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Australia, Human Rights, Refugees and Asylum Seekers

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This Issue

AUSTRALIA, HUMAN RIGHTS, REFUGEES AND ASYLUM SEEKERS: *A comment on the current human rights issues faced by Australia in the processing of refugees and asylum seekers*

By Gillian Triggs

It is clear that Australia is currently facing challenges with respect to asylum seekers and refugees, particularly those who arrive by boat. Over the last several months the rate of asylum boat arrivals has increased significantly.

The Australian Human Rights Commission (the Commission) recognises the importance of effective border management and acknowledges that Australia has a right as a sovereign State to exclude non-citizens from its territory. However, Australia also has international obligations in relation to asylum seekers who come to Australia, including those who arrive by boat, which must be observed in its border management and migration practices.

The international legal regime sets out a comprehensive framework for the protection of refugees and asylum seekers. It is comprised of the Convention relating to the Status of Refugees and its subsequent Protocol (the Refugee Convention),[1] and the key human rights treaties, including the International Convention on Civil and Political Rights

1 Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), as amended by the Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (Refugee Convention).

Photo credit: Lisa Solonynko

(ICCPR),[2] the International Convention on Economic, Social and Cultural Rights (ICESCR),[3] the Convention Against Torture (CAT)[4] and the Convention on the Rights of the Child (CRC).[5]

In particular, States have non-derogable *non-refoulement* obligations under the Refugee Convention, ICCPR, CAT and CRC, and indeed under customary international law.[6] That is, States must not send any person to a country where they are at real risk of arbitrary deprivation of life, torture or cruelty, inhuman or degrading treatment or punishment, including arbitrary detention. *Non-refoulement* obligations extend to indirect *refoulement*, meaning Australia also must not send any person to a country from which he or she might subsequently be *refouled*.[7] The principle of non-refoulement also requires 'access to fair and effective procedures for determining status and protection needs.'[8]

The Australian Government's current approach to processing asylum seekers includes several aspects which raise serious concerns about Australia's compliance with international human rights law. Some of those aspects include third country processing, the current freeze on processing protection claims on the mainland and the removal of work rights for asylum seekers granted bridging visas.

The Third Country Processing Regime

In September 2012, the Australian Government reinstituted third country processing for asylum seekers who arrive unauthorised by boat after 13 August 2012. This followed the release of the Expert Panel on Asylum Seekers report, which recommended the re-commencement of regional processing as part of a package of measures to deter asylum seekers from risking their lives getting on a boat.[9] In September 2012 the

2 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR).
3 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (ICESCR).
4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (CAT).
5 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC).
6 Article 33, Refugee Convention, articles 6 and 7, ICCPR; article 3, CAT; articles 6 and 37, CRC.
7 See for example, Committee on the Rights of the Child, General Comment No 6 - Treatment of unaccompanied and separated children outside their country of origin, UN Doc CRC/GC/2006/6 (2005), para 27. At http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2005/6 (viewed 24 June 2013).
8 United Nations High Commissioner for Refugees, Addendum to the report of the United Nations High Commissioner for Refugees, UN Doc A/53/12/Add.1 (30 October 1998), p 8. At http://www.unhcr.org/refworld/docid/3ae68c950.html (viewed 24 June 2013). See also United Nations High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (26 January 2007), paras 19-20. At http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4&page=search (viewed 24 June 2013).
9 A Houston, Air Chief Marshall AFC (Ret'd), P Aristotle & M L'Estrange, Report of the Expert

Australian Government began transferring people to Nauru and in November 2012 to Manus Island, Papua New Guinea. Over 730 people have been transferred to Nauru or Manus Island, including around 30 children. As at 24 June 2013, there were 430 asylum seekers detained in the 'regional processing centre' on Nauru and 232 on Manus Island, including around 10 children.[10]

International law does not prohibit third country processing of asylum seekers' claims. However, in transferring asylum seekers to third countries, Australia must ensure that adequate safeguards are in place in those countries. If Australia has 'effective control' over the treatment of asylum seekers whom it has transferred to another country, then it is obliged to continue to treat them consistently with the human rights obligations it has agreed to be bound by.[11] Even if Australia does not have effective control over the situation in Nauru and PNG, it cannot avoid its own international law obligations by transferring asylum seekers to those third countries – it may remain liable for the consequences of its action of transferring them.[12] The UN Human Rights Committee has stated that a State Party will be responsible for extra-territorial violations of the ICCPR if its actions expose a person to a 'real risk' that his or her rights will be violated,[13] and this risk could reasonably have been anticipated by the State.[14]

Panel on Asylum Seekers, Australian Government (2012).

10 J Robertson, 'Children taken off Manus Island', The Sydney Morning Herald, 20 June 2013, at http://www.smh.com.au/opinion/political-news/children-taken-off-manus-island-20130620-2olze.html (viewed 24 June 2013).

11 See the decisions of the European Court of Human Rights in Bankovic v Belgium and others (dec.) [GC] [2001] ECHR 890 and Al-Skeini v United Kingdom [GC] [2011] ECHR 1093.

12 G Goodwin-Gill and J McAdam, The Refugee in International Law (3rd ed, 2007), pp 408-411.

13 See Human Rights Committee, General Comment No 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 12. At http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f (viewed 24 June 2013), and the following decisions of the Human Rights Committee: Kindler v Canada, Communication No. 470/1991, UN Doc CCPR/C/48/D/470/1991 (1993), paras 13.1-13.2. At http://www.unhcr.org/refworld/publisher,CAN_SC,,USA,3ae6b6ed0,0.html (viewed 24 June 2013); Ng v Canada, Communication No. 469/1991, UN Doc CCPR/C/49/D/469/1991 (1993), paras 14.1-14.2. At http://www1.umn.edu/humanrts/undocs/html/dec469.htm (viewed 24 June 2013); Cox v Canada, Communication No. 539/1993, UN Doc CCPR/C/52/D/539/1993 (1994), paras 16.1-16.2. At http://www.unhcr.org/refworld/publisher,HRC,,USA,4028ba144,0.html (viewed 24 June 2013); ARJ v Australia, Communication No. 692/1996, UN Doc CCPR/C/60/D/692/1996 (1997), paras 6.6 - 6.14. At http://www.unhcr.org/refworld/country,,HRC,,AUS,,4028adfa7,0.html (viewed 24 June 2013); Judge v Canada, Communication No. 829/1998, UN Doc CCPR/C/78/D/829/1998 (2003), paras 10.2-10.7. At http://www.unhcr.org/refworld/docid/404887ef3.html (viewed 24 June 2013); GT v Australia, Communication No. 706/1996, UN Doc CCPR/C/61/D/706/1996 (2007), para 8.1. At http://www.unhcr.org/refworld/country,,HRC,,AUS,,4ae9acbfd,0.html (viewed 24 June 2013); Nakrash and Qifen v Sweden, Communication No. 1540/2007, UN Doc CCPR/C/94/D/1540/2007 (2008), para 7.3. At http://www.unhcr.org/refworld/country,,HRC,,CHN,,4a93a2362,0.html (viewed 24 June 2013); Bauetdinov v Uzbekistan, Communication No. 1205/2003, CCPR/C/92/D/1205/2003 (2008), para 6.3. At http://www.worldcourts.com/hrc/eng/decisions/2008.04.04_Yakupova_v_Uzbekistan.htm (viewed 24 June 2013); Munaf v Romania, Communication No. 1539/2006, UN Doc CCPR/C/96/D/1539/2006 (2009), para 14.2. At http://www.unhcr.org/refworld/publisher,HRC,,ROM,4acf500d2,0.html (viewed 24 June 2013).

14 Human Rights Committee, Munaf v Romania, para 14.2 (and the jurisprudence cited therein).

The Australian Human Rights Commission made a detailed submission to the Parliamentary Joint Committee on Human Rights regarding the many human rights concerns with the third country processing regime. Those concerns include: the conditions in which people are detained, such as the remoteness and lack of facilities in the detention centres; the lack of healthcare facilities on the islands generally; the lack of established procedures for determining claims for protection; the delays in beginning the processing of asylum claims; and the lengthy period of time asylum seekers are spending in detention with no freedom of movement.[15] These concerns were affirmed by the JCHR in its report on the package of legislation regarding the regional processing regime. The JCHR concluded that the overall regime significantly risks being incompatible with Australia's human rights obligations.[16]

Processing 'Freeze'

The Australian government has effectively placed a 'freeze' on the processing of claims for protection by those who have arrived by boat after 13 August 2012.[17] As at late-June 2013, the Department of Immigration and Citizenship had still not

15 For further details, see Australian Human Rights Commission, Submission to the Joint Committee on Human Rights' Examination into the Migration (Regional Processing) package of legislation (2012). At http://www.humanrights.gov.au/submissions/examination-migration-regional-processing-package-legislation (viewed 24 June 2013).

16 Parliamentary Joint Committee on Human Rights, Ninth Report 2013: Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 and related legislation (19 June 2013), at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/reports/index.htm (viewed 24 June 2013).

17 Department of Immigration and Citizenship, Senate Estimates, 27 May 2013, p 33.

Photo credit: EU Humanitarian Aid and Civil Protection

begun processing claims for protection from this group of asylum seekers.

The result of the 'freeze' is that over 19,000 asylum seekers who arrived in Australia after 13 August 2012 have not been able to formally lodge claims for protection and have spent many months waiting to do so, often in detention. Although many have now been released into the community on bridging visas, they still have no idea when processing of their claims for protection will begin. The backlog of claims which has accumulated means it could take years for people's claims to be determined once they commence processing.

The lengthy delays in processing mean that there are many asylum seekers who have been in mandatory detention for extended periods. As at 30 April this year, there were about 8,800 asylum seekers in closed immigration detention in Australia (including Christmas Island). This number includes over 1,600 children.[18] The Commission is concerned that the prolonged mandatory detention of these asylum seekers may be arbitrary in breach of Australia's obligations under article 9(1) of the ICCPR.

18 Department of Immigration and Citizenship, Immigration Detention Statistics Summary, 30 April 2013, at http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/ (viewed 24 June 2013).

Removal of Work Rights

Since November 2011, the Australian Government has had a policy of releasing asylum seekers who arrived by boat into the community on bridging visas, after initial health and security checks, while their claims for protection are finalised. As of April 2013, there were around 10,300 asylum seekers in the community on bridging visas.[19]

The Commission has repeatedly emphasised the damage caused by long-term immigration detention on asylum seekers' health and mental health and has therefore welcomed the use of alternatives to detention such as community detention and bridging visas.[20] In order to comply with the prohibition against arbitrary detention, the increased use of these alternatives should continue wherever possible.

19 Department of Immigration and Citizenship, Senate Estimates, 27 May 2013, p 19.
20 See for example Australian Human Rights Commission, Submission to the Joint Select Committee on Australia's Immigration Detention Network (August 2011), Section 12. At http://www.humanrights.gov.au/australian-human-rights-commission-submission-joint-select-committee-australia-s-immigration (viewed 24 June 2013); Australian Human Rights Commission, Submission to the Senate Standing Committees on Legal and Constitutional Affairs Inquiry into Australia's agreement with Malaysia in relation to asylum seekers (September 2011), para 76. At http://www.humanrights.gov.au/inquiry-australia-s-agreement-malaysia-relation-asylum-seekers (viewed 24 June 2013); Australian Human Rights Commission, Community arrangements for asylum seekers, refugees and stateless persons (2012). At http://www.humanrights.gov.au/publications/community-arrangements-asylum-seekers-refugees-and-stateless-persons-2012 (viewed 24 June 2013).

On 21 November 2012 the Minister announced that asylum seekers who arrived by boat to Australia on or after 13 August 2012 and remained in Australia would be considered for the grant of bridging visas, but they would not be given permission to work and would only be given 'basic accommodation assistance, and limited financial support'.[21] In combination with the 'no advantage' principle, this means that thousands of people, including families with children, will be living in the community on less than the dole (89% of the Centrelink Special Benefit Rate) for potentially many years.

The Commission is concerned that Australia may be in breach of its obligations under ICESCR, including the right to work and the right to an adequate standard of living, especially if people are living on such limited means for such periods of time that they are forced into poverty.[22]

Conclusion

While the increasing number of asylum seekers arriving by boat presents a challenge for the Australian Government, the international legal framework sets out clear guidelines to ensure that asylum seekers and refugees are protected and treated with dignity. The third country processing regime, the current freeze on processing protection claims on the mainland and the removal of work rights for asylum seekers granted bridging visas are three specific aspects of Australia's current system for processing asylum seekers which raise serious questions about Australia's compliance with international human rights law. They suggest that Australia needs to do better in designing policies that meet the international responsibilities Australia has voluntarily agreed to assume.

Emeritus Professor Gillian Triggs is the President of the Australian Human Rights Commission, taking up her appointment by the Commonwealth Attorney-General in 2012. Professor Triggs' long-standing commitment to legal education will build upon the Commission's efforts to inform Australians, especially children, about their fundamental human rights.

21 The Hon C Bowen MP, Minister for Immigration and Citizenship, 'No advantage onshore for boat arrivals', (Media Release, 21 November 2012). At. http://www.minister.immi.gov.au/media/cb/2012/cb191883.htm (viewed 24 June 2013).
22 Articles 6 and 11, ICESCR. For further information see the Australian Human Rights Commission, note 15, section 14.

INTERNATIONAL LAW AND THE 2003 INVASION OF IRAQ REVISITED

By Donald K. Anton

This comment considers the international legal arguments surrounding the 2003 Iraqi invasion ten years on. Recently, former Prime Minister John Howard spoke about the political or ethical justification of his government's participation in the 2003 invasion.[1]

Prime Minister Howard seemed to go out of his way to make his defence relative. He strongly emphasized that "context … is everything" when considering the 2003 invasion. He went on to locate his defence within what may be said to be the "known knowns" and "unknown unknowns" about Iraq's possession of weapons of mass destruction and the consequences for Australia. For Howard, the key context of the 2003 invasion is what he called "fear" and "dread". Howard talked about the perceived "profound vulnerability", the "preoccupation" with the next attack, the "unnerved Americans", and so on.[2]

International law was only incidental in this talk – a brief reference to the purported legal use of force under Security Council Resolution 678 adopted on 29 November 1990. It is important to treat the law in more detail.

1 See John Howard, Iraq 2003: A Retrospective, available at: http://www.lowyinstitute.org/publications/iraq-2003-retrospective.
2 Ibid.

Now as every first year law student learns, law is context dependent. The international law debate about the facts surrounding the 2003 invasion has centred squarely on whether they made the invasion legal. Surely the burden of proof was and is on Australia, the US, and the UK to demonstrate that the war in Iraq fell within an exception to the prohibition to the use of force. As Hersch Lauterpacht wrote in connection with recognition, when alleged illegality raised by facts "consists in acts of aggression against … other members of the [international] community in deliberate disregard of fundamental legal obligations of conduct, a heavy … burden of proof falls upon those embarking on [their] legalization …".[3] As I show, the US, Australia, and the UK failed to carry this burden and the passage of time has not changed things.

And so the factual context is important in the legal analysis of Iraq. From an international legal point of view, two questions need to be considered. The first is whether the so-called "war on terror" following the 9/11 attacks worked any change in the international law limiting the use of force. The second question is more doctrinaire and relates to

3 Hersch Lauterpacht, Recognition in International Law (1947), p 430.

arguments about legal interpretation and implicit Security Council authorization (or not) prior to the 2003 invasion.

International Law, Pre-Emption and the Iraq War

Article 2, paragraph 4 of the UN charter creates a peremptory norm of international law[4] that makes it illegal to use force against the territorial integrity or political independence of other states. There are only two universally accepted legal justifications for the use of force in international relations that are generally accepted as existing in international law: self defence and authorization by the UN Security Council. One question presented by the so-called "war on terror" following the 9/11 attacks is whether it added further exception(s) to international law's prohibition on the use of force.

The US position was that terror attacks like those of 9/11 were a fundamental change in circumstances – what President George W. Bush called "a different kind of war against a different kind of enemy" – justifying new and responsive law. This view of changed factual circumstances was echoed by John Howard in a press conference immediately prior to the war on the 18th of March. He said:

> This, of course, is not just a question of legality, it is also a question of what is right in the international interest and what is right in Australia's interests. We do live in a different world now, a world made more menacing in a quite frightening way by terrorism in a borderless world …[5]

The US argued that the fundamental change in the use of force in the international system represented by terrorism legitimised what became known as the Bush Doctrine of pre-emptive self-defence fembodied in the September 2002 National Security Strategy of the United States. The doctrine is expressed in the part V of the Strategy as follows:

4 Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) [1986] I.C.J. 14

5 Transcript of John Howard's Press Conference, March 18, 2003, Sydney Morning Herald, available at: http://www.smh.com.au/articles/2003/03/18/1047749752613.html.

Photo credit: dboyles

> Given … rogue states and terrorists, the US can no longer rely on a reactive posture as we have in the past. ... We cannot let our enemies strike first … We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction … The doctrine of self-defen[c]e needs to be revised in the light of modern conditions.[6]

Although Australia was an outspoken supporter of the US pre-emption doctrine,[7] it did not use this justification for its participation in Operation Iraqi Freedom in 2003. For the US, however, the use of force in Iraq epitomised a lawful use of pre-emptive self-defence against terrorism.[8]

This self-defence justification was immediately challenged. First of all, China, France, Germany, and Russia insisted that a threat be imminent for self-defence to be lawful and did not accept the legality of any threat that was not imminent. Even within the US and UK, there were reports that intelligence services did not accept that Iraq posed an imminent threat.[9]

Moreover, the states resistant to claims of self-defence all sought to continue UN weapons inspections regime established under Security Council Resolution 687 and extended in November 2002 under Security Council Resolution 1441 unless an imminent threat could be shown.

In the absence of any sort of imminent threat, the U.S. case for self-defence had to rest on some sort of more distant, threat tied to Iraq's possession or development of weapons of mass destruction. It thus claimed in the changed, fearful world that pre-emption was available and attempted to make the case – recall US National Security Advisor Condoleeza Rice's statement in September 2002: "we don't want the smoking gun [in Iraq] to be a mushroom cloud".[10]

This U.S. attempt to extend the war against terrorism to cover purely pre-emptive action provoked significant opposition and controversy. Over the last ten years, there has been little sign that states, outside of the United States, are willing to abandon the requirement that for self-defence to be permissible an attack should have already happened

6 The National Security Strategy of the United States of America (September 2002), p 15, available at: http://www.state.gov/documents/organization/63562.pdf.
7 See Joseph M. Siracusa, 'John Howard, Australia, and the Coalition of the Willing' (2006) Yale Journal of International Affairs 39, 43.
8 US Congressional Resolution, Authorizing the Use of Military Force Against Iraq Resolution 2002. Available at: http://thomas.loc.gov/cgi-bin/query/z?c107:H.J.RES.114:.
9 See, eg, James Risen and David E. Sanger, After the War: C.I.A. Uproar; New Details Emerge On Uranium Claim and Bush's Speech, New York Times, July 18, 2003, available at: http://www.nytimes.com/2003/07/18/world/after-the-war-cia-uproar-new-details-emerge-on-uranium-claim-and-bush-s-speech.html. See also House of Commons Foreign Affairs Committee, 'The Decision to go to War in Iraq', Ninth Report of Session 2002-03, Vol. 1, at 15-16, 26, 74-75.
10 See Hector Tobar, On Iraq war anniversary, Condoleezza Rice announces a book, Los Angeles Time, March 19, 2013, available at: http://articles.latimes.com/2013/mar/19/entertainment/la-et-jc-on-iraq-war-anniversary-condoleezza-rice-announces-a-new-book-20130319.

or be underway; or be imminent.[11] Since Iraq, even the United States appears to have been reticent to push pre-emption, at least in name, even though with Iran and North Korea it would seem likely to be in mind.

Without a widespread and nearly uniform change in the practice and attitude by states the pre-emptive self-defence will remain lex lata. There are, of course, good reasons why it should not be law. In my view, pre-emption remains a troubling doctrine per se and ought to be rejected first and foremost because of its ease of manipulation. Its inherent uncertainty means it can easily be used as a pretext for a use of force that serves non-defensive purposes. This uncertainty arises because pre-emption cannot clearly tell us when pre-emptive action is legitimate. Moreover, it does not tell us what legal forms pre-emptive action can take. And, finally, it does not envisage a role for collective security by the United Nations.

Prior Security Council Authorisation

The second legal justification that was advanced to support the 2003 invasion was the prior authorisation by the Security Council to use force. Many states argued that no use of force was permitted without Security Council authorisation. In the end, this is precisely what Australia, the UK and the US argued they had, at least on an implicit basis.

Their argument had its foundation in a Security Council Resolution more than twelve years old at the time -- Resolution 678.[12] Resolution 678 authorised states to "use all necessary means" to eject Iraq from Kuwait following its 1990 invasion. In addition to imposing obligations concerning the demarcation and respect for the boundary with Kuwait, Resolution 687 imposed obligations of disarmament in a bid to rid Iraq of weapons of mass destruction. The Resolution empowered UN weapons inspectors to monitor the disarmament, but the inspectors met with continuing resistance. The inspectors were withdrawn in December 1998 prior to the start of the unilateral US Operation Desert Fox to try to compel Iraq to cooperate with the inspectors.

Operation Desert Fox did not have the desired effect and Iraq refused to allow the weapons inspectors back in the country. In the lead up to the 2003 invasion, the US and the UK claimed that without inspectors it was probable that Iraq was developing weapons of mass destruction (WMD) and might supply WMD to terrorists. In an apparent final attempt to secure a solution without the use of force, the Security Council

11 See Patrick Wintour and Nick Hopkins, 'Iran military action not "right course at this time", Downing Street says, The Guardian, October 26, 2012, available at: http://www.guardian.co.uk/world/2012/oct/26/iran-military-action-downing-street.

12 UN SCOR, 45th sess, 2963rd mtg, UN Doc S/RES/678 (29 November 1990).

Photo credit: taliesin

passed Resolution 1441[13] unanimously in November 2002 requiring Iraq to allow the UN weapons inspections to resume their work. Iraq accepted the demands of the Resolution.

Resolution 1441 recalled Resolution 678 and Resolution 687. The Resolution went on to state that the Council, acting under Chapter VII of the Charter, had decided that Iraq "has been and remains in material breach of its obligations under relevant resolutions, including Resolution 687". The Council said was affording Iraq "a final opportunity to comply" with its disarmament obligations. It also set up an enhanced inspection regime and additional reporting obligations for Iraq, the non-observance of which would also be a further material breach. The Resolution provided that Security Council was to reconvene immediately upon receipt notice of Iraq's failure to comply "in order to consider the situation and the need for full compliance with all of the relevant Security Council resolutions …". The Resolution concluded by recalling that the Council had repeatedly warned Iraq that it would face "serious consequences" as a result of its continued violations.

There are several things to observe about Resolution 1441. First of all, nowhere does it expressly authorize the use of force against Iraq. The debates leading up to the resolution made it clear that China, France, Germany and Russia were not willing to expressly authorise force in 1441 and thought they were establishing a two-stage process. This would have required second resolution by the Security Council to expressly authorise force in the event of continued Iraqi non-compliance and fur¬ther material breach.[14]

Debate initially focused on whether Resolution 1441 alone was enough to authorise force without a second

13 UN SCOR, 57th sess, 4644th mtg, UN Doc S/RES/1441 (8 November 2002).

14 UN Press Releases SC/7534, SC/7536 (17 October 2002) and SC/7564 (8 November 2002).

resolution. The Security Council records make it clear that this was not the understanding of member states at the time. China, Russia and France would have vetoed the resolution if it had contained any immediate authorisation (explicit or implicit) of military action. Even the US and the UK were in agreement that there was no, what was called "automaticity," in the resolution and they did not rely on Resolution 1441 alone as the basis for military action.[15]

However, they maintained, along with Australia, that no second resolution was necessary. This argument was significantly undermined by the fact that the US and UK made persistent, but unsuccessful, attempts to obtain a second resolution explicitly authorising the use of force. Notwithstanding, Australia, the UK and US argued that the essential feature of Resolution 1441 was that it expressly said that the Security Council must adopt a second Security Council resolution before military action would be authorised. The key paragraph, Paragraph 12, required only that the Security Council meet to "consider the situation" which, Australia, the US, and UK claimed, did not require a further Security Council decision. Accordingly, their view was that states were free to unilaterally resort to force against Iraq in the event of further material breaches of the cease-fire regime. In essence, it was argued that Authority to use force against Iraq arose from the combined effects of resolutions 678, 687 and 1441 under Chapter VII of the UN Charter and the revival of the authority to use force in Resolution 678.[16]

Ultimately this justification failed to convince the vast majority of other states. While the argument has plausibility, it is by far and away not the best reading of these resolutions. The context of the situation as well as better reasoning and reasons support a reading that a second Security Council resolution was required and that the US, UK and Australia did not have the necessary authorisation and acted unlawfully. Let us consider the problems with the US, UK, Australian approach.

First, as already mentioned, the US and UK desperately, but unsuccessfully, sought a second resolution. Had they truly believed in the force of their argument about revival then presumably they would not have strived so hard for the second resolution.

Second, the prior authorisation argument assumes, without any explicit legal basis or authority, that Resolution 678 and its authorisation to "use all necessary means" continues in perpetuity and that it could be invoked unilaterally despite

15 FCO, 'Legal Basis for the Use of Force' (17 March 2003), para 11, (2003) 52 ICLQ 812.

16 Christine Gray, International Law and the Use of Force (2d ed, 2004), p 274. For the Australian case see 'Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq', reprinted in (2003) 4 MJIL 178. For the UK case, see (2003) 52 ICLQ 811, supra n. 16.

the cease-fire declared in Resolution 678. The better way to look at things under the Charter, of course, is that once a cease-fire is established then fresh authority to use force is required. Unlike the law pre-Charter, the use of force is outlawed and the breach of a treaty (even a cease-fire treaty) cannot be used to justify the use forcible measures to compel compliance. This narrow view of permissible violence post-Charter is confirmed by the strong and universally accepted jus cogens prohibition on the use of force.

Third, how could it be that Resolution 678 was designed to provide authority to use force in circumstances that were much different than were present in 1990. Resolution 678 was addressing a specific problem. It was passed in response to the invasion of Kuwait by Iraq; it authorised member states "acting in cooperation with the government of Kuwait" to use all necessary means to drive Iraq out of Kuwait and to restore international peace and security in the area. This was a vastly different context in 2003. Resolution 1441 was not tied in any way to meeting an illegal use of force by Iraq threatening international peace and security. This was the central purpose of Resolution 678.

Even states in the region strongly objected to the revival of 678 in such different circumstances. Following the overthrow of the Iraqi government in 2003, the League of Arab States wrote to the Security Council to condemn "the American/British aggression against Iraq" and record their view that the aggression was "a violation of the Charter of the United Nations and the principles of international law, … a threat to international peace and security and an act of defiance against the international community."[17] The way most states saw it was that under Resolution 678, Iraq had been driven from Kuwait and international peace and security had been restored in that context. Hence, new authority for a new use of force was required.

Australia attempted to directly address the problem of the revival in its Memorandum of Advice on the Use of Force against Iraq. Australia argued that no time limit on its duration had been established in the operative part of Resolution. Just as equally, there was nothing in the operative part of Resolution 678 that said the authorisation to use force was perpetual and it is unreasonable to assume that it would be. Australia also asserted that Resolution 678 was not confined to the restoration of the sovereignty and independence of Kuwait; the authority to use force also extended to the restoration of international peace and security in the region. A cease-fire, however, lays the ground for the restoration of peace and security. After a certain period without

17 Letter Dated 23 March 2003 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council, UN Doc S/2003/365 (26 March 2003).

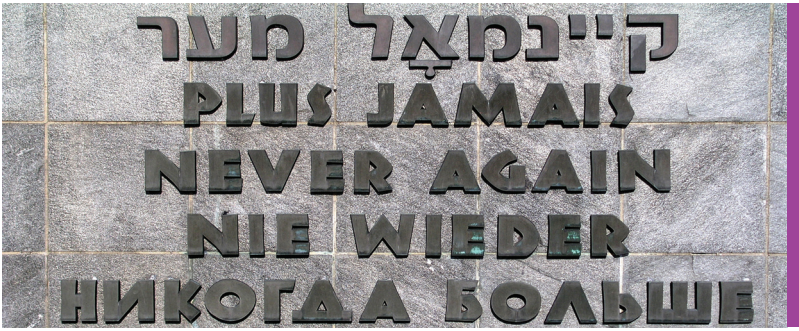

Photo credit: kconnors

active hostility, it must be said that peace and security has, in fact, been restored. One may debate how long that period might be, but it is certain that it is not over twelve years long. Just as certain, peace and security had obviously been restored in relation to the fighting that ended when Iraq was ejected from Kuwait. Moreover, to read the resolution as broadly as Australia asserted - to restore international peace and security in the region - would seemingly provide authority to intervene in states other than Iraq "in the region" and for reasons other than the Resolution was first passed.

Another problem with the case of pre-existing Security Council authorisation is its essentially unilateral nature. Many states insisted that the decisions on material breach and on the use of force were for the Security Council. These states argued that only the Security Council could determine the cease-fire was over. In Resolution 1441 all the Security Council had found was that Iraq "has been and remains in material breach" of its obligations under the relevant Security Council resolutions. It did not terminate the cease-fire or authorize force.

Conclusion

The continuing debates about the future of Iraq make it clear that many states that opposed military action in Iraq are keen to ensure that it will not be legitimised with the passage of time. Many states continue to assert the illegality of the invasion. The way in which the US, UK and Australia mounted their revival argument has, no doubt, hampered the ability to reach agreement in the Security Council on urgent humanitarian disasters like Syria and elsewhere. One hopes that in the future the long work on cooperative action in the Security Council will be preferred to plausible, but unpersuasive, legal interpretation.

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THE MARITIME REGULATION OF PIRACY

By Eric Shek

Piracy continues to threaten the peace and security of the international community. The United Nations Convention on the Law of the Sea (UNCLOS)[1] is said to limit the legal grounds for the interdiction and prosecution of pirates. Whilst the effectiveness of legal measures aimed at supressing piracy are to be evaluated by the extent to which they expand the limited grounds for interdiction and prosecution under UNCLOS, respect for state sovereignty as a bedrock of international peace must also be considered as a criterion of their effectiveness.

Overall, current regulatory and enforcement measures represent an appropriate balance between the need to broaden the grounds for the interdiction of vessels engaging in piracy, and respect for state sovereignty. UNCLOS provides limited grounds for the interdiction of vessels engaged in these activities. As such, the United Nations Security Council (UNSC) has passed several resolutions concerning piracy. These resolutions have not modified UNCLOS, but have provided the impetus for the adoption of treaties that broaden the grounds by which interdiction of these activities can occur. In addition to treaties, a range of enforcement activities have been initiated on the basis of UNSC resolutions; however, some of these activities have limited efficacy due to their encroachment upon state sovereignty. Currently, the deficiency of prosecution measures for actors engaged in piracy is perhaps of greatest concern.

Limitations in UNCLOS

Whilst UNCLOS provides that a state may interdict[2] or seize[3] a ship engaging in piracy on the high seas, such measures can only be taken if the act meets the definition of piracy under UNCLOS. Acts of piracy must meet a 'two-ships' requirement,[4]

1 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')

2 Ibid art 110(1)(a)
3 Ibid art 105.
4 Ibid art 101(a).

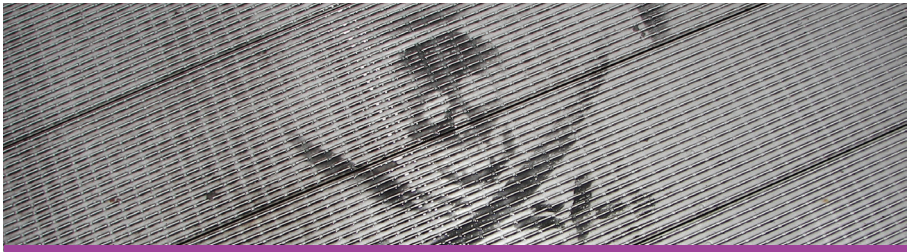

Photo credit: hurley_gurlie182

leaving illegal acts of violence committed on one vessel shielded from interdiction. Moreover, the requirement that piracy be committed for 'private ends'[5] excludes actions taken for political motives such as terrorism.[6] Whilst Guilfoyle suggests that this phrase merely emphasises that interdiction is permissible where violence lacks state sanction or authority,[7] the lack of clarity as to whether acts of terrorism constitute a grounds for interdiction reflect UNCLOS' insufficient scope to take action against violent acts on the high seas threatening international security. Furthermore, UNCLOS limits the definition of piracy as occurring in any place outside the jurisdiction of the state.[8] Therefore, acts of violence in the territorial sea or contiguous zone would not be subject to foreign interdiction. Although this limitation recognises state sovereignty, perpetrators can take advantage of weak States' territorial sea sanctuaries, such as the Gulf of Eden.[9] With evidence that only a minority of pirate-like acts occur on the high seas,[10] the geographical limitation in UNCLOS is a barrier to the effective policing of piracy.

5 UNCLOS art 101(1)(a)
6 Donald R Rothwell and Tim Stephens, The International Law of the Sea (Hart Publishing, 2010) 162.
7 Douglas Guilfoyle, Shipping Interdiction and the Law of the Sea (Cambridge University Press, 2009) 42.
8 UNCLOS art 105.
9 James Anderson, 'A Sea of Change Reforming the International Regime to Prevent, Suppress and Prosecute Sea piracy' (2013) 44 Journal of Maritime Law and Commerce 47, 66.
10 Ibid 64.

Impact of UNSC Resolutions on UNCLOS

The United Nations Security Council (UNSC) has issued several resolutions with the aim of reducing piracy, in response to the growing piracy problem in Somali territorial waters.[11] In response to increasing attacks to foreign-flagged vessels in Somali waters, the UNSC adopted Resolution 1816,[12] authorising member states cooperating with the Somali Transitional Federal Government (TFG) to take action against pirates in Somalia's territorial waters for a period of six months.[13] Resolution 1851 extended this mandate for twelve months, and allowed member states to 'undertake all necessary measures that are appropriate in Somalia, for the purposes of suppressing acts of piracy and armed robbery at sea'.[14] The issue is the extent to which these resolutions affect UNCLOS.

These resolutions covered several shortfalls in the definition of piracy, enabling foreign states to police against Somali pirates.[15] Firstly, armed robbery at sea is defined broadly, encompassing 'any unlawful act of violence or detention or any act of depredation….directed against

11 Rothwell and Stephens, above n 7, 164, 433.
12 SC Res 1816, UN SCOR, 63rd sess, 5902nd mtg, UN Doc S/RES/1816 (2 June 2008) ('SC Res 1816') Preamble para 13.
13 Ibid para 7(a).
14 SC Res 1851, UN SCOR, 63rd sess, 6046th mtg, UN Doc S/RES/1851 (16 December 2008) ('SC Res 1851') para 6.
15 Robin Geiß and Anna Petrig, Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia (Oxford University Press, 2011) 2.

a ship…within a State's jurisdiction'.[16] Therefore the resolution removes the need to fixate on arcane notions of 'two-ships' and 'private ends' as required in UNCLOS.[17] Secondly, the resolution breaks down the territorial nexus of piracy by permitting enforcement action both in the Somali territorial sea, and mainland.[18] Broadening the geographical element was particularly effective as Somali pirates were said to be 'savvy enough to know how to evade capture by entering a State's territorial sea'.[19]

Although the policing regime under these UNSC resolutions has a wider scope than the regime under UNCLOS, the resolutions do not have general application so as to displace UNCLOS' enforcement regime. Firstly, the resolutions clearly stipulate that the enforcement regime mandated by the UNSC only applies in respect of the Somali situation, and does not set down customary international law.[20] Secondly, this enforcement regime only applies to Somali territorial waters and land; it remains silent about permissible policing action on the high seas.[21] Whilst interdictions of vessels on the high seas that have been involved in pirate-like acts in the Somali territorial sea may legally fall within the scope of the resolutions,[22] they do not override UNCLOS' provisions on piracy.[23] Thirdly, any actions taken by member states in Somali territorial waters and land under the resolutions must been done through 'advance notification' to the TFG,[24] affirming existing principles of state sovereignty, in contrast with the unilateral interdictions permitted under UNCLOS. Consequently, the UNSC resolutions in relation to piracy do not modify the law of the sea.

Although the UNSC resolutions in relation to piracy do not modify UNCLOS, they enhance the effectiveness of enforcement measures. Firstly, acting under the self-defence mechanism of the UNC, the UNSC has passed resolutions allowing for special enforcement measures, beyond the scope of UNCLOS, to suppress specific threats. Secondly, by emphasising the need for international cooperation in suppressing these activities, the UNSC's resolutions have initiated international treaties that strengthen efforts to police piracy.

16 Ibid 73, citing Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, IMO Res 922, 22nd sess, Agenda Item 9 (2 December 2009) Annex 2.2.
17 Ibid, 71, 79.
18 SC Res 1851, para 6.
19 Anderson, above n 10, 62.
20 See, eg, SC Res 1816, para 9; SC Res 1897, UN SCOR, 64th sess, 6226th mtg, UN Doc S/RES/1897 (30 November 2009) para 8; SC Res 1846, UN SCOR, 63rd sess, 6026th mtg, UN Doc S/RES/1846 (2 December 2008) para 11; SC Res 1918, UN SCOR, 65th sess, 6301st mtg, UN Doc S/RES/1918 (27 April 2010) Preambule para 4; Geiß and Petrig, above n 16, 78.
21 Anderson, above n 10, 65-66.
22 Geiß and Petrig, above n 16, 71, 76
23 Ibid 78.
24 SC Res 1851, para 6.

Interaction between UNSC Resolutions & Treaties

The international community has concluded several multilateral treaties on the suppression of piracy that overcome the limited grounds for interdiction in UNCLOS. These agreements define piracy broadly, giving greater legal scope for the interdiction of suspect vessels. Furthermore, by stipulating flag state consent as a condition for interdiction, these treaties recognise the importance of state sovereignty in international enforcement action.

The SUA Convention

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention),[25] seeks to broaden the limited grounds for the interdiction of piracy under UNCLOS,[26] making it an offence to '[seize] or [exercise] control over a ship by threat or use of force thereof or any other form of intimidation', overriding the 'two ship' and 'private ends' requirements under UNCLOS. This provides an explicit international statement lacking in UNCLOS: *maritime acts of violence are illegal*. However, the Convention does not set down the grounds for unilateral interdiction of ships on the high seas, but rather place an obligation on states to criminalise[27] and establish jurisdiction over such offences[28] that are committed in their territorial sea.[29] This is nevertheless an effective legal measure, given the prevalence of violent acts in the territorial sea. With 160 State Parties ratifying the SUA Convention,[30] and

25 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, opened for signature 10 March 1988, 1678 UNTS 201 (entered into force 1 March 1992) ('SUA Convention').

26 Rothwell and Stephens, above n 7, 163; Guilfoyle, Shipping Interdiction, above n 8, 38.
27 SUA Convention, art 3.
28 Anderson, above n 10, 65.
29 SUA Convention, art 6(1).
30 International Maritime Organization, Summary of Status of Convention (as at 30 April 2013) <www.imo.org/About/Conventions/StatusOfConventions/Documents/Summary%20of%20Status%20of%20Conventions.xls> (Accessed: 3

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UNSC's Resolution 1851 reiterating the obligation to criminalise piracy under the Convention,[31] there are strong grounds to assert that the obligation to interdict vessels engaged in piracy in the territorial sea has become customary international law.

Bilateral Shiprider Agreements

The UNSC resolutions have led to the adoption of bilateral shiprider agreements, broadening the scope for the interdiction of vessels engaged in piracy.[32] These agreements allow law enforcement officials of one state party to interdict the vessel of another state party on the high seas, giving contracting states reciprocal jurisdiction to undertake enforcement operations against suspect flagged vessels beyond the state's own territorial sea.[33]

The effectiveness of these bilateral agreements is evident. Firstly, the conclusion of these agreements has the support of the international community, with the UNSC encouraging States to adopt such agreements to suppress piracy in Somalia[34] through resolutions 1851[35] and 1897.[36] Secondly, these agreements require that interdiction be done with the consent of the flag state,[37] emphasising the need to adhere to principles of flag state jurisdiction.[38] With the main criterion for interdiction being consent of the flag state, the agreements overcome the lacunae in the limited definition of piracy under UNCLOS.[39]

As it is only the US that has concluded shiprider agreements to date,[40] these agreements have yet to give rise to an international norm allowing one state to interdict foreign vessels suspected of piracy with consent of the flag state.[41] Nevertheless, these agreements serve as effective legal measures as they broaden the grounds on which interdiction of vessels can take place whilst respecting principles of state sovereignty.

June 2013).
31 SC Res 1540, UN SCOR, 59th sess, 4956th mtg, UN Doc S/RES/1540 (28 April 2004) Preamble para 9; Geiß and Petrig, above n 16, 168.
32 Geiß and Petrig, above n 16, 88.
33 Rothwell and Stephens, above n 7, 164; Guilfoyle, Shipping Interdiction, above n 8, 72.
34 Ibid; Geiß and Petrig, above n 16, 86.
35 SC Res 1851, para 3.
36 SC Res 1897, UN SCOR, 64th sess, 6226th mtg, UN Doc S/RES/1897 (30 November 2009) para 6.
37 Keyuan Zou, 'Maritime Enforcement of United Nations Security Council Resolutions: Use of Force and Coercive Measures' (2011) 26 International Journal of Marine and Coastal Law 235, 255.
38 Douglas Guilfoyle, 'The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?' (2005) 29 Melbourne University Law Review 733, 738.
39 Guilfoyle, Shipping Interdiction, above n 8, 248.
40 Ibid, 247.
41 Jinyuan Su, 'The Proliferation Security Initiative (PSI) and Interdiction at Sea: A Chinese Perspective' (2012) 43 Ocean Development & International Law 96, 103, cf Ticy V Thomas, 'The Proliferation Security Initiative: Towards Relegation of Navigational Freedoms in UNCLOS? An Indian Perspective' (2009) 8 Chinese Journal of International Law 657, 679.

Policing Activities

The UNSC resolutions on piracy have spurred the conclusion of treaties that have increased the effectiveness of policing measures against these activities.

In response to resolution 1851, the Contact Group on Somali Piracy was established as the primary mechanism for a range of states and organisations to coordinate international response to piracy off Somalia,[42] enhancing international cooperation to tackle the Somali piracy problem.

The main fault in the international legal frameworks aimed at combatting piracy is its overreliance on national law to prosecute and punish these offences.[43] Whilst the SUA Convention obliges states to establish jurisdiction to criminalise piracy[44] and accept delivery of those responsible for such acts,[45] the effectiveness of this jurisdictional requirement is limited by the finite logistical and financial resources of states.[46] With suspects of piracy being released due to lack of such resources to process their prosecution,[47] there is a need to look towards establishing a regional or international body dedicated to the prosecution of such crimes.[48]

Conclusion

The effectiveness of maritime regulatory measures in relation to piracy hinges upon the extent to which they widen the legal scope for interdiction and prosecution of vessels suspected of engaging in such activities, as well as the extent to which they respect the core international principle of state sovereignty. The highly limited legal bases provided by UNCLOS to interdict such vessels have not been broadened by UNSC resolutions. However, these resolutions have spurred the creation of international treaties, including the SUA Convention, and shiprider agreements that have broadened the scope of interdiction of such vessels whilst respecting flag state jurisdiction through requirements of consent. Although, given the limitations on relying on national mechanisms to bring perpetrators to justice, the international community should strive to establish an international judicial body devoted to their prosecution.

Eric Shek is in his final semester of an Asia-Pacific Studies and Law degree. He is currently completing a law honours thesis combining these research areas on the topic of linguistic human rights.

42 See generally Jennifer Landsidle, 'Enhancing International Efforts to Prosecute Suspected Pirates' (2011) 44 Case Western Reserve Journal of International Law 317, 318.
43 Guilfoyle, Shipping Interdiction, above n 8, 27.
44 SUA Convention arts 3 (1)(a), 6(1)(a); F182-3.
45 Ibid, art 8; Guilfoyle, Shipping Interdiction, above n 8, 69.
46 Geiß and Petrig, above n 16, 138.
47 Ved P Nanda, 'Maritime Piracy: How Can International Law and Policy Address this Growing Global Menance?' (2011) 39 Denver Journal of International Law and Policy 177, 203; Jennifer Landsidle, 'Enhancing International Efforts to Prosecute Suspected Pirates' (2011) 44 Case Western Reserve Journal of International Law 317, 320.
48 See, eg, Geiß and Petrig, above n 16, 138.

DRONES AND OBAMA'S GLOBAL WAR

By Michael Hayworth

Drones, or unmanned aerial vehicles, are the latest technology to be deployed by the US in its "War on Terror". Shrouded in secrecy, the US targeted killing program has deployed drone strikes against alleged militants, and in some cases, US citizens, in places like Yemen, Somalia and Pakistan.[1] In doing so, the US has relied on its 'global war' theory as a justification for what would appear to be extra-judicial killings. President Obama has continued to argue that drone strikes prevent terrorism attacks, save lives and are legal under US and international law.[2] However, whether this is in fact the case is highly questionable.

Drone strikes

A recent report by the Center for Civilians in Conflict compiled a series of press reports, statements and leaked documents to create a harrowing picture of a drone strike.[3] There are a large number of undisclosed civilian casualties that will likely remain secret, both due to the secretive nature of the attacks and the potential misclassification of civilians as combatants.

These strikes can be both pre-planned and opportunistic.[4] They can be specifically targeted against an individual or conducted as a result of an unknown person's behavioural pattern or signature.[5] The process for specifically targeted attacks appears to begin with the gathering of intelligence that feeds into senior US officials deciding on a list of targetable individuals or a 'kill list'.[6] Reports indicate that those on the kill list are often killed in signature strikes.[7]

1 'USA: Words, War and the Rule of Law' (Report, Amnesty International, May 2013) 4.
2 President Obama, 'Remarks by the President' (Speech deliver at the National Defense University, Washington D.C., 23 May 2013).

3 Sarah Holewinski et al, 'The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions' (Report, Center for Civilians in Conflict and Columbia Law School Human Rights Clinic, 2012).
4 Ibid, 11.
5 Ibid, 8.
6 Ibid, 9.
7 Adam Entous, Siobhan Gorman and Julian E Barnes, 'US Tightens Drone Rules', The Wall Street Journal, November 4 2011 cited in Sarah Holewinski et al, 'The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions' (Re-

Photo credit: nasirkhan

Signature strikes are attacks conducted without specific knowledge of the identity of the individual targeted. Rather, that person matches a 'signature' or a pattern of behaviour that leads the US to believe they are militants.[8]

Signature strikes are more controversial and raise the largest number of questions under both international humanitarian and human rights law, especially as they these operations are often run without clear public or judicial oversight.[9] Instead, they are justified by the US 'global war' against al-Qaeda and its almost indeterminable list of co-belligerents.[10]

Global war

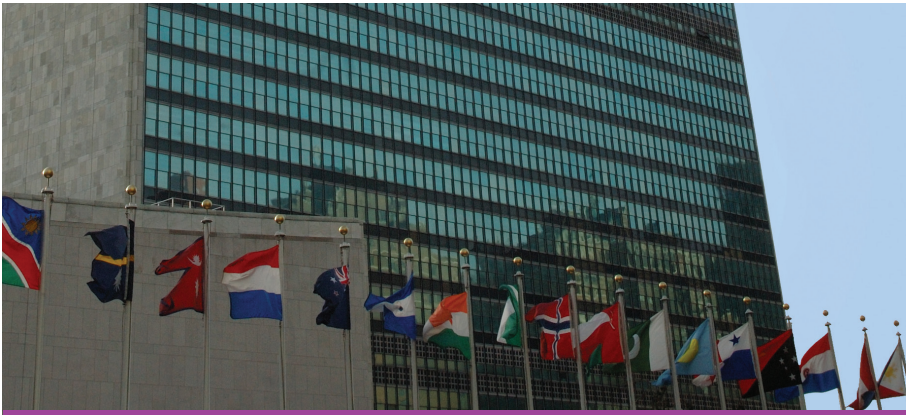
The leaked US Department of Justice white paper stated that the US is at war with al-Qaeda and all of its affiliates.[11] This global, pepetual war was reaffirmed by President Obama as recently as May 2013.[12] The argument asserts that, by virtue of the Authorisation for Use of Military Force (AUMF)[13] by US Congress in 2001, the US is in a non-international armed conflict with al-Qaeda and its affiliates. The white paper asserts that any operation, despite being geographically removed from any active theatre of war, is a part of this conflict.[14]

While it must be acknowledged that the US has been a part of armed conflicts post 9/11 and remains so to this day, there is little evidence to suggest that the US has met the definition of armed conflict under international law that would allow its forces to kill individuals anywhere, at any time, based on secret information.

The 'global war' appears to be a convenient contrivance to justify an ongoing targeted killings program that relies heavily on US domestic law[15] - to the detriment of international humanitarian and international human rights law.

This is not to say that where the US is engaged in a legitimate armed conflict under international law they are unable to use drones to attack legitimate military targets, if it conforms with international humanitarian law. The inference is, that without any evidence to support the classification of such attacks as part of an armed conflict,[16] international human rights law applies.

port, Center for Civilians in Conflict and Columbia Law School Human Rights Clinic, 2012), 9.
8 Holewinski et al, above n 3, 8.
9 'Lawfulness of a Lethal operation directed against a U.S. Citizen who is a Senior Operational Leader of Al Qa'ida or An Associated Force' (U.S. Department of Justice, White Paper, 4 February 2013) 5.
10 See Hamlily v Obama, 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009) for discussion of the definition of 'associated forces'.
11 U.S. Department of Justice above n 9, 2.
12 Obama above n 2.
13 Authorisation for Use of Military Force, Pub. L. No 107-40, Stat. 224, 224 (2001).
14 U.S. Department of Justice above n 9, 3.
15 See al-Adahi v Obama, 613 F.3d 1102, 1003, 1111 (D.C. Cir. 2010) for US authority to detain al Qa'ida members under AUMF.
16 Sylvain Vite, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations.' International Review of the Red Cross, (2009) 91 (873) 69, 72.



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Application of international human rights law

The killing of a person is in clear violation of their right to life under international human rights law.[17] Thus the deliberate and unlawful killing of individuals with unmanned drones may well be considered extra-judicial execution.[18]

Human rights law does allow for the use of lethal force, but only if it is "strictly unavoidable" and in response to an "imminent threat of death".[19] The US white paper argues that lethal drone strikes should only be carried out where a person constitutes an "imminent threat".[20] However, the US has broadened the concept of 'imminence' in its paper, so much so that the term 'imminent threat' in this context is almost meaningless. The white paper states that an operational leader of al-Qaeda or associated force would constitute an imminent threat if:

- He or she has been "personally and continually involved in planning terrorist attacks against the United States";
- He or she has "recently been involved in activities posing an imminent threat of violent attack against the United States"; and
- There is "no evidence suggesting that he has renounced or abandoned such activities". [21]

What is missing is any intelligence about a specific planned attack. Therefore, a person could be designated an 'imminent threat' and targeted for killings without any specific knowledge of a planned impending attack.

Application of international humanitarian law

For the sake of argument, if we accept the 'global war' theory as valid, this would allow the US to meet the very limited circumstances in which only international

17 Universal Declaration of Human Rights art 3.
18 "Disappearances" and Political Killings: A manual for action' (Report, Amnesty International, 1994) 86-87.
19 Amnesty International above n 1, 5.
20 U.S. Department of Justice above n 9, 6.
21 U.S. Department of Justice above n 9, 1.

humanitarian law would apply. Therefore the US white paper's argument that the fundamental law of war principles - necessity, distinction, proportionality, and humanity - would also apply.

It would not take long for humanitarian law professionals to point out that the 'signature attacks'[22] that target unidentified individuals on the basis of a pattern of behaviour are inconsistent with such laws of war. It is almost impossible to argue military necessity and proportionality without ascertaining the person's identity,[23] as these two principles are based on establishing a direct military advantage.[24]

Civilians Victims

Signature attacks also have the potential to be directed at civilians. Under international law, persons who have not committed hostile acts are entitled to a presumption of civilian status, until it is demonstrated that they are not civilians.[25] The burden of proof rests with the US to establish that a person is a combatant and a lawful target.[26] A difficult task given the extreme remoteness of drone attacks and the difficulty of post-strike investigations.

Presently civilians have no readily cognizable right of redress under US law for deaths and damage caused by the program. There have been suggestions of a pre-strike 'kill court' to be established. This secret court would appear to vet strikes before they occur.[27] However, the secrecy and inability for the aggrieved to appear would make this body a court in name only and would clearly fail to meet the basic standards of justice. In fact, such a court would likely only serve to further entrench a culture of secrecy and human rights abuse and would not discharge the US's obligation to independently and impartially investigate unlawful killings. For justice to be served, victims must have access to more vigorous and effective post-strike review and remedies for unlawful killings.

Conclusion

By failing to acknowledge and apply international human rights law to its targeted killings program, the US has continued to flout its obligations to the international community. The secrecy with which it has conducted the 'signature' attacks makes this 'global war' all the more insidious and terrifying.

Michael Hayworth is the Crisis Response Campaigner with Amnesty International Australia, working to defend the rights of people in emerging or worsening human rights crises around the world.

22 Holewinski et al above n 3, 9.
23 See Jean-Marie Henckaerts and Louise Doswald-Beck 'Customary International Humanitarian Law, Volume 1: Rules' (Report, International Committee of the Red Cross and Crescent, 2005) 17 for an outline of the rule in relation to civilians in armed conflict.
24 Ibid 46.
25 ICTY, Dragomir Milosevic case, Judgement, 12 December 2007, ss 945-946.
26 Ibid
27 Scott Shane, 'Debating a Court to Vet Drone Strikes', The New York Times, 8 February 2013.

INTERN PROFILE: with the Legal Protection Unit at UNHCR Canberra

By Laura John

'Am I ever going to escape this roundabout?', my thoughts as I circled round and round on my drive through Canberra to begin my internship with the Legal Protection Unit (LPU) at UNHCR. Mastering the art of Canberra's giant, disorientating roundabouts was one of the many skills I developed while interning with the UN Refugee Agency from August to October in 2012.

I decided to intern at UNHCR as I wanted to explore how an international organisation like the UNHCR worked with communities and governments to fulfil its protection mandate. I felt instantly welcomed by the small, yet highly competent team at the Regional Office in Canberra. I was tasked with responding to correspondence from asylum seekers and their families, reviewing individual refugee decisions and assisting in submissions to government. During my time at UNHCR, I was continually struck by the expertise and compassion of my colleagues, who offered comfort and advice to those concerned for their loved ones in Syria, Iran or Pakistan; carefully negotiated with government officials to maximise the protection space available to refugees, and resolved complex legal questions about derivative refugee status and statelessness.

While I was interning, I was writing my honours thesis examining the Australian-Indonesian approach to migrant smuggling and asylum flows. Although there were nights where I wished I had deferred university for the duration of my internship, I appreciate in hindsight that my thesis benefited greatly from the perspectives and knowledge I gained at UNHCR. .

On balance, my internship with UNHCR has helped me develop both professionally and personally. Working with UNHCR has given me a clearer direction and cemented my interest in refugee law. After completing my internship, I will be moving to New York for three months to volunteer with Human Rights First in their Refugee Protection Program. I am excited about using my new skills of legal analysis, negotiation and interpersonal communication, to assist asylum seekers in the United States. I have found my time with UNHCR to be both surprising and rewarding in that I have been surprised by the depth of work I was able to do and rewarded by the contribution I was able to make to an issue that is far bigger than any single person or government. I would encourage anyone interested in refugee law, politics, diplomacy, human rights or communications, to apply for an internship with UNHCR.

UNHCR
The UN Refugee Agency

Internships are periodically offered within the Legal Protection Unit and the Public Information Unit of UNHCR's Regional Office in Canberra. Please contact UNHCR on + 61 2 6260 3411 or email aulca@unhcr.org for further information. Laura John studied for a Bachelor of Arts/Bachelor of Laws at Monash University. She was an intern in 2012. After finishing her internship, she moved to New York for 3 months where she volunteered with Human Rights First. (Photo credit: Fred Hugo)

ABOUT THE

ANU INTERNATIONAL LAW SOCIETY

The ANU International Law Society (ILS) is a student run orgnisation located at the Australian National University in Canberra. The society is dedicated to promoting interest in and the study of international law. Its activities include publishing the *International Advocate* featuing contributions from students, academics and practitioners, as well as providing insightful events and valuble academic support to students.

For more information on the society's activities, upcoming events and how you can get involved please visit

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