their project. Indeed, '[o]ne way forward is to refocus international law on issues of structural justice that underpin everyday life'.<sup>45</sup> But international legal scholars will naturally become mindful of a negative aspect to their evaluation of international law at this level: they cannot solve the 'why' of inequality. The patterns of inequality are living things; they are emerging; they are not always clear; they are reconnecting to other forces — historical, economic, political and legal.

The 'why' is a constant, and inequality is an important question, but there is movement here. Academics at this level have the advantage of knowing they are in for a struggle in maintaining the interdisciplinary requirements for successful tackling of the 'why' question — for selecting the pattern that is significant and then for

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41 BS Chimni, 'Legitimizing the International Rule of Law' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 290, 301. See also Bowring, above n 25, 10, drawing on the reference to a 'class approach to international law' as suggested by Chimni.

42 Anghie and Chimni, above n 37, 78.

43 Ibid.

44 Anghie, above n 37, 290.

45 Charlesworth, above n 6, 391.

holding on to moving patterns of multiple causations while trying to link all of this meaningfully to international law. It is a difficult task that requires judgment, skill and real-world engagement.

### Landing the National

Next, the alien lands. At this point, she arrives in Adelaide. This is where Judith Gardam lived and taught, and the alien has arrived here again. And the alien asks: What does international law do in Adelaide, in Australia? Here, the scholar of international law is on firmer footing. Metaphorically, the alien has landed, but so, too, has the international scholar. There are clear lines of what international law is at a domestic level, although to say there are clear lines does not mean that there is perfect clarity. There is also ambiguity about how we implement treaties, about what international law Australia abides by.<sup>46</sup> Compared with the other levels of analysis, though, the capacity to describe international law at a national level and argue for how it should be formed or interpreted, or incorporated, is a more stable proposition.<sup>47</sup>

The scholar at this level has that advantage of stability, of the capacity to describe, the capacity to recommend. Here, the scholar of international law has a clearly contoured reality. The limitation of this level is that we know there is so much more to international law than Adelaide, or indeed Australia. This knowledge means that there is always a sense that scholars could be doing more. Yes, they are accurately describing and arguing within their own community, and in that sense, they are concrete and grounded. Yet there is a realisation that they are implicated, in some way, in how patterning and inequality have been, and are, formed internationally. But for their scholarship's relevance and coherence, it is necessary to assume that international law was a discrete and uncomplicated matter.<sup>48</sup> For the domestic international legal scholar, then, the advantage is a reality and certainty. This is a great advantage of this level of analysis, but the disadvantage is a sense of always not quite seeing the whole picture, always having the echo that this is not everything. Put differently, a sense of being too grounded has its limitations.

Indeed, most contemporary international legal scholars eschew an overly positivistic approach to their work, recognising that the doctrinal quest for 'the law' is a rather disconnected enterprise, explaining little of how international

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46 Hilary Charlesworth et al (eds), *No Country Is an Island: Australia and International Law* (University of New South Wales Press, 2006).

47 The above capacity could also have productive comparative analysis. See generally Matthew Bloom, 'A Comparative Analysis of the United States's Response to Extradition Requests from China' (2008) 33 *Yale Journal of International Law* 177.

48 Daniel Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25 *European Journal of International Law* 9.

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law actually operates, how it affects decisions, interacts with municipal law, and shapes norms.<sup>49</sup>

Finally, the alien comes to the law school, a law school in which the alien's existence was created back in 1997 by Gardam. And the alien comes this time to speak to me, and the alien will only meet one human.<sup>50</sup> She offers me nothing in terms of the resolution of the level of analysis. Each had its own contributions; each could describe and contain a narrative of earth. Unlike her conversation with Gardam, which revealed objective observations regarding international humanitarian law, the project has been too big and she can only say that each level held relevance and interest for the international scholar.

## REVERSALS

There is nothing that points to one level of analysis being superior to another. Each has its potential to represent the experience of international law. However, the travels are important to replicate. In giving the overview and having a deeply agnostic view of any particular level, then, my chapter has by this point invoked visual imagery in considering the act of writing. In making our choice of area and level, we are like the alien we chose to enter and land in a space. This imagery of entering a space is important because it sets us up for what Certeau states is the most important question:

A final point remains to be determined, the most important one: how does *time* articulate itself on an organized space? How does it affect its 'breakthrough' in the occasional mode? In short, what constitutes the *implantation of memory in a place* that already forms an ensemble?<sup>51</sup>

Certeau's formulation of this question is also the question of this chapter — that is, given that we exist as scholars and can choose anything, how do we make a breakthrough, contribute to a pre-existing space?

He goes on to say that the way of breaking through is through a response that is<sup>52</sup> '*singular*. Within the ensemble in which it occurs, it is merely *one more detail* — an action, a word — so well-placed as to reverse the situation'.<sup>53</sup>

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49 Janet Koven Levit, 'Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law' (2007) 32 *Yale Journal of International Law* 393, 394.

50 See Gardam, above n 1, 244.

51 Michel de Certeau, *The Practice of Everyday Life* (Steven Randell trans, University of California Press, 1984) 86 [trans of: *L'invention du quotidien. Vol 1, Arts de faire* (first published 1980)] (emphasis in original, underlining added).

52 Ibid 86-7.

53 Ibid 88 (emphasis in original).

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Academics writing within their chosen ensemble/space/level have the potential to provide a singular response, and write a 'word so well-placed as to reverse the situation'. This is often described as originality, a contribution, something useful; but at its best, it is a reversal of time and memory. Certeau's concept of 'reversal' only makes sense when we see writing as occurring in a space that we enter, which has its own pre-existing universe and gravity and time. That is the innately visual contribution that Gardam's alien device and travels gives: to see our embodied selves as international law writers within space, and to give a physicality to the struggle, power and purpose of international scholarship, which can enter an area and reverse an omission, literally pulling and reversing the laws and imagery that govern that space through a word.

A reversal cannot always be assumed to be for the good. Like any intervention, it may not be. But in studying the omissions, carefully checking for events, individuals and thoughts that are not there in the space, there is a natural tendency towards restraint, towards the mitigating impulses of caring for details and, perhaps, towards intuition. Orford's writing in the context of international trade is an example of such a reversal. She reflects on the classroom experience of teaching international trade, in which, through teaching and scholarship, the endless forward and closed category of international trade seems impenetrable:

Later in the subject, we moved to look closely at the work of international economic institutions and trade agreements, using human rights texts and norms to critique the forms of law that trade agreements require states to enact. In particular, we talked about whether these trade agreements constrained democratic participation and those civil and political rights designed to enable that participation. At this point, the mood shifted quite dramatically. The critique became sharper, yet a sense of hopelessness also began to grow. As one student said dully: 'But there is no other way, there is no alternative.' I felt that the discussion was deadened the more I talked about the nature of the legal forms mandated by the various agreements and their relation to human rights norms. Instead of engagement and of opening texts out to alternative readings, this discussion seemed to produce an exhausted acceptance of the inevitability or necessity of sacrifice and punishment in order to reach the goals of development or economic integration. Why did the appeal to democracy and human rights when read with capitalism produce this sense of closure? We all know (don't we?) that we don't have to organize ourselves according to this economic vision, that there are all sorts of other worlds out there that look nothing like this fantasy of perfect control and endless profit, docile bodies and redeemed souls. So what was my role in (re)producing this fantasy in my classroom? How might I approach this differently?<sup>54</sup>

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54 Anne Orford, 'Trade, Human Rights and the Economy of Sacrifice' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press, 2006) 156, 164.

Orford then considers the hidden sacrifice that trade involves, noting that in a World Trade Organisation (WTO) decision, the impact of levels of hormone in beef was 'nonchalantly'<sup>55</sup> noted in a footnote as having possibly contributed to the death of 371 women<sup>56</sup> from breast cancer. The WTO decision itself was concerned with risks to human health which could be legally protected, and with the nature and meaning of risk to human health.<sup>57</sup> In her work, Orford wrestles the women from the footnote; they had been placed there as a reasonable loss. She reclaims their ordered and embedded sacrifice, which had been contained in a logical and highly produced legal judgment. Orford then gives life to their judicially ordained, otherwise silent sacrifice. In doing so, Orford creates a space, and the women are moved from being a footnote in a WTO decision; their reversal is from irrelevance, from a utilitarian trade-off, from obscurity. The outcome of her work is to consider the sacrifice that is often closed and hidden in trade,<sup>58</sup> thereby reversing the silence of the '... something [which] escapes the closed circle of this sacrifice economy'.<sup>59</sup>

Writing in a way that 'reverses' a space can be translated to any area of international law. For international trade, this could well be done by examining one development zone created under a trade agreement and looking at one life affected by that agreement. How has that trade architecture affected the people within that development zone, their lives, their opportunities?<sup>60</sup> For international humanitarian law, the reversal could be effected by taking one proportionality decision, following it to its real-life location, writing of and about one lawful civilian death, for one alchemic moment, turning the scales of proportionality from a leaden scale necessary for our law to a scale where the loss of *one* is written. Such a technique reverses for that moment the understanding of war itself.<sup>61</sup>

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55 Ibid 176.

56 Ibid 168: commenting in the context of the WTO, Orford stated that it is an agreement that 'mandates a particular approach to decision-making about issues that include food security, consumer safety, regulation of genetically modified food, sustainable farming practices, animal welfare or the effects of the agribusiness on small farmers'.

57 Ibid 169, discussing the WTO decision.

58 Ibid 176, 189-90.

59 Ibid 176.

60 On this point, see Rubin, above n 8, 1425, 1431.

61 Although Kennedy does not write of such an individual, his text contains a call for such a narrative: David Kennedy, *The Dark Sides of Virtue* (Princeton University Press, 2005). As noted by Judith Resnik, 'Living Their Legal Commitments: Paideic Communities, Courts and Robert Cover' (2005) 17 *Yale Journal of Law and the Humanities* 17, 28-9, referring to violence occasioned by the judicial order itself, 'Yet violence occasioned by judicial order is a peculiar and constrained form. Although judges make rulings that reallocate personal property, limit individual freedoms, and even contribute to ending lives, judges do not themselves carry out the orders that they issue'.



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The device of Gardam's alien gives a visual and physical expression to our writing, letting us see our own landings at different levels. This chapter's purpose was to examine what the international scholar *should* examine, given that all levels of analysis are on offer. The suggested answer is anything — but, on entering the chosen space, the international scholar should know that to include the 'well-placed word' is to affect the space itself. Those that do this have created purposeful and transformative international legal scholarship through their reversals.

# 13

## THE ALIEN WITHIN

MARGARET DAVIES

### INTRODUCTION

In 'An Alien's Encounter with the Law of Armed Conflict',<sup>1</sup> Judith Gardam converses with an other-worldly creature about international humanitarian law. Gardam's alien is a device to explore the law of armed conflict from without, as a method of investigating the law 'objectively'. This constitutes an inventive variation on several epistemological methods, which often use different subject positions in order both to reflect critically on the production of knowledge, and to construct alternatives to mainstream truths. In this chapter, I review some of these methods with the aim of illustrating the significance to legal scholarship of a range of such approaches over the past few decades. I also ask what imagining a more radical (that is, external, albeit fictional) subject of knowledge contributes to debate about social and legal norms. In doing so, I will refer to the *Alien* film series to consider the ways in which imagining a thoroughly radical and incomprehensible outside can seriously unsettle human self-knowledge.

Judith Gardam's alien dramatises theoretical approaches that deploy position and perspective in order to mobilise different truths. Rather than assume or claim that there is a unified truth or unsituated perspective, such methods explicitly acknowledge the role of plural locations in truth construction. As Sandra Harding says in relation

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<sup>1</sup> Judith Gardam, 'An Alien's Encounter with the Law of Armed Conflict' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (LBC Information Services, 1997) 233.

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to feminist standpoint epistemology, the point of such methodology is that it 'makes strange what had appeared familiar'<sup>2</sup> and enables the scholar 'to value the Other's perspective ... in order to look back at the self in all of its cultural particularity from a more distant, critical, objectifying location'.<sup>3</sup> These statements accurately capture Gardam's alien and alien methodology: it starts from an explicit position of strangeness rather than familiarity, and objectifies the law of armed conflict by looking back from a completely foreign place to the 'cultural particularity' of the law. As I will explain, methods mobilising perspective have been, and continue to be, very influential in legal scholarship (though the alien perspective is, I believe, unique). Indeed, the deployment of some form of 'non-legal' position and perspective has become so crucial and so accepted in the understanding of law that we might even say in some circumstances that the 'alien' has been somewhat normalised, if not domesticated, in legal thinking. Much depends on what is understood as 'legal' and 'non-legal' — this is a highly contextual matter perceived in various ways by different scholarly niches.

### AN IMAGINED OUTSIDE

Having 'nothing to do during an intergalactic storm but browse through the laws of armed conflict',<sup>4</sup> Judith Gardam's alien is benign and highly curious, an intelligent 'knower' who attempts to understand the law primarily by reading its written sources. It begins by interrogating the various humanitarian law documents for information about human beings, their values and their societies.<sup>5</sup> The alien traverses a range of emotional states in its reading of the law of armed conflict. It is in turn confused, surprised, puzzled and bewildered when it looks at the law. Later in the chapter, Gardam inserts herself into the narrative in conversation with the alien as they exchange their knowledge<sup>6</sup> — the alien relates its impression of a law that does not fully reveal itself because it is embedded in, and reliant upon, social norms that are invisible to an outsider. In the conversation with the alien, Gardam fills in some of these gaps in the written record.

The purpose of the alien is to examine the law of armed conflict from the outside, as a method of investigating the law 'objectively'. As noted by Gardam, the concept of objectivity had at the time of writing been (as it continues to be) strongly and persuasively questioned and reconstructed by feminists and critical theorists.

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2 Sandra Harding, *Whose Science? Whose Knowledge?* (Cornell University Press, 1991) 150.

3 Ibid 151.

4 Gardam, above n 1, 233-4.

5 Ibid 234.

6 Ibid 244-9.

However, 'objectivity' has several slightly different meanings, and I think it is accurate to say that Gardam's alien uses one type of objectivity in order to challenge another type. Essentially, the key point is that Gardam uses the external standpoint as a means of reflecting on the value-laden nature of law, and its frequent recourse to unstated assumptions. The objectivity of the external observer therefore contests the claim to 'apolitical' and 'neutral' objectivity of law.

This strategy is worth unpacking a little further. One meaning of objectivity in a legal setting is that decision makers (in particular judges) can and should apply legal norms in a value-neutral fashion — in a sense, they analyse a situation by reference *only* to law, and should not bring social assumptions or non-legal norms into the picture. Such a notion of objectivity relies on the very dubious assumption that (legal) knowers are interchangeable<sup>7</sup> — in other words, that there is a correct view of the law and of the decision required under it. Legal knowledge is supposedly independent of who the legal knower is.

Objectivity in this first sense fails for several reasons, not the least of which is that it is quite impossible for legal norms to stand alone: to make sense, the law necessarily relies on already-existing shared meanings and assumptions. All too often, these quasi-legal assumptions and meanings have reflected a society in which women and men are not equal and in which the truth is defined according to ingrained patriarchal and misogynist cultural narratives. The claim to objectivity in a legal system that is actually sustained by such values is clearly a sham, achieved only by marginalising or foreclosing alternative truths. Much feminist legal thought has been devoted to exposing this bias in mainstream legal thought:<sup>8</sup> it challenges the perceived neutrality of law; it highlights the gendered social context upon which much law has been based; and it draws out alternatives which, first, better reflect women's perceptions and experiences, and second, promote a more egalitarian formulation of legal principles.

Judith Gardam's alien illustrates that any notion of legal objectivity which tries to separate law from its social-normative environment is flawed — law cannot be understood in isolation from social context, though an effort to do so reveals some interesting features of law. As I have said, the alien's illustration of the contextuality of law is achieved by Gardam's mobilisation of a different angle on objectivity — that in order to truly perceive the object as an object, the knower must stand *outside* it, and not themselves be implicated in the system under investigation. In the traditional

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7 Harding above n 2, 51-2; Lorraine Code, 'Taking Subjectivity into Account' in Linda Alcoff and Elizabeth Potter (eds), *Feminist Epistemologies* (Routledge, 1993) 15.

8 For an overview, see Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 *Journal of Law and Society* 351, 359-63; see also Rosemary Hunter, Clare McGlynn and Erica Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010).

legal view, the judge stands outside a dispute and has no relationship to the parties and is therefore objective in the negative sense of not being a subject in the matter being contested — s/he is supposed to be able to see the *whole* object (facts, law, parties and so on) in a disinterested fashion.

Nonetheless, by definition, all participants in a legal system are subjects in it and subject to it. They are subjects in the social and cultural contexts that underpin and give shape to legal norms. Even a judge, though external to the dispute before her or him, is a subject within the broader social environment, which is filled with norms about gender, class and race, as well as taken-for-granted geopolitical and ontological 'truths'.<sup>9</sup> Any human actor, as a subject of these social constructions, is therefore ultimately incapable of looking at the system as an object. They will always have a 'partial perspective' — one shaped by their own histories and positions; and although various commentators, as well as judges, aspire to objectivity, this is clearly always philosophically impossible. By hypothetically taking the observer outside the system as a whole, Gardam highlights this inbuilt flaw in the legal notion of objectivity.

Gardam's deployment of objectivity does not therefore simply call up traditional notions of legal objectivity — for instance, as personified in the judge as an 'objective' legal decision maker. The alien is a device to engage a more imaginative outside, to envisage the impossible — a being that is not a subject in the system, and is therefore, at least in its fictional state, *capable* of perceiving the object as a stranger to it.<sup>10</sup> The alien looks at the object, the law of armed conflict, in the way that it *might* appear to a being who did not share human social presumptions and experiences. In doing so, the alien illustrates very amply the extensive reliance of formal law on social contexts and historical circumstances. The alien is frequently confused about the law, and its confusion is essentially generated by what the law does not make explicit — for instance, about the nature of the state, and the roles of the different actors within it (civilians, combatants, women and children).<sup>11</sup> Contradictions in the law remain unexplained, and significant areas, such as warfare conducted between non-state groups, are inexplicably not addressed, partly because of the Western orientation of the law.<sup>12</sup> Of course, the alien is a fabrication and an element of Gardam's own imagination: as she says, 'I decided to create from myself two separate commentators'.<sup>13</sup>

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9 For discussion on gender, bias, social conditioning and judging, see Reg Graycar, 'The Gender of Judgments: Some Reflections on "Bias"' (1998) 32 *University of British Columbia Law Review* 1.

10 This leads to a further philosophical question about the gap of incomprehension: a subject who is truly — completely and utterly — outside might be able to perceive the object, but to what degree can they *comprehend* it?

11 For instance, see Gardam, above n 1, 245.

12 Ibid 248.

13 Ibid 234.

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The two sides of Gardam's story are in some ways similar to Thomas Nagel's division between the subjective and the objective standpoints, or the view from the self and the 'view from nowhere'.<sup>14</sup> Gardam invokes a view that is thoroughly embedded in human society and law, and a view that is not.<sup>15</sup>

That said, Gardam's alien does not follow a pre-formed epistemological method and is not theorised at great length. Her primary purpose is not intentionally to make a contribution to philosophy, but rather to shed a quite different kind of light on the law of armed conflict. For my purposes, the alien provides an imaginative and somewhat unusual entry-point into the question of perspective in theories of knowledge, and I use it here as an opening for reviewing the ways in which perspective may be deployed methodologically as an epistemological resource. My focus is on law and scholarly methods that have become influential in law. Before turning to this more familiar terrain, I want to raise a preliminary matter in the next section — that is, the meaning of a position which is radically other to Western knowledge constructs, or even outside human 'knowledge' altogether. Such a radical position may emerge from within the self, as a psychological or emotional other to rational knowledge, or it may be literally outside (the perspective of an animal, for instance).

## THE UNKNOWNABLE

Aliens come in many guises, few of them as benign or as conversational as Gardam's. Recently I have watched — with Judith Gardam — the entire *Alien* film series, released between 1979 and 1995. In these films, an increasingly grim, and ultimately part-alien, lieutenant on a cargo spaceship, Ellen Ripley (Sigourney Weaver), battles giant insect-like creatures with acid for blood and horrifying, drippy, hissing faces. More frighteningly, the aliens reproduce parasitically: immature aliens are implanted into human (or, in one instance, canine) hosts until they are ready to burst violently out of their carrier's body. Once a viewer has witnessed it, it is impossible to forget the horrendous scene where a baby alien erupts in a massive blood splatter from the actor John Hurt's convulsing chest, just as he is engaged in an entirely quotidian and sociable human activity — eating a meal with his crew-mates.<sup>16</sup>

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14 Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1986). Nagel points out that there is not actually a dualism between subjective and objective. Rather, it is a question of degree — as we become more detached from our own individual perspective, we become more objective.

15 There are also significant differences between the alien and Nagel's 'view from nowhere', but this is not the place to explore them in depth.

16 Indeed, after a thirty-five-year interval between my first and second viewing of *Alien*, this is the *only* part I remembered, and vividly at that.

Among many other things, these aliens are a metaphor for an archetypal other,<sup>17</sup> both the literal, absolute outside beyond Earth and the psychological alien within (as the gruesome 'birth' illustrates). 'That monster drooling K-Y Jelly on Sigourney Weaver's shaved head is actually the enemy inside us all — struggling to get out.'<sup>18</sup> To human perception, the aliens are entirely incomprehensible except for their aggression and their determination to reproduce. Whether they are at all intelligent remains obscure. It is only as Ripley continues to battle them — aiming for their complete extermination in response to their absolute hostility (there is no law of armed conflict here!)<sup>19</sup> — that she begins, very slowly and almost on an emotional rather than a rational plane, to comprehend their motivation and *modus operandi*.<sup>20</sup> Having sacrificed her own life in *Alien 3* in an effort to kill the being gestating within her, Ripley is resurrected as a clone of her former self in the final film, together with the alien. As a result of the alien DNA now combined with hers, she also has some of their characteristics (acidic blood, superhuman strength). At this moment of blurring the biological boundaries between human and alien, her comprehension of the other clarifies slightly, but is more sensory or visceral than cognitive. From the other side, the alien-human hybrid born in this final film appears also to comprehend something of Ripley and bonds with her, albeit minimally. Despite these inchoate connections, there is no synthesis, and aliens and humans remain intractably and structurally distinct.

*Alien* and its successor movies are a fictional depiction of a radical and absolute position of mutual incomprehension, whether originating inside or outside the self. We see suggestions of communication between the species, but no significant

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17 The aliens also carry many other metaphoric resonances — most notably, the cultural fear associated with childbirth, a monstrous and purely instinctual form of motherhood, and the entirely visceral and physical nature of reproduction. See Stephen Scobie, 'What's the Story, Mother? The Mourning of the Alien' (1993) 20 *Science Fiction Studies* 80; see also Jackie Byars et al, 'Symposium on Alien' (1980) 7 *Science Fiction Studies* 278. Resisting the temptation to explore the many symbolic registers of the films, I focus here only on the issue of knowledge and otherness.

18 Sydney Day, quoted in Scobie, above n 17, 80.

19 Scobie, above n 17, 86, points out that the basic motivation for both Ripley and the aliens is survival of their species. The human versus alien dynamic is troubled through all the films by the presence of 'the company', an entity for whom people are 'expendable'. In *Alien 3* the location and nature and even existence of normality becomes very insecure, as *all* of the players are positioned as outsiders — the prisoners on the penal planet, Ripley as the only woman and crash survivor there, the alien, and eventually even the company contingent which arrives eerily — wearing white plastic ponchos — towards the end of a long battle between the prisoners/Ripley and the alien.

20 Ripley is engaged as a consultant to a troop of marines in the second of the films, while in the third she takes de facto leadership of a penal colony. She gains this position because of her knowledge of the alien but also because, as the host of the new alien queen, she is immune from attack.

understanding, especially not from the alien's point of view.<sup>21</sup> Such an extreme perspective would be literally inconceivable and cannot be accommodated within the domain of rational thought. The films do not even attempt to fictionalise an alien sensibility or intelligence, as many science fiction narratives have. As Gardam says, we cannot step outside our social conditioning.<sup>22</sup> Nor can we 'know' what is inside the self, but by definition beyond cognition (such as the specific contents of the unconscious mind). Nonetheless, much has arguably been gained by acknowledging the existence of such an outside — as Gardam has shown, the peculiarity and contingency of accepted truths may be more apparent if we look back at them from a standpoint which has displaced normality as we know it. In the movie *Alien*, we do not see human society from the alien's perspective, but its presence nonetheless serves to reveal much about human values, relationships and behaviour.

In a more intrinsic sense, critical theory has shown that the limits of rationality, of knowledge, and even of identity, depend on oppositions, boundaries, insides and outsides, and ultimately on the 'alien' or 'other' to thought. Some form of the unknowable, though generally in a more abstract form, has often emerged in theoretical systems, allowing us to identify the boundaries of knowledge and to appreciate that there is always something that remains unsaid and unsayable. Theorists influenced by psychoanalysis, for instance, use various terms to refer to processes or places, necessary to the constitution of the subject, which are outside rational and conscious thought — the 'imaginary', the 'unconscious', 'jouissance', 'loss', and 'lack'. Deconstruction uses notions such as undecidability, trace, aporia, rupture, *différance*, or slippage to point to the existence of unspeakable indeterminacies in language, meaning and conceptualisation, which nonetheless hold it in place. These various notions are not other 'perspectives'; rather, they exist in the gaps *between* perspectives, or between existing beings, thoughts, concepts (and so on) — we can notice or intellectualise these gaps, but a sense of lack of coherence or of completion always remains. The alien is present in knowledge, but as an absence: always there, but lurking in the cracks, ready to erupt violently when we least expect it.

Recognising the existence of these unspeakable and unknowable aliens in their various forms is theoretically productive. As suggested in the movies, we will never be able to control the alien completely,<sup>23</sup> but we can nonetheless learn from the gap or

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21 In *Alien 3* the existence of an alien perspective is suggested by rapid switching between a normal 'human' view and the upside-down vision we see as the alien — walking on ceilings — chases humans through a maze of tunnels.

22 'I am not suggesting that I can truly step outside the system with this alien. The idea is to demonstrate the flexibility of objectivity, that it can in fact provide a range of perspectives and that there are some viewpoints that have not been given the attention they warrant in this area.' Gardam, above n 1, 235.

23 Even if we think the alien has been conquered, we are constantly proved wrong, and can never be sure. The first two movies reiterate this point by putting an alien onto the escape pod even after Ripley



difference it represents in all interactions. We do not have to be an alien to experience some form of existential bewilderment at all forms of others, whether they are close to us emotionally and culturally, or far away. Thinking about the gap between our own perception and that of another person or, say, an animal, gives an insight into such a place of utter incomprehension. We cannot possibly know what it feels like to be that other person, or to be, to use Nagel's example, a bat.<sup>24</sup> Our consciousness is entirely our own, but the process of self-reflectiveness is surely imperative to knowledge.

*Alien* and its successor films remind us of the presence of things that are unknowable, uncontrollable and/or utterly different. Such things may be threatening or welcome, but they nonetheless provide opportunities for self-reflection and for expanding our knowledge horizons. In the following three sections, I review some variations on the theme of the alien as a motivator of legal self-knowledge. First, I explore the emergence of 'alien methodologies'<sup>25</sup> in legal scholarship (such as the sociology of law), which have gradually been brought into the interior of legal analysis. Second, I consider more recent critical approaches, which question the nature of the legal subject and the foundations of legality itself by, in a sense, finding an internal alien within knowledge — its unstated, repressed, or marginalised content. Third, I review feminist standpoint approaches, which are based on the acknowledgement of embodied and experiential knowers. All of these approaches were in full flight by the time 'An Alien's Perspective' was published and — as it does — they contest the primarily doctrinal and insider's view of the law (and other disciplines) by highlighting alternative standpoints and ruptures in the coherence of law as a concept. After a further (almost) twenty years of scholarship, the accumulated effect of these approaches is arguably that the nature of the legal inside, or the scholarly understanding of it, has changed markedly — indeed, it is much more difficult now to perceive a definable inside and outside to law.

### 'ALIEN' METHODOLOGIES

Although in some contexts it denotes a totally inscrutable outside or 'other', 'alien' is usually a relative term. Any being, human or otherwise, who comes from outside a system that perceives itself as closed, sovereign or autonomous, can be termed

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appears to have destroyed them all. The third movie ends with the apparent death of both Ripley and the alien species, only to see them resurrected symbiotically by cloning.

24 Thomas Nagel, 'What is it Like to be a Bat?' (1974) 83(4) *The Philosophical Review* 435.

25 I note that Roger Cotterrell, one of the foremost theorists of sociology of law of the past half-century, insists that sociology is not 'alien' or other to law (and nor does it 'colonise' law): see the discussion of sociology of law, below. My use of the term is, admittedly, a shorthand way of depicting things normalised as 'legal' and things excluded from that category, a distinction I have myself many times rejected. I merely wish to draw attention to the significance of position/perspective in such methods.

'alien'. In a legal sense, for instance, an 'alien' is more commonly a non-citizen than an extraterrestrial being.<sup>26</sup> Legally defined sovereign territories have mappable geographical boundaries, providing a reference space for citizens and aliens. Similarly, law itself, as a discipline of knowledge, is also often defined by legal practice with its many jurisdictional limits, providing a reference space for knowledge of law.<sup>27</sup> Yet the growth of interdisciplinarity in scholarship has led to extensive and sometimes heated debate about the interplay between knowledge that is internal to law and 'alien'<sup>28</sup> or external disciplinary methods applied to law, such as sociology and economics.

'Traditional' doctrinal legal knowledge has often been understood as being the knowledge of the legal insider — it is seen as the result of legal training, or training to 'think like a lawyer' within a framework with clear boundaries. There is nothing pre-given about these boundaries. We *could* think of law in a general sense as encompassing all of the official, semi-official, informal and customary norms governing a modern life.<sup>29</sup> However, Western thinkers tend not to think of 'law' in this way.<sup>30</sup> Instead our default (however much we try to challenge it) is that 'law' is paradigmatically the body of rules and principles formally laid down or formally accepted by the state — or, by extension, laid down or accepted by states collectively. Those who have a privileged and professional knowledge of this law are legal 'insiders' — primarily judges and the legal profession, and to a lesser extent academics, bureaucrats, quasi-legal professionals and law students. Thus legal knowledge is traditionally seen to involve the application of 'legal method' — statutory interpretation, the ordering and reading of precedents, and so forth — by legal insiders to legal doctrinal content

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26 Though see the notorious Canadian case of *Joly v Pelletier* [1999] OJ No 1728 [QL]. The plaintiff claimed to be a martian but had his claim dismissed, in part because, if martian, he could not be a legal person and had no standing.

27 See Douglas Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 *Journal of Law and Society* 163, 180.

28 For use of the term 'alien' in relation to a methodology, see Roger Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25 *Journal of Law and Society* 171, 191; David Nelken, 'Blinding Insights? The Limits of a Reflexive Sociology of Law' (1998) 25 *Journal of Law and Society* 407, 410. As I will explain, Cotterrell's point is that sociology is not in fact an alien methodology, even though it is sometimes understood that way; it is absolutely intrinsic to a thorough understanding of law and legal concepts. For an extended discussion of the rise and effect of interdisciplinarity in law see Vick, above n 27. Vick also refers to 'alien' disciplines: Vick, above n 27, 189.

29 Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law and Society Review* 719.

30 On the concept of law as a monopoly of the state, see Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375, 379; see also Margaret Davies, 'Legal Pluralism' in Cane and Kritzer (eds), *The Oxford Handbook of Empirical Legal Studies* (Oxford University Press, 2010) 805; Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (Butterworths, 2<sup>nd</sup> ed, 2002) 90.

derived from formal legal sources.<sup>31</sup> It has quite specific parameters. Since law is an artificially constructed system, acceptance of the fiction of the system as a whole is a necessary prerequisite to formulating legal truth.

Since the explosion in theoretical approaches promoting alternative legal truths,<sup>32</sup> it is no longer possible to say that even doctrinal scholarship relies solely on such an 'insider's' perspective. Perhaps it would be more accurate to say that the insider's perspective has been gradually redefined to acknowledge the range of matters that are relevant to legal analysis. At its most basic, this change is due to the deliberate deployment over the twentieth century of both alternative perspectives and non-legal methodologies in law. As I will explain in the next section, various critical approaches — from feminist legal theory to postcolonial theory, as well as the more abstract 'immanent' critiques associated with postmodernism and the Frankfurt school — consciously bring different methods and theories to bear on legal analysis.

Decades prior to the broad adoption of critical legal ideas, however, sociology studied law essentially from the outside as a patterned set of practices — as material, behavioural, data, rather than as an autonomous and self-supporting system of norms.<sup>33</sup> As Nicola Lacey puts it, '[s]ociological approaches to law are ... diverse, but are related by their espousal of an "external", non-lawyer's perspective on the practices which they address'.<sup>34</sup> Sociology of law aims to understand law as one among many social practices, and as fully embedded in, and interconnected with, society. It challenges a purely norm-centred or doctrinal account of law by seeing law as a set of institutions that can be studied and understood empirically. One of its

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31 See, for example, WT Murphy and Simon Roberts, 'Introduction' (1987) 50 *Modern Law Review* 677, 678-679; Vick, above n 27, 177-8. Legal formalism or 'legalism' is the approach which insists on the most thoroughgoing boundaries to legal knowledge and analysis: see, for example, Ernest Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal* 949; John Gava, 'Another Blast from the Past or Why the Left Should Embrace Strict Legalism: A Reply to Frank Carrigan' (2003) 27 *Melbourne University Law Review* 186. However, much legal scholarship starts with an acceptance of clear boundaries but then departs from them to varying degrees.

32 See, for example, Marc Galanter and Mark Allan Edwards, 'The Path of the Law *And's*' (1997) *Wisconsin Law Review* 375.

33 For a very early summary, see Roscoe Pound, 'The Scope and Purpose of Historical Jurisprudence' [Part 3] (1912) 25 *Harvard Law Review* 489; see also Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter Moll trans, Russell and Russell, 1962) [trans of: *Grundlegung der Soziologie des Rechts* (first published 1913)]; K Alex Ziegert, 'A Note on Eugen Ehrlich and the Production of Legal Knowledge' (1998) 20 *Sydney Law Review* 108.

34 Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing, 1998) 222.

key contributions is the recognition of legal plurality — that state law is not the only form of law even in those societies where it appears to hold a monopoly.<sup>35</sup>

There have been many other ways of bringing outside perspectives to bear on 'law' — including (for instance) economics,<sup>36</sup> history,<sup>37</sup> anthropology, geography, literary analysis and psychology. These 'law and ...' movements are essentially a response to the positivist and formalist defence of law's boundaries — they respond, in other words, to the notion that there is a separation between law and non-law and, in consequence, that there are insiders and outsiders to legal knowledge. Clearly, the very concept of there being native and alien methodologies to legal analysis arises out of a perception that law is necessarily and determinately limited.<sup>38</sup> This is, if not an exclusively twentieth-century approach to law, at least one that arguably reached its zenith in twentieth-century scholarship. These limits have been increasingly tested by the use by legal scholars of disciplines other than law, and as I will explain later have arguably resulted in a more fluid and context-dependent understanding of the nature of law and of legal analysis.

#### CRITIQUE AND DIFFERENCE: DIVIDING AND MAKING THE SUBJECT

Paying attention to non-mainstream perspectives in order to generate a more complete knowledge of an object can take forms other than those generated by particular disciplinary approaches. Aliens do not only come from another planet, but may also appear closer to home, at the edge of perception, or even from within. The technique of division and objectification illustrated by Gardam and her alien observer recalls

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35 Ehrlich, above n 33; John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1; Anne Griffiths, 'Reconfiguring Law: An Ethnographic Perspective from Botswana' (1998) 23 *Law and Social Inquiry* 587; Martha-Marie Kleinhans and Roderick A Macdonald, 'What is a Critical Legal Pluralism?' (1997) 12 *Canadian Journal of Law and Society* 25; Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Ashgate, 2009).

36 See, for example, Frank Easterbrook, 'The Inevitability of Law and Economics' (1989) 1 *Legal Education Review* 3; Robert Cooter and Thomas Ulen, *Law and Economics* (Pearson, 2012); Megan Richardson and Gillian Hadfield (eds), *The Second Wave of Law and Economics* (Federation Press, 1999).

37 Historical jurisprudence is much older than sociology of law. However, it did not necessarily take a completely extrinsic method and apply it to law; rather, it saw law and the validity of law in historical terms: see generally Harold Berman, 'The Origins of Historical Jurisprudence: Coke, Selden, Hale' (1994) 103 *Yale Law Journal* 1651.

38 On reading an early article by Pound on the sociology of law, I was struck by the fact that there appeared to be little perception in 1910 on legal scholarly methods being intrinsic or otherwise to law, though what Pound calls the 'Analytical School' is clearly closest to what we would now understand to be legal doctrinal analysis. See Roscoe Pound, 'The Scope and Purpose of Historical Jurisprudence' [Part 1] (1910) 24 *Harvard Law Review* 591.

critique itself,<sup>39</sup> which (among other things) evokes division, separation and reflection in its efforts to interrogate the limits and assumptions of thought.

Critique is a contested term, and can mean many things. In the continental tradition of 'critical theory', it essentially refers to an exploration of the embedded limits and grounds of thought in a particular field. Costas Douzinas emphasises that the etymology of 'critique' connects it to crisis, cutting, separation and distinguishing.<sup>40</sup> As he says, critique 'objectifies and defamiliarises received patterns of thought and accepted forms of life. It allows their assumptions and premises to come to the surface, lose their naturalness and, under observation, turn from unquestionable grounds into challenged ideologies'.<sup>41</sup> Critique, in other words, turns knowledge against itself. It finds the alien within existing knowledge and even within ourselves as subjects of knowledge, and uses that perspective to observe and interrogate the limits of what we know.

Judith Butler characterises the practice of critique as the suspension of judgment and as a process of making the self: critique involves forming the self in relation to pre-existing possibilities, but in a way which is never entirely constrained by them.<sup>42</sup> The transformative power of critique may well be directed outwards — at political expressions of power and governmentality, for instance. However, it is also intrinsic to the self because it necessarily engages how we construct and perform ourselves as ethical subjects. In Butler's words:

One asks about the limits of ways of knowing because one has ... run up against a crisis within the epistemological field in which one lives. The categories by which social life are ordered produce a certain incoherence or entire realms of unspeakability. And it is from this condition, the tear in the fabric of our epistemological web, that the practice of critique emerges, with the awareness that no discourse is adequate here or that our reigning discourses have produced an impasse.<sup>43</sup>

Because it is not her primary purpose, Judith Gardam avoids the abstract and often obscure nature of such theorisations. Nonetheless, the imagining of a radical internal

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39 Gardam mentions Irigaray's use of the idea of mimesis as a critical tool to subvert mainstream knowledge. Gardam, above n 1, 234.

40 Costas Douzinas, 'Oubliez Critique' (2005) 16 *Law and Critique* 47.

41 Ibid 48.

42 Judith Butler, 'What is Critique? An Essay on Foucault's Virtue' in Sarah Salih and Judith Butler (eds), *The Judith Butler Reader* (Blackwell, 2004). Butler's analysis is lengthy and subtle, and my rendering of it is very simplified. See also Tom Boland, 'Critique as a Technique of Self: A Butlerian Analysis of Judith Butler's Prefaces' (2007) 20 *History of the Human Sciences* 105; Tom Boland, 'Critical Subjectivity: Towards a Gnomonic Model of Subject Constitution' (2007) 48 *Culture, Theory and Critique* 123.

43 Butler, above n 42, 308.

objectivity through a device such as an alien is one way in which the legal critic can question and re-form her own preconceptions, suspend judgment about her 'object' (since the alien starts from a position of ignorance), and investigate a law which leaves much unspoken. The gesture explicitly divides the critic from herself and examines the law from the perspective of the 'alien within' in order to better understand its shape, limitations and underlying assumptions.

In a legal context, politically and/or theoretically motivated critique has been pursued by various forms of critical legal scholarship across the Anglosphere since the 1970s, or even earlier. It has often started with a shift in perspective or a process of stepping outside previously accepted knowledge. Dissatisfaction with the dominant ideas associated with law — that it is somehow a closed system, that it is neutral, objective, certain; that it is non-political, colour- and gender-blind (and so on) — produced the kind of epistemological crisis that Butler refers to. In particular, the legal notion of neutrality and mainstream law's inability to identify structural social forms of power, let alone perceive law's own role in maintaining these systems, was a strong motivation for much critical legal thought. The dominant mythologies constituting what we thought we knew about law proved to be quite unsustainable, unjust and incoherent, and so critical legal thought in its many forms began a long process of undoing, reflecting, pulling apart and challenging these mythologies. Frequently, this was done in the interests of challenging the default legal 'subject', who — though not formally defined as such — was all too often given the attributes of rationality, independence and individuality, and gendered as male, white and relatively privileged.

But critical legal scholarship has taken many directions, many of which can be combined in productive ways. I have myself deployed both the very abstract techniques and approaches of poststructuralism and deconstruction,<sup>44</sup> as well as the more grounded and much more directly practical arguments of feminism and sexuality-based critiques.<sup>45</sup> The collusion of Western law with colonial violence (and the continuation of this collusion), its struggles with questions relating to culture, race and ethnicity, have also emerged as foundational issues in understanding law. The common factor in these quite different forms of critique is that law is never allowed to be itself. It is seen from the position of the other, and its blind spots, incoherences, repressions and ruptures are deliberately brought to the forefront of analysis. From the perspective of the other, law can be seen for what it is — a system formed in the

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44 Margaret Davies, *Delimiting the Law: Postmodernism and the Politics of Law* (Pluto Press, 1996); Margaret Davies, 'Derrida and Law: Legitimate Fictions' in Tom Cohen (ed), *Jacques Derrida and the Humanities: A Critical Reader* (Cambridge University Press, 2001) 213.

45 Margaret Davies, 'Feminism and the Flat Law Theory' (2008) 16 *Feminist Legal Studies* 281; Margaret Davies, 'Beyond Unity: Feminism, Sexuality and the Idea of Law' in Vanessa Munro and Carl Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Cavendish Press, 2007) 151.

political context of white male 'normality', one which reproduces many of its original presumptions even into supposedly more 'equal' times. These forms of critique are pursued in the interests of providing a space for rethinking the nature of law, and in the more immediate interests of highlighting and addressing actual social inequities.

### FEMINIST EPISTEMOLOGIES: SITUATED KNOWERS

Like Gardam's alien, disciplines external to law as well as various forms of critique make an otherwise familiar law strange (to paraphrase Harding).<sup>46</sup> They objectify law by drawing on, or drawing out, alternative and suppressed narratives, allowing us to see it as multidimensional and nuanced, rather than singular and straightforward. Feminist theory more than any other approach has emphasised the significance for knowledge of the other point of view, and in particular the 'view from below'.<sup>47</sup> Like the other areas I have discussed, such perspectives are not 'alien' in the sense of being generated by aliens — in the history of knowledge, women have been much more likely to have been associated with nature rather than with extraterrestrial beings. Rather, such perspectives are 'alien' in the sense that they have traditionally been ignored or deliberately excluded from mainstream knowledge and powerful institutions.

By the mid-1980s, as pointed out by Judith Gardam, feminist legal theorists were accustomed to the notion that traditional objectivity is a myth and a construct which masks and reinforces inequality by positioning structurally powerful voices as authoritative.<sup>48</sup> Power is, among other things, an ability to shape and define truth and to marginalise the voices of those who are relatively less privileged. Feminists pointed out that this collusion between truth and power is obscured in post-Enlightenment thought by the insistence that knowledge is identical for everyone and based in universals. Feminist epistemology coupled a critique of naïve objectivity with a feminist emphasis on lived experience (and consciousness developed through that

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46 Harding, above n 2.

47 The origins of feminist epistemology lie in Hegel's master-slave dialectic and in Marxist theory. See, for example, Nancy Hartsock, 'The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism' in Sandra Harding and Merrill Hintikka (eds), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology and Philosophy of Science* (Kluwer, 1983) 283.

48 Some notable early work includes Janet Rifkin, 'Toward a Theory of Law and Patriarchy' (1980) 3 *Harvard Women's Law Journal* 83; Catharine MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7 *Signs: Journal of Women in Culture and Society* 515; Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497; Clare Dalton, 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (1987-88) 3 *Berkeley Women's Law Journal* 1.

experience) as the basis for knowledge.<sup>49</sup> All knowledge is 'situated', meaning that it is always produced in a particular context, by particular knowing subjects. This does not mean that knowledge is simply subjective: subjects share social values and experiences, and this shared context forms the basis for a knowledge that reaches beyond any one individual. But it does mean that the subject of knowledge, the knower, cannot be simply erased from the notion of truth — there always is an embodied subject of knowledge who is not interchangeable with other subjects.

One of the most powerful and controversial ideas developed by feminists concerns the standpoint of a knowing subject. Standpoint theory essentially argues that the 'view from below' may have an 'epistemic privilege' or additional value as knowledge when compared to the view from a privileged perspective. In simple terms, this means that the person who is oppressed may have a better understanding of the truth than the person who is in a position of power.<sup>50</sup> So, for instance, an Indigenous Australian has an experience and knowledge of the ongoing effects of colonialism and dispossession which is difficult or impossible for a non-Indigenous person to comprehend. A person with a disability has an experienced knowledge of the ways in which everyday physical spaces assume physical ability — for instance, the ability to negotiate stairs or kerbs, or to avoid obstacles.<sup>51</sup> The 'epistemic privilege' is not a total or unqualified privilege, but is relative to the situation of the knowers involved and the 'knowledge' they might hold. The person who brings the coffee to a corporate boardroom would not normally have an epistemic privilege in relation to the business being conducted there, but may be only too conscious of the effects on his or her labour conditions of class, gender, opportunity, employment conditions and socioeconomic difference more generally.

The valuing of situatedness in feminist epistemology did not mean that the concept of objectivity was abandoned altogether. Rather, in the work of Sandra Harding and Donna Haraway,<sup>52</sup> objectivity is strengthened by the explicit acknowledgement of position, and by the fact that a more complete knowledge is possible when marginal and suppressed perspectives are taken into account.

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49 Sandra Harding famously divided feminist epistemology into feminist empiricism, feminist standpoint theory, and postmodernism: Sandra Harding, *The Science Question in Feminism* (Open University Press, 1986). See also MacKinnon, above n 48, 534-44; Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 *Feminist Studies* 575.

50 See generally Hartsock, above n 47; Harding, above n 2; Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Routledge, 1991) 183-201; Terri Elliott, 'Making Strange What Had Appeared Familiar' (1994) 77 *The Monist* 424, 426.

51 The example is from Elliott, above n 50, 426.

52 On weak and strong objectivity, see Harding, above n 2, 138-63; on objectivity as 'positioned rationality', see Haraway, above n 50, 183-96.



## IMAGINING LAW

Feminist theory therefore showed some decades ago that mainstream accounts of 'objective' knowledge often emanate from specific and unacknowledged perspectives, associated with male, or white, or heterosexual, or socioeconomically advantaged positions. A better and (some would say) a more 'objective' knowledge can be obtained by empowering non-mainstream perspectives. Examples in the legal arena are numerous, with feminists challenging the uncritical use of myths and stereotypes, and offering more defensible interpretations of law, as well as suggestions for reform. Recently, for instance, feminist academics have taken to rewriting judgments in an effort to contest the gendered nature of legal reasoning.<sup>53</sup> Given that judges often exercise wide discretion in their interpretation and application of the law, there is considerable scope for untested assumptions and stereotypes to creep into legal reasoning.

## ALIENS CHANGING THE LAW

There are many 'sociolegal', 'law and society', critical, and feminist approaches that deploy a multitude of methodological and theoretical perspectives in order to enrich the analysis of legal doctrine. As we have seen, these approaches explicitly make use of split viewpoints to bring new knowledge to the discipline of law. Some observations might be made about the accumulated effects of several decades of scholarship in which these methods have co-existed.

First, *the boundaries between different methodologies have themselves become less obvious*. Whereas once it would have been possible to delineate sociolegal (and in particular sociological) approaches to law from critical approaches,<sup>54</sup> this distinction is now difficult to maintain in any disciplinary sense. *Sociology* of law clearly still involves structured empirical analysis, but even this may be somewhat indistinct:<sup>55</sup> researchers engage to a greater or lesser extent with the formal demands of the discipline of sociology. By contrast, the definition of 'sociolegal' is productively unclear and may not involve empirical analysis at all.<sup>56</sup> 'Sociolegal' or 'law and society' can encompass critical, feminist, postcolonial and other approaches: it now demarcates almost any

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53 See especially Hunter, McGlynn and Rackley (eds), above n 8.

54 See, for example, Lacey, above n 34.

55 See, for example, Jíří Příbáň, 'Sharing the Paradigms? Critical Legal Studies and the Sociology of Law' in Reza Banakar and Max Travers (eds), *An Introduction to Law and Social Theory* (Hart Publishing, 2002). This book includes a wide range of approaches under the title 'law and social theory', many associated with the theoretical arm of sociology, itself rather expansive, but also crossing into a number of other disciplinary areas, such as ethnomethodology. See also Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005).

56 See, for instance, the opening comments in Paddy Hillyard, 'Invoking Indignation: Reflections on Future Directions of Socio-Legal Studies' (2002) 29 *Journal of Law and Society* 645.

inquiry beyond an exposition of doctrinal law. The Law and Society Association of Australia and New Zealand, for instance, says that its aim is 'to promote and foster scholarship broadly focusing on the interactions and intersections between law and society',<sup>57</sup> while the British Socio-Legal Studies Association flags itself as the place 'where law meets social sciences and the humanities'.<sup>58</sup> The US-based 'Law and Society Association' makes more of an effort to define itself, but with similarly broad results.<sup>59</sup>

Second, *many scholarly interventions have extended or at least tested the conceptualisation of law* as a limited state-based institution with clear rules for determining what is 'legal' and what is 'non-legal'. Thinking about law from the perspective of a subject nominally excluded from the position of legal knowledge-holder has revealed all sorts of social norms embedded in law,<sup>60</sup> the ways in which law is held up by social relationships, as well as completely alternative systems of normative ordering which may lay equal claim to being conceptualised as law.<sup>61</sup> In response to this conceptual and practical plurality, legal scholars now have a quite fluid approach to the boundaries of law, and can consciously deploy critique, perspective, alternative methodologies and situated knowledge (including literature) in order to generate new knowledge about law.

Third, and flowing out of the first and second points, *scholarly knowledge of law engages the limits of law in a dynamic way* — the internal and external approaches may be deliberately and reflectively utilised in order to illustrate differences between them, or challenged and reconstructed. It is possible to think of the 'law and ...' approaches as constructing a form of knowledge which remains external to law — for instance, as a subdiscipline of sociology, or of geography. To take just one example, sociology

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57 The Law and Society Association of Australia and New Zealand Inc, *Home* (2013) <<http://www.lsaan.org>>.

58 Socio-Legal Studies Association, *Aims of the SLSA* (1999-2013) <<http://www.slsa.ac.uk/#aims>>.

59 'Although they share a common commitment to developing theoretical and empirical understandings of law, interests of the members range widely. Some colleagues are concerned with the place of law in relation to other social institutions and consider law in the context of broad social theories. Others seek to understand legal decision-making by individuals and groups. Still others systematically study the impact of specific reforms, compliance with tax laws, the criminal justice system, dispute processing, the functioning of juries, globalization of law, and the many roles played by various types of lawyers. Some seek to describe legal systems and identify and explain patterns of behavior. Others use the operations of law as a perspective for understanding ideology, culture, identity, and social life. Whatever the issue, there is an openness in the Association to exploring the contours of law through a variety of research methods and modes of analysis.' Law and Society Association, *Interests of our Members* (2013) <<http://www.lawandsociety.org/interests.html>>.

60 As indicated above, feminist legal research has been particularly instrumental in illustrating the extent of the inter-relationship between law and other social norms.

61 Above n 35.

of law has often been understood as primarily external and separate from law, and as a contribution to policy and law reform, rather than to legal meanings.<sup>62</sup> Many empirical studies might be seen primarily though not exclusively in this light: for instance, studies of behaviour and social patterns relating to law such as jury studies, criminological research, research into the nature of the legal profession, and so forth. Sociology of law may also be characterised as contributing to an understanding of why legal ideas have arisen in a particular way — in a sense, as the study of the social basis of legal ideology.<sup>63</sup>

However, it is also possible to see the sociology of law and other 'law and ...' approaches as challenging the dichotomy between law and non-law and becoming integrated *with* legal meanings. In an effort to complicate the polarisation of the positions inside and outside law, Roger Cotterrell has argued that movement *between* internal and external attitudes is characteristic of legal sociology. His version of it is characterised by the mobility of the sociological observer and the porosity of legal boundaries:

Sociological insight is simultaneously inside and outside legal ideas, constituting them and interpreting them, sometimes speaking through them and sometimes speaking about them, sometimes aiding, sometimes undermining them. Thus a sociological understanding of law does not reduce them to something other than law. It expresses their social meaning *as law* in its rich complexity.<sup>64</sup>

Instead of seeing sociology as an external discipline, Cotterrell argues that it makes a useful contribution to legal *meanings* and legal *ideas*, and that seeing it this way is emphasised in the (often forgotten) tradition of sociology of law.<sup>65</sup> As an example, he argues that understanding the law of trusts sociologically will incorporate both an empirical historical investigation into how doctrine has evolved and its response to social conditions, thus 'treating legal ideas as an aspect of social ideas in development'.<sup>66</sup> Perhaps more importantly, a sociological understanding extends the 'legal' domain beyond the doctrinal perspective of legally privileged insiders such as judges and legislators, to fully understand how trusts work as social relationships.<sup>67</sup>

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62 Ibid. See also Reza Banakar and Max Travers, 'Conclusion: Law and Sociology' in Banakar and Travers, above n 55, 345. By contrast to Cotterrell, Banakar and Travers argue that sociology of law should be seen as a 'sub-field of sociology', which leaves it in an external position to law.

63 Cotterrell, above n 28, 171, 173.

64 Ibid 181 (emphasis in original).

65 And in particular in the work of Ehrlich and Petrazycki. See Cotterrell, above n 28. See also Reza Banakar, 'Sociological Jurisprudence' in Reza Banakar and Max Travers (eds), *An Introduction to Law and Social Theory* (Hart Publishing, 2002) 33.

66 Cotterrell, above n 28, 191.

67 Ibid.

In a sense, such insights may already be incorporated into legal doctrinal analysis — Cotterrell's point is that the sociological approach will do so *systematically*, and will therefore enhance and strengthen the integration of social and legal domains into a more truly *sociolegal* continuum.

This leads us to a fourth point, which is that *law is the product of social relationships*. Indeed, as many would now say, it is 'performative', in the sense that it is formed in millions of everyday interactions, including (but not limited to) judicial actions.<sup>68</sup> A century of sociology of law, as well as several decades of aligned and increasingly intermingled sociolegal, anthropological, geographical and other approaches, has led to a solid appreciation that law is truly (and only) a product of *social* interaction broadly understood to encompass cultural, discursive, economic, political and undoubtedly other factors. Indeed, how could it be otherwise? Legal doctrines are a privileged type of social norm: they have arisen from social beliefs and values, which are themselves the product of material relationships. Law may be formalised in a particular way, given an abstract identity, and attributed a top-down legitimacy, but this does not change the fact that it is the end-result of the ways in which people *do* law in an everyday setting. The research of Patricia Ewick and Susan Silbey on legal consciousness has been particularly influential in documenting 'how what [people] think and do coalesces into a recognizable, durable phenomena and institution we recognize as the law'.<sup>69</sup> Legal change occurs as a result not only of legislative reform, but also of more incremental changes in material social relationships.

Finally, despite these various challenges to the integrity and identity of law, in the Western consciousness *it remains in many ways a distinct and limited enterprise*, because that is how it is understood and performed. Although it is a construct with contingent boundaries, it still makes sense to speak of limits to law: as Vick says, '[d]octrinalism remains the benchmark against which legal academics define themselves and their work'.<sup>70</sup> Lawyer's law is still understood to be essentially state-based law — an object with admittedly porous boundaries, but with nonetheless sufficient identity to produce stability for most practical situations to which it applies.

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68 Robert Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4; Margaret Davies, *Delimiting the Law: Postmodernism and the Politics of Law* (Pluto Press, 1996), 134-9; Margaret Davies, 'The Law Becomes Us: Rediscovering Judgment' (2012) 20 *Feminist Legal Studies* 167; Nick Blomley, 'Performing Property: Making the World' (2013) 26 *Canadian Journal of Law and Jurisprudence* 23.

69 Susan Silbey, 'After Legal Consciousness' (2005) 1 *Annual Review of Law and Social Science* 323, 347; see also Patricia Ewick and Susan Silbey, 'Conformity, Contestation, and Resistance: An Account of Legal Consciousness' (1992) 26 *New England Law Review* 731.

70 Vick, above n 27, 188.

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### CONCLUSION

In 'An Alien's Encounter with the Law of Armed Conflict', Judith Gardam imagined and named the unknowable in our constructions of knowledge. As she illustrated, although this position or place of incomprehension remains inaccessible, the act of identifying the limits to thought and trying to see from a place beyond those limits is an extremely valuable exercise for developing a self-reflective truth. As we have further seen in relation to scholarly knowledge of law, alien methods and disciplines allow us to see it in a multitude of different ways and — over time — promote transformation in our perception of the nature of law (and therefore of the law itself). Insides and outsides are constantly being challenged, remade, reaffirmed and once again challenged. Defamiliarisation, making the familiar strange by looking at it from another place, has proved both productive and very unsettling for the discipline of law. It is undoubtedly a process which — now that it has been taken up with such enthusiasm — will continue to challenge the disciplinary boundaries and knowledge constructions of law. In the scholarly context (and admittedly more among some scholars than others), law has become a place of hybrid, complex or blended knowledges, rather than a place where disciplinary norms are mobilised with complete certainty. At the same time, for the moment at least, the dominant operative concept of law remains tied to the nation state and to the broad contours of legal practice. It seems unlikely that this will always be the case, but it may yet be some decades before widespread transformation in the concept and practice of law is obvious.

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