EVERY THING SECRET
Carmen K.M. Cheung

AUSTRALIA’S RELIANCE ON US EXTENDED NUCLEAR DETERRENCE AND INTERNATIONAL LAW
Monique Cormier and Anna Hood

ON THE DIFFICULT CASE FOR A FUNCTIONAL INTERPRETATION OF THE UNWILLINGNESS CRITERION BEFORE THE INTERNATIONAL CRIMINAL COURT
Vincent Dalpé

RE-PURPOSING UN COMMISSIONS OF INQUIRY
Michael Nesbitt

COLD COMFORT: ARCTIC CONFLICT, ENVIRONMENTAL PROTECTION AND THE LIMITS OF LAW
Christopher K. Penny
# Editorial Board

<table>
<thead>
<tr>
<th>Editors-in-Chief</th>
<th>itre</th>
<th>Editors-in-Chief</th>
<th>itre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Moyosore Arewa</td>
<td></td>
<td>Philip Omorogbe</td>
<td></td>
</tr>
<tr>
<td>Jane Zhang</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Executive Editors</th>
<th>itre</th>
<th>Executive Editors</th>
<th>itre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alexis Giannelia</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Managing Editors</th>
<th>itre</th>
<th>Managing Editors</th>
<th>itre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Per Kraut</td>
<td></td>
<td>Anne-Rachelle Boulanger</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Web Editor</th>
<th>itre</th>
<th>Web Editor</th>
<th>itre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gabrielle Lim</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Book Review Editor</th>
<th>itre</th>
<th>Book Review Editor</th>
<th>itre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colin Baulke</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Executive Managers</th>
<th>itre</th>
<th>Executive Managers</th>
<th>itre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Devon LaBuik</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Marketing Manager</th>
<th>itre</th>
<th>Marketing Manager</th>
<th>itre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sam Levy</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Senior Editorial Board</th>
<th>itre</th>
<th>Senior Editorial Board</th>
<th>itre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scott Dallen, Chair</td>
<td></td>
<td>Anna Christiannsen</td>
<td></td>
</tr>
<tr>
<td>Jessica Mank</td>
<td></td>
<td>Rebecca Borkowsky</td>
<td></td>
</tr>
<tr>
<td>Sheena Singh</td>
<td></td>
<td>Janelle Deniset</td>
<td></td>
</tr>
<tr>
<td>Nicole Gladstone</td>
<td></td>
<td>Michael Thomas</td>
<td></td>
</tr>
<tr>
<td>Sarah Israr</td>
<td></td>
<td>Ari Blaff</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Associate Editors</td>
<td>itre</td>
<td>Associate Editors</td>
<td>itre</td>
</tr>
<tr>
<td>Simon Fraser</td>
<td></td>
<td>Joffre Brunet</td>
<td></td>
</tr>
<tr>
<td>Robert Chiu</td>
<td></td>
<td>Aladdin Diakun</td>
<td></td>
</tr>
<tr>
<td>Daniel Sisgoreo</td>
<td></td>
<td>Calum Agnew</td>
<td></td>
</tr>
<tr>
<td>Brenda Chang</td>
<td></td>
<td>Caroline Wang</td>
<td></td>
</tr>
<tr>
<td>Brolin Frasheri</td>
<td></td>
<td>Matthew Smith</td>
<td></td>
</tr>
<tr>
<td>Michael Cleveland</td>
<td></td>
<td>Taraleigh Stevenson</td>
<td></td>
</tr>
<tr>
<td>Michelle Beck</td>
<td></td>
<td>RJ Reid</td>
<td></td>
</tr>
<tr>
<td>Murad Javed</td>
<td></td>
<td>Kabir Bhatia</td>
<td></td>
</tr>
<tr>
<td>Philippe Picard</td>
<td></td>
<td>Matthew Savoy</td>
<td></td>
</tr>
<tr>
<td>Sixbert Himbaza</td>
<td></td>
<td>Benjamin Smalley</td>
<td></td>
</tr>
<tr>
<td>Graeme Stewart-Wilson</td>
<td></td>
<td>Ashely-Nicole Harrison</td>
<td></td>
</tr>
<tr>
<td>Michelle Musindo</td>
<td></td>
<td>Mia Fortino</td>
<td></td>
</tr>
<tr>
<td>Andrew Hakes</td>
<td></td>
<td>Silos Yassa Roy</td>
<td></td>
</tr>
<tr>
<td>Geneva Calder</td>
<td></td>
<td>Desmond Christy</td>
<td></td>
</tr>
<tr>
<td>Katrina Kairys</td>
<td></td>
<td>Cadhla Gray</td>
<td></td>
</tr>
<tr>
<td>Karen Holstead</td>
<td></td>
<td>Karen Holstead</td>
<td></td>
</tr>
<tr>
<td>Joshua Mazur</td>
<td></td>
<td>Ramanan Thanabalan</td>
<td></td>
</tr>
<tr>
<td>Meghan Harris</td>
<td></td>
<td>Bethlehem Solomon</td>
<td></td>
</tr>
<tr>
<td>Nicolas Jonathan</td>
<td></td>
<td>Emma Woodbeck</td>
<td></td>
</tr>
<tr>
<td>Jennifer Harris</td>
<td></td>
<td>Cameron Torrens</td>
<td></td>
</tr>
<tr>
<td>Sydney Piggott</td>
<td></td>
<td>Anton Tulenkov</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Faculty Advisors</td>
<td>itre</td>
<td>Faculty Advisors</td>
<td>itre</td>
</tr>
<tr>
<td>Tara Rajabi</td>
<td></td>
<td>Rinchen-Dolma Karma</td>
<td></td>
</tr>
<tr>
<td>Mojann Zibapour</td>
<td></td>
<td>Claire Robbins</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Senior Advisory Board</th>
<th>itre</th>
<th>Senior Advisory Board</th>
<th>itre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kenneth Abbott</td>
<td></td>
<td>José Alvarez</td>
<td></td>
</tr>
<tr>
<td>Upendra Baxi</td>
<td></td>
<td>Laurence Boisson de</td>
<td></td>
</tr>
<tr>
<td>Chazournes</td>
<td></td>
<td>Jutta Brunnée</td>
<td></td>
</tr>
<tr>
<td>Michael Byers</td>
<td></td>
<td>Martti Koskenniemi</td>
<td></td>
</tr>
<tr>
<td>Martha Finnemore</td>
<td></td>
<td>Robert Keohane</td>
<td></td>
</tr>
<tr>
<td>Benedict Kingsbury</td>
<td></td>
<td>Karen Knop</td>
<td></td>
</tr>
<tr>
<td>Karen Knop</td>
<td></td>
<td>Martti Koskenniemi</td>
<td></td>
</tr>
<tr>
<td>Stephen Krasner</td>
<td></td>
<td>Friedrich Kratochwil</td>
<td></td>
</tr>
<tr>
<td>Oona Hathaway</td>
<td></td>
<td>René Provost</td>
<td></td>
</tr>
<tr>
<td>Philippe Sands</td>
<td></td>
<td>Shirley Scott</td>
<td></td>
</tr>
<tr>
<td>Shirley Scott</td>
<td></td>
<td>Gerry Simpson</td>
<td></td>
</tr>
<tr>
<td>Janice Stein</td>
<td></td>
<td>Stephen Toope</td>
<td></td>
</tr>
<tr>
<td>Rob Walker</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The Journal of International Law and International Relations is published by the University of Toronto Faculty of Law.
CONTENTS

Every Thing Secret
Carmen K.M. Cheung 1

Australia’s Reliance on US Extended Nuclear Deterrence and International Law
Monique Cormier and Anna Hood 3

On the Difficult Case for a Functional Interpretation of the Unwillingness Criterion at the International Criminal Court
Vincent Dalpé 48

Re-Purposing UN Commissions of Inquiry
Michael Nesbitt 83

Cold Comfort: Arctic Conflict, Environmental Protection and the Limits of Law
Christopher K. Penny 123
Editors’ Acknowledgement:  
Moyosore Arewa, Philip Omorogbe and Jane Zhang

Founded in 2004, The Journal of International Law and International Relations (JILIR) is a joint venture between the Munk School of Global Affairs and the University of Toronto Faculty of Law. The journal continues to grow in ambition from year to year — it has laid the foundation to expand its digital platform and streamlined its editorial processes to seek out even more original scholarship — and Volume 13.2 deepens this ambition.

In this issue, you’ll find a range of papers touching on nuclear deterrence, Arctic security, UN Commissions of Inquiry, the International Criminal Court, and drone warfare and targeted killings. The tenor of Volume 13.2 demonstrates once more JILIR’s commitment to the nexus between international law and international relations.

Volume 13.2 was an all-hands-on-deck endeavor and we would like to highlight the incredible work of our editorial team, including our Submissions Editor, Alexis Giannelia; our Managing Editors (and incoming co-Editors-in-Chief), Per Kraut and Anne-Rachelle Boulanger; our Executive Managers, Devon LaBuik and Sam Levy; and our Web Editor, Gabrielle Lim. We also acknowledge the tireless work of our Senior and Associate Editors, especially Rebecca Borkowsky and Sheena Singh, whose devotion made this ambitious issue possible.

More than ever, we relied heavily on support from advisors at the University of Toronto Faculty of Law and the Munk School of Global Affairs. We would especially like to recognize the support of Professors Denise Reaume, Maria Banda, Anna Su, Audrey Macklin, Karen Knop and Ron Levi. Many thanks as well to our peer reviewers, whose critical reviews further strengthened the scholarship presented in this issue.

Importantly, we thank our authors—Carmen Cheung, Monique Cormier, Vincent Dalpé, Anna Hood, Michael Nesbitt, and Christopher K. Penny—for their astute contributions and patience with us during the editorial process.

As our tenure comes to a close, we tease you with what to expect in the future. Expect commentary on current international affairs and law, expect a more interactive and engaging format, and as always expect pioneering thought on the critical confluence of international law and international relations.

We pass JILIR into the fully capable hands of Anne-Rachelle Boulanger, Tanzeel Hakak and Per Kraut, confident that they will nurture JILIR’s ambitions and augment its performance.

Moyosore Arewa, Philip Omorogbe, and Jane Zhang
Editors-in-Chief
Every Thing Secret
CARMEN K.M. CHEUNG*


I first read the proofs for Jameel Jaffer’s The Drone Memos in the early fall of 2016. Shortly after the book’s publication and the American election, the editors of JILIR asked whether I could share my thoughts on the book in a brief reflection. Much to the consternation of the editors, these several hundred words have taken me a long time to write. This was, in part, because in the months since the election, I have often thought about Jaffer’s book and the nature of executive power. The issues raised in this book demand and deserve contemplation.

The Drone Memos is many things. It is, of course, a book about the U.S. government’s targeted killing program: a counter-terrorism strategy predicated on the killing of suspected terrorists and militants, with armed drones as the weapon of choice. It is an account of what the public knows of the program’s reach, its toll on civilians, and its (questionable) strategic efficacy. It is also a collection of the handful of legal and policy documents available to us describing the rules governing this program of extrajudicial killing. It is a story of how many of these documents came to be disclosed through the tenacious efforts of the American Civil Liberties Union, where Jaffer had served as Deputy Legal Director until last summer.

The Drone Memos is an illustration of how extraordinary practices come to be normalized, as set out through Jaffer’s narrative and the collected documents themselves. Under President Barack Obama, the drone program grew in size, scale and scope. As the program expanded, so did its administrative architecture. Extrajudicial killing—including the assassination of America’s own citizens—became part of the government’s bureaucratic machinery, involving databases, matrices, hundreds of civilian officials, and “kill lists.”

Jaffer’s book is a rumination on the reaches of executive authority, and on a polity’s faith in the discipline and character of its leaders. The targeted killing program bureaucratized by President Obama’s administration is, as Jaffer observes, “a legal regime in which executive branch actors are judge, jury and executioner,” and one which is subject to little meaningful constraint

* Carmen Cheung is a Professor of Global Practice at the Munk School of Global Affairs and a human rights lawyer.
by the legislature or the judiciary. As a result, the legitimacy of the program became inexorably linked to the character of the President and those involved in decisions concerning targeted killings. The American public tolerated—and approved of—the drone program in no small part because of its faith in President Obama as a man of integrity, surrounded and advised by men and women of similar integrity and sound judgment. Indeed, as Jaffer points out: the good character of the President and his advisors was all the public had to go on, because the secrecy surrounding the drone program was such that “Americans did not—could not—know the program’s full scope, or the legal basis for it, or its effectiveness at averting terrorist attacks, or the extent to which it had resulted in the deaths of innocents.”

Ultimately, The Drone Memos is about secrecy—the pervasive, excessive secrecy that surrounds much of national security policy and practice. It is about regulation by secret law, conduct guided by secret legal opinions by government lawyers, and policy-making based on evidence and information inaccessible to the public. While national security activities will necessarily require some secrecy, Jaffer’s account shows that government can tend towards reflexive and sometimes unnecessary secrecy.

Yet, as Lord Acton famously observed, “every thing secret degenerates.” Secrets beget secrets. Citizens become increasingly distanced from the actions that are being undertaken in their name. Representative government becomes an exercise of faith in personality.

A meaningful ability for citizens to engage in public decision-making requires meaningful access to information relevant to public decisions. This is true whether the information in question is the number of civilian casualties resulting from drone strikes, or the framework for authorizing the use of lethal force against suspected terrorists overseas, or climate change data produced by government scientists. In this moment, where the concept of “alternate facts” has entered the political lexicon and Oxford Dictionaries has declared “post-truth” to have word-of-the-year significance, it may seem that the need for public access to accurate, factual information is more urgent than ever. But access to information has always been—and always will be—critical to the exercise of democratic self-government. And so like all good historical accounts, The Drone Memos is perhaps also a reminder for the present, and a warning for the future.
I. Introduction......................................................................................................................... 5

II. ANZUS and Extended Nuclear Deterrence................................................................. 8
   1. History and Context ................................................................................................. 8
   2. Applying the Principles of Treaty Interpretation to Article IV of ANZUS ............... 12
   3. Does the Object and Purpose of ANZUS Affect the Scope of Article IV? .............. 12
   4. Are There Any “Relevant Rules of International Law” that Affect the Interpretation of Article IV? ........................................................... 22
   5. The Effect of ANZUS on Australia’s Policy of Relying on US Extended Nuclear Deterrence ............................................................................. 24

III. Australia’s Extended Nuclear Deterrence and the NPT ........................................ 26
   1. Article VI of the NPT ............................................................................................ 27
   2. Three Interpretive Approaches to Article VI ....................................................... 28
   3. Is Australia’s Reliance on Extended Nuclear Deterrence Compatible with Article VI? .................................................................................. 35
   4. Is Australia Prioritizing Extended Nuclear Deterrence at the Expense of its Article VI Obligations? .............................................................. 37

\[\text{BIntSt/LLB (Hons I) (Adelaide); LLM (Columbia); PhD Candidate and Research Fellow, Melbourne Law School.}
\[\text{BA/LLB (Hons I) (Melbourne); LLM (NYU); PhD (Melbourne); Lecturer, University of Auckland. The authors would like to thank Maria Elander, Jonathan Kolieb, Rain Liivoja, Simon McKenzie, Josh Paine and Tim Wright for their thoughtful comments on an earlier draft. Particular thanks goes to Professor Richard Tanter for sharing his expertise and for reading an earlier draft so thoroughly, to Professor Daniel Joyner for providing confirmation on some of the technical aspects of the NPT, and to Associate Professor Treasa Dunworth for her insights and ongoing support. Finally, we would like to thank Associate Professor Ian Henderson and Professor Michael Hamel-Green for the constructive feedback contained in their peer review reports. Thanks also to Professor Hamel-Green for kindly providing us with copies of the Treaty of Rarotonga preparatory materials.}
\copyright \text{2017 Journal of International Law and International Relations Vol 13 No. 2, pages 3-47. ISSN: 1712-2998.}
One of the central tenets of Australia’s defence policy is to rely on the extended nuclear deterrence of the United States (“US”). In recent years, politicians and civil society have questioned the doctrine’s compatibility with Australia’s international legal obligations but to date there has been very little academic analysis of the issue. The lack of scholarship in this area is concerning given that the legality of Australia’s reliance on US nuclear protection has significant ramifications for US-Australian relations, Australia’s national security policy and the global nuclear disarmament movement more broadly. This article explores the international legal issues that arise with respect to Australia’s policy of extended nuclear deterrence.

The first part of the article focuses on whether the Australia, New Zealand, United States Security Treaty ("ANZUS") places Australia under US nuclear protection and, if so, whether ANZUS requires Australia to maintain its policy of extended nuclear deterrence. It argues that, as currently interpreted, Article IV of ANZUS implicitly allows for the US to use, or threaten to use, nuclear weapons in defence of Australia. However, contrary to what has been asserted by an Australian politician, this state of affairs does not mean that Australia is under an obligation to maintain its policy of extended nuclear deterrence.

Having determined that ANZUS does not prevent Australia from giving up nuclear deterrence, the article then turns to examine whether the Nuclear Non-Proliferation Treaty ("NPT") or the South Pacific Nuclear Free-Zone Treaty ("Treaty of Rarotonga") require Australia to abandon its reliance on US nuclear protection. The article argues that while Australia’s policy of extended nuclear deterrence does not conflict with the terms of the Treaty of Rarotonga, Article VI of the NPT creates a more significant challenge for the policy. Article VI of the NPT requires Australia “pursue negotiations in good faith towards effective measures” relating to nuclear disarmament. While this obligation is not necessarily incompatible with extended nuclear deterrence, Australia’s entrenched opposition to a global nuclear ban treaty casts doubt on Australia’s commitment to the NPT.
I. INTRODUCTION

For a number of decades a central tenet of Australia’s defence policy has been to rely on United States (“US”) extended nuclear deterrence. The precise definition of “extended nuclear deterrence” varies in different contexts.\(^1\) However, in the US-Australian context it refers to the idea that in the event of a nuclear attack on Australia, the US would use, or threaten to use, nuclear weapons in defence of Australia.\(^2\) The rationale behind extended nuclear deterrence is that the knowledge that the US may use nuclear weapons to defend Australia will deter other states from using such weapons against Australia.\(^3\)

Australia’s reliance on extended nuclear deterrence has long been controversial and has attracted significant attention from political scientists, international relations specialists, civil society and the media.\(^4\) Questions have been raised, \textit{inter alia}, about the origins, the scope, and the wisdom of the policy, and whether the US has in fact consented to the policy.\(^5\) However, for most of the policy’s history, few questions have been raised about its legality and in particular the extent to which it is compatible with Australia’s international legal obligations. This has recently begun to change as efforts to rid the world of nuclear weapons have intensified.\(^6\)

\(^1\) In some contexts, extended nuclear deterrence involves the deployment of foreign nuclear weapons to allied states and nuclear sharing arrangements. For the purposes of this article, it refers to one state being prepared to use, or threaten to use, nuclear weapons in defence of another state. See Richard Tanter, “Just in Case: Extended Nuclear Deterrence in the Defense of Australia” (2011) 26 Pacific Focus 113 at 115-121 [Just in Case].

\(^2\) Ibid at 117-121; Australia, Department of Defence, Australia’s Strategic Policy (Canberra: 1997).


\(^5\) Ibid.

\(^6\) The UN General Assembly hosted a High Level Meeting on Nuclear Disarmament in September 2013; in 2013 and 2014 Norway, Mexico and Austria hosted multilateral conferences on the humanitarian consequences of using nuclear weapons; and in March 2017 multilateral negotiations began towards a global treaty to ban nuclear weapons. In addition to these state-based actions numerous civil society organisations have launched campaigns to push for nuclear disarmament.
Over the last few years, as part of the international efforts to achieve nuclear disarmament, civil society organisations have put pressure on the Australian government to abandon its policy of relying on US extended nuclear deterrence,\(^7\) and have suggested that Australia may be legally obliged to give up this policy pursuant to the nuclear disarmament obligations in the Nuclear Non-Proliferation Treaty (“NPT”)\(^8\) and the South Pacific Nuclear-Free Zone Treaty (“Treaty of Rarotonga”).\(^9\) To date the Australian government has refused to entertain the idea of abandoning its reliance on US nuclear protection. In support of this position it has claimed that not only is Australia permitted to rely on extended nuclear deterrence under international law but that Australia’s obligations under the Australia, New Zealand, United States Security Treaty (“ANZUS”))\(^10\) implicitly require it.\(^11\) Indeed in 2013, Australia’s then foreign minister, Bob Carr, stated that the only way that Australia could discard US nuclear protection would be to withdraw from ANZUS or negotiate an amendment to it because the treaty “implies nuclear protection for Australia in the event of a nuclear threat to Australia”.\(^12\) However, the idea that Australia is under an obligation to maintain the policy of extended nuclear deterrence and remain under US nuclear protection is far from self-evident. There is nothing on the face of ANZUS that suggests the treaty allows for, let alone requires, extended nuclear deterrence and no explanation has ever been offered as to how the treaty may require Australia to maintain the policy.\(^13\) The lack of certainty surrounding Australia’s policy is in stark contrast to the explicit assurances that the US has made to other states that enjoy US nuclear protection. For example, throughout the history of the North Atlantic Treaty Organisation (“NATO”), the US has explicitly guaranteed that it would use

---


10. Security Treaty between Australia, New Zealand and the United States of America, 1 September 1951, 131 UNTS 83 (entered into force 29 April, 1952) [ANZUS].

11. Australia’s Strategic Policy, supra note 2; Defending Australia in the Asia Pacific Century, supra note 3. See also comments by Senator Bob Carr when he was the Minister of Foreign Affairs under the previous Labor government: Commonwealth, Parliamentary Debates, Senate Standing Committee on Foreign Affairs, Defence and Trade Legislation (Estimates), 6 June 2013 at 34 (Senator B Carr, Minister for Foreign Affairs) (Austl).

12. Commonwealth, Senate Standing Committee, supra note 11 at 34.

nuclear weapons to defend other NATO states if necessary, and since the 1950s, it has made similar assurances to Japan.\textsuperscript{14}

To date, very little legal analysis has been conducted on extended nuclear deterrence\textsuperscript{15} and as a result there is significant ambiguity about the limits of such policies and how they interact with international treaty regimes. This article seeks to alleviate the uncertainty that has been generated by the competing arguments over the legality of Australia’s reliance on US extended nuclear deterrence under international law. In order to do this, it explores the compatibility of extended nuclear deterrence with Australia’s legal obligations under ANZUS, the Treaty of Rarotonga, and the NPT.\textsuperscript{16}

The article begins in Part II by analysing whether ANZUS places Australia under US nuclear protection and, if so, whether ANZUS then requires Australia to maintain its policy of extended nuclear deterrence. We argue that while it is unlikely that ANZUS placed Australia under US nuclear protection when it first entered into force, subsequent practice over the last two to three decades suggests that today ANZUS can be interpreted as allowing the US, in very limited situations, to use or threaten to use nuclear weapons in defence of Australia. Thus ANZUS does place Australia under US nuclear protection. Importantly, however, this state of affairs does not necessarily lead to the conclusion that ANZUS legally obliges Australia to maintain its policy of extended nuclear deterrence.

In Part III we examine whether it is possible for Australia to uphold its policy of relying on US nuclear protection while still fulfilling its obligations under the NPT. Part III begins with an analysis of the NPT, identifying Article VI as a provision that potentially conflicts with Australia’s reliance on extended nuclear deterrence. Specifically, we explore whether Australia’s obligation in Article VI to “pursue negotiations in good faith on effective measures relating to … nuclear disarmament” is compatible with its policy of extended nuclear deterrence. We argue that under the prevailing interpretation of Article VI, Australia’s reliance on US nuclear protection does not in and of itself breach the NPT. However, Australia’s entrenched opposition to a global nuclear ban

\textsuperscript{14} Tanter, Just in Case, supra note 1 at 117.

\textsuperscript{15} An important exception to this is Michael Hamel-Green, “Nuclear umbrella or nuclear-free? Australia’s disarmament dilemma”, International Law and Policy Institute Nuclear Weapons Project, Background Paper No. 8, (June 2014), online: <ilpi.org/publications/nuclear-umbrella-or-nuclear-free>. See also a report by the Netherlands Institute of International Relations that explores whether the Netherlands has an obligation to maintain its nuclear deterrence policies under NATO agreements. See Onur Güven and Sico van der Meer, “A treaty banning nuclear weapons and its implications for the Netherlands”, Clingendael, the Netherlands Institute of International Relations, Policy Brief, (12 May 2015), online: <www.clingendael.nl/sites/default/files/A%20treaty%20banning%20nuclear%20weapons%202015.pdf>.

\textsuperscript{16} NB. There may be other international obligations that could affect the legality of Australia’s policy. However, these are the most relevant international instruments to which Australia is party, and given space constraints, this article is limited to a discussion of these three treaties.
treaty and its recent boycott of multilateral negotiations means that Australia is likely in breach of Article VI.

Part IV examines whether Australia can maintain its reliance on extended nuclear deterrence while remaining in compliance with its obligations under the Treaty of Rarotonga. We contend that there is nothing in the treaty itself that legally precludes Australia from continuing to rely on US nuclear protection, but that Protocol II to the treaty likely imposes restrictions on the ability of the US to use, or threaten to use, nuclear weapons in defence of Australia.

Ultimately we conclude that there is nothing in ANZUS that would legally prevent Australia from abolishing its reliance on US extended nuclear deterrence and that, because of its obligations under Article VI of the NPT, Australia must reconsider its attitude towards current global attempts to negotiate towards nuclear disarmament. As part of this it may well need to forgo its reliance on US nuclear protection. It is worth noting that although the legal analysis in the article focuses on Australia as a specific case study, many of the issues raised and conclusions drawn (especially in relation to the NPT) are applicable to other states that rely on US extended nuclear protection.

Researching the legality of Australia’s policy of extended nuclear deterrence has made us think about issues beyond the substantive questions of law we were directly analysing. In particular we have thought a lot about and questioned the role of international law in discussions about Australia’s policy on extended nuclear deterrence and our role as lawyers intervening in these discussions. In a postscript to the article, we set out some of our reflections on these matters.

II. ANZUS AND EXTENDED NUCLEAR DETERRENCE

1. History and Context

Before turning to look at whether ANZUS implies nuclear protection for Australia, it is helpful to provide some background information about the nature and scope of this treaty. ANZUS was signed by Australia, New Zealand and the US on 1 September 1951 and entered into force seven months later on 29 April 1952. The treaty sought to consolidate and strengthen military cooperation amongst the three states parties. It set out a number of vaguely worded commitments that each state party was obliged to undertake including developing their individual and collective capacity to resist attack; consulting one another in the event that their territorial integrity, political independence or security were threatened; and acting to defend other states parties in the event that they suffered an armed attack. In 1984, New Zealand and the US had a serious dispute about the scope of the treaty and whether it required

17. ANZUS, supra note 10 at art II.
18. Ibid at art III.
19. Ibid at art IV.
New Zealand to allow US nuclear-powered ships to enter its ports.\textsuperscript{20} The two states were unable to resolve the dispute and as a result the US suspended its obligations to New Zealand in 1986.\textsuperscript{21} Consequently, today ANZUS no longer remains operational between New Zealand and the US.\textsuperscript{22}

Prima facie, the idea that ANZUS places Australia under US nuclear protection seems far-fetched. There is nothing on the face of the treaty that suggests that Australia is subject to US extended nuclear deterrence. The words “extended nuclear deterrence” do not appear in the treaty; in fact, there is no reference to nuclear weapons at all in the text. In order to determine whether the treaty implies nuclear protection for Australia, it is necessary to go beyond a cursory examination of the text and analyse whether any of the treaty’s articles give rise to an implication that Australia is under the nuclear protection of the US.

One provision that could potentially give rise to such an implication is Article IV.\textsuperscript{23} The first paragraph of Article IV says:

Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.


\textsuperscript{22} It should be noted that in the last couple of years the relationship between New Zealand and the US has improved considerably. This has been demonstrated by the Washington Declarations of 2010 and 2012. However, despite the general relationship improving, the ANZUS treaty relationship between New Zealand and the United States has not, at this stage, been revived. See, Graeme Dobell, Kiwi and Kangaroo (Part III): The ANZUS Resurrection (Australian Strategic Policy Institute, 2013), online: <http://www.aspistrategist.org.au/kiwi-and-kangaroo-part-iii-the-anzus-resurrection/>; Wayne Mapp, The New Zealand Paradox: Adjusting to the Change in Balance of Power in the Asia Pacific Over the Next 20 Years 8 (Centre for Strategic and International Studies, 2014), online: <http://csis.org/files/publication/140425_Mapp_NewZealandParadox_Web.pdf>.

\textsuperscript{23} North Atlantic Treaty, art V, opened for signature 4 April, 1949, 34 UNTS 243 (entered into force 24 August, 1949), contains a very similar provision which has been interpreted to allow the use, or threat of use, of nuclear weapons by nuclear weapons states parties to the treaty in defence of other states parties. Given the similarity between Article IV of ANZUS and Article V of the North Atlantic Treaty, it makes sense to investigate whether Article IV of ANZUS gives rise to the right to use, or threaten to use, nuclear weapons as Article V of the North Atlantic Treaty does. It cannot, however, automatically be assumed that Article IV should be interpreted in the same way as Article V of the North Atlantic Treaty as the two treaties have slightly different wording as well as different negotiating histories and they are subject to different subsequent agreements and practice.
The way that Article IV could potentially imply nuclear protection for Australia is if it permits the US to use, or threaten to use, nuclear weapons in defence of Australia.

Precisely how Article IV operates legally has not been thoroughly discussed in the literature since J G Starke’s 1965 book *The ANZUS Treaty Alliance*. In his book, Starke asserted that Article IV enables a state party to determine unilaterally when another state party had suffered an armed attack and to decide what (if any) action it should take in response.\(^{24}\) He supported this idea by noting that there is nothing in the Article to suggest that a state party must consult with other states parties, the ANZUS Council or another body such as the United Nations ("UN") Security Council when deciding whether an armed attack has occurred.\(^{25}\) Further, he argued that Article IV is modelled on the inherent right of self-defence in Article 51 of the UN Charter, which entitles each UN member state to judge for itself when an armed attack has occurred against another state.\(^{26}\)

He justified his argument that a state party has discretion to determine what sort of action to take, when acting under Article IV, without consulting other states parties or international bodies by pointing to the lack of a reference to a need to consult with other states parties or organs. The significance of this lack of reference to consultation in Article IV is heightened by the fact that Article III contains a requirement that states parties consult with one another when a state’s territorial integrity, political independence or security is threatened.\(^{27}\) A further reason why Starke said that Article IV does not require a state to consult with others before taking action was that Article V of the North Atlantic Treaty, which closely reflects Article IV of ANZUS, is interpreted to allow states parties to act to defend another state party without consultation about the measures they invoked.\(^{28}\)

While Starke’s analysis of Article IV was sound in 1965, the law of collective self-defence has developed over the last 50 years and the rules of treaty interpretation require Article IV to be read in light of these developments.\(^{29}\)

\(^{24}\) J G Starke, *The ANZUS Treaty Alliance* (Victoria: Melbourne University Press, 1965) at 129-130. It is also worth noting that ANZUS has only been invoked once in its history. Australia invoked it on 14 September 2001 after the 9/11 terrorist attacks in the US, to indicate its willingness to consult with US authorities about Australian support of any US response to the attacks.

\(^{25}\) *Ibid* at 124.

\(^{26}\) *Ibid* at 117, 124.

\(^{27}\) Starke notes that states may consult when acting under Article IV but Article III creates an obligation for them to negotiate. *Ibid* at 109.

\(^{28}\) *Ibid* at 130.

\(^{29}\) This is required by *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 art 31(3)(c) (entered into force 27 January 1980) [VCLT] and *ANZUS*, *supra* note 17 at art VI. Further it should be noted that if there is any inconsistency between Article IV of ANZUS and the collective self-defence rights in *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI art 51 (entered into force 24 October 1945) [UN Charter], the obligations in Article 51 of the UN Charter would prevail pursuant to Article 103 of the UN Charter.
Today it is no longer the case that Article 51 of the UN Charter entitles UN member states to determine that another UN member state has suffered an armed attack and respond on their own accord. Rather, the victim state must first declare that it has suffered an armed attack and request assistance. This position has been put forward by the International Court of Justice (“ICJ”) and is supported by state practice. If Article IV of ANZUS is interpreted in accordance with these procedural requirements then the US would only be able to come to the defence of Australia if Australia declared the existence of an armed attack and asked the US to help.

While under this interpretation the US can only act in defence of Australia if Australia first requests help, there is nothing in the law of collective self-defence that suggests that once it has been invited to defend Australia, the US can only take measures that have been authorised by Australia. What this means for Article IV of ANZUS is that once Australia has identified the existence of an armed attack and requested assistance from the US, the US has broad discretion to decide what actions to take. What must be determined are the legal limits on the way the US can exercise its discretion when acting under Article IV. Specifically, it is necessary to ascertain whether there are any legal limits that would prevent the US from using, or threatening to use, nuclear weapons in defence of Australia. If there are not, then it would follow from this state of affairs that ANZUS provides nuclear protection for Australia, at least in certain circumstances.

Having regard to the text of ANZUS, it appears that there are no explicit limits on the sort of action a state may decide to take when acting under Article IV. It is uncontentious that permissible actions include diplomatic actions, economic sanctions and conventional military action, and, prima facie, there appears to be no reason why the action that the US takes could not also

31 The International Court of Justice put forth these procedural requirements in relation to the customary right of collective self-defence in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)*, Judgment [1986] ICJ Rep 14 at para 199. There has been debate about whether the Court in that case was in fact saying that these requirements must be followed (see Gray, *supra* note 30 at 185-186). However, in *Oil Platforms (Islamic Republic of Iran v US)*, Judgment [2003] ICJ Rep 161 at para 51, the Court noted that the procedural requirements it had specified in *Nicaragua v US* were indeed required for the exercise of collective self-defence. Although the procedural requirements put forward by the ICJ were in relation to the customary right of collective self-defence, and not Article 51 of the UN Charter, it is widely accepted that the procedural requirements also apply to Article 51.
32 Although it should be noted that questions have arisen as to how genuine requests for help have been. Gray, *supra* note 30 at 186-187.
33 Starke, *supra* note 24 at 130; Chinkin, *supra* note 20 at 120, citing The Honourable Bill Hayden, Address (Rotary Club of Brisbane Mid-City, 21 February 1986) [unpublished]; Starke, *supra* note 24 at 130.
include the use, or threat of use, of nuclear weapons. Treaty interpretation, however, requires more than a textual analysis of the provision in question. Part B undertakes a systematic examination of Article IV of ANZUS through the lens of the principles of treaty interpretation.

2. Applying the Principles of Treaty Interpretation to Article IV of ANZUS

The principles of treaty interpretation require that, when interpreting a treaty term, regard must not only be had to the text of the treaty and the ordinary meaning of its terms in their context but also to its object and purpose; any subsequent practice or subsequent agreement between the states parties to the treaty; and international legal obligations by which the states parties are bound. All three of these principles of treaty interpretation have the potential to affect the scope of Article IV and will be analysed in turn.

3. Does the Object and Purpose of ANZUS Affect the Scope of Article IV?

The object and purpose of ANZUS could affect the scope of Article IV if it revealed that ANZUS was intended to be a conventional defence treaty and not a nuclear defence or nuclear deterrent treaty. If the object and purpose of establishing ANZUS was to set up a conventional defence treaty, then it would make sense to conclude that, when the treaty was opened for signature in 1951, Article IV was meant to be read in a way that precluded the use, or threat of use, of nuclear weapons.

Precisely what the object and purpose of ANZUS is, and whether it was meant to be a conventional defence treaty only, is unclear from the text of

---

34. Indeed, Starke asserts that, providing the use or threat of nuclear weapons complies with other relevant international laws, it would be permitted under Article IV; Starke, supra note 24 at 131, 229. See also Chinkin, supra note 20 at 120.
35. VCLT, supra note 29 at arts 31-32. Although the VCLT entered into force in 1980, nearly three decades after ANZUS, it can be applied to interpret ANZUS because Articles 31 and 32 of the VCLT codified the customary principles of treaty interpretation: Kasikili/Sedudu Island (Botswana v Namibia), Judgment, [1999] ICJ Rep 1045 at 1059; Richard Gardiner, Treaty Interpretation (Oxford: Oxford University Press, 2010) at 7. This also means that the US, which has signed but not ratified the VCLT, is nevertheless bound by the customary principles of treaty interpretation as reflected in Articles 31 and 32.
36. VCLT, supra note 29 art 31(1).
37. Ibid at art 31(3)(a)-(b).
38. Ibid at art 31(3)(c).
39. It should be noted that in practice what action (if any) the US decides to take in response to an armed attack on Australia is likely to depend on a range of policy, diplomatic and political matters in addition to any legal limits.
40. Conventional defence treaties refer to treaties that are only concerned with the use of conventional weapons for defence. Nuclear defence and nuclear deterrent treaties refer to treaties that are concerned with the use of nuclear weapons for defence or deterrent purposes either exclusively or in addition to conventional weapons.
the treaty itself and has been the subject of debate amongst politicians and scholars. The preamble of the treaty suggests that its purpose is to “strengthen the fabric of peace in the Pacific Area” and to “coordinate efforts for collective defence for the preservation of peace and security”. This provides little indication as to whether the treaty was meant to be merely a conventional one. Given it is not possible to discern the precise parameters of the treaty’s object and purpose from these words, it is permissible to have regard to the preparatory documents that were exchanged between the parties when the treaty was being drafted to see whether they shed any light on its object and purpose.

We have read through a large number of the publicly available diplomatic documents that were exchanged between Australia, New Zealand and the US during the drafting stages of ANZUS. There is no suggestion in these documents that the purpose of the treaty was to create a nuclear defence or deterrent pact. There is no reference at all to nuclear weapons and it appears from the documents that while the three states were motivated to create ANZUS by different concerns, none of those concerns centred on nuclear issues. Australia and New Zealand had been seeking a Pacific defence treaty since the mid-1930s. After World War II, the desire for such a treaty grew. Both states were concerned that their traditional alliances with Britain would be insufficient to guard against future attacks, and felt an alliance with the US was essential for protecting their security and providing them with a voice in global affairs. Additionally, they were very concerned about the resurgence of Japan in the early 1950s and wanted a guarantee from the US that it would protect them from future Japanese aggression. Further, both Australia and New Zealand were conscious of the fact that if a conflict broke out in other parts of the world in the future and they committed troops or resources to that conflict, they would be left very vulnerable on the home front.

41. See, e.g., Chinkin, supra note 20 at 121; Thomas Daughton, “The Incompatibility of ANZUS and a Nuclear-Free New Zealand” (1985-1986) 26:2 Va J Intl L 455 at 465-466.
42. VCLT, supra 29 art 32.
43. “The 1951 ANZUS Treaty—Volume 21”, Australian Department of Foreign Affairs and Trade, online: <http://dfat.gov.au/about-us/publications/historical-documents/Pages/volume-21/the-1951-anzus-treaty-volume-21.aspx>. NB. We do not claim that our searches have been exhaustive. It is possible that preparatory documents we have not reviewed refer to the use, or threat of use, of nuclear weapons within the ANZUS framework. However, the results of our searches correlate with those of other searches undertaken by scholars over the last 60 years.
44. Starke, supra note 24 at 4.
45. Ibid at 62-63; Richard G Casey, Australian Minister for External Affairs, Opening Speech at the First Meeting of the ANZUS Council, Honolulu (4 August 1952).
46. Australian Department of Foreign Affairs and Trade, (No 23, 24, 26), supra note 43.
47. Starke, supra note 24 at 68; Chinkin, supra note 20 at 118; Australian Department of Foreign Affairs and Trade, (No 20, 21, 31, 67, 71), supra note 43.
48. See Philip Dorling, “The Origins of the ANZUS Treaty: A Reconsideration” (Flinders Politics Monographs, No. 4, 1989); Australian Department of Foreign Affairs and Trade, (No 7, 20,
In contrast, the US had long been reluctant to enter a formal defence agreement with either state. This changed, however, at the very beginning of the 1950s for a number of non-nuclear related reasons. First, the US was determined to get Australia and New Zealand to sign the Japanese Peace Treaty and it was clear that neither state would do so without some form of formal security guarantee from the US. Second, the Korean War had begun and the US was acutely aware that it could not face such conflicts without the support of states such as Australia and New Zealand. Finally, fears of the expansion of communism meant the US was keen to strengthen its alliance networks.

One scholar has suggested that given ANZUS was concluded at the dawn of the nuclear age, when the US and the Soviet Union had both exploded nuclear weapons and the US was beginning to craft its global nuclear deterrent strategy, that it must have been in the parties’ minds that this treaty could operate as part of a global nuclear deterrent strategy. However, there is no information in the thousands of pages of preparatory documents to support this view. It is of course possible that there are classified documents from the period when ANZUS was being drafted that show that ANZUS was intended to be a nuclear deterrent treaty. However, without evidence that such documents exist, let alone access to them or knowledge of their content, such speculation does not advance the enquiry.

So what conclusions can be drawn from the evidence that is available? On one reading of the information, the fact that the parties did not discuss the use, or threat of use, of nuclear weapons or the idea of nuclear deterrence in the preparatory documents is of little consequence. It could be concluded that the object and purpose of ANZUS was to create a general treaty to protect the Pacific Area and it was intended that the parties could use whatever means they wanted to achieve this. On a different reading, however, the lack of reference to nuclear weapons and nuclear deterrence could be interpreted to suggest that the parties intended to create a conventional defence treaty only. This conclusion is supported by the statements of a number of politicians and scholars over the years. For example, during the dispute about US nuclear-powered ships accessing New Zealand ports in the 1980s, the New Zealand Prime Minister of the time, David Lange, insisted that ANZUS was intended

---

49. Chinkin, supra note 20 at 118.
50. Dorling, supra note 48 at 1; Australian Department of Foreign Affairs and Trade, (No 67), supra note 43.
51. Dorling, supra note 48 at 1-2.
52. Chinkin, supra note 20 at 118; Australian Department of Foreign Affairs and Trade, (No. 1), supra note 43.
53. Daughton, supra note 41 at 465-466.
54. The possibility that such classified documents exist has been raised in Lyon, supra note 4.
to be a conventional defence treaty; not a nuclear one. Additionally scholars such as J G Starke and Christine Chinkin have stated that they believe the preparatory documents show the treaty was intended to be conventional only. In our view, this interpretation is more persuasive, and it is likely that ANZUS was intended to be a conventional treaty when it was first concluded. This means that when ANZUS was opened for signature in 1951, Article IV would have been read to allow the use, or threat of use, of conventional weapons but not nuclear ones. Under this interpretation, ANZUS would not have implicitly offered Australia nuclear protection at this point in time.

a. Are there any Subsequent Agreements or Subsequent Practice that have Altered the Scope of Article IV Since 1952?

While it is possible to conclude that ANZUS did not place Australia under US nuclear protection in 1952, as noted above, the VCLT states that in addition to considering the text of the treaty and its object and purpose, it is necessary to look at any subsequent agreement or subsequent practice between the states parties to a treaty that may affect the meaning of a treaty’s terms. If there was:

a. some form of subsequent agreement or subsequent practice between Australia, New Zealand and the US before the alliance between New Zealand and the US collapsed in the 1980s that indicated that the US would extend nuclear protection to Australia and New Zealand because of the ANZUS alliance; or

b. some form of subsequent agreement or subsequent practice between Australia and the US after this time that demonstrated the US would offer nuclear protection to Australia alone because of its ANZUS obligations,

then it would no longer be possible to read Article IV down to preclude the US from using, or threatening to use, nuclear weapons. Rather, it would be necessary to conclude that the scope of the Article has expanded to include the use, or threat of use, of nuclear weapons. This section explores first whether there have been any subsequent agreements, and second whether there has been any subsequent practice, that have changed the scope of Article IV in this way.

55. In a speech he gave in Los Angeles in 1985 Lange declared, “Unlike NATO, the ANZUS Alliance has in the past been regarded by the Treaty partners as a conventional alliance, not a nuclear alliance”. David Lange, Speech delivered to “The New Zealand Connection” (Los Angeles, 26 February 1985). Reprinted in (1985) 35 NZ Foreign Aff Rev 3 at 5.

56. This conclusion is supported by Christine Chinkin who has written that “it can be argued that [ANZUS] was framed as a conventional treaty”; Chinkin, supra note 20, at 121. See also, Christine M Leah, *Australia and the Bomb*, 1st ed (New York, NY: Palgrave Macmillian, 2014) at 5.
b. Have There Been any Subsequent Agreements That Have Changed the Scope of Article IV?

Subsequent agreements are agreements made between the states parties after a treaty has been concluded, that provide information about how the parties intend to interpret a treaty provision. They can be formally binding treaties but need not be. They can also include informal written agreements (such as those recorded in memoranda of understanding and meeting minutes), oral agreements and a “series of…communications from which an agreement can be inferred”. In determining whether there have been any subsequent agreements that have changed the scope of Article IV, it is helpful to consider separately whether any such agreements existed in the period prior to New Zealand leaving the alliance and whether any such agreements emerged after this time.

i. Was There a Subsequent Agreement During the Period that Australia, New Zealand and the US Were All Actively Involved in ANZUS?

It is difficult to identify the existence of a subsequent agreement which sets out the meaning of Article IV amongst the original ANZUS states parties prior to the mid-1980s. As far as we are aware, there has never been a formal or informal written agreement between the states parties that sets out the meaning of the Article or suggests that it permits the US to use, or threaten to use, nuclear weapons. Further, there is no evidence that there were a series of communications or discussions between the states parties about the scope of Article IV prior to the departure of New Zealand from the alliance.61

ii. Has There Been a Subsequent Agreement Since the Alliance Between New Zealand and the US Collapsed in the Mid-1980s?

There is one piece of information that suggests there may have been a subsequent agreement between the US and Australia in more recent times.

---

58. Ibid at 118.
60. Ibid at 199-200.
61. It is possible that such evidence exists and we have not come across it or it is not publicly available. In his 1965 book J G Starke stated that “it can be taken that the parties have tacitly agreed that the United States is entitled to use the deterrent by way of defensive response to an ‘armed attack’ upon any ANZUS party in the Pacific, within the meaning of article IV of the Treaty” (Starke, supra note 24 at 229). However, Starke fails to explain how he concluded that there was a tacit agreement amongst the parties and without more information it is difficult to endorse his conclusion.
It comes from information provided by Hugh White, the Deputy Secretary for Strategy in the Department of Defence between 1995 and 2000, to the Australian Parliamentary Joint Standing Committee of Foreign Affairs, Defence and Trade in 2004. In a statement to the Committee, White testified that in the lead up to writing the 2000 Defence White Paper, he had had “explicit discussions with US officials” to the effect that the US “would threaten nuclear retaliation against a country that attacked Australia with nuclear missiles”. As noted above, it is possible for oral discussions to amount to subsequent agreements. However, there are two uncertainties surrounding the discussions White had that make it difficult to determine definitively that they amount to a subsequent agreement which alters the interpretation of Article IV. First, in order for an exchange to amount to a subsequent agreement, it must have been conducted by persons with the authority to make binding agreements on behalf of the states involved. In this case, there is no information about what positions the US officials who made these statements held or whether they possessed the requisite authority. Second, for the exchange to amount to a subsequent agreement about the interpretation of Article IV, it would be necessary to have information showing that it took place in the context of interpreting Article IV, or at the very least ANZUS. Without such information, it cannot be concluded that the discussions provide evidence of a subsequent agreement about the meaning of Article IV.

c. Has There Been Subsequent Practice to Change the Scope of Article IV?

Subsequent practice consists of acts or communications from states parties that “establish a discernible pattern implying the agreement of the parties regarding [the treaty’s] interpretation”. Generally, subsequent practice only arises from states undertaking actions in furtherance of their treaty obligations; mere pronouncements or statements about what states think a treaty provision means are not alone deemed sufficient. However, pronouncements or statements can amount to subsequent practice where they are linked to the actions of a state or they amount to an articulation of a policy that will be implemented by a state. This is important in the context of Article IV of ANZUS as there has never been an opportunity where it may have been appropriate for the US to use, or threaten to use, nuclear weapons in defence

---

63. Gardiner, supra note 57 at 218.
65. Gardiner, supra note 57 at 227.
66. Ibid.
of Australia. Consequently, it is impossible to distil subsequent practice from actions states have taken in carrying out Article IV. However, it may be possible to identify subsequent practice arising from policy pronouncements such as statements the Australian government has made in its Defence White Papers.

It is necessary for subsequent practice to consist of a plurality of acts as opposed to one isolated incident; that is, there must be a consistency in the practice over a period of time. Further, subsequent practice must be concordant and common but not all states parties have to engage actively with the practice. Rather, subsequent practice can emerge from the actions or pronouncements of just one state party providing the other states parties to the treaty assent or acquiesce to it. Acquiescence can occur by a state simply not dissenting to the actions or pronouncements of another state party. It is important to note though that not all failures to dissent will amount to acquiescence. For example, if one state expresses an opinion in a circumstance that does not warrant a reaction from another state, the silence of the second state cannot be said to constitute acquiescence. However, where one state’s action or pronouncement is “in plain view for a long time” or brought to the attention of another state party “where it is clear that the circumstances were such as called for some reaction, within a reasonable period”, then a failure to react or respond will be understood as acquiescence.

i. Was There Subsequent Practice During the Period That Australia, New Zealand and the US Were All Actively Involved in ANZUS?

It is hard to find evidence of subsequent practice that alters the meaning of Article IV from the period when all three states were actively involved in the treaty. It is apparent from statements made by some Australian diplomats during the Cold War that at times Australia assumed ANZUS provided it with nuclear protection. However, it is highly questionable whether these

---

68. Ibid at 200; Gardiner, supra note 57 at 227.
69. Roberts, supra note 59 at 200.
71. Ibid at 192-193.
74. For example, at the time that the NPT was being negotiated Australia was concerned that if it signed the NPT it would no longer be allowed to pursue its own nuclear weapons programme. This led to discussions amongst Australian diplomats about whether Australia could be assured of nuclear protection under ANZUS. Some were of the view that Article IV of ANZUS clearly provided Australia with nuclear protection. For example, in a cable from Arthur Tange to the
statements amount to articulations of policy. Further, the significance of these statements is undermined by the fact that other documents and statements from this time reveal a level of uncertainty as to whether Australia did enjoy US nuclear protection. For example, a cable from the then Australian Ambassador to the US, Keith Waller, on 29 November 1967, expresses doubt as to whether Australia can rely on American nuclear deterrence, and a document from 26 March 1971 states that Australia “cannot rely on the US nuclear umbrella. We may find it imperative at some future time to have our own nuclear deterrence against for instance a possible Chinese attack”. Further, in an article published in 2003, former Defence Minister Kim Beazley affirmed that between the 1960s and 1980s Australia was unable to get the US to confirm that Australia was in fact under US nuclear protection.

Even if it were possible to conclude that Australia believed ANZUS provided a guarantee of nuclear protection during this time, for subsequent practice to be established it is necessary for the other states parties to agree with Australia’s position and this is very difficult to ascertain. Our research, and that of others, suggests that during this period, no US official made a statement that Article IV (or ANZUS more generally) entitled the US to use nuclear weapons in defence of the other treaty partners. In 1969, Richard Nixon set forth what became known as the Nixon Doctrine which provided that the US “shall provide a shield if a nuclear power threatens the freedom of a nation allied with us or of a nation whose survival we consider vital to our security”. However, this Doctrine cannot be read as an interpretation of Article IV of ANZUS. It was a very general policy statement that provided nuclear protection to all of the US’ allies. No mention was made of ANZUS in the statement let alone the idea that the US commitment grew out of

Department of External Affairs on 18 August 1967, Tange explained that he had been asked by an Indian politician whether Australia had a nuclear guarantee from the US. In response, Tange “described Article IV of the ANZUS Treaty which did not go beyond an undertaking by the United States to ‘act’ according to its constitutional processes” and said that “Australia had considerable confidence in this generalised language”. See Wayne Reynolds and David Lee eds, Documents on Australian Foreign Policy: Australia and the Nuclear Non-Proliferation Treaty, 1945-1974 (Canberra: Department of Foreign Affairs and Trade, 2013) at 152.

75. Ibid at 157-158.
76. Ibid at 303.
78. Tanter, Just in Case, supra note 1 at 121. See also Früling, supra note 4 at 25-7. It is possible that such statements were made. If evidence of such statements emerges then different conclusions could be drawn.
any obligations it had under the treaty.\textsuperscript{80} It could potentially be argued that the silence of the US during the first four decades of the treaty’s existence could be read as acquiescence to Australia’s belief that Article IV gave rise to nuclear protection. However, given the Australian position was so uncertain during this period, it is problematic to infer that the US’ silence amounted to acquiescence to this interpretation of ANZUS.

It is even harder to determine that New Zealand believed that Article IV of ANZUS gave rise to nuclear protection during this time. In fact, far from agreeing that the treaty permitted the US to use nuclear weapons in defence of its treaty partners, New Zealand at times vehemently denied that the alliance was a nuclear one as evidenced by the quotation from David Lange in Part B(1) above.\textsuperscript{81}

\begin{itemize}
\item[ii.] Has There Been Subsequent Practice Since the Alliance Between New Zealand and the US Collapsed in the Mid-1980s?
\end{itemize}

While it is not possible to identify consistent practice amongst the ANZUS states parties during the first four decades of the treaty’s existence which shows that Article IV permitted the use, or threat of use, of nuclear weapons, the situation changed after New Zealand left the alliance. According to Beazley:

\begin{quote}
Two decades of struggle to get the United States to clarify its extended deterrence guarantee to Australia was replaced with the cheerful Australian assumption that no enemy of Australia’s could guarantee the United States would not aid its Antipodean ally, and that would do.\textsuperscript{82}
\end{quote}

Indeed, from the early 1990s onwards, Australia began to assert publicly in its Defence White Papers that ANZUS provided Australia with nuclear protection from the US. The first iteration of this idea was in the 1994 Defence White Paper. The White Paper stated, “[w]e will continue to rely on the extended deterrence of the US nuclear capability to deter any nuclear threat or attack on

\textsuperscript{80} Moreover, it is unclear whether Australia believed that the Nixon Doctrine provided nuclear protection to Australia. In 1971 the Minister for External Affairs William McMahon and then Leader of the Opposition, Gough Whitlam, both stated in parliament that they believed the Nixon Doctrine did place Australia under US nuclear protection (See Commonwealth of Australia, House of Representatives, Official Hansard, 27th Parl, 2nd Sess, No 12 (19 March 1970) at 679 (William McMahon); Commonwealth of Australia, House of Representatives, Official Hansard, 27th Parl, 2nd Sess, No 15 (7 April 1970) at 751 (Gough Whitlam). However, there is evidence that the Prime Minister of the day, John Gorton was less certain of this guarantee. For example, Gough Whitlam stated that “the Prime Minister did his best to cast doubts on the guarantee.” Further, doubts persisted in the following decades about whether Australia was in fact under US nuclear protection. See Beazley, supra note 77 at 329.

\textsuperscript{81} See also, Leah, supra note 56 at 81.

\textsuperscript{82} Beazley, supra note 77 at 329.
Australia”.83 This statement was followed by similar assertions in subsequent Defence White Papers. There was a statement in the 1997 Defence White Paper that the ANZUS “alliance does provide a clearer expectation of US support […] against nuclear attack”,84 a statement in the 2000 Defence White Paper that “Australia relies on the extended nuclear deterrence provided by US nuclear forces to deter the remote possibility of any nuclear attack on Australia”85 and a statement in the 2009 Defence White Paper that ANZUS “means that, for so long as nuclear weapons exist, we are able to rely on the nuclear forces of the United States to deter nuclear attack on Australia”.86

In the 20 years that Australia has been clearly and publicly interpreting ANZUS as providing Australia with nuclear protection, the US has not commented publicly on these statements. While it has not endorsed the statements, it has also not refuted them or claimed that they are without foundation. Can the silence of the US in the face of repeated assertions by Australia that ANZUS provides Australia with nuclear protection amount to acquiescence to Australia’s interpretation of ANZUS? As noted above, silence in response to another state’s actions or pronouncements that have been in the public domain for a long time or that have been drawn to the attention of the state’s treaty partner in circumstances where some form of response is warranted, will amount to acquiescence. Here, there can be no question that the US has been aware of the content of the White Papers as Australia has not only made them available to the public generally but also asked for input into the papers from its allies and has directly briefed its allies once the White Papers have been published.87 Further, the fact that Australia has consulted with the US about the content of the White Papers seems to create the circumstances where some form of response might be expected from the US if it disagreed with the papers’ content. This is especially so as states do, at times, respond to White Papers and highlight problems they have with them.88 In light of this, it could possibly be concluded that after 20 years of being made aware of Australia’s interpretation of ANZUS in White Papers, the US should

83. Defence 2000, supra note 3 at 36.
84. Australia’s Strategic Policy, supra note 2.
86. Defending Australia in the Asia Pacific Century, supra note 3. It should be noted that the Defence White Papers only ever referred to ANZUS generally; they did not refer specifically to Article IV of the NPT. However, as Article IV is the only Article that could potentially give rise to nuclear protection, we assume the statements in the Defence White Papers refer to this Article.
have spoken up if it disagreed with the interpretation. The fact that it has not suggests that it may have acquiesced to the interpretation and that, therefore, subsequent practice has emerged.

If this is the case then today ANZUS can be said to empower the US to use, or threaten to use, nuclear weapons in defence of Australia. It is important to note in drawing this conclusion, however, that it is possible in time that information that undermines the idea that the US has acquiesced to Australia’s interpretation of ANZUS may emerge. Alternatively, it is possible that information could emerge that reveals that ANZUS has allowed the use of nuclear weapons since a much earlier date.

4. Are There Any “Relevant Rules of International Law” that Affect the Interpretation of Article IV?

In addition to looking at subsequent agreements and subsequent practice between treaty parties when interpreting a treaty term, pursuant to Article 31(3)(c) of the VCLT it is also necessary to look at whether there are any “relevant rules of international law applicable in the relations between the parties” which affect the meaning of the treaty term.99 The idea behind Article 31(3)(c) is that if a term of a treaty is open-textured and capable of an array of meanings, it should be interpreted in a way that ensures it complies with the states parties’ other international legal obligations.

Precisely how Article 31(3)(c) of the VCLT might be used in the context of Article IV is not straightforward. In exploring how it might be applied two questions must be answered: a) are there any rules of international law relevant to the interpretation of Article VI? And b) what effect might they have on Article IV of ANZUS? Rules that might be relevant include any that limit or prohibit the use, or threat of use, of nuclear weapons, and rules that limit or prohibit the doctrine of extended nuclear deterrence. This section turns to consider whether such rules exist and, to the extent they do, how they affect Article IV of ANZUS.

a. Is There a Prohibition or Limitation on the Use or Threat of Use of Nuclear Weapons under International Law?

The ICJ examined the question of whether international law prohibits the use, or threat of use, of nuclear weapons in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. It concluded that there was neither a treaty nor customary rule of international law that prohibited this conduct. With respect to treaty law, the Court noted that although treaties which limit the “acquisition, manufacture, possession, deployment and testing

99. VCLT, supra note 29 at art 31(3)(c).
of nuclear weapons” exist and although there are some regional nuclear weapons free zones, there is no “comprehensive and universal conventional prohibition on the use, or threat of use,” of nuclear weapons. With respect to customary international law, the Court said that while no state has used nuclear weapons since 1945 and a significant number of states believe that the use of nuclear weapons is contrary to international law, the fact that nuclear weapons states have continuously advanced the doctrine of nuclear deterrence, prevents a determination that a rule of customary international law prohibiting the use, or threat of use, of nuclear weapons exists. However, the Court did make it clear that any use, or threat of use, of nuclear weapons would have to be consistent with both jus ad bellum and jus in bello. With respect to jus ad bellum, the Court stated that (unless acting with the authority of the UN Security Council) states looking to use nuclear weapons would have to comply with the requirements of self-defence in Article 51 of the UN Charter. Further, it set out that any use of force pursuant to Article 51 would have to be necessary and proportionate. With respect to jus in bello, the Court said that states would have to observe the laws applicable in armed conflict and noted that the use, or threat of use, of nuclear weapons “would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law”.

It is difficult to argue that the international legal landscape has changed significantly in the decades since the Advisory Opinion was handed down. While there has been a concerted effort in the last few years to advance the nuclear disarmament agenda, there is still no international convention that expressly prohibits the use, or threat of use, of nuclear weapons, and nuclear weapons states (as well as many of their allies) still adhere to the policy of deterrence which, according to the ICJ, prevents the emergence of a rule of customary international law. Thus, at this stage in the development

91. Ibid at 63. It is important to note that the Treaty of Rarotonga has created a nuclear weapons free zone in the South Pacific. This treaty limits nuclear activity in the South Pacific but, as will be discussed below, it does not prevent the US from using or threatening to use nuclear weapons in defence of Australia outside the Pacific region.
92. Ibid at 65-73.
93. Ibid at 38-39.
94. Ibid at 41. Ultimately, the ICJ decided with respect to the use of nuclear weapons and jus ad bellum “the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake” at 266 conclusion E.
95. Ibid at 266 conclusion E.
96. It is important to note, however, that the ICJ’s reasoning has been criticised and it is not universally endorsed by scholars. See e.g., Vera Gowlland-Debbas, “The Right to Life and Genocide: The Court and an International Public Policy” in Laurence Boisson de Chazournes & Philippe Sands, eds, International Law, The International Court of Justice and Nuclear Weapons.
of international law, the use, or threat of use, of nuclear weapons is not explicitly prohibited by international law but any such use, or threat of use, would have to comply with the laws applicable in armed conflict, which is a significant limitation.97

What this means for Article IV of ANZUS is that any use, or threat of use, of nuclear weapons carried out pursuant to the Article would have to be in accordance with the laws applicable in armed conflict.

b. Is There a Prohibition or Limitation on the Policy of Extended Nuclear Deterrence under International Law?

In addition to there being no international law that prohibits the use, or threat of use, of nuclear weapons, there is no explicit treaty or customary international rule that outlaws the doctrine of extended nuclear deterrence.98 The fact, however, that there is no explicit prohibition on the doctrine does not mean that there are no international laws that may affect and potentially limit its operation. One international legal obligation that may limit the operation of extended nuclear deterrence is contained in Article VI of the NPT. Article VI provides that states parties must “pursue negotiations in good faith on effective measures relating to...nuclear disarmament”. Another treaty that could potentially affect Australia reliance on US nuclear protection is the Treaty of Rarotonga. We explore how these treaties may limit the doctrine of extended nuclear deterrence in Parts III and IV below.

5. The Effect of ANZUS on Australia’s Policy of Relying on US Extended Nuclear Deterrence

It is apparent from the above analysis that at this point in time — leaving to one side any effect Article VI of the NPT or the provisions in the Treaty of Rarotonga may have — Article IV of ANZUS legally enables the US to use, or threaten to use, nuclear weapons in defence of Australia providing any such use or threat of use complies with the principles of jus ad bellum and the laws applicable in armed conflict. This means that ANZUS does currently place Australia under US nuclear protection.


98. In the ICJ Nuclear Weapons Advisory Opinion, the Court was ambiguous about the legality of nuclear deterrence and declared that “[t]he Court does not intend to pronounce here upon the practice known as the policy of nuclear deterrence”: Legality of the Threat or Use of Nuclear Weapons, supra note 90, at para 67. For a comprehensive discussion of the Court’s consideration of nuclear deterrence see Nobuo Hayashi, “Legality of Nuclear Weapons under Jus Ad Bellum”, in Nuclear Weapons under International Law 31 (Gro Nystuen et al. eds., 2014).
However, caution should be exercised in inferring from this that ANZUS prevents Australia from giving up its reliance on US extended nuclear deterrence. This is because while Article IV of ANZUS legally allows the US to use nuclear weapons in defence of Australia, it does not create any legal obligation on Australia to continue to adhere to a policy of extended nuclear deterrence. This means that, in theory, Australia could declare that it was abandoning its policy of relying on US nuclear protection without breaching the treaty.

If Australia decided to give up its policy of extended nuclear deterrence, what then would the ramifications be for ANZUS? The answer to this question would depend on the US response to such a decision. If the US accepted, or acquiesced to, Australia’s decision to forgo US nuclear protection, then this would result in the scope of Article IV of ANZUS reverting to its original parameters allowing the US to use, or threaten to use, only conventional weapons in defence of Australia. If the US refused to accept Australia’s rejection of extended nuclear deterrence, then the scope of Article IV would remain as it is now with the US being legally entitled to use or threaten to use nuclear weapons in Australia’s defence. In this situation Australia would have no power to prevent the US from using, or threatening to use, nuclear weapons in the event of an armed attack on Australia. While any decision by Australia to abandon reliance on US extended nuclear deterrence could not unilaterally alter the scope of Article IV, Australia would nevertheless remain in full compliance with that provision.

The situation would be different if Australia’s extended nuclear deterrence arrangements with the US were comparable to those in place between the US and its NATO partners. A number of NATO states have concluded bilateral agreements with the US which establish that the NATO states agree to cooperate on the uses of atomic energy for defence purposes and which provide the basis for nuclear-sharing arrangements between these states and the US. Pursuant to these agreements, any decision by a NATO state to abandon reliance on US extended nuclear deterrence may be problematic as explicit terms of the agreements could be violated. For example, the North Atlantic Treaty placed the Netherlands under US nuclear protection when it entered into force in 1949. However, a decade later, in 1959, an agreement was concluded between the US and the Netherlands whereby the Netherlands agreed, as part of its nuclear partnership with the US, to share information.

---

99. This conclusion flows from the requirement that changes in the interpretation of a treaty term require subsequent agreement or subsequent practice from all (or in this case both) parties to the treaty. See VCLT, supra note 29 at art 31(3).

100. See, e.g., Agreement between the Government of the Kingdom of the Netherlands and the Government of the United States of America, Neth-US, 1959. See also, Clingendael, supra note 15 at 7.

101. For a discussion of this issue in the context of the Agreement between the Netherlands and the US see Clingendael, supra note 15 at 10.
with the US and transfer non-nuclear parts of atomic weapons systems.\textsuperscript{102} If the Netherlands were to abandon its policy of relying on US extended nuclear deterrence and stop cooperating with the US on nuclear matters, it is likely it would be in breach of the 1959 Agreement.\textsuperscript{103} Australia and the US have not concluded an agreement that explicitly sets out terms for nuclear cooperation or nuclear sharing between the two countries. As such, while Article IV of ANZUS may mean the US can use nuclear weapons in limited circumstances in defence of Australia, there is nothing that obliges Australia to maintain a domestic policy adhering to the doctrine of US extended nuclear deterrence.

In summary, it can be seen that, in light of US acquiescence to Australia’s repeated assertions that ANZUS offers Australia nuclear protection, Article IV of ANZUS does now place Australia under US nuclear protection. This does not mean, however, that Australia is legally required to maintain its policy of relying on US extended nuclear deterrence. To the contrary, Australia would not be in breach of ANZUS if it decided to give up its reliance on US nuclear protection. Such a decision would not be effective in altering the scope of Article IV of ANZUS unless the US agreed, or at the very least acquiesced, to it. But regardless of the US response, such a decision would not place Australia in breach of Article IV. It is thus evident that Bob Carr’s assertion that Australia could only relinquish its reliance on US extended nuclear deterrence by withdrawing from ANZUS or negotiating an amendment to it is not persuasive.

Having determined that ANZUS does not prevent Australia from forgoing its policy of relying on US extended nuclear deterrence, the next question that arises is whether there are any obligations that require Australia to abandon its policy. In the rest of the article we examine whether the NPT or the regional Treaty of Rarotonga create any obligations on Australia to do this.

### III. AUSTRALIA’S EXTENDED NUCLEAR DETERRENCE AND THE NPT

The NPT is the key legal text in the international nuclear non-proliferation regime, setting restrictions on states parties with respect to the sharing of nuclear weapons and materials, and obliging parties to work towards global disarmament. Australia has been a party to the NPT since 1973.

The purpose of this Part is to ascertain whether Australia’s reliance on extended nuclear deterrence is compatible with its obligations under the NPT. Very little has been written on the legal compatibility of extended nuclear deterrence under Article VI, but there are growing claims from civil society that Australia’s reliance on US nuclear protection is obstructing progress

\textsuperscript{102} Ibid at 10.
\textsuperscript{103} Ibid.
on disarmament in contravention of the NPT. Although the policy of extended nuclear deterrence is prima facie not necessarily incompatible with disarmament, there are a number of ways in which the policy could come into conflict with the Article VI obligation.

This Part explores how Article VI of the NPT might affect the doctrine of extended nuclear deterrence. It begins by providing a brief overview of Article VI before addressing the legal content of the obligation. It will then consider whether it is possible for Australia to maintain a policy of extended nuclear deterrence and still be in compliance with its obligations under Article VI of the NPT.

1. Article VI of the NPT

Article VI of the NPT states that:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

To ascertain the scope and meaning of this text, it can be broken into its components. All parties have an obligation “to pursue negotiations in good faith on effective measures” relating to the following three outcomes:

1. Cessation of the nuclear arms race at an early date;
2. Nuclear disarmament; and
3. A treaty on general and complete disarmament under strict and effective international control.

Of particular relevance to extended nuclear deterrence is the second outcome: states parties have an obligation to pursue negotiations in good faith on effective measures relating to nuclear disarmament. Two questions


105. In this article, references to “Article VI” or “the Article VI obligation” are referring only to the NPT obligation to “pursue negotiations in good faith […] on effective measures relating to nuclear disarmament”. Extended nuclear deterrence will also be affected by negotiations on the third outcome, but discussion of a treaty on general and complete disarmament is beyond the scope of this article. For analysis of this aspect of Article VI, see Randy Rydell, “Nuclear
arise from this: a) what does this obligation “to pursue negotiations in good faith on effective measures relating to nuclear disarmament” entail? And b) is Australia’s reliance on extended nuclear deterrence compatible with this obligation?

With respect to the first question, there is some divergence among scholars about how the Article VI obligation “to pursue negotiations in good faith on effective measures relating to nuclear disarmament” should be interpreted.\textsuperscript{106} Analysis of Article VI is well-travelled territory in the existing legal literature. As such, this section does not undertake a forensic legal examination of the Article VI provision, which has been done effectively elsewhere and is not necessary for the purpose of this article.\textsuperscript{107} Instead, this section provides a concise overview and some evaluation of how Article VI has been interpreted by the ICJ, scholars and practitioners. Clearly articulating the Article VI obligation is required here in order to be able to address the second question of whether Australia’s reliance on extended nuclear deterrence is compatible with this provision.

2. Three Interpretive Approaches to Article VI

Broadly speaking, the various interpretations of the Article VI obligation fall into three categories, which we term “twofold obligation”, “plain meaning obligation” and “minimal obligation”. This analysis will proceed by taking each of these in turn to address what the obligation “to pursue negotiations in good faith on effective measures relating to nuclear disarmament” entails. The following section will then examine the question of whether it is possible for Australia to continue to rely on extended nuclear deterrence and remain in compliance with Article VI as variously interpreted.

\begin{footnotesize}

\end{footnotesize}
a. The twofold obligation interpretation

The starting point for our secondary analysis of Article VI is the ICJ’s 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* in which the Court held that:

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.\(^{108}\)

This unanimous conclusion was drawn from an interpretation of Article VI of the NPT earlier in the Opinion that imposed on states parties a “twofold obligation to pursue and to conclude negotiations”\(^{109}\):

In these circumstances the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament… The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.\(^{110}\)

In other words, the obligation on states parties under Article VI is not just an obligation to pursue negotiations in good faith, but an obligation both to pursue negotiations *and* to achieve nuclear disarmament. It is unlikely that the Court intended for the twofold obligation interpretation to mean that states parties are, by virtue of the fact that they have yet to conclude negotiations, currently in breach of this obligation. Presumably it means that there will come a point in time at which continuing negotiations towards disarmament will not be enough, and when failure to achieve nuclear disarmament will mean that states parties to the NPT will be in breach of this aspect of Article VI.\(^{111}\) But it raises the question of what is considered a reasonable timeframe for disarmament negotiations to reach a conclusion. At what point will states parties be required to conclude negotiations or be in breach of this obligation? The ICJ Opinion does not provide any guidance on this point.

---

\(^{108}\) *Threat or Use of Nuclear Weapons*, *supra* note 90 at 268.

\(^{109}\) *Ibid* at 263 para 100.

\(^{110}\) *Ibid* at 263 para 99.

\(^{111}\) Of course in order for the Article VI obligation to be fulfilled in its entirety under this interpretation, all three outcomes would need to be achieved: cessation of the nuclear arms race; nuclear disarmament; and a treaty on complete and general disarmament under strict and effective international control.
Despite such ambiguities, the ICJ’s twofold obligation interpretation is often cited with approval by scholars and practitioners who advocate for a global ban treaty. Unsurprisingly, the Republic of the Marshall Islands relied upon this interpretation in the applications it filed against the nuclear weapons states in the ICJ in 2014. Proponents of this interpretation accord it significant weight because it comes from the ICJ, but the soundness of the ICJ’s legal reasoning in reaching its twofold obligation interpretation of Article VI has been called into question by a number of commentators. For example, Daniel Joyner criticises the Court’s analysis of Article VI as “not particularly methodical” and concludes that the interpretation “almost certainly did stretch the meaning of the terms of Article VI past their plain meaning”. Roger Clark cites the twofold obligation with approval, but notes that the obligation to bring negotiations to a conclusion “is stronger than the literal language of Article VI”. The Court’s discussion of Article VI is brief and situated at the end of the Opinion, almost as an

115. The Republic of the Marshall Islands instituted proceedings in the ICJ against all nine states that possess nuclear weapons. In the case of the five nuclear weapon states parties to the NPT, the Marshall Islands argued that they have breached Article VI of the NPT. The case was dismissed in October 2016 on the grounds that the ICJ did not have jurisdiction to hear the merits given the lack of a dispute between the parties. Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom), Preliminary Objections, [2016] ICJ Rep (5 October).
118. Roger S Clark, “Book Review: Nuclear Weapons and the World Court by Ved P. Nanda & David Krieger” (2000) 14:199 Emory Intl L. Rev. note 6. Clark sees the ICJ’s twofold interpretation as a possible pronouncement of customary law, rather than a direct interpretation of Article VI of the NPT: Roger S Clark, “The Laws of Armed Conflict and the Use or Threat of Use of Nuclear Weapons” (1996) 7:265 Crim L Forum 294. Few other scholars, practitioners and state representatives claim that this is the case. In any event, the question of whether the twofold obligation interpretation of Article VI has reached the status of customary law is not relevant for the purposes of this article, as Australia is a state party to the NPT.
afterthought. Without further clarification from the ICJ on this point, the legal parameters of the twofold obligation interpretation remain uncertain.

b. The plain meaning interpretation

A second approach to interpreting Article VI is the “plain meaning” interpretation. In terms of practical effect, this approach does not differ significantly from the twofold obligation, but it is important to set out the parameters of the plain meaning interpretation as it has attracted support from a number of international law scholars. The essential element of the plain meaning interpretation is that because Article VI does not indicate any timeframe or method for nuclear disarmament, the key to deciphering the legal obligation in this provision is dependent on what it means “to pursue negotiations in good faith”.

Good faith is a “well-established principle of international law”. Gerald Fitzmaurice, a former Special Rapporteur on the Law of Treaties and ICJ Judge, explained good faith in international law as follows:

The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have bona fide reasons for what it does, and not act arbitrarily and capriciously.

In addition to a general principle of good faith in international law, the obligation to negotiate in good faith is recognised as a specific application of the principle. And in order for states to be in compliance with this, “something more than ‘going through the motions’ is required”. For example, in the ICJ’s North Sea Continental Shelf cases of 1969 the Court declared that:

---

119. Indeed, the question of Article VI’s interpretation was not one put to the Court by the UN General Assembly in its request for an advisory opinion.
120. Joyner, supra note 107 at 95-108; Rietiker, supra note 106 at 52-54.
121. Compare this with the first outcome of Article VI “cessation of the nuclear arms race at an early date” (emphasis added).
124. Goodwin-Gill, supra note 122 at 88.
The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation [...]. They are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.\textsuperscript{126}

The 1957 \textit{Lake Lanoux} Arbitration Panel held that contravention of the obligation to negotiate an agreement may arise:

[I]n the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith.\textsuperscript{127}

Essentially, the requirement that negotiations must be conducted in good faith means that they must be meaningful with states prepared to be flexible and willing to compromise.\textsuperscript{128} Negotiations should move forward and states must not cause unreasonable delays.\textsuperscript{129} Ultimately, bona fide efforts need to be made to reach agreement.\textsuperscript{130}

What does this mean for Article VI? A plain meaning interpretation obliges parties to engage in negotiations in good faith with a view to actually achieving nuclear disarmament. This differs from the twofold obligation interpretation in that it does not make the achievement of nuclear disarmament a legal requirement under the NPT. The plain meaning interpretation sees Article VI as an obligation of conduct rather than an obligation of result.\textsuperscript{131}

Practically, this will make a negligible difference to the outcome precisely

\textsuperscript{127} \textit{Lake Lanoux Arbitration (France v Spain)} (1957), 24 ILR 101 at 23 (Arbitral Tribunal set up under a Compromis dated 19 November 1956, pursuant to an Arbitration Treaty of 10 July 1929, between France and Spain) (Arbitrators: Petrén, President; Bolla, De Luna, Reuter, De Visscher).
\textsuperscript{128} The Arbitral Tribunal of the Agreement on German External Debts held that “parties must make every effort […] to reach a mutually satisfactory compromise, even going so far as to abandon previously inflexibly held positions”. Arbitration Panel/Tribunal of the Agreement on German External Debt AFDI, XIX RIAA 27-64 (1973).
\textsuperscript{129} In her separate opinion to the 2004 ICJ Advisory Opinion on the \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, Judge Higgins observed that state should follow the “procedural obligation to move forward simultaneously”: \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, Advisory Opinion, [2004] ICJ Rep 136 at para 18.
\textsuperscript{130} For further analysis of the obligation to negotiate in good faith, see International Association of Lawyers against Nuclear Arms, \textit{supra} note 107, at 26-28; Rietiker, \textit{supra} note 106 at 58–59; Joyner, \textit{supra} note 107 at 103.
\textsuperscript{131} For a discussion of the differences between an obligation to negotiate (\textit{pactum de negotiando}) and an obligation of result (\textit{pactum de contrahendo}) see Constantin P Economides, “Content of the Obligation: Obligations of Means and Obligations of Result” in James Crawford et al, eds, \textit{The Law of International Responsibility} (Oxford: Oxford University Press, 2010) at 377-381.
because of the elements of good faith that must be satisfied. If states parties are in compliance with the obligation “to pursue negotiations in good faith on effective measures relating to [...] nuclear disarmament”, there will be a clear trajectory of negotiated disarmament steps that will, if maintained, result in total nuclear disarmament at some point. If complete disarmament is not a foreseeable result at some stage, then it is likely that the negotiations on effective measures are not being undertaken in good faith. In other words, it is not necessary to read an obligation to achieve a result into Article VI, because the good faith component means that a result should actually be achieved within a reasonable timeframe if parties are undertaking negotiations on effective measures towards nuclear disarmament.

The main difference between the plain meaning interpretation and the twofold obligation interpretation is that, under the latter, it is possible that at some point in the future all states parties to the NPT could be in breach of their Article VI obligation if “nuclear disarmament in all its aspects” has not been achieved, even if the majority of parties are in compliance with Article VI. Whereas the plain meaning interpretation may allow for the fact that some states parties will be in breach of Article VI, which could make complete nuclear disarmament impossible. For example, State A is doing everything in its power to pursue negotiations in good faith on effective measures towards nuclear disarmament and State B is hampering these efforts meaning that nuclear disarmament will not be achieved any time soon. Under the ICJ’s interpretation of Article VI, State B is currently in breach of Article VI and State A is in compliance. But if nuclear disarmament as a result is not achieved by a (yet to be articulated) future date, then both States A and B will be in breach of Article VI for not achieving a result. Whereas under the plain meaning interpretation, if State A can argue that but for the non-compliance of State B, its own efforts would result in the achievement of nuclear disarmament, then State A will likely remain in compliance with Article VI.132

c. The minimal obligation interpretation

There is one other possible interpretation of Article VI which is often mentioned in the literature, which is the “minimal obligation” interpretation advocated by Christopher Ford, the former US Special Representative for Nuclear Non-Proliferation.133 Ford argues that Article VI merely requires states “to pursue negotiations in good faith” and that this does not necessarily

---

132. André Nollkaemper & Dov Jacobs, “Shared Responsibility in International Law: A Conceptual Framework” (2013) 34 Mich J Intl L 359. This issue also comes down to the question of whether the Article VI obligation is one of individual or shared responsibility. For the purposes of this article, we are proceeding on the assumption that the NPT creates individual responsibilities for each state party.

133. Joyner, supra note 107 at 96–97; Pietrobon, supra note 107 at 180; Rietiker, supra note 106 at 66.
mean that the negotiations must take place, let alone succeed.\textsuperscript{134} He comes to this conclusion after a selective analysis of the plain meaning of the text, the preamble and the NPT’s negotiating history.\textsuperscript{135} Ford makes the case that as long as a state party to the NPT is making a good faith effort to \textit{pursue} negotiations, it is fulfilling the Article VI obligation. In Ford’s view, the deliberate use of the word “pursue” in Article VI “clearly leaves open the possibility that such negotiations might not take place, let alone succeed”.\textsuperscript{136}

It is interesting to note that during the negotiations of the NPT in the late 1960s, Australia’s original interpretation of Article VI reflected the “minimal obligation” interpretation:

[Article VI] has been included in response to arguments by some countries that the Treaty as previously drafted was too one-sided in that it bound the non-nuclear powers to remain non-nuclear, but did not place any obligations on the nuclear powers to reduce their nuclear armouries. The Article in fact only binds the parties to “pursue negotiations” and it should not be expected that the United States or the Soviet Union would reduce their nuclear arms to the point where their mutual deterrent value or their deterrence vis-à-vis other countries was no longer effective.\textsuperscript{137}

\textsuperscript{134} Ford, \textit{supra} note 107 at 403.
\textsuperscript{135} \textit{Ibid} at 402-9. The treaty’s only article dealing with disarmament, focusing upon both its text and negotiating history, and assesses its applicability as a standard for judging treaty compliance. The author critiques comments on Article VI made by the International Court of Justice in a 1996 case as legally ill founded and conceptually incoherent as a compliance yardstick. The only interpretation of Article VI consistent with its text and history, the author argues, is that it—as it says—merely requires all states to pursue negotiations in good faith; specific disarmament steps are not required. Claims that the 2000 NPT Review Conference imposed new legal obligations for disarmament or altered the meaning of Article VI are found to be mistaken; although the conference could theoretically have adopted interpretive criteria for understanding the meaning of Article VI, it did not in fact do so. Applying his Article VI compliance standard to the case of U.S. compliance, and comparing modern circumstances with those during the Cold War, the author also describes what he says is an excellent U.S. record of Article VI compliance.
\textsuperscript{136} \textit{Ibid} at 403.\textsuperscript{137} Australian Department of Foreign Affairs and Trade (No. 102), \textit{supra} note 43. Australia’s current policy with respect to Article VI and extended nuclear deterrence will be
This interpretation does not appear to have been taken up by other legal scholars, and in fact it has been criticised as an “extremely limited interpretation … [that] almost certainly does not give the plain meaning of the terms of Article VI its full extent of scope and meaning”. The notion that nuclear weapons states would reduce their nuclear arms to the point where their deterrent value was no longer effective is precisely what should be expected under a good faith interpretation of Article VI. Ford’s minimal obligation approach appears inconsistent with a good faith interpretation and will not be applied in our analysis of the compatibility of the Article VI obligation with Australia’s policy of extended nuclear deterrence.

d. Implementation of Article VI

Regardless of which interpretation is adopted—the twofold obligation or plain meaning—there is little consensus on what “effective measures” should be implemented in order to fulfil the Article VI obligation, and disagreement on what measures are effective. It is beyond the scope of this article to discuss the precise content of what measures would satisfy Article VI, but questions remain with respect to whether Article VI requires the conclusion of a treaty, whether bilateral negotiations are acceptable acts of compliance, and whether partial disarmament steps are sufficient to fulfil the Article VI obligation. For the purposes of this article, these questions can be left open as they do not have any significant bearing on whether Australia’s reliance of extended nuclear deterrence is compatible with its obligation to pursue negotiations in good faith on effective measures relating to nuclear disarmament.

In concluding this section, it is apparent that under both the twofold obligation and plain meaning interpretations of Article VI, states parties to the NPT must undertake meaningful negotiations on effective measures that will result in total disarmament within a reasonable timeframe. The next section will examine whether it is possible for Australia to continue to rely on extended nuclear deterrence and still fulfil its obligations under Article VI of the NPT.

3. Is Australia’s Reliance on Extended Nuclear Deterrence Compatible with Article VI?

As demonstrated above, Australia relies on US nuclear protection as part of an implicit obligation under the ANZUS Treaty. The 2013 Australian

---

138. Joyner, supra note 107 at 97; for a detailed critique see also 96-100. See also Pietrobon, supra note 107 at 180.
140. Rietiker, supra note 106 at 81; Pietrobon, supra note 107 at 182.
141. Pietrobon, supra note 107 at 182-5.
142. Kiernan, supra note 107.
Defence White Paper sets out the government’s policy of extended nuclear deterrence as follows:

[As long as nuclear weapons exist, we rely on the nuclear forces of the United States to deter nuclear attacks on Australia. Australia is confident in continuing viability of extended nuclear deterrence under the Alliance, while strongly supporting ongoing efforts toward global disarmament.]

This statement, which is a standard expression of Australia’s extended nuclear deterrence policy, contains an explicit claim that Australia supports the process of nuclear disarmament and a tacit recognition of the global abolition goal. Theoretically, as articulated, there is nothing in this policy that is fundamentally incompatible with Australia’s obligations under Article VI of the NPT. As long as Australia is fulfilling its obligation to pursue negotiations in good faith on effective measures relating to nuclear disarmament, there is no fundamental incompatibility between the Article VI disarmament obligation and reliance on extended nuclear deterrence. Thus, the claim that Australia will be able rely on extended nuclear deterrence for “as long as nuclear weapons exist”, while still fulfilling its Article VI obligation to pursue negotiations towards disarmament is hypothetically possible, in a very narrow set of circumstances. If good faith negotiations were able to reach a stage where nuclear disarmament measures were effective to the point that nuclear weapons ceased to exist, Australia could theoretically rely on extended nuclear deterrence right up until the US’s last nuclear weapon was destroyed.

Far more likely, however, is that there will come a time (if it has not already occurred) when the progression of good faith negotiations towards nuclear disarmament will no longer be possible because of nuclear deterrence policies. In such a case non-nuclear weapon states such as Australia will reach a point where there is nothing further that they can do towards nuclear disarmament, with the final logical step being to give up reliance on extended nuclear deterrence. Australia will then need to demonstrate willingness to compromise and give up its policy of extended nuclear deterrence or risk being in violation of the good faith element of Article VI. It will not matter that nuclear weapon states such as the US maintain their reliance on nuclear deterrence, as they have additional disarmament responsibilities which include the physical destruction of existing nuclear weapons. For example, the US could lawfully retain nuclear deterrence while it takes steps to reduce its nuclear weapon stockpile, as long as such steps are sufficient to satisfy Article VI. Australia

could not continue to rely on US nuclear protection if it had exhausted or finalised all other negotiations under Article VI.\textsuperscript{144}

Ultimately, if there is any indication or evidence that Australia prioritises extended nuclear deterrence at the expense of nuclear disarmament, then this would likely render the fulfilment of Article VI remote or impossible. Similarly, if Australia were to ever claim that it was no longer able to pursue good faith negotiations towards nuclear disarmament because of its policy of extended nuclear deterrence under ANZUS, it would amount to a clear breach of Article VI.

This final section evaluates whether, under the parameters articulated above, Australia’s policy of extended nuclear deterrence is getting in the way of its Article VI obligation.

4. Is Australia Prioritizing Extended Nuclear Deterrence at the Expense of its Article VI Obligations?

Since the 2010 NPT review conference, momentum has been building in favour of a comprehensive global treaty to outlaw nuclear weapons. As part of a minority group of states that rely on nuclear deterrence as a key security policy, Australia has continually opposed a global ban treaty. This opposition to a ban treaty has become a focal point in the debate over whether Australia is prioritising extended nuclear deterrence at the expense of its Article VI obligations. The discussion in this section uses recent activity relating to Australia’s refusal to support a global ban treaty to evaluate whether fulfilment of Article VI is compatible with continued reliance on extended nuclear deterrence.

a. Is Australia in Breach of Article VI?

In December 2016, the UN General Assembly voted overwhelmingly in favour of convening a UN conference “to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination”.\textsuperscript{145} Australia was one of 35 states that voted against the resolution, and when negotiations began in March 2017, Australia was not among the 132 states that

\textsuperscript{144}This reflects the idea that Article VI (and the NPT more broadly) contains “common but differentiated responsibilities” for nuclear weapon states and non-nuclear weapon states. For a general discussion on common but differentiated responsibilities, see Christopher D Stone, “Common but Differentiated Responsibilities in International Law” (2004) 98 Am J Intl L 276.

\textsuperscript{145}Taking Forward Multilateral Nuclear Disarmament Negotiations, GA Res 71/258, UNGAOR, 71st Sess, 68th plen mtg, UN Doc A/RES/71/258 (2016). The resolution was adopted with 113 votes in favour, 35 votes against and 11 abstentions. It endorsed a resolution of the First Committee of the General Assembly in October 2016 which was adopted by a vote of 123 states in favour, 38 against and 16 abstentions: Taking Forward Multilateral Nuclear Disarmament Negotiations, UNGAOR, 1st Comm, 71st sess, Agenda Item 98(kk), UN Doc A/C.1/71/L.41.
convened in New York;\textsuperscript{146} choosing instead to boycott the talks. The Australian government has justified its actions on the grounds that negotiating a ban treaty without the support of nuclear weapon states would be an ineffective measure for nuclear disarmament.\textsuperscript{147} The Department of Foreign Affairs and Trade ("DFAT") has advised the government that boycotting the negotiations does not put Australia in breach of Article VI of the NPT.\textsuperscript{148} When questioned about the government’s position during a Senate hearing, a representative from DFAT explained that Australia was not attending the talks because it “would not be able to negotiate in good faith”.\textsuperscript{149} This implies a belief that Australia would be in breach of Article VI if it attended the negotiations and could not negotiate in good faith because of its opposition to a ban treaty. As discussed above, such an interpretation of the Article VI obligation is problematic because it allows Australia to “insist upon its own position without contemplating any modification of it” contrary to the requirements of good faith in international law.\textsuperscript{150} Australia's view of a global ban treaty has become immoveable, with no scope for modification or compromise. As such, a strong argument can be made that by voting against the UN General Assembly resolution and by boycotting the negotiations for a global ban treaty, Australia is in breach of its Article VI obligations. Whether this breach is a direct consequence of Australia’s reliance on extended nuclear deterrence is less certain.

\textbf{b. Is Australia in Breach of Article VI because of its Policy of Extended Nuclear Deterrence?}

In recent years, civil society and the media have accused Australia of “undermining” and “abandoning” disarmament because of its reliance on extended nuclear deterrence.\textsuperscript{151} Such accusations were driven by the release of a cache of previously classified documents from the Australian Department of Defence and DFAT following a request by the International Campaign to Abolish Nuclear Weapons ("ICAN") under freedom of information laws.\textsuperscript{152}
These documents included diplomatic cables, emails, talking points and other statements relating to Australia’s refusal in 2013 to sign on to multilateral statements condemning the humanitarian consequences of nuclear weapons and calling for negotiations on a global ban treaty.\textsuperscript{153} The declassified files contain some documents that appear to confirm suspicions that Australia is objecting to progress towards banning nuclear weapons because of its reliance on extended nuclear deterrence. For example in a cable dated 9 October 2013 Australia explained its objection to multilateral statements condemning the humanitarian consequences of nuclear weapons in the following terms:

Some elements of previous statements caused difficulties for us, and for other countries that advocate nuclear disarmament but rely on extended nuclear deterrence while the threat of nuclear attack or coercion remains. Australia’s position to date has been to express reservations about language that appears inconsistent with extended nuclear deterrence, such as an inclusion in the Swiss and South African statements of the following reference: “it is in the interests of the very survival of humanity that nuclear weapons are never used again, \textit{under any circumstances}”.\textsuperscript{154}

Yet in numerous other documents, Australia stresses that a ban treaty is not an effective means of disarmament and expresses its support for “the step-by-step approach (reduce, eliminate and prohibit, as opposed to outlaw and eliminate)”.\textsuperscript{155} It asserts that “to be effective, disarmament must engage the nuclear armed states substantively and constructively” and that disarmament “must be based on high-level political will, supported by practical, sustained efforts”.\textsuperscript{156} Publicly, Australia has consistently maintained that a global ban treaty is an ineffective means of nuclear disarmament, and this position is reflected throughout the declassified documents. While it is highly likely that Australia’s rejection of a global ban treaty is ultimately driven by its reliance on extended nuclear deterrence, the Australian government has been careful to frame its opposition in terms of “ineffectiveness”. This makes it difficult
to conclude with any certainty that Australia’s opposition to a global ban treaty is because of its reliance on extended nuclear deterrence. Regardless of the motivation behind the boycott, Australia’s refusal to participate in global efforts to negotiate a ban treaty is arguably rendering fulfilment of Article VI remote or impossible.

The next Part of this article will discuss whether there are any additional legal ramifications for Australia’s reliance on extended nuclear deterrence under the Treaty of Rarotonga.

IV. AUSTRALIA’S EXTENDED NUCLEAR DETERRENCE AND THE TREATY OF RAROTONGA

The Treaty of Rarotonga was concluded on 6 August 1985 and it entered into force on 11 December 1986. The treaty was set up by the states of the South Pacific Forum (a group that includes Australia) to create a nuclear free zone in the South Pacific. The impetus to establish such a zone originated from a desire to stop further nuclear weapons testing in the region and to prevent the dumping of nuclear waste at sea. At the outset, the treaty obliges states parties to refrain from manufacturing, or otherwise acquiring, possessing or gaining control over any nuclear explosive device. Other obligations include the promise not to assist or encourage the manufacture or acquisition of any nuclear weapon by any other state and the commitment to prevent the dumping of radioactive waste anywhere in the established zone.

Prima facie the idea that Australia could maintain a policy of relying on extended nuclear deterrence when it is a party to a treaty setting up a nuclear free zone appears incongruous. However, the Treaty of Rarotonga does not rule out all forms of nuclear activity in the area. To the contrary, when the treaty was being drafted there were a number of states within the South Pacific Forum that sought to place limits on the scope of the treaty.

157. There are 13 states parties to the treaty: Australia, Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa. The geographic region covered by the treaty encompasses the area between “the border of the Latin American NWFZ in the east to the west coast of Australia, and from the border of the Antarctic zone in the south to the equator—with some extension into the northern hemisphere to include Kiribati.” Savita Pande, “Regional denuclearisation - II Treaty of Rarotonga: Nuclear-free South Pacific?” (1998) 22:2 Strategic Analysis 195 at 199. See also Treaty of Rarotonga, Annex I, supra at note 9.

158. Treaty of Rarotonga, supra at note 9 at art 3(a).

159. Ibid at art 3(c).

160. Ibid at art 7.


Most prominent were efforts to ensure that each state within the South Pacific Forum maintained the ability to decide whether it would allow nuclear armed and nuclear powered ships to enter its territory. These efforts are reflected in Article 5(2) of the treaty which states that:

Each Party in the exercise of its sovereign rights remains free to decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign ships in its territorial sea or archipelagic waters in a manner not covered by the rights of innocent passage, archipelagic sea lane passage or transit passage of straits.

While a lot of attention was devoted during the drafting period to ensuring that nuclear armed and nuclear powered ships and aircraft could continue to visit South Pacific Forum states with their permission, Australia also worked to ensure that the Treaty of Rarotonga would not limit certain other nuclear policies and issues. One such issue was nuclear deterrence. On a cursory examination of the text of the treaty it appears that Australia was successful, as there is no article that explicitly prohibits a state party from relying on extended nuclear deterrence. Various commentators have concluded that the policy of seeking nuclear protection from a nuclear weapon state does not breach any specific provision of the treaty.

This assessment is supported by comments from Australian politicians that were made at the time the treaty was concluded. When introducing the legislation to implement the Treaty of Rarotonga into Australian law, the then Minister for Foreign Affairs and Trade, Bill Hayden, said to the House of Representatives:

[T]he Treaty does not seek to undermine the factors that have created and sustained the very favourable security environment which the South Pacific enjoys. It does not in any way conflict with Australia’s defence

163. Ibid at 9.
arrangements, notably ANZUS. It does not run counter to our support for stable nuclear deterrence.\footnote{165}

This understanding of the treaty was echoed by Senator Gareth Evans when he introduced the implementing legislation into the Australian Senate. Evans stated:

It is important to appreciate—I do not think very many people in the Opposition do—that the Treaty of Rarotonga and its protocols simply do not cut across acknowledgement of the central importance of stable nuclear deterrence. That is one of the reasons why some people say that the Treaty does not go as far as they would like it to...I simply do not believe that there is any foundation for the argument that the Treaty will operate to reduce strategic mobility, undermine the principle of nuclear deterrence, or in some other way weaken those larger, Western strategic interests to which Australia is necessarily bound.\footnote{166}

Despite the fact that the Treaty of Rarotonga does not explicitly prohibit reliance on extended nuclear deterrence, there are two features of the treaty that raise potential concerns about the legality of Australia’s reliance on US nuclear protection. The first is Article III(c) and the second is Protocol II to the treaty. The following analysis will consider each of these in turn.

1. **Article III(c) of the Treaty of Rarotonga**

   Article III(c) obliges states parties “not to take any action to assist or encourage the manufacture or acquisition of any nuclear explosive device by any State”. This raises the question as to whether Australia’s policy of relying on US extended nuclear deterrence constitutes an action that might “encourage” other states to manufacture or acquire nuclear explosive devices. For example, if China hypothetically became concerned about Australia’s extended nuclear deterrence policy and as a result decided to expand its nuclear arsenal, would maintaining extended nuclear deterrence amount to Australia “encouraging” China to manufacture or acquire nuclear weapons? The answer to this question turns on the meaning of the word “encourage” and, in particular, whether encourage requires some degree of intention. In this hypothetical scenario, if we presume that by adopting a policy of extended nuclear deterrence Australia did not intend for China to respond by manufacturing or acquiring nuclear weapons, then Australia could only be said to have encouraged China if “encourage” is interpreted to include actions that have inadvertent, or unintentional, outcomes. It is therefore necessary to

\footnote{165} Austl, Commonwealth, House of Representatives, *Parliamentary Debates* (5 June 1986) at 4619 (Bill Hayden, Minister for Foreign Affairs and Trade).

\footnote{166} Austl, Commonwealth, House of Representatives, *Parliamentary Debates* (2 December 1986) at 3127 (Gareth Evans, Senator).
ascertain a more precise meaning of the word “encourage” as it is used in Article III(c).

The starting point for determining the meaning of the word “encourage” in Article III(c) is Article 31(1) of the VCLT, which provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”. To ascertain the ordinary meaning of the term “encourage”, recourse may be had to a dictionary. The Oxford English Dictionary defines “encourage” to mean:

- To inspire with courage, to animate, instirpt
- To inspire with courage sufficient for any undertaking; to embolden, make confident
- To incite, induce, instigate
- To stimulate persons by assistance, reward or expressions of favour or approval
- To allow or promote the continuance or development of something.

These five definitions each differ slightly in meaning and provide little clarity as to whether the term “encourage” includes an intention requirement. It is possible that an intention element could be read into some of the definitions but others are quite vague and it is much less certain whether intention is a crucial component.

To ascertain which definition of “encourage” is applicable in Article III(c) we must have regard to the context of the term as well as the object and purpose of the treaty. In terms of context, the word “encourage” appears in two other places in the Treaty of Rarotonga but its use in those places provides little insight into its meaning. The treaty’s preamble also does little to contextualise the term “encourage”, but is useful in determining the treaty’s object and purpose. Divining a treaty’s object and purpose is an inexact science that requires regard to be had to both the preamble and operative paragraphs of the treaty at hand. The Treaty of Rarotonga’s preamble places strong emphasis on establishing a nuclear free zone in the South Pacific, creating a secure, healthy environment in the South Pacific, and contributing to a nuclear weapons free world. However, as discussed above, some of the substantive provisions of the treaty were specifically drafted to allow some leeway with

---

167. VCLT, supra note 29 at art 31(1).
170. VCLT, supra note 29 at art 31(1).
171. Treaty of Rarotonga, supra note 9: it appears in Article 6(b) and Article 7(1)(b).
172. Gardiner, supra note 57 at 196.
173. Treaty of Rarotonga, supra note 9 at preamble paras 6 and 10.
174. Ibid at preamble paras 3, 4 and 9.
175. Ibid at preamble paras 1-3.
respect to the passage of nuclear armed or nuclear powered vessels within the zone. It follows that the object and purpose of the treaty cannot be taken to be the creation of a space that is absolutely free of all nuclear weapons and nuclear-related activities.

Rather, based on the emphasis of the preamble, it could be said that the object and purpose of the Treaty of Rarotonga is to progress the goal of a nuclear free world by significantly limiting nuclear related activities in the South Pacific.\footnote{See also Don Rothwell’s interpretation of the object and purpose of the treaty which is “to establish the South Pacific Nuclear Free Zone and to address the renunciation of and prevention of the use or testing of nuclear explosive devices with the proclaimed Zone”: Rothwell, \textit{supra} note 166 at para 29.} Given the treaty does not create an absolute prohibition on all nuclear activity in the South Pacific, it could possibly be concluded that the word “encourage” should be interpreted to prohibit only state actions that are proactively, intentionally, stimulating other states to manufacture or acquire nuclear weapons; it should not cover actions that only passively, unintentionally, embolden states to pursue nuclear weapons. However, it could equally be argued that even though the object and purpose of the Treaty of Rarotonga is not to create a completely comprehensive nuclear weapons free zone, it still sets a high bar for limiting nuclear activity and thus the word “encourage” should be interpreted liberally to prohibit actions that have the effect of inciting or emboldening other states to manufacture or acquire nuclear weapons, even if unintentional.

Where the meaning of a treaty term remains ambiguous or obscure (as it does in this case), Article 32 of the VCLT allows for recourse to be had to supplementary means of interpretation such as preparatory materials. One of the key preparatory documents for the Treaty of Rarotonga is a report prepared by the Chair of the Working Group for the treaty. This report sheds light on the meaning of the words “not to take any action to assist or encourage” in Article III(c). The report states:

\begin{quote}
The terms used in the draft “not to take any action to assist or encourage” were understood to relate to any deliberate action, either positive or permissive, to facilitate [an activity such as the manufacture of nuclear explosive devices]. It was understood to exclude actions which have other intended purposes but might unintentionally and incidentally assist the activities mentioned.\footnote{Working Group Report, \textit{supra} note 161 at 13-14.}
\end{quote}

It further provides that “[t]he undertaking in Article 3 ‘not to take any action to assist or encourage the acquisition of nuclear explosive devices by any State’ does not relate in any way to the attitude of Forum member countries to nuclear deterrence”.\footnote{\textit{Ibid} at 14.}
The Working Group Report makes it apparent that the term “encourage” was designed to capture deliberate, intentional efforts to encourage other states to acquire or manufacture nuclear weapons; it was not drafted to encompass a state that unintentionally or inadvertently encourages another state to manufacture or acquire nuclear weapons. From this state of affairs it can be concluded that Article III(c) of the Treaty of Rarotonga cannot be interpreted to prohibit Australia from relying on US nuclear deterrence if that reliance inadvertently encourages another state (such as a hypothetical China) to acquire or manufacture nuclear weapons. This conclusion is supported by the explicit assertion in the Working Group Report that Article III(c) does not relate to member states’ approach towards nuclear deterrence.\footnote{One final point on the meaning of the word “encourage” worth noting is that the wording of Article III(c) of the Treaty of Rarotonga closely mirrors wording in Article I of the NPT. Article I of the NPT states that “[e]ach nuclear-weapon State Party to the Treaty undertakes...not in any way to assist, encourage, or induce any non-nuclear weapons State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices...”. We have found nothing in the literature on Article I of the NPT, however, that explains what the term “encourage” is meant to mean here and thus the similarity is of little use. For example no explanation is offered in Mohamed Shaker, \textit{The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959-1979}, (New York: Oceana Publications, 1980); Joyner, \textit{supra} note 107.}

Before leaving the discussion of Article III(c), it is worth highlighting that even if the provision could be read as prohibiting states parties from relying on extended nuclear deterrence where such reliance would inadvertently encourage another state to acquire nuclear explosive devices, Australia’s reliance on US nuclear protection would not be in breach of Article III(c). This is because there is no evidence to suggest that any state has been encouraged to pursue the acquisition or manufacture of nuclear explosive devices as a result of Australia’s reliance on US nuclear deterrence.

2. \textit{The Protocols of the Treaty of Rarotonga}

One final issue with the Treaty of Rarotonga involves the three Protocols to the treaty and the extent to which they limit the activities of the nuclear weapons states in the South Pacific Nuclear Free Zone. Appended to the treaty are three Protocols which the nuclear weapons states have been invited to sign and ratify. By ratifying the Protocols the nuclear weapons states undertake to respect key provisions of the Treaty of Rarotonga. Of particular significance in the context of this study is Protocol II, Article I which provides that states party to the Protocol undertake not to use or threaten to use any nuclear explosive device against parties to the treaty or certain territories in the South Pacific.\footnote{The territories that states parties to Protocol II cannot use nuclear weapons against are those that nuclear weapons states, which have ratified Protocol I are intentionally responsible for in the South Pacific Nuclear Free Zone. An example of such a territory is the Pitcairn Islands which the United Kingdom is responsible for under international law.} At this point in time the US has signed but not ratified the three Protocols.
If the US were to ratify Protocol II, it would place a limit on the extent to which the US could use or threaten to use nuclear weapons in defence of Australia. It would mean that the US would not be able to use or threaten to use nuclear weapons against states parties to the Treaty of Rarotonga or territories identified in Protocol II, Article I. The treaty would not, however, limit the ability of the US to use or threaten to use nuclear weapons against other states in the world in Australia’s defence.  

As the US has signed but not ratified the three Protocols, it is not bound to adhere to their terms. However, pursuant to the customary principles of treaty interpretation (as reflected in Article 18 of the VCLT), the US must not do anything to defeat the Protocols’ object and purpose. The obligations within Protocol II suggest that its object and purpose is to ensure that nuclear weapons states respect and protect the aims of the South Pacific Nuclear Free Zone. It is difficult to see how using or threatening to use nuclear weapons against states parties to the treaty or the relevant territories would be consistent with this object and purpose. It is thus possible to say that Protocol II to the Treaty of Rarotonga limits to a certain extent the scope of US nuclear protection towards Australia, even while the US has not ratified the Protocol. This does, however, leave room for the US to use or threaten to use nuclear weapons against states outside the South Pacific Nuclear Free Zone in defence of Australia.

V. CONCLUSION

In concluding our analysis, it appears that at this point in time Article IV of ANZUS permits the US to use, or threaten to use, nuclear weapons in defence of Australia. This means that ANZUS does currently place Australia under US nuclear protection, although it does not legally require Australia to maintain its policy of relying on US extended nuclear deterrence. Furthermore, the ability of the US to use, or threaten to use, nuclear weapons in defence of Australia is not unlimited. Protocol II of the Treaty of Rarotonga, for example, limits the extent to which the US could use, or threaten to use, nuclear weapons in defence of Australia within the South Pacific context. This is in addition to the significant limitations set by the laws of jus ad bellum and jus in bello.

With respect to the NPT, we have argued that extended nuclear deterrence may in some instances be incompatible with Australia’s obligation in Article VI to “pursue negotiations in good faith on effective measures” relating to nuclear disarmament. Australia’s recent boycott of global negotiations towards a nuclear ban treaty has likely placed Australia in breach of Article

181. Additionally, it would not prevent the US from launching nuclear weapons from within the area covered by the Treaty of Rarotonga against targets outside the area. Cf Protocol to the Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Art II.

182. Protocol II requires nuclear weapons states not to use or threaten to use nuclear weapons against states parties to the Treaty of Rarotonga and certain territories. It also requires them not to do anything to contribute to any act by a state party that violates the Treaty.
VI but it remains uncertain whether this apparent breach of the NPT is the result of Australia’s reliance on extended nuclear deterrence. In order to assist with future legal analysis of these issues, it would be helpful for the Australian government to clarify its policy of extended nuclear deterrence and clearly state whether it does or does not prioritise the policy over pursuing negotiations in good faith negotiations towards nuclear disarmament.

VI. POST SCRIPT

As mentioned in the Introduction, this project has made us think about the role of international law in policy discussions about extended nuclear deterrence and our role as international lawyers in such discussions. When we embarked on this research we discovered that there was a severe lack of legal analysis on the issue of extended nuclear deterrence (both in Australia and elsewhere) and this seemed like a significant omission. The scholarly examination of extended nuclear deterrence appears to have largely remained within the purview of International Relations, and we thought the time was overdue for publication of a thorough legal analysis so that that advocacy efforts concerning extended nuclear deterrence could be informed by what the legal position is. However, identifying “what the legal position is” proved challenging. We have been thorough in our legal research, analysis and reasoning, but the law is rarely, if ever, clear cut and in the areas we have analysed, it is particularly complex and nuanced. What is more, there is an inherent difficulty with determining what the legally relevant facts are in this field given much of the material we are dealing with is classified because it concerns matters of national and international security. We have put forward one reading of the legal implications of Australia’s reliance on extended nuclear deterrence but it is possible that others will come to different conclusions or material we have not come across would change our conclusions.

Further care needs to be taken with the idea that legal interpretations must always dictate policy. While law can and should play a role in discussions about the future of extended nuclear deterrence, we do not necessarily think it should be the definitive feature of these debates and we do not necessarily believe that our legal views on extended nuclear deterrence are the best/true/right way to advance discussions about Australia’s approach to nuclear weapons issues. To the contrary, in many respects, we are sceptical about the role law can play in such debates. In light of this, there is a need for caution with how law is employed and wielded in debates about extended nuclear deterrence. It is important to bear in mind that the law is just one lens through which to view the issue of extended nuclear deterrence. To date it has been missing from the dialogue about Australia’s nuclear policies. What role it will play in the future, or should play, is something that requires further exploration and discussion.
Article 17(2) of the Rome Statute states that the International Criminal Court (ICC) will possess jurisdiction over domestic proceedings when the state is deemed “unwilling” to prosecute. This dimension of the ICC’s complementarity scheme has not yet been conceptualized by jurisprudence. This article will argue that the provision enshrining the unwillingness criterion is inherently vague, and that there consequently exists a risk that loopholes could be created by allowing certain types of sham trials to take place among member states. Conversely, the vague character of this provision may also allow for a broad and intrusive interpretation that would risk...
upsetting state parties to the Rome Statute, in turn posing the danger of engendering withdrawals from the statute. This article will propose a conceptual framework for the application of this criterion to prevent these twin dangers. In doing so, this article will suggest drafting a universal code of standard practice for international criminal law prosecutions to assess the unwillingness criterion in a more accurate fashion.

**International Criminal Court; Complementarity; Unwillingness; Sham Trials**

**INTRODUCTION**

In 2012, the International Criminal Court (ICC) indicted Uhuru Kenyatta in relation to violence following the 2008 election in Kenya.¹ This was a daring decision, as Kenyatta was an immensely popular political figure at the time, being the son of the country’s founding father and first president. Since the indictment, Kenyatta was himself elected president and has done everything in his power to rally support to oppose the ICC both domestically and across the African continent – with much success. Having fought a difficult battle to keep the prosecution going, the Prosecutor of the ICC was eventually forced a few years later to drop the charges due to lack of evidence.² It was reported that the prosecution repeatedly demanded for more time to build the case, contending that witnesses had been bribed and intimidated, and that the Kenyan government refused to hand over important evidentiary material.³ The Kenyan president has in turn argued publicly that the Court’s so-far exclusive focus on African situations amounts to a classic example of neo-colonialist intervention into strictly domestic affairs.⁴ Following these events, a number of African states have taken steps to extend the jurisdiction of the (African based) African Court on Human and People’s Rights’ to crimes of mass atrocity – as well as to withdraw *en masse* from the Rome Statute of the International Criminal Court.⁵

¹ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11, Decision on the Confinnation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012)* (International Criminal Court) online: https://www.icc-cpi.int/CourtRecords/CR2012_01006.PDF.
² *International Criminal Court Office of the Prosecutor, Notice of Withdrawal of the Charges against Uhuru Muigai Kenyatta (5 December 2014)* online: https://www.icc-cpi.int/CourtRecords/CR2014_09939.PDF
Against a backdrop characterised by mounting tensions, it may not be irrelevant to reflect on strategies addressing domestic opposition to ICC intervention. Of particular relevance to this issue is the complementary principle underpinning the court’s jurisdiction, a principle allowing the ICC to intervene where attempts at carrying out proceedings reflect “unwillingness” or “inability” to prosecute on the part of state authorities. Article 17(2) of the Rome Statute enshrines the unwillingness criterion:

“In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

a. The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

b. There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

c. The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”

While the mere existence of domestic proceedings should normally preclude the ICC from intervening, the unwillingness criterion thus allows the opening of a case where such proceedings prove to be carried out in order to escape justice. More precisely, Article 17(2) allows the court to intervene where domestic proceedings (1) are undertaken for the purpose of shielding the accused from criminal responsibility; (2) present an unjustified delay; or (3) are not conducted independently or impartially.

The precise meaning of the three sub-criteria remains vague. No situation has required the court’s jurisprudence to expand significantly on this criterion thus far. Despite the important role played by this issue in the Libya Case, it appears that other more preliminary components of the admissibility test...
have occupied center stage until now, making for a case law predominantly constituted of fragmentary passages.7 Some of the case law even reveals a simplistic comprehension, with the Katanga case for instance concluding to unwillingness without making reference to the provision’s sub-criteria.8 Similarly, the (otherwise abundant) academic literature on complementarity tends to discuss unwillingness rather briefly, seldom dedicating more than a few paragraphs to this important provision.9 Frédéric Mégret notes in this


regard that “[i]n the presence of so much hesitation, one could have expected the literature to bring novel perspectives. And yet, the few works dedicated to complementarity typically picture it as a ‘general regime’ of the ICC [..., rarely posing] the question of its substantive content.”  

While the situation has improved since this statement was made in 2005 – with a number of works now directly touching on the substance of unwillingness – much of this provision nevertheless remains unclear and contentious, leaving its concrete application uncertain. 

---


difficult to determine in many cases. Where some propose complementing this provision with analogous rules drawn from other areas of international law via Article 21,12 the propositional character of these different suggestions precludes any definitive answer.13

Referring to the vague contours characterising this provision, former ICC President Philippe Kirsch noted the following shortly after the establishment of the ICC: “[t]he Court will really have to invent, create and define the meaning of a State that is unable or unwilling to conduct ‘genuine’ proceedings.”14 Little has been done in this respect. A clear and apparent danger posed by this situation – the danger at the heart of this article – is its possibly leaving the door open for states to orchestrate sham trials. Indeed, one may think that some will have an advantage in feigning genuine proceedings, hoping to preserve amicable relations on the international scene while nevertheless preventing justice from coming to fruition. A lack of reflection on the unwillingness criterion risks allowing for the development of non-exhaustive legal standards for the assessment of this provision, in turn leaving room for elaborate schemes to escape international justice. Conversely, another danger posed by the current understanding of unwillingness is that it could potentially allow for an all-embracing interpretation. An overly intrusive approach to complementarity could upset a number of state parties to the Rome Statute. Recalling some of the tensions currently facing the ICC on the African continent, one should bear in mind the fundamental importance of the preservation of state sovereignty. Avoiding any further withdrawal from the statute will be perhaps even more essential than the thwarting of sham trials. This article will suggest a functionalist interpretation of the unwillingness criterion attempting to reconcile these twin dangers.

The dangers exposed here are more than mere suppositions. Mégret points to the twenty years preceding Maurice Papon’s trial for the deportation of Jews to German camps, wondering if this situation could amount to an ‘unjustified delay.’15 He continues with the example of Lieutenant Calley’s

12 Article 21 of the Rome Statute allows to complement the court’s normative corpus with established rules and principles of international law where the court’s statute and regulations are mute with respect to a certain issue. Schabas supra note 10 at 381; Joe Verhoeven, “Article 21 of the Rome Statute and the Ambiguities of Applicable Law” (2002) 33 NYIL 3.
13 Generally, Harmen Van der Wilt and Sandra Lyngdorf, “Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of ‘Unwillingness’ and ‘Inability’ in the Context of the Complementarity Principle” (2009) 9 International Criminal Law Review 39; Kleffner supra note 10 at 127 et seq.; Stigen supra note 12 at 219 et seq.; Generally, Mégret, supra note 11. It remains unclear how and which of these proposed norms will translate into the court’s practice. See section III of this article for further discussion.
condemnation to five years in prison for the My Lai Massacre, asking if this would now be considered ‘shielding.’\textsuperscript{16} More recent examples can also be cited. In the Kenyan situation the government did little to address crimes committed in the wake of the 2008 election, remained fairly uncooperative throughout the proceedings, and eventually took part in an anti-ICC campaign intended to undermine the court politically.\textsuperscript{17} Lionel Nichols adds that “despite the absence of investigations and prosecutions, the government sought to give the impression [to the international community] that progress was being made throughout this period” by initiating a number of weak initiatives.\textsuperscript{18} Another example could be the Colombian situation, where the state is alleged to have preserved close ties with some of the paramilitary groups targeted by its transitional justice mechanism.\textsuperscript{19} Commenting on the efforts deployed by the government until 2010, Judge Baltasar Garzon bluntly stated that there

\textsuperscript{16} Mégret, supra note 11 at 2; Michal Belknap, \textit{The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley} (Lawrence, Kan: Univ of Kansas, 2013).

\textsuperscript{17} The Prosecutor V. Uhuru Muigai Kenyatta, ICC-01/09-02/11, Decision on Prosecution’s Application for a Finding of Non-Compliance under Article 87(7) of the Statute (3 December 2014) at para. 78 (“mere declarations of compliance are insufficient.”); Lionel Nichols, \textit{The International Criminal Court and the end of impunity in Kenya} (London: Springer, 2015) at 104 (“the government made no serious attempt to prosecute either low-level or high-level perpetrators); Sosteness Francis Materu, \textit{The Post-Election Violence in Kenya: Domestic and International Legal Responses} (Heidelberg: Springer, 2015) at 218 (“Kenya […] did not show any political will to investigate or prosecute those who bear the greatest responsibility for the crimes”); Abraham Koror Sing’Oei, “The ICC Arbiter in Kenya’s Post-Election Violence” (2010) Minnesota J Int Law Online 19:5–20 at 11 et seq. (arguing that the government’s actions amounted to unwillingness in the sense of article 17(2) RS).

\textsuperscript{18} Nichols \textit{supra} note 17 at 104.

On the Difficult Case for a Functional Interpretation

existed at the time “a lack of the political and judicial coordination and resolve necessary to begin trials.”

This article suggests interpreting the unwillingness criterion so as to prevent both sham trials and political disengagement with respect to the ICC. This article will begin by exposing the current definition of the unwillingness criterion, as found in the existing literature. The discussion will subsequently move to the different interpretations this criterion may receive, before suggesting the drafting of a code of standard practice for mass atrocity prosecutions. This article will conclude by underlining the various policy implications presented by this new method.

I. DOCTRINAL DEFINITION

Few of the many authors having touched upon the unwillingness criterion gave this provision the attention it deserves. This section aims to provide the reader with an overview of this literature. It will firstly discuss the wording contained in Article 17(1)(a) and (2) \textit{chapeau}, before moving to the three sub-criteria contained in Article 17(2)(a)-(c). The discussion will finish with a short review of the criterion’s drafting history.

1. Article 17(1)(a) and Article 17(2) Chapeau

The unwillingness criterion is preceded by the first limb of Article 17, specifying that a case is admissible where a “State is unwilling or unable

20 Tom Davenport, “ICC may intervene in Colombia: Spanish Judge” Colombia Reports (3 August 2010) online http://colombiareports.com/spanish-judge-icc-to-intervene-if-colombian-justice-fails. Similar allegations have also been made with respect to a number of other situations before the court, including Israel, Uganda, Sudan and the Democratic Republic of the Congo. For Israel, see Valentina Azarov and Sharon Weill \textit{supra} note 10. For Uganda, see Patrick Wegner, \textit{The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace-Justice Divide} (Cambridge University Press, 2015) at 193 (“The [Ugandan] army has also made clear that it wants to avoid ICC investigations of UPDF crimes”); Nouwen \textit{supra} note 11 at 171 (discussing the political calculus behind the Ugandan government’s referral to the ICC); Wairagala Wakabi, “Will Indicted Ugandan LRA Commander be sent to the ICC?” \textit{International Justice Monitor} (5 January 2015) (“Uganda’s president Yoweri Museveni has recently led the campaign for African countries to abandon the ICC”). For Sudan, see Report of the Special Rapporteur on the Situation of Human Rights in the Sudan, Sima Samar, United Nations Human Rights Council, A/HRC/11/14 (June 2009) online http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.14_AUV.pdf at para. 17 (“In all areas of Sudan, a key challenge to human rights protection continues to be the lack of political will and capacity to ensure justice and accountability for serious violations of human rights and IHL”); Nidal Nabil Jundi, \textit{The International Criminal Court and National Courts: A Contentious Relationship} (London: Routledge, 2016) at 238-39 (arguing that domestic proceedings against nationals Kushayb and Harun should amount to sham trials in the sense of Article 17(2)). For the Democratic Republic of the Congo, see Marlies Glasius, “A Problem, Not a Solution: Complementarity in the Central African Republic and Democratic Republic of Congo” in Carsten Stahn and Mohamed El Zeidy, \textit{The International Criminal Court and Complementarity: From Theory to Practice} vol. II (New York: CUP, 2011) at 1228.
genuinely to carry out the investigation or prosecution” (emphasis added).\textsuperscript{21} John Holmes recalls that prior drafts of the statute originally employed the term “ineffective,“ and that a number of delegations viewed this phrasing as overly subjective.\textsuperscript{22} Textually, the term qualifies and possibly objectifies the act of investigating and prosecuting, thus slightly moving the emphasis from intentions to actions.\textsuperscript{23} It appears to command the undertaking of a number of reasonable measures demonstrating the state’s sincere commitment throughout the proceedings. The Appeals Chamber alluded to this dimension of the admissibility test in the Gbagbo case, reminding that these requirements cannot be satisfied by merely demonstrating that an investigation is ongoing.\textsuperscript{24} The precise meaning of this term however remains debated.\textsuperscript{25}

The second limb of Article 17 commences the unwillingness criterion with the chapeau specifying that determinations shall be made “having regard to the principles of due process recognized by international law.”\textsuperscript{26} The phrase was introduced to ensure that the Court relies on objective criteria in its assessment of domestic proceedings.\textsuperscript{27} The statute however fails to define these principles and the drafting history does not elucidate exactly what the drafters had in mind.\textsuperscript{28} Taking into account that certain areas of international law already contain norms relating to the protection of due process, some authors suggest drawing these principles from existing jurisprudence, especially in the area

\textsuperscript{24} Prosecutor v Simone Gbagbo, ICC-02/11-01/12-75-Red, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo” (27 May 2015) at para. 29.
\textsuperscript{28} Ibid; Kleffner supra note 10 at 127.
of international human rights. The literature however remains divided on this front, with others arguing for different and sometimes conflicting interpretations of this formula. In the Al-Senussi case, the Appeals Chamber answered some of these questions, noting that human rights standards may assist the court in admissibility decisions, and that violations of due process rights to the detriment of the accused – unless egregious – should not satisfy the unwillingness test for the purposes of the Article 17(2)(c) analysis.

The chapeau further stipulates that the Court “shall consider” whether “one or more” of the sub-criteria exist in order to determine whether a case is admissible. The literature is divided on the exact meaning of this language. While some read “shall consider” as allowing the court to consider other factors than the three sub-criteria, others believe that the list in sub-paragraphs (a)-(c) is exhaustive. The fact that unwillingness operates as an exception to the primacy of domestic proceedings appears to call for a restrictive interpretation.

33. Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court” (2003) 14 EJIL 481 at 500 (emphasizing that the word “consider” has been interpreted as deliberately opening this list); Louise Chappell, Rosemary Grey and Emily Waller, “The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court’s Preliminary Examinations in Guinea and Colombia” (2013) 7:3 International Journal of Transitional Justice at 460; Sophie Morel, La mise en oeuvre du principe de complémentarité par la cour pénale internationale: le cas particulier des amnisties (Lausanne: Editions bis et ter, 2005) at 117. But Holmes supra note 10 at 675; Stigen supra note 12 at 257 et
2. Article 17(2)(a)-(c)

The sub-criteria enshrined in Article 17(2)(a)-(c) arguably form the core of the unwillingness criterion. These factors were originally introduced into the statute in order to address concerns regarding the vagueness and subjectivity of the term “unwillingness”, therefore adding some objectivity to the court’s future admissibility determinations.\(^{34}\)

The first sub-criterion is commonly referred to as “shielding” and concerns the situation where a state, while pretending to fulfil the letter of the Statute, stages a sham prosecution intended to protect the accused from genuine proceedings.\(^{35}\) The criterion reads as follows: “The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility (…)”\(^{36}\) Kai Ambos rightly asserts that “the term “purpose” suggests a subjective interpretation in the sense of the State’s specific intention […]. It constitutes, at the same time, an expression of bad faith of the respective State with regard to the intention to bring the person(s) responsible to justice.”\(^{37}\) The fundamentally subjective threshold presented by this sub-criterion poses significant evidentiary difficulties.\(^{38}\) It is argued that a state’s unwillingness will have to be inferred from objective departures from standard practice applicable in similar cases, such as the inadequate allocation of resources to investigations, the appointment of a special investigator who is politically close to the accused, the transfer of a case to secret or special tribunals, the general lack of support and cooperation with investigative authorities, or the granting of blanket amnesties and immunities.\(^{39}\) In the Georgia case, Judge Peter Kovacs alluded...
to this sub-criterion in his separate opinion on the request for authorization of investigation. His opinion noted the inconsistency between Russia’s contention that the investigation had been “unable to confirm involvement of Russian servicemen” in the commission of the crimes on the one hand, and the admission that the Russian Investigative Committee “still need[ed] to verify allegations against its servicemen” – having even been obliged to request four times the legal assistance of the Georgian authorities in this respect. For this reason Judge Kovacs concluded that “there is, at the minimum, a situation of inactivity [...] if not unwillingness [...] to genuinely carry out the investigation in accordance with article 17(1)(a) and 2(a) of the Statute.”

The second sub-criterion is referred to as “unjustified delay,” and reads as follows: “there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice”. To establish unwillingness, a threefold test must be satisfied: (1) there must be a delay in the proceedings; (2) this delay must be unjustified; (3) such that this delay is inconsistent with the intent to bring the person to justice. The notion of intent present in this sub-paragraph must be read against the more objective criterion it is placed with, namely that this delay must be “unjustified.” It follows that a long delay may be excused by valid justifications. Some of the literature suggests borrowing justifications from international human rights jurisprudence on the right to be tried “without undue delay” and to a hearing “within a reasonable time” in the determination of criminal charges, as well as the right to a hearing in the determination of one’s civil rights and obligations. Again, the assessment of an unjustified delay is not conducted in the abstract, but by comparing the case at hand to standard procedure for comparable situations under established domestic law.

A delay should be unjustified where it could have been avoided by employing

---

40. Situation in Georgia, ICC-01/15, Decision on the Prosecutor’s Request for Authorization of an Investigation, Separate Opinion of Judge Peter Kovacs (27 January 2016) at para. 61 (“It follows that there is, at the minimum, a situation of inactivity with respect to these potential case(s) if not unwillingness on the part of the Russian authorities to genuinely carry out the investigation in accordance with article 17(1)(a) and 2(a) of the Statute.”).
41. Ibid, at para. 60.
42. Ibid.
45. Ambos supra note 10 at 310; El Zeidy supra note 10 at 901; Stigen supra note 10 at 289-90; Kleffner supra note 10 at 139.
46. Van der Wilt supra note 14 at 40; Kleffner supra note 10 at 139; Ambos supra note 10 at 310; Stigen supra note 12 at 291 et seq.
appropriate care. In assessing this sub-criterion in the *Libya* case, the court took into consideration every step of the state’s slow, albeit diligent, investigation. In spite of the fact that national authorities had not yet formulated charges nor appointed an attorney to represent the indictees two years after their arrest, the court nevertheless concluded to inadmissibility on the basis that the slow progression of the case appeared excusable. This conclusion was reached in light of the extensive magnitude of the investigation (spanning crimes committed over several decades throughout the entire country) and the state of conflict prevailing in certain regions of the country.

The third and last sub-criterion is referred to as “lack of independence or impartiality”. According to William Schabas, it targets the situation where, “even if the proceedings are not a sham, they were defective in the sense that even though the State may be acting in good faith, there are persons whose conduct is geared to [...] cause mistrial or taint evidence.” The sub-criterion reads as follows: “the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.” The mental element referred to in this text is the same as in sub-criterion 17(2)(c), and requires a proof of bad faith based on objective deviations from established standards. In the absence of a definition in the statute, some of the literature suggests assessing these deviations in light of international human rights case law specifically addressing independence and impartiality. In order to establish a lack of independence, the doctrinal view is that the court will examine, among other things, the manner of appointment of the members and their term of office, the existence of guarantees against outside pressures, and the question whether the body presents an appearance of independence.

---

48. *Prosecutor v. Saifal-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, “Decision on the Admissibility of the Case against Abdullah Al-Senussi”, 11 October 2013 at paras. 211 et seq. The court namely considered “(i) that adequate investigative steps have been taken by the Prosecutor-General’s investigative team, including conducting interviews of witnesses, obtaining documentary evidence, and requesting specific information from relevant external sources; (ii) that multiple lines of investigation have been followed by the judicial authorities with a view to ascertaining those facts that may be relevant to ascertaining Mr Al-Senussi’s alleged criminal responsibility; and (iii) that, during interviews, witnesses were asked to provide information of a potential exculpatory nature, to comment on information given by other witnesses or on items of documentary evidence, and to clarify portions of their own interviews (...)”

49. *Ibid*, at paras. 227 et seq.

50. *Triffterer, supra* note 10 at 393, 394.


52. Van der Wilt and Lyngdorf, *supra* note 25 at 71; Ambos *supra* note 25 at 69; Kleffner *supra* note 10 at 145 et seq.; Stigen *supra* note 10 at 300 et seq.; Schabas *supra* note 10 at 335.

on the other hand, should be assessed as both a freedom from personal bias as well as from “surrounding circumstances which objectively give rise to an appearance of bias.” In the Al-Senussi case, the Pre-Trial Chamber did not make a finding of lack of independence or impartiality despite the evidence of public statements from the government undermining the accused’s rights to be presumed innocent.

3. The Drafting History

It was recognised from a very early stage during the negotiations that the court, in contrast to its two ad hoc counterparts, should not have primary jurisdiction over domestic proceedings. The ICC was understood from the outset as an institution intended to complement domestic efforts, hence the term “complementarity.” The provision on admissibility was studied in detail at the August 1997 meeting of the Preparatory Committee, where a number of proposals were discussed informally. Discussants proposed to include the “unwilling or unable” concept in the statute on this occasion, drawing from an earlier report suggesting that domestic proceedings may be unsatisfactory due to “ineffective or unavailable procedures.” Consensus gradually coalesced around the text, receiving a few minor adjustments in the Zutphen draft and the final version in April 1998. John Holmes (who coordinated the negotiations) specifies that the sub-criteria were added to the unwillingness provision so as to give more precision and objectivity to the court’s future determinations of admissibility, with some states complaining upon completion of the final text

57 Draft proposal by Italy on article 35 (issues of admissibility); Non-Paper/WG.3/No.4,5 August 1997; ‘Canadian-German draft proposal on complementarity, Article 35, Issues of Admissibility,’ 5 August 1997; ‘Draft Proposal by Singapore on article 35, Addition to the United Kingdom Formulation,’ Non-Paper/WG.3/No.5, 5 August 1997.
58 For the earlier report, see Preparatory committee 1996 report, vol I. at para. 165. For the insertion of “unwillingness” into the statute, see Informal Consultation on Article 35, Coordinator’s Draft Consolidated Text, ‘11 August 1997.
59 Schabas supra note 10 Commentary at 338; Zutphen Report at 41-43; Preparatory Committee Draft Statute, p.40-42
that its content remained overly subjective. This addition to the statute was made bearing in mind that “the Court should not serve as an appellate body or a court of last resort for national legal systems.” Cameroon, Tunisia and India for instance felt the need to underline that the ICC should in no way be used to second-guess national procedures. On the other hand, a number of states including Australia, Finland and the Netherlands warned that according too much deference to national jurisdictions could hinder the Court’s mandate by allowing sham trials to take place. Others specifically expressed their reticence to an overly burdensome system of supervision, feeling that this would fall outside the Court’s mandate.

One of the main concerns throughout the negotiation of the statute was the preservation of state sovereignty. The granting of the Prosecutor’s *proprio motu* powers generated constant debate, with certain states demonstrating strong reticence to the Court’s potential interference into domestic affairs. Negotiations surrounding complementarity have been pictured as “a clash between the opposed views of “sovereign-anxious” and “court-friendly” states.” Holmes states that the solutions developed “were both complex and

---

politically sensitive, reflecting the concerns of States over national sovereignty and the potentially intrusive powers of an international institution.”68 He specifies that the outcome is a “very delicately balanced text”, a “package” which was the “product of intense negotiations and judicious compromises designed to reach widespread agreement.”69 Delegations did not have the chance until the very last moment to have a look to the whole picture, which led to the inclusion of some “uneasy technical solutions” and “awkward formulations.”70 Loopholes and inconsistencies between norms thus leave a number of issues unresolved.71

II. INTERPRETATIONAL DIFFICULTIES

The language employed in the unwillingness criterion has a fleeting character. While on appearance anchored in objective terms, this criterion leaves substantial space for strong arguments both in favour and against the admissibility of cases presenting signs of unwillingness. In the absence of case law meaningfully complementing the difficult agreement reached in Rome, the escheresque nature of this provision frequently leaves one with more questions than answers. This section aims to depict the two contrasting interpretations this provision may receive in the face of so much uncertainty: a broad, impunity-sensitive one, and a narrow, sovereignty-sensitive one.

1. The Unwillingness Criterion against the Protection State Sovereignty

When read against the need to protect state sovereignty, the language provided for in the unwillingness criterion appears to endow states with a substantial amount of autonomy in their carrying out of judicial proceedings. A sovereignty-oriented interpretation could go as far as to take away much of the bindingness associated with the Rome Statute. Article 17(2) chapeau for instance stipulates that the Court shall consider whether “one or more” of the sub-criteria exist in order to determine whether a case is admissible. This wording appears to grant the Court discretion to find a case inadmissible even where a state is nevertheless shielding the accused, delaying the proceedings or lacking independence or impartiality – an unlikely opening that could

---

68. Holmes supra note 10 at 668.
71. Ibid.
however be invoked in cases of lesser gravity such as “unjustified delays.”\footnote{Article 17(2) chapeau \textit{Rome Statute of the International Criminal Court}, 17 July 1998, A/CONF. 183/9; Ambos \textit{supra} note 25 at 66; Azarov and Weill \textit{supra} note 10 at 911; Stigen \textit{supra} note 10 at 258, 290.} Moreover, the exact meaning of the term “genuinely” remains contentious, with a number of authors questioning whether the term should apply principally to the verb “to carry out” or the words “unwilling or unable” in Article 17(1)(a).\footnote{See note 27.} Were “genuinely” to apply to the latter, a strong case could be made that this term has the effect of augmenting the evidentiary threshold commanded by Article 17(2) – requiring evidence that a state be “genuinely unwilling” to carry out the proceedings instead of merely “unwilling.” One should bear in mind that the term “ineffective” was originally employed and that a number of delegations viewed this phrasing as overly subjective, eventually finding agreement on “genuinely” after refusing other terms such as “good faith”, “diligently” and “sufficient grounds” for the same reason.\footnote{Holmes \textit{supra} note 63 at 664.}

The uncertainties regarding the concrete evidencing of Article 17(2) pose particular difficulties.\footnote{Megan A Fairlie and Joseph Powderly, “Complementarity and Burden Allocation,” in Carsten Stahn & Mohamed M. El Zeidy, eds., \textit{The International Criminal Court and Complementarity: From Theory to Practice} (New York, NY: Cambridge University Press, 2011) vol I 642 at 644.} One may for instance wonder whether the sub-criteria require mutually exclusive evidence, keeping in mind that the sub-criteria were introduced in order to add more specificity to admissibility assessments – and therefore to limit the court’s discretion in scrutinizing domestic affairs.\footnote{See note 63.} As an exception to the general prevalence of domestic prosecutions under the Rome Statute, one could think that these sub-criteria must be construed narrowly and therefore target three fundamentally distinct scenarios: one where the state directly intends to shield the accused, one where there is an unjustified delay, and one where proceedings demonstrate a clear lack of independence or impartiality. Moreover, the exact evidentiary threshold for each of these sub-criteria remains uncertain. For similar reasons, one could argue that the unwillingness criterion presents an exceptional situation where states’ devious intentions must be made completely clear before the court. Mere allegations or appearances would contradict the foundational principle of complementarity, allowing the ICC to encroach upon state sovereignty where authorities may simply be experiencing temporary difficulties.\footnote{Article 1 and preambular paragraph 10 \textit{Rome Statute of the International Criminal Court}, 17 July 1998, A/CONF. 183/9.} The requisite mental elements found in the sub-criteria would also appear to be inherently high, with language such as “for the purposes of shielding” and “inconsistent with an intent to bring the concerned person to justice” reflecting the primacy of sovereignty. In light of the above, one may finally argue that
the court should not be allowed to scrutinize of its own volition each and every step undertaken by states. The language provided for in Rule 51 of the Rules of Procedure and Evidence seems to support this interpretation, depicting all forms of positive action in the matter of evidencing inadmissibility as essentially stemming from the state:

“In considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, inter alia, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.”

Strong arguments in favour of a narrow interpretation of the unwillingness criterion may also be drawn from the provision’s drafting history. States repeatedly expressed concerns with respect to their sovereign interests in the administration of criminal justice. The general rule under international law is clear: the exercise of criminal jurisdiction by a state over its territory is an expression of sovereignty. All states have the right to prosecute the perpetrators of crimes committed within their borders and interference by external bodies is prohibited. William Burke-White and Scott Kaplan note that admissibility was thus probably viewed in Rome as primarily intended

---

to protect sovereignty. Complementarity constituted a solution reconciling the priority of protecting the sovereign exercise of domestic jurisdiction with the requirements of international justice. Carsten Stahn recalls that “states were ready to consent […] on the basis of the assumption that this institution would act as a court of last resort, which intervenes on an exceptional basis.”

According to Holmes, “the critical factor […] was whether there was a defect in the approach taken by the state which inevitable, if left to its conclusion, would result in a travesty of justice.” Later commenting on the unwillingness criterion directly, Holmes concludes that “undoubtedly, the standards are high. However, the underlying premise of the complementarity regime was to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases (emphasis added).”

Jo Stigen warns that “it must be borne in mind that the complementarity principle grants states a generous margin of appreciation not only as to how they carry out the investigation, but also as to the thoroughness.”

He continues, “The fact that the investigators merely are doing a sloppy job will not, for instance, indicate unwillingness. This was stressed by several states during the negotiations.” The very risk posed by this apparent limit is that it may open the door to sham trials. The general framework of the unwillingness assessment requires that deviations be noted from standard procedure. In jurisdictions where the standard procedure for the criminal investigation and prosecution of crimes of such magnitude as mass atrocities may not be thoroughly established, one may think that such deviations will be difficult to determine. States with devious intentions may take advantage of this situation and orchestrate a sham trial specifically intended to respect the (insufficient) standards in place. Only a few furtive and specific adjustments to the proceedings could suffice to derail the entire process. For example, a state could stealthily distort the gathering and presentation of the evidence so as to ensure that certain incriminating facts do not find their way into the judgement. A state could order some officials to taint the drafting of the indictment, the presentation of the evidence, or the interrogation of the testimonies. Such irregularities could very well go unnoticed by an ICC assessing the proceedings from afar and with a certain level of deference. This scenario would not be entirely unrealistic taking into account that international criminal tribunals frequently prosecute highly influential individuals and that states may lack the resources required to carry out flawless proceedings in the aftermath of mass atrocity.

83. Stahn, supra note 81 at 96.
84. Holmes, supra note 24 at 674
85. Ibid at 675.
86. Stigen, supra note 10 at 273.
87. Ibid.
2. The Unwillingness Criterion against Principles of Due Process Recognized by International Law

The language employed in the unwillingness criterion also allows for a second, broader interpretation. The terms “shall consider” in the chapeau have been argued to be explicitly intended to open the list of sub-criteria contained in Article 17(2). Darryl Robinson, who himself drafted Article 17, highlights that “the open-ended wording ‘shall consider whether’ was deliberately chosen, as opposed to language imposing fixed requirements (e.g. ‘means’ or ‘must conclude that’) – thus indicating that terms such as ‘intent to shield’ are illustrative.” Christopher Hall adds that a broad interpretation should be retained to ensure that the court “preserve the potential power to act in a broad range of situations.” Taking into account the court’s over-arching mandate of eradicating impunity and its corollary of deterring mass atrocities, he stresses that as many potential perpetrators as possible “should understand that they risk prosecution […] even if current resource constraints limit the risk in practice.” It should also be recalled that Article 17(2) chapeau demands that unwillingness determinations be carried out “having regard to the principles of due process recognized by international law.” Considering that the statute does not define the aforementioned phrase, this language appears inherently broad, potentially redirecting the court to many areas and sub-categories of international law regulating due process rights. Jann Kleffner mentions that:

“such principles and standards can be derived from relevant human rights, the concept of a denial of justice, obligations to investigate and prosecute serious

---

88 See note 35.
89 Robinson, supra note 10 at 68.
90 Robinson, supra note 35 at 500. It should however be noted that many do not endorse this interpretation. See note 35.
92 Preambular paragraphs 4 and 2 Rome Statute of the International Criminal Court, 17 July 1998, A/CONF. 183/ 9. Respectively, (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished”) and (“Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”).
93 Hall supra note 94 at 15.
95 Kleffner supra at 127, 256; Stigen supra note 10 at 253 (“There is hardly any need for an expansive reading as a plain reading suggests that the criteria are broad, allowing for a variety of considerations.”); Michael A. Newton, “Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court” (2001) 167 Mil. L. Rev at 66; with regard to human rights, William Schabas, The International Criminal Court: A Commentary on the Rome Statute (Oxford University Press, 2010) at 345.
violations of human rights, the jurisprudence of the various international and regional human rights bodies on the exhaustion of local remedies requirement, rules regulating offences against the administration of justice and, subsidiarily, the doctrine of command responsibility.”

Particularly relevant for the purposes of unwillingness determinations are the principles developed by the European Court of Human Rights (ECHR) pertaining to the obligation to conduct adequate and effective investigations with respect to grave violations of human rights, such as torture. Harmen van der Wilt and Sarah Lyngdorf propose drawing from this case law, noting its opportune insistence on the even-handed and thorough investigation of each domestic case. In Orhan v. Turkey, the ECHR for instance took issue with the fact that “there was no evidence of any request to the security forces for information concerning their operations […] about their activities at Lice Boarding Scholl,” where an illegal detention was alleged to have taken place, “an omission which was itself sufficient to warrant describing this investigation as seriously deficient.” In Khashiyev and Akayeva v. Russia, the court similarly emphasised that “the investigation failed to obtain a plan of the military operations […] despite strong evidence that such an operation was taking place. Such a plan could have constituted vital evidence.” The measures required by the court concern familiar police methods such as hearing key witnesses, inquiries into forensic evidence and autopsies. Of particular importance are the cases where such shortcomings have been identified in the context of mass atrocities, such as Musayev and Others v. Russia, where the court took into consideration the fact that the case file “did not contain a single

96. Kleffner, supra note 10 at 256. See also Mégret, supra note 11; Stigen, supra note 10 (implicitly) at 263 et seq.
97. Harmen van der Wilt and Sarah Lyngdorf astutely note that the procedural limb of Articles 2, 3 and 5 of the European Convention on Human Rights has already produced a body of jurisprudence assessing the very rigorosity of criminal proceedings. Van der Wilt and Lyngdorf supra note 14 at 51; Kleffner supra note 10 at 131 et seq. Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5; 213 UNTS 221.
100. Khashiyev and Akayeva v. Russia (ECHR, nos. 57942/00 and 57945/00, 24 February 2005) at para. 159.
101. Van der Wilt and Lyngdorf supra note 14 at 56 (“Regarding questioning of (key) witnesses, the Court has in many cases found inadequacies concerning insufficient evidence obtained from eye-witnesses or other key witnesses 5and inadequate questioning of police, security forces and/ or state officials.”); Şemsi Onen v. Turkey (ECHR, no. 22876/93 14 May 2002) at para. 88 regarding failure to show photos of the suspect to applicants or to carry out a formal confrontation; Orhan v. Turkey supra note 101 at para. 349 regarding overly brief statements; Akitas v. Turkey, ECHR, no. 24352/94, §304, ECHR 2003-V at para. 306 regarding the omission of questioning regarding certain incriminatory facts; Demiray v. Turkey (ECHR, no. 27308/95, ECHR 2000-XII) at para 61, where none of the policemen present at the moment of the alleged crime were questioned.
list of those who were killed,” that there was “no plan of the district which might show the locations of the bodies and important evidence,” and that no attempt “seemed to have been made to draw up a list of the local residents who remained in the district” at the time of the events.  

A number of arguments can be found in the drafting history in favor of this interpretation. Holmes recalls that during the negotiations “delegations were mindful that the ICC was not envisaged as an appellate body to review decisions of domestic courts” and that “to avoid this result, it was said that the criteria permitting ICC intervention should be as objective as possible.” Burke-White and Kaplan note that “the Statute reflects a compromise as evidenced by the travaux préparatoires.” Stating that several states were sceptical of any intrusion on state sovereignty and that, by contrast, other states favoured more inclusive admissibility criteria, they contend that “the language eventually adopted appears to reflect both the desire to retain sovereign prerogative […] and the need to create a court with the authority and capacity to effectively ‘put an end to impunity’ (emphasis added).” Benjamin Schiff states in this respect that “to soothe worried states, the negotiators established hurdles that must be surmounted before the ICC can bring suspects before judges (emphasis added).” Mohamed El Zeidy finally notes that the phrasing “principles of due process recognized by international law” was inserted into the statute “to inject more objectivity into the criteria for determining unwillingness and to suggest an assessment of the quality of justice from the standpoint of procedural and even substantive fairness.” One could therefore argue that states intended to allow the court to rely on an extensive corpus of due process norms for the purposes of admissibility determinations. This could allow for a certain level of scrutiny into domestic initiatives provided that admissibility only be granted upon significant and conclusive inquiry. In this respect Darryl Robinson argues that state sovereignty is not violated when the court acts based on substantiated grounds due to the fact that states have “entered into a compact with the ICC, specifically mandating the ICC to prosecute wherever the state itself fails to do so.”

102. Musayev and Others v. Russia, ECHR, nos. 57941/00, 58699/00 and 60403/00, § 162, 26 July 2007 at paras. 160-61. See also Gul v. Turkey, ECHR, no. 22676/93, § 82, 14 December 2000 at paras. 89-90 (“no attempt to find the bullet allegedly fired […] at the police officers, no proper recording of the alleged finding of two guns and a spent cartridge inside the flat, no photograph taken of the weapons at the alleged location, no testing of hands for traces that would link him with the gun and no testing of the gun for prints.”); Yassen Ates v. Turkey, ECHR, no. 30949/96, § 110, 31 May 2005 at para 89, 96.

103. Holmes, supra note 24 at 673-74.

104. Burke-White and Kaplan, supra note 84 at 265.

105. Ibid.


107. El Zeidy, supra note 10 at 902.

108. Robinson, supra note 34 at 486; Brighton supra note 10 at 632.
Such elements make clear that the court will not simply notarise the exercise of jurisdiction by a state where the situation presents signs of unwillingness. A certain degree of scrutiny will be required. The court may indeed be inclined to conduct an inquiry into domestic proceedings in anticipation of its own opinion on factual and legal issues. One should however note that the phrase “having regard to the principles of due process recognized by international law” came as a replacement of the original language, “in accordance with the norms of due process recognized by international law.” It would seem that “in accordance with” suggests more rigour than “having regard to.” One should also recall that language explicitly referring to certain human rights standards (“ineffectiveness” and “unavailability”) in earlier drafts of the statute was eventually removed due to the wide-ranging discretion implied. Holmes explains that in removing this language, states were specifically concerned “that the Court should not take the approach that it could do the job of investigation and prosecution better than domestic courts, which terms such as ‘effectiveness’ might imply.” He continues, “The critical factor, to these delegations, was whether there was a defect in the approach taken by the state which inevitably, if left to its conclusion, would result in a travesty of justice (emphasis added).” Philippe Kirsch and Darryl Robinson also recall that many types of safeguards against the court’s encroachment on state sovereignty were discussed during the negotiations, and that “a watershed was reached when a proposal was made by Argentina and Germany suggesting that the prosecutor be required to submit proprio motu investigations to independent juridical review”. They further explain that, under this proposal, the prosecutor would “initially be able to carry out only a relatively limited preliminary examination of information received (whether from

110. Van der Wilt and Lyngdorf, supra note 14 at 63.
113. Holmes, supra note 24 at 674.
114. Ibid,
A danger posed by this broader, “international standards” interpretation of the unwillingness criterion is that it may lead to perceptions of infringement on state sovereignty, in turn undermining the legitimacy of the ICC regime more generally. The very notion of the court’s potential supervision over domestic proceedings was understood by some during the negotiation as having a close nexus with sovereignty. France for instance noted that the court should not be granted “undue control over the functioning of domestic jurisdictions.” In a vivid critique of the unwillingness criterion, Michael Newton contends that this provision “holds the seeds of unchecked erosion” because its contents remain to be defined by the court itself. State sovereignty has also surfaced more recently in the political imbroglio involving the ICC and the African Union, with a number of states this time taking issue with the court’s refusal to recognise the validity of Head of State immunities. South

116. Ibid.
117. Stigen, supra note 10 at 253.
Africa for instance expressed its regrets in this respect in a speech delivered at the Assembly of State Parties in 2016.\textsuperscript{122} The speech stated that, “There are perceptions of inequality and unfairness in the practice of the ICC … [from the] focus on African states … [In the future,] South Africa will, where necessary, itself prosecute the perpetrators of mass atrocity.”\textsuperscript{123} Elements such as the withdrawal of South Africa, Burundi and Gambia (who later rejoined the statute) and discussions before the African Union of a mass withdrawal from the Rome Statute all demonstrate the seriousness of the situation. Perceived respect for state sovereignty will be vital for court to flourish in the future.\textsuperscript{124}

The “principles of due process” advocated for in this section therefore present a number of problems. As mentioned by Newton, these standards presently remain indeterminate.\textsuperscript{125} The court has yet to determine which of the different norms proposed in the literature are to translate into practice. The exact test the court will apply in doing so also remains unknown. Van der Wilt and Lyngdorf further caution that ECHR jurisprudence may lack the universal validity required to act in situations spanning across the globe.\textsuperscript{126} The degree of supervision and potential intrusiveness of the monitoring required also remains uncertain. One may therefore think that the court’s conjuring of indeterminate, non-universal and potentially intrusive standards further risks engendering perceptions of infringement on state immunity. What is more, Van der Wilt and Lyngdorf also acknowledge that the principles identified by their study do not cover every stage of the proceedings: the European Court’s case law mainly targets obvious failures in the initial phases of criminal investigation.\textsuperscript{127} Other principles of international law proposed in the literature (namely the denial of justice, the exhaustion of local remedies and command responsibility) also seem to present similar limitations, never


\textsuperscript{123} Ibid.

\textsuperscript{124} See note 6.

\textsuperscript{125} See note 123, referring to note 98.

\textsuperscript{126} Van der Wilt and Lyngdorf supra note 14 at 70 (Arguing that this requirement may hamper the ICC from adopting the standards developed by the ECHR because the jurisdiction of the European Court only has limited geographical scope). Similarly, Kleffner supra note 10 at 130-31.

\textsuperscript{127} Ibid at 62 (Also acknowledging “we have not been able to detect case law in which the Court denounced a national court’s acquittal of a suspect of mass violations of human rights on the basis of lack of evidence or a spurious legal qualification.” At 62).
fully overlapping with the precise demands of the unwillingness criterion.\textsuperscript{128} It therefore remains uncertain whether these principles could themselves fully immunize the court against sham trials.

\section*{III. A CONSENSUAL SOLUTION}

The two conflicting interpretations of the unwillingness criterion have been caricatured to some extent in this last section. More than presenting the interpretation to be retained, this section has sought to illustrate the wide specter of implications this norm may engender in its current state. The correct interpretation certainly lies somewhere between these two opposite conceptions, reflecting the fact that this provision first and foremost remains the product of judicious compromises designed to reach widespread agreement among “sovereign-anxious” and “court-friendly” states.\textsuperscript{129} The court’s practice to this date would seem to suggest a similar interpretation. In the \textit{Libya} case, the Appeals Chamber noted that the ICC is not “an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights.”\textsuperscript{130} The chamber subsequently emphasized that Rule 51 of the Rules of Procedure and Evidence allows States to forward information showing that its courts meet internationally recognized norms, concluding that “human rights standards may assist the Court in its assessment.”\textsuperscript{131}

The court’s supervisory practice on the ground would however seem to suggest deference to state sovereignty. The ICC’s instruments provide for

\textsuperscript{128} Especially taking into account that the Article 21(1)(b)-(c) test to be applied by the court in invoking these rules risks filtering some of their content, therefore only translating a portion of their full normativity into practice. Article 21 \textit{Rome Statute of the International Criminal Court}, 17 July 1998, A/CONF. 183/9.


\textsuperscript{130} \textit{Prosecutor v. Saifal-Islam Gaddafi and Abdullah Al-Senussi}, Case No. ICC-01/11-01/11 OA4, “Judgment on the Appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October Entitled ‘Decision on the Admissibility of the Case against Abdulah Al-Senussi’”, 24 July 2014 at para. 219. \textit{But Prosecutor v. Thomas Lubanga Dyilo}, Doc. no. ICC-01/04-01/06, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58” (13 July 2006) at para. 31 (“The Court as an organic entity is put in the position of an overseer of the investigatory, prosecutorial and judicial processes of national authorities with regard to crimes falling within the jurisdiction of the Court”).

\textsuperscript{131} Ibid at 220. Similarly, In its assessment of Article 17(2) and (3) in the \textit{Al Senussi} admissibility challenge, the Pre-Trial Chamber for instance took note of incidents relevant to principles of due process recognized by international law without however mentioning which of these principles would be applied in the final analysis, principally focusing on facts evidencing Libya’s efforts in respecting the rights of the accused despite certain shortcomings. See note 50 at paras. 202 et seq.
a limited right to monitor proceedings once an investigation is opened.\textsuperscript{132} Articles relating to the transmission of information on domestic proceedings (articles 18(5) and 19(11)) are framed in language depicting the prosecutor as playing a passive role in this respect.\textsuperscript{133} Expanding on his role, the prosecutor stated in the Gaddafi admissibility hearing that the Office of the Prosecutor (OTP) had “some capacity” to examine national proceedings.\textsuperscript{134} The prosecutor specified, “We do some of that from the seat of the Court in The Hague, but of course the OTP may not be in a position to permanently monitor proceedings in court every day.”\textsuperscript{135} In this regard the government of Libya specifically requested during the admissibility proceedings “the implementation of a supervisory scheme [which] would provide the Prosecutor with an in-depth, contemporaneous understanding of the progress of Libya’s investigation and prosecution.”\textsuperscript{136} This proposal was unfortunately not addressed by the chamber. The weak regime as currently interpreted therefore appears as an impediment to complex forms of monitoring.\textsuperscript{137}

The 2003 Informal Expert Paper on Complementarity notes that evidencing unwillingness “may be technically difficult” and “politically sensitive.”\textsuperscript{138} It further stresses that regimes “may employ sophisticated schemes to cover up involvement,” and that information and analytic tools are consequently needed to penetrate such tactics.\textsuperscript{139} This section suggests developing the tools necessary to strike a balanced approach to unwillingness assessments. It

\textsuperscript{132} Article 15(2) however appears to grant the prosecutor broader powers in the context of preliminary examinations. Article 15 Rome Statute of the International Criminal Court, 17 July 1998, A/CONF. 183/ 9.


\textsuperscript{135} Ibid.


\textsuperscript{137} Stahn “Admissibility Challenges before the ICC”, supra note 10 at 252.

\textsuperscript{138} Informal Expert Paper, supra note 10 at 14.

\textsuperscript{139} Ibid.
proposes to work out an agreement before the Assembly of State Parties (ASP) setting out the precise terms through which an attentive supervision could take place. The first part of this section proposes a conceptual framework for unwillingness determinations based on this code, and the second part presents policy considerations in favor of such an agreement.

1. Assessing the Unwillingness Criterion against a Code of Standard Practice

A code of standard practice for mass atrocity proceedings could enshrine some of the principles of due process recognized by international law, serving as a reference against which the court could note deviations from standard practice applicable in the region concerned. This code could contain some of the defining principles found in the jurisprudence of international human rights bodies throughout the world pertaining to the assessment of prosecutions for complex offenses. An important component could be the compilation of customary police methods in different regions of the world regarding duties such as the hearing of key witnesses, inquiries into forensic evidence or autopsies. Like the codification of case law in an area of professional liability, such as medical liability, this document should seek to define with precision each and every step mass atrocity proceedings normally require in the region in question. In addition to principles of due process, attention could also be paid to a wide body of similar standards stemming from training documentation published by domestic and international actors, existing

---

140. See Van der Wilt and Lyngdorff, supra note 104.
141. As an illustration, some of the areas regulated could be the selection of the investigation approach and strategy; the identification of witnesses; witness protection; the selection of investigation sites; the preparation of witnesses for court hearings; minimal amounts of evidence required for specific infractions; the presentation of evidence; the drafting of indictments and judgments; financial and human resources; witness protection; investigative strategy; the selection of investigation sites, etc.
142. Such as denial of justice, obligations to investigate and prosecute serious violations of human rights, the jurisprudence of the various international and regional human rights bodies on the exhaustion of local remedies requirement, rules regulating offences against the administration of justice and the doctrine of command responsibility. Kleffner supra at 256.
domestic legislation and case law on wrongful conviction, or governmental protocols on investigation and charging.

A difficulty in the realisation of this ambitious task is the wide diversity of practices, standards and legal traditions applicable among the different state parties to the Rome Statute. A universal template could be adopted stipulating the general principles upon which different codes of practice could subsequently be developed by the court on a case by case basis. The Assembly of State Parties should thus be made to agree to the general idea of expounding the notion of “principles of due process recognised by international law” into a number of exhaustive codifications compiling the practices in place throughout the different regions where the court is involved. In this way, the OTP and the state under investigation could themselves seek an accord on the precise terms on which proceedings should be assessed having regard to the specificities of the situation at hand. The ASP’s assent would also be necessary to authorize a more active role in the monitoring of domestic proceedings. Such monitoring could be agreed upon via Article 54(3)(d), authorizing the prosecutor to “enter into arrangements” not inconsistent with the statute “as necessary to facilitate the cooperation of a State” or “an intergovernmental organization” during an investigation.

Trial monitoring by professional and independent agencies such as the Organisation for Security and Co-operation in Europe could therefore be officially legitimized, both legally and politically. These agencies could themselves forward information to the OTP, thus respecting the prosecutor’s apparent obligation to maintain a more passive role.

The determining component in the assessment of unwillingness should be the two different categories of mental elements contained in the sub-criteria, namely “for the purpose of shielding” and “inconsistent with an intent to bring the person concerned to justice.” “For the purpose of shielding” should be
assessed requiring that the sum of individual deviations from standard practice amount to the state’s gross negligence throughout the process. In the absence of unequivocal expressions of unwillingness (such as insider information, orders, amnesty decrees), the state’s specific intention will most often need to be evidenced through circumstantial evidence. One may argue that conclusive circumstantial evidence should suffice for the demonstration of an “intent to shield” in light of the special nature of admissibility assessments. Contrary to its domestic criminal law counterpart, where the requisite mental element normally determines guilt or innocence, the intention to shield in the context of admissibility decisions merely governs forum allocation. “Inconsistent with an intent to bring the accused person concerned to justice,” on the other hand, merely demands inconsistency with an intent, suggesting that fewer and lighter shortcomings may suffice. It may be argued that the miscarriage of a single step in the proceedings could suffice to render the case admissible, so long as this step amounts to a noticeable deviation from standard practice impacting the outcome of the case.

2. Policy Considerations for a Comprehensive Complementarity Strategy

Beneath the narrow issue of sham trials discussed in this section lies the more fundamental issue of the prosecutor’s discretion in assessing domestic proceedings. The eventuality of sham trials under the ICC’s complementarity regime remains but a mere manifestation of a complex challenge perpetually facing the court: the development of a comprehensive prosecutorial policy constructing productive relationships with state parties. The indeterminacy characterizing protocols on ICC-state relationships presents a problem perhaps even more important and difficult than the prevention of sham trials.

---

150. For more illustrations, see Informal Expert Paper, supra note 10 at 31-32.
152. One may argue that the prosecution of high-ranking mass atrocity perpetrators may be considered too important to be handled recklessly and that a presumption should therefore be established to the effect that a state’s incompetence and carelessness throughout the process should be reflective of an intent to shield. Kleffner, supra note 10 at 136; Rule 51 Rules of Procedure and Evidence; Holmes supra note 10 at 337.
153. Other examples in international law are the principle of “good faith” under public international law and the responsibility regime for a state’s aiding or assisting in the commission of internationally wrongful acts under Article 16 of the Articles on State Responsibility. Cited in Kleffner, supra note 10 at 136. The emphasis on the multiplicity of minor shortcomings would also have the advantage of preventing (or for the least dissuading) defendants considering making use of their influence in order to hide behind an absence of clear and obvious procedural defect.
154. See note 47.
155. This emphasis on the adequate management of the case at all stages from all officials offers the advantage of precluding defendants considering escaping justice from ordering that impeccable work be done save for the individual, fatal fault of a single person – a situation which would have left room for a state to invoke its otherwise irreproachably diligent work.
This is no small task. Brilliant minds have sought to confront the realpolitik status quo for decades before international criminal tribunals could finally be established in the 1990s.\textsuperscript{156}

Newton’s critique should not be taken lightly: The ICC remains the sole arbiter and guardian of the broad discretion afforded by Article 17(2)’s many ambiguities.\textsuperscript{157} Other critiques have also been formulated targeting the prosecutor’s readiness to make full use of this broad discretion. Nouwen questions the very legality of some of the prosecutor’s more active undertakings under the auspices of positive complementarity,\textsuperscript{158} and Schabas describes the prosecutor’s pursuing of a self-referral practice as an “opportunistic construction.”\textsuperscript{159} Robinson concludes that the prosecutor may thus “need to be particularly clear about independence and impartiality and to explain case selection decisions [... an issue on which] the OTP had not done enough” at the time of writing in 2010.\textsuperscript{160} A clearer delineation of the ICC’s supervisory role would therefore (partly) dissipate suspicions that this broad discretion furthers institutional interests.

Judge Fausto Pocar notes that the court is in a “unique position” to exercise “enormous influence in the correction, strengthening and improvement of

\textsuperscript{156} Sikkink, supra note 122 at 1-31.
\textsuperscript{157} Newton, supra note 98 at 66.
\textsuperscript{159} Nouwen, supra. note 11 at 97 et seq.; William Schabas, “Prosecutorial Discretion v. Judicial Activism at the International Criminal Court” (2009) 6 JICJ 731 at 760. See also Andreas Muller and Ignaz Stegmiller, “Self-Referrals on Trial: From Panacea to Patient” (2010) 8:5 Journal of International Criminal Justice Journal of International Criminal Justice 1267 at 1285 (briefly criticising the prosecutor’s willingness to define the scope investigations according to ‘understandings’ between The Hague and the referring state); Waldorf supra note 11 at 1268.
national criminal justice with respect to international crimes.”161 While precise boundaries have tended to evolve over time, the prosecutor’s policy of positive complementarity in essence aims to achieve this ambitious task.162 This policy seeks to catalyze domestic proceedings by engaging the ICC in a relationship of assistance and coordination between interested parties.163 For example, the court may coordinate investigative activities, facilitate the exchange of information among stakeholders, oversee capacity-building workshops, promote national proceedings, and even enter into communication with domestic authorities in order to identify norms and principles that domestic jurisdictions must meet in order to comply with the letter of the statute.164 With the very normative content of these standards remaining ambiguous, one may however question the level of guidance afforded by this practice on the ground. Nouwen highlights a number of misunderstandings engendered by this very ambiguity in the Ugandan situation.165 In one striking example, several high-ranking Ugandan officials believed to be under the obligation to

161. Fausto Pocar in Theodor Meron, Robert Toscano, Fausto Pocar and Others, “Round Table” in Mauro Politi and Federica Gioia eds, The International Criminal Court and National Jurisdictions (London: Routeledge, 2016) at 155 (“The ICC has the opportunity to play a fundamental pedagogical role for national jurisdiction”).

162. In doing so, the court hopes to diminish its potential caseload by maximising the number of domestic prosecutions. Luis Moreno Ocampo, statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal, 16 June 2003 at The Peace Palace, The Hague, online: <http://www.iccnow.org/documents/MorenoOcampo16June03.pdf>; See also note 161.


165. Nouwen, supra note 11 at 19. In Sudan, see Kamari Maxine Clarke, Fictions of Justice: the International Criminal Court and the Challenges of Legal Pluralism in sub-Saharan Africa (Cambridge;
mimic the ICC in every possible manner, going as far as to reform the country’s prison system.\textsuperscript{166} The vague, escheresque nature of the standards prescribed under Article 17 creates a concrete risk of misunderstanding between states.\textsuperscript{167} Setting clear and transparent expectations would ensure that the ICC, states, and civil society speak the same language when dialoging on matters of complementarity.

The ICC has largely operated on the basis of self-referrals in its initial years, an approach likely providing smoother political terrain.\textsuperscript{168} The first instance where the prosecutor opened an investigation through \textit{proprio motu} powers is the Kenyan situation, where a number of difficulties ultimately demanded the withdrawal of charges.\textsuperscript{169} The decision was made more recently to open two other investigations via \textit{proprio motu}, one in Côte d’Ivoire and another in

---

\textsuperscript{166} Nouwen supra note 11 at 19. In Sudan, see Kamari Maxine Clarke, \textit{Fictions of Justice: the International Criminal Court and the Challenges of Legal Pluralism in sub-Saharan Africa} (Cambridge; New York: Cambridge University Press, 2009) at 232 et seq. In Kenya, see Nichols, supra note 17 at 143 et seq.


\textsuperscript{169} See note 3; \textit{The Prosecutor v. William Samoei Ruto and Joshua Arap Sang}, ICC-01/09-01/11, Decision on Defence Applications for Judgments of Acquittal (5 April 2016) (International Criminal Court) online https://www.icc-cpi.int/CourtRecords/CR2016_04384.PDF.
Georgia. In continuing to sustain efforts at developing a *proprio motu* practice – in gradually changing the focus to confront more recalcitrant states as the court matures – the expounding of the legal terms underpinning such future confrontations appears apropos. What is more, clearer standards should also facilitate the gathering of evidence in many situations currently under preliminary examination. The prosecutor has at times shown signs of timidity in advancing towards a definitive decision in this respect, with the Colombian, Afghan and Guinean situations for instance remaining under preliminary examination ever since 2006, 2007, and 2009 respectively.

The concerted codification proposed in this article would admittedly transform the ICC’s vocation as a court principally responsible for the determination of guilt or innocence of individuals to one of prosecution and monitoring. Commenting on this nascent institution in 2002, Kirsch however noted that “independent from the existence of a duty to prosecute, the complementarity regime is surely designed to encourage states to exercise their jurisdiction and thus make the system of international criminal law

---


171. The prosecutor should indeed be better equipped to determine the precise forms of behaviour amounting to admissibility, consequently putting the court in a better position to consolidate a legally sound position moving forward in the absence of a referral. See also Claus Kress, “‘Self-Referrals’ and ‘Waivers of Complementarity’: Some Considerations in Law and Policy” (2004) 2:4 Journal of International Criminal Justice Journal of International Criminal Justice 944 at 948; Andreas Muller and Ignaz Stegmiller, “Self-Referrals on Trial: From Panacea to Patient” (2010) 8:5 Journal of International Criminal Justice 1267 at 1293.

enforcement more effective. One may see in this line of reasoning a vocation departing from the traditional duties of vesting a domestic criminal court. A closer look at the statute’s drafting history however reveals that this intention may not have been shared by all delegations, or at least that the exact materialization of this extra-judicial function was imagined in vastly divergent terms. While other major jurisprudential developments in international criminal law mainly concern technical modalities regulating the attribution of individual criminal guilt, one should bear in mind that the development of the unwillingness criterion will have a direct impact on state parties. This relationship is both vital and fragile.

Its unilateral development through case law (or administrative decree) could make for volatile standards likely to spark frustration among state parties. In moving slowly from a self-referral practice, the very preservation of the court would seem to demand a clear mandate coming from those holding the reins.

IV. CONCLUSION

This article has sought to conceptualise the ICC’s unwillingness criterion in order to detect attempts to bypass justice by crafting a subtle sham trial. Perhaps the solutions identified are unrealistic, shattering the fragile agreement achieved on Article 17’s cunningly escheresque terms. Or perhaps this proposed agreement is undesirable, imposing burdensome obligations on a weak court with little more than the creative ambiguity of its statute as a tool to induce state action. Perhaps this agreement is unconstructive, imposing the counterproductive solution of an increased level of coerciveness over reluctant human minds. Perhaps the eventuality of sham trials should instead be viewed as the inevitable cost of a system imposing a semblance of domestic law “bindingness” on such disconcerting events. Perhaps, indeed, this juridical reflex of taking issue with loopholes and imprecision is an instinct one should leave to domestic legal practice. More than proposing any definitive answers to this difficult question, this article has mainly sought to open the discussion on this underexplored issue. Reflecting on this issue seems important as the court slowly progresses from its infancy into maturity, progressively seeking autonomy from self-referrals and other voluntary modes of jurisdiction attribution.


174. See Section II(A).
I. INTRODUCTION

Contemporary large-scale, *ad hoc* United Nations Commissions of Inquiry (UN COIs) are the biggest, best resourced, most important international fact-finding bodies in existence today. They tend to focus on international criminal and human rights law, humanitarian law, and more broadly on the field of transitional justice. These contemporary UN COIs have most often been promulgated in recent years by the UN Human Rights Council, but also by the UN Secretary-General and even the Security Council. They are now routinely relied upon as the UN’s first line of response to the world’s biggest and most intractable conflicts, including in the Democratic Republic of Congo (DRC...
Mapping Exercise), Syria, Guinea, Gaza (alternatively called the Goldstone COI), Darfur (Sudan), Rwanda and elsewhere. Though each UN COI has its own peculiarities there also tends to be a great deal of uniformity in terms of what type of situation they respond to—armed conflict in particular, where mass abuses or serious international crimes are suspected. As a mechanism for identifying a road-map to structural reform of legal, political and other public institutions, COIs have demonstrated both in domestic cases and internationally that they can be very useful.

8. In the international domain the ad hoc COI model has been used in a multiplicity of situations to fulfill a variety of different purposes over the years, from providing a cooling-off period and mediating a conflict between nations, to playing an educative function in terms of informing a domestic or international audience of what is or has transpired, to making detailed factual and legal findings and corresponding recommendations on institutional reform based on well-researched, detailed information. Such legal and factual findings can then be used by the international community to signal its disapprobation with a particular nation’s actions, as well as to indicate the expected outcomes to the resolution of a problem—i.e., to signal to the investigated party (or parties) those outcomes that the international community deems appropriate. In turn, COI reports might influence third parties—generally other states or courts—to impose individual criminal punishments or other individual or state sanctions. Given the scope and flexibility of UN COIs, one can see why, in the right circumstances, it is increasingly preferred by the UN to many of the available fact-finding alternatives.
Given the scale of the crises to which they respond, it is perhaps unsurprising that their mandates are correspondingly ambitious: they are designed both to promote individual accountability for criminal wrongdoing—in particular war crimes, crimes against humanity, or genocide; and, they are to lay the foundation for broad-based transitional justice reforms, whereby UN COIs map the social, political, legal and even the economic landscape of countries in the aftermath of conflict and provide holistic recommendations meant to transition those troubled nations to peace and democracy. Today, the recommendations of such inquiries often read like a combination of a criminal indictment and a laundry list of structural and legal reforms thought foundational to prosperous multicultural democracies.

Yet despite these lofty goals and the perceived importance of these UN COIs, there remains relatively little research that critically examines their contemporary mandates—the reasons why COIs are said to be constituted in the first place. That research which does exist has only recently begun to seriously interrogate UN COIs from a legal or due process perspective. This paper attempts to remedy this oversight by challenging the prevailing wisdom surrounding the possible uses of contemporary large-scale UN COIs. In so doing, the paper finds that the two most prevalent purposes ascribed to such UN COIs, those being that COIs investigate possible breaches of international criminal or humanitarian law and provide transitional justice solutions, are necessarily—and legally—ill-suited to the COI process.

This paper will proceed first by briefly introducing large-scale UN COIs and the benefits that they are thought to offer today. Second, it will discuss sequentially the two most prevalent purposes for which ad hoc UN COIs operate—as quasi-criminal investigations and as robust transitional justice investigations—and conclude that both options represent purposes for which formal, large-scale UN COIs are not ideally suited. All of this analysis will be informed by looking at some recent UN war crimes COIs and will also draw from the experience of some domestic examples, particularly Canada’s lengthy experience with domestic COIs. The result leaves the future of large-scale ad hoc UN COIs up in the air, as the goals for which most contemporary UN COIs

---


10 Though there are certainly several reasons why the UN and domestic context in which COIs operate are different, there is a wealth of experience with COIs as an investigative technique and no doubt some of this can offer lessons for the relatively young international system.
are now constituted are seen to inapposite to the structure of the COI process. But this does not mean that UN COIs cannot be of great benefit to the UN, merely that how, when and why they are used requires a complete re-think.

II. WHAT IS A LARGE-SCALE, AD HOC UN COI TODAY, WHERE DID IT COME FROM AND WHAT ARE ITS REAL BENEFITS AS COMPARED TO THE ALTERNATIVES

A comprehensive history of COIs—or even UN COIs—is well beyond the scope of this article. However, some introductory words are perhaps called for in order to situate ad hoc UN COIs in their contemporary context.

The idea of COIs as a method of credibly and independently fact-finding in the hopes of addressing a dispute involving one or more states is not new. Indeed, Commonwealth COIs date back hundreds of years, and the progenitors of the contemporary large-scale, ad hoc UN (or international) COI model date back hundreds of years, at least to the Hague Conventions of 1899 and 1907. The 1899 Hague Convention, for example, stated:

In differences of an international nature involving neither honor nor vital interest and arising from a difference of opinion on points of fact, the Signatory Powers recommend that the parties who have not been able to come to an agreement by means of diplomacy, should as far as circumstances allow, institute an International Commission of Inquiry to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.

---

12. Thomas Lockwood locates the first such “Commonwealth” commission as an investigation between 1080 and 1086, resulting in the Domesday Book. See Thomas J Lockwood, “A History of Royal Commissions” (1967) 5 Osgoode Hall LJ 172.

13. See The Hague Convention for the Pacific Settlement of International Disputes of 1899, 1 Bevans 230; 1 AJIL 103 (1907) [1899 Hague Convention]; The Hague Convention for the Pacific Settlement of International Disputes of 1907, 1 Bevans 577; 2 AJIL Supp. 43 (1908) [1907 Hague Convention]. The text of both of the Hague Conventions can be found online at Yale’s Avalon Project: http://avalon.law.yale.edu/subject_menus/lawwar.asp. For correspondence and historical reports of the Hague Conference of 1899 see http://avalon.law.yale.edu/subject_menus/haguemen.asp. For a discussion of the role played by the Hague Conventions in contemporary UN COIs, see Lemnitzer, supra note 9.

14. See Title III, Article IX of the 1899 Hague Convention, ibid. See also the 1907 Hague Convention, ibid at Part II, “International Commissions of Inquiry”. See in particular Article 9, which states: “In disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.”
Under the Hague Conventions, a series of rules and understandings were drafted for the first time for the conduct of international fact-finding missions and dispute resolution. Under their auspices, fact-finding was to take place on an independent, impartial and “conscientious”, voluntary—all states involved had to agree—and *ad hoc* basis.\(^{15}\) Such fact-finding was intended only to settle questions of fact—and not questions of *law*—of an international nature, questions involving neither the honour nor the vital interests of the relevant states.\(^{16}\) The conclusions reached by the commissions were non-binding on the parties.\(^{17}\) As Nissim Bar-Yaacov has since stated: “[t]he promoters of the Hague institutions primarily had in mind the appointment of inquiry commissions in connection with border incidents, acts of sabotage or, perhaps, the persecution of minorities.”\(^{18}\) Indeed, as originally introduced by the Russian Foreign Ministry at the Hague Conference, and explained by its principal legal advisor, at the time (Professor de Martens), inquiries were thought to be primarily of value as a preliminary effort before arbitration.\(^{19}\)

In 1945, the drafters of the UN Charter took their cues with respect to fact-finding and international peace and security from these Hague Conventions, as well as several other sources such as the inquiry process under the defunct League of Nations.\(^{20}\) Initially, *ad hoc* investigations at the UN were conducted under the auspices of the UN General Assembly,\(^{21}\) UN Security Council or the UN Secretary-General; it is only more recently that the Commission on Human Rights (now the Human Rights Council, as of 2006) has begun initiating an increasing number of COIs.\(^{22}\)

\(^{15}\) 1899 Hague Convention, *ibid*.


\(^{17}\) *Ibid* at para 11, page 5.


\(^{20}\) See *Report of the Secretary-General on methods of fact-finding*, *supra* note 16. See also Shore, *ibid* at 26. Various other treaties outside the League of Nations, which considered conciliation were also thought to be of value. See *Report of the Secretary-General on methods of fact-finding*, *supra* note 16 at para 133, pages 23-4.

\(^{21}\) For a discussion of fact-finding practice at the UN General Assembly between 1945 and 1965, see *Report of the Secretary-General on methods of fact-finding*, *supra* note 16 at paras 149-239. See also Shore, *supra* note 19; Bar-Yaacov, *supra* note 19.

\(^{22}\) These certainly do not represent the full range of fact-finding done under the auspices of the UN or affiliated bodies. Specialized fact-finding has also taken place throughout the history of the UN, for example by the International Labour Organization (ILO), UN Educational, Scientific and Cultural Organization (UNESCO), the UN Food and Agricultural Organization (FAO) and the World Health Organization (WHO). See generally B Ramcharan, ed, *International Law and Fact-Finding in the Field of Human Rights* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1982) at 9-11; 16-7 dealing with the ILO; 18-9 dealing with UNESCO; and 19 dealing
Starting around the early 1990s, the purposes for which UN COIs were established shifted ever-so-slightly in response to contemporary trends in international law and human rights. The two most salient trends are discussed in parts 2.1, 2.2 and 2.3 of this paper. First, parts 2.1 and 2.2 posit that, starting perhaps with the Yugoslav inquiry of the early 1990s, and then with the Darfur, Gaza, and other COIs—and it has remained the case in the wake of the UN COIs established in Libya, Syria, and elsewhere in reaction to the ‘Arab Spring’—contemporary UN COIs tend to be established (a) in response the outbreak of armed conflict and mass abuses, and (b) they thus almost all focus first and foremost on the most serious international crimes, being genocide, war crimes and crimes against humanity. Of course, the timing of the shift in UN COI practice is no surprise: it coincided with the development of international criminal tribunals—such as those in the former Yugoslavia and Rwanda—and took-off with the coming-into-force of the Rome Statute of the International Criminal Court (ICC) in 1998.

Second, part 2.3 of this paper analyzes the rise to prominence of transitional justice in the 1990s, and the corollary tendency for contemporary ad hoc UN COIs to increasingly focus on that field—which includes a focus on accountability for international criminal law and human rights wrongdoing, but also a multitude of other issues all thought to be instrumental to


23. The COI’s mandate stated that the Security Council, by virtue of UN Security Council Resolution 780 of 6 October 1992: “[r]equests the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations...with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.” UN Security Council Res 780, UNSCOR, 47th Sess, UN Doc S/RES/780 (1992) at para. 2.

24. In relevant part, the UN Secretary-General was asked to establish a COI to: “investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensure that those responsible are held accountable.” See UNSC Res 1564, UNSCOR, 47th Sess, UN Doc S/RES/1564 (2004) at para. 12.

25. The “revised” mandate that the Goldstone inquiry took to be their guiding document required them to: “investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during, or after.” See Goldstone Report, supra note 4 at 13, para. 1.

reforming institutions and producing lasting stability in a nation or region.\textsuperscript{27} So for example, UN COIs now regularly offer the standard transitional justice laundry list of solutions, including: combatting impunity, fighting crime and halting injustices; searching for a “truth” regarding the causes and consequences of a conflict; contributing to national and international peace and security; contributing to national reconciliation processes; contributing to economic and social development and a transitioning from conflict to peace; promoting institutional reform and development, particular with respect to nations’ security apparatuses (like the military and police); and, encouraging domestic or international action and disapprobation, when necessary.\textsuperscript{28}

Taken together, this will demonstrate most contemporary UN COIs operate first and foremost in the wake of mass atrocities, in response to what are thought to be serious international crimes, while their mandates require them to investigate international \textit{criminal} wrongdoing as well as transitional justice solutions more broadly. The goals of \textit{ad hoc} UN COIs have morphed, in other words, to coincide with the developments of international law, and particularly the focus on international criminal law—as contrasted to wrongdoing more broadly—and the robust contemporary conception of transitional justice.\textsuperscript{29}


\textsuperscript{28} We will see that vague recommendations from many UN COIs adopt a ‘transitional justice approach’ by recommending the same general list of ‘solutions’. The ICTJ offers the “basic approaches” to transitional justice (in international law) as: criminal prosecutions (which invariably includes reference to international, hybrid and domestic prosecutions), truth commissions (and “truth seeking”), reparations programs, gender justice, security system reform and memorialization projects. See http://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf. See further the definition of transitional justice offered by Dinah Shelton, \textit{The Encyclopedia of Genocide and Crimes Against Humanity} (Macmillan Reference USA, 2004) at vol 3, pages 1045-7.

\textsuperscript{29} Jan Martin Lemnitzer has argued that the turn to international criminal wrongdoing is not in fact a new one for international COIs and that they have been doing something similar since the North Sea Incident Commission of 1905 or even before: “Commissions of inquiry clearly have a history of dealing with matters of international criminal law that predates the Hague Conventions.” See Lemnitzer, \textit{supra} note 9 at 926-927. By way of contrast, I would argue that the twin concepts of individual criminal law and transitional justice did not exist in anything resembling their modern form in the late 18th and early 19th Centuries, which means that there has been a shift to a newly-definable UN COI practice, even if previous international COIs are not so starkly different from today’s as some have claimed. While international COIs under the Hague Conventions and early UN practice were certainly forerunners to the concept of transitional justice and though some may have made findings of accountability, the investigations did not pertain to established international \textit{criminal} law as defined by specific \textit{elements of the crime} (\textit{actus reus} and \textit{mens rea}) as we have today. In any event, what is crucial
As we shall see, this shifting focus—and the reciprocal increase in attention that UN COIs have garnered—has also meant that UN COIs have crystallized into distinctly legal bodies (if they were not so before). That is, today’s *ad hoc* UN COIs are infused throughout by legal obligations and tasks: they are legally constituted by a legal mandate from the UN Human Rights Council, Security Council, General Assembly, or Secretary-General; they apply legal (criminal) standards to make legal findings; and, they have legal implications in that their findings can be used to support sanctions or criminal charges against individuals. Moreover, UN COIs rely for their success on their legal legitimacy: that is, to be taken seriously UN COIs must demonstrate their ability to conduct fair, balanced, independent, and impartial investigations while abiding by international norms of human rights and due process, and then they must make persuasive—i.e. credible and reliable—factual and legal claims. The ultimate benefit of a contemporary UN COI can thus be said to derive from the fact that it is able to act, to a greater or lesser degree, “legally” in otherwise highly political contexts, to offer the legal legitimacy that flows from a certain fidelity to legal standards of fairness for legally-constituted (albeit “non-judicial”) investigative bodies.

Some further generalizations can be made about contemporary *ad hoc* UN COIs that might help define both what they are and distinguish them from alternatives (what they are not). First, large-scale, *ad hoc* UN COIs are defined by the fact that their mandates are determined on a case-by-case basis by the most powerful of UN constituting bodies. These *ad hoc* UN COIs can then be contrasted with standing (permanent) bodies like the UN Special

---

30. The UN has repeatedly affirmed the obligation of its bodies and staff to abide by international human rights norms—and indeed it would make little sense for human rights monitors to be able legally to eschew the norms that they were enforcing. See for example UN General Assembly, *The rule of law at the national and international levels*, Draft Resolution A/67/L.1 (19 September 2012), stating at para 2: “We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.” [Emphasis added.] See also Report of the United Nations Secretary General to the UN General Assembly, *Delivering Justice: programme of action to strengthen the rule of law at the national and international levels*, UN Doc A/66/749 (16 March 2012), at para 11(c), online: <https://www.un.org/ruleoflaw/files/SGreport%20Eng%20A_66_749.pdf> [Delivering Justice].

31. I have expanded on this argument in the context of the UN Human Rights Council’s 2009 Goldstone COI. See Nesbitt, supra note 9, especially at part II, pages 149-156, for an argument regarding the necessary and inextricable link between legality and the (successful) work of UN COIs.
Re-Purposing UN Commissions of Inquiry

Rapporteur or Independent Experts investigative systems, or with smaller *ad hoc* investigations promulgated by the World Health Organization or other agencies of the UN.\(^{32}\) Their specific mandates determine on an *ad hoc* basis both the scope and the temporal limitations of the inquiry, meaning both how long it has to report its findings and the time-period covered by its investigations.

Second, UN COIs are usually composed of three or so commissioners who are asked by the UN body to investigate a problem and then produce and issue a report. The fact-finding process includes, *inter alia*, travel to the territory of the atrocities if possible as well as site visits, hearings, interviews, the collection of secondary evidence, and forensic evaluations.

Finally, the unique structure of large-scale, *ad hoc* UN COIs has—much like national or Commonwealth COIs—imbues them with several advantages in contrast to many of the currently available fact-finding alternatives. For example, large-scale *ad hoc* UN COIs tend to be larger, better resourced, and endowed with a greater breadth of expertise than other UN fact-finders, meaning that the breadth and depth of the research over a short period of time is much greater than available alternatives. As the 2006 UN Secretary-General Report on Impunity stated:

> While the special procedures of the Commission on Human Rights play a crucial role in monitoring and following up on the human rights situation at the country level, their impact cannot substitute for the role that an international commission of inquiry can play. Comparatively, international commissions have operated with much larger resources, support and expertise and have been able to issue long and comprehensive reports allowing for the detailed description of events and extensive legal analysis.\(^{33}\)

A point of contrast might be investigations by UN Special Rapporteurs. UN Rapporteurs have permanent mandates, are led by only one Rapporteur, usually with a small or non-existent staff (as opposed to the large staffs of UN COIs), and focus on very discrete issues—for example there is a Special Rapporteur on Torture and another on Extrajudicial Executions, though they can also be geographically limited (the Rapporteur on Palestine).\(^{34}\) The result is that *ad hoc* UN COIs attract more international attention both because they are

\(^{32}\) For an overview of the Human Rights Council’s Special Rapporteur and Independent Experts systems, as well as a list of Rapporteurs and Experts, see United Nations Human Rights Council, online: <http://libraryresources.unog.ch/c.php?q=462681&p=3162781>. The United Nations itself has come to distinguish these other bodies from the distinct work of the UN’s Commissions of Inquiry: see UN Library and Archive at Geneva, Research Guides, *International Commissions of Inquiry, Fact Finding Missions: Home*, online: <http://libraryresources.unog.ch/factfinding>.

\(^{33}\) Secretary-General Report on Impunity, supra note 27 at para. 6.

the biggest and best resourced fact-finding alternative available to the UN and because they tend to operate in the most visible—and disastrous—conflicts in existence today.\footnote{For a comparison between the Darfur COI and the international fact-finding alternatives, see generally Philip Alston, “The Darfur Commission as a Model for Future Responses to Crisis Situations” (2005) 3 Journal of International Criminal Justice 600 at 604-5.}

As a result, for UN COIs, the question is not whether they can sometimes be of benefit in a general sense; for all of the above reasons, UN COIs have become the go-to investigative tool in response to the most intractable conflicts of the day. However, just because they can theoretically be useful does not mean that they will necessarily be useful in achieving any purpose ascribed to them. Unfortunately, as the UN has plowed ahead with a plethora of criminally- and transitional justice-focused \textit{ad hoc} COIs, particularly in the past 25-years or so, there remains a question as to whether the common goals ascribed to virtually all contemporary UN COIs—which, as we shall see, are to investigate criminal as well as human rights wrongs, pronounce on criminal wrongdoing, and focus on transitional justice responses—are appropriate given their processes and procedures. This is a question that neither the UN nor the relevant academic literature on UN fact-finding has fully put to the test, and to which I will now turn.

\section*{III. CONFOUNDING THE PURPOSE: THE LIMITATIONS OF UN COIS}

Keeping in mind what UN COIs bring to the table in terms of their benefits and attributes— their size, expertise and resources, their flexibility, and the persuasiveness of their reports—we can now start to discuss what they have been doing to see how effective they have been. In particular, the intention herein is to dispense with certain purposes that UN COIs should not pursue, not to determine precisely what all \textit{ad hoc} UN COIs should do.

Though those who establish UN COIs have not always been clear in terms of what they hope they can achieve, as has already been mentioned it now appears that the current contemporary tendency is either to: (1) treat UN COIs as quasi-criminal investigations, looking first and foremost into the commission of war crimes and crimes against humanity,\footnote{Here we also have the COIs instituted in the wake of the Arab Spring uprisings in the summer of 2011, including COIs into government human rights violations and protestor repression in Tunisia, Libya (\textit{Libya COI}, supra note 7); and the \textit{Syria COI}, supra note 2.} or (2) treat UN COIs as a sort of transitional justice panacea wherein many or all of the primary goals of transitional justice are addressed through a single fact-finding mechanism—\textit{e.g.} a history of the conflict is given to provide the relevant society with a narrative and truth, crimes are investigated and accountability and reparations demanded, reform of institutions is considered, the social and
economic situation (and possibly social and economic rights)\textsuperscript{37} are considered, and so on.\textsuperscript{38} Contemporary \textit{ad hoc} UN COIs seem to treat these two purposes as though they represented the natural ambitions of the COI process itself, as if the COI process demands that at least one and perhaps both of these be the necessary purpose(s) of all contemporary UN COIs.

This tendency is not merely problematic because it presumes two general purposes for all UN COIs, thus limiting the thinking about a whole range of alternative investigations that might be useful. It is also the case that the pursuit by UN COIs of either of these two general purposes is intrinsically problematic because legally and practically they cannot make findings of individual criminal responsibility, and because the focus on transitional justice requires the COI’s efforts to be spread too thin with the result that the findings are rarely sufficiently specific, contextual, or even new.

Let us begin with a discussion of the problems associated with the first of these two purposes, using large-scale UN COIs to investigate international criminal and humanitarian law violations, before moving to a critique of the second of these approaches, what I will call the holistic transitional justice approach.

1. \textit{The problems with the “non-criminal” criminal investigations}

Today’s \textit{ad hoc} UN COIs almost all end up recommending ICC or other criminal action; and occasionally, as in the 2005 Darfur and the 2011 Syria inquiry,\textsuperscript{39} they collect names of possible perpetrators to hand over to the Security Council and/or the ICC for subsequent prosecution and punishment. As noted by the UN Secretary-General’s Report on \textit{The Promotion and Protection of Human Rights: Impunity},

\begin{quote}
[j]t has been widely recognized that the commissions of inquiry and fact-finding missions can play an important role in \textit{combating impunity}. As demonstrated in this report, recent international commissions of inquiry have been established with \textit{comprehensive mandates}, including specific requests for \textit{complex legal determinations and identification of perpetrators}.\textsuperscript{40} [Emphasis added.]
\end{quote}

\textsuperscript{37} See Goldstone Report, \textit{supra} note 4 at chapter XIII, where the Report focused on the destruction of industrial infrastructure, food production, housing and water installations; and, Chapter XII, Part E, which focused on the destruction of economic and infrastructure targets.

\textsuperscript{38} See for example the DRC Mapping Exercise, \textit{supra} note 1.

\textsuperscript{39} See “The UN has list of top Syrian leaders for crimes probe”, \textit{Associated Press} (23 February 2012).

\textsuperscript{40} See Secretary-General Report on Impunity, \textit{supra} note 27 at page 3. See also 2011 Secretary-General Report on the Rule of Law and Transitional Justice, \textit{supra} note 27, which asserts, at para. 25: “Commissions of inquiry are increasingly viewed as effective tools to draw out facts necessary for wider accountability efforts...These inquiries have encouraged national authorities to take action and are laying the groundwork for prosecutions. In addition, the Council has relied on commissions of inquiry to refer cases to the International Criminal Court, as in Darfur. Commissions of inquiry have also made a range of broader recommendations for non-judicial
There clearly exists the perception that UN COIs’ reports do not just make complex legal determinations about individual criminality, but are also intended to help guide courts in making complex legal determinations.\(^{41}\)

Though any number of contemporary UN COIs could equally demonstrate the same point, let us consider the purpose of the 2009 Guinea UN Human Rights Council’s COI in order to illustrate the potential problems with UN COIs conducting such legal-criminal investigations.\(^{42}\) The Guinea COI is chosen because it is both consistent with its contemporaries, but also because the Guinea Report is transparent in its evaluation of its mandate and thus demonstrates the issues in a straightforward manner.

Following a *coup d’état* in December 2008, a military junta took power in Guinea. Though an election was scheduled for January 2010, in the summer of 2009 there were indications that junta leader Captain Moussa Dadis Camara would break his pledge not to run for office. A peaceful protest was called in response to fears of this broken pledge and was held 28 September 2009 in a large stadium in Conakry, Guinea. By way of response to the protest, an official crackdown at the stadium saw at least 156 persons killed or “disappeared”, numerous injuries, widespread sexual violence, and the arrest and torture of various individuals.\(^{43}\) The Guinean COI was set-up by the UN Secretary-General in order to, in the words of its terms of reference:

> investigate the facts and circumstances of the events of 28 September 2009 and related events in their immediate aftermath. To that end, the Commission shall (a) establish the facts; (b) qualify the crimes; (c) determine responsibilities and, where possible, identify those responsible; and (d) make recommendations, including, in particular, on accountability measures.\(^{44}\) [Emphasis added.]

measures, including truth-seeking, reparations and institutional reform....” In other words, it is again evident that the COIs are first and foremost about ensuring accountability through prosecutions, potentially by referral to the ICC. However, they retain a broader transitional justice focus on both “truth-seeking” —and thus history telling—and institutional reform.

\(^{41}\) Consider here the DRC Mapping Exercise, *supra* note 1 at 36, para 95: “[o]ne of the major premises is that mapping remains a preliminary exercise that does not seek to gather evidence that would be admissible in court, but rather to ‘provide the basis for the formulation of initial hypotheses of investigation by giving a sense of the evidence.’” [Emphasis added.] See generally *Delivering Justice*, *supra* note 30 at para. 40: “In addition to the primary role of national authorities to punish those responsible for international crimes and other gross violations of human rights, international and hybrid criminal tribunals have played an important role in closing the accountability gap. Commissions of inquiry and fact-finding missions have also been increasingly viewed as effective tools to draw out facts necessary for wider accountability and transitional justice efforts.” See also the DRC Mapping Exercise’s Terms of Reference, *infra* note 118.

\(^{42}\) *Guinea COI, supra* note 3.

\(^{43}\) For a brief overview see *ibid* at Annex, page 2.

\(^{44}\) *Ibid* at 6, para 5.
Let us put this mandate and the problem that flows from it in context. Here, an intergovernmental authority—in this case the UN’s Secretary-General—legally promulgated a COI under his statutory powers—the UN Charter. That COI was then legally mandated to investigate the purported legal-criminal wrongdoing and produce a report that relies for its veracity on its assertions of impartiality, fairness and concurrence with international standards and laws. Moreover, it was to include in this report specific conclusions about international criminal wrongdoing with reference to international criminal law standards (“qualify the crimes”). Yet at the same the COI had to claim not to be “judicial”—just as Justice Goldstone’s 2009 Gaza COI and others have done—because it was not a court of law with the power to make international criminal law findings as they pertain to individuals.

The result is inherently confusing: the establishment of an ad hoc UN COI that is “non-judicial” and makes no claims with respect to legality in its structure, practice or findings; but one that is nevertheless legally mandated to fairly investigate and qualify international crimes with reference to criminal law tests, including the legal elements of the crimes (mens rea and actus reus) that must necessarily attach to individuals, and to “identify those responsible” for the crimes. By “qualify the crimes” with reference to criminal law tests, I mean that possible abuses are legally analyzed with specific reference to the legal elements of international crimes and, in the end, qualified as specific international crimes (say the crime against humanity of extermination) based on this criminal or humanitarian law analysis.

In practice, the result is that we get paragraphs such as the following, which offer contradictory signals:

[t]he final determination of individual criminal responsibility lies exclusively with a court of law. However, the Commission is obliged by its mandate to establish responsibility and to identify, where it can, the perpetrators of the crimes committed. In this section, the Commission assesses the individual criminal responsibility of the presumed perpetrators listed in chapter II (paras. 53 to 168 above). The information in this report could guide any possible future criminal investigation of the presumed perpetrators of the human rights violations which took place at the stadium on 28 September 2009 and the days that followed.46 [Emphasis added.]

45. After issuing the Goldstone Report, Goldstone asserted: “Some have charged that the process we followed did not live up to judicial standards. To be clear: Our mission was in no way a judicial or even quasi-judicial proceeding. We did not investigate criminal conduct on the part of any individual in Israel, Gaza or the West Bank.” [Emphasis added.] Richard Goldstone, “Reconsidering the Goldstone Report on Israel and war crimes”, The Washington Post (2 April 2011) [Goldstone’s Reconsideration].
46. Goldstone Report, supra note 4 at 47, para 212.
On the one hand, clearly the Guinea COI is investigating crimes and making findings of individual responsibility ("determine responsibility")—findings which can only obtain where criminal responsibility obtains—and then going a step further by listing "those responsible". On the other hand, the COI is not a court of law, which the COI says has exclusive jurisdiction to make findings of criminal responsibility. Here we find a contradiction in how contemporary UN COIs, including the Gaza, Darfur, Yugoslav, and Guinea COIs as well as the DRC Mapping Exercise, have come to be practiced: such COIs are asked to look into whether war crimes and/or crimes against humanity have been committed without ever being able to make criminal findings.\(^ {47}\) This is particularly important because many serious international criminal wrongs tend to contemplate the mens rea of intent, or something close thereto, which cannot be determined without a trial; and, not incidentally, elements of crimes such as mens rea generally cannot be determined, or often even guessed at, without better access to information than COIs tend to have. As a result, there is confusion both about what the COI does—it is both qualifying crimes and identifying perpetrators while simultaneously acting as a non-criminal prelude to a court performing these very same criminal tasks—and how legally determinative its findings are.

The next problem seen in the Guinean COI’s terms of reference is also a common one for UN COIs: because the Guinea COI’s terms of reference were focused on the investigation and qualification of crimes, so too was the majority of the fact-finding and ultimately the final report.\(^ {48}\) This meant that little research was available with respect to the underlying or contributing causes of the conflict, possible paths to resolution, or reform recommendations. As a result, we got the same now-standardized list of broad transitional justice

\(^ {47}\) For example, the DRC Mapping Exercise, immediately after stating that it was “not to establish or try to establish individual criminal responsibility of given actors” and that “it would have been imprudent, and unjust, to seek to ascribe personal criminal responsibility to any given individual, which is first and foremost a matter for legal proceedings based on the appropriate level of evidence”, nevertheless stated that, “information on the identity of the alleged perpetrators of some of the crimes listed does not appear in this report but is held in the confidential project database submitted to the UN High Commissioner for Human Rights. However, the identities of alleged perpetrators under warrant of arrest and those already sentenced for crimes listed in the report have been disclosed....” DRC Mapping Exercise, supra note 1 at 5, para 8; see also 40, para 104.

\(^ {48}\) The major finding of the Guinea COI’s report was as follows: “The Commission concludes that Guinea violated several provisions of the international human rights conventions ratified by it. The Commission believes that it is reasonable to conclude that the crimes perpetrated on 28 September 2009 and in the immediate aftermath can be described as crimes against humanity. These crimes are part of a widespread and systematic attack launched by the Presidential Guard, the police responsible for combating drug trafficking and organized crime and the militia, among others, against the civilian population. The Commission also concludes that there are sufficient grounds for assuming criminal responsibility on the part of certain persons named in the report, either directly or as a military commander or supervisor.” See Guinea COI, supra note 3 at Executive Summary, page 3; 41, para 180; pages 44-5, paras 198-200.
recommendations, with little detail or specificity as to how these recommendations applied or could be achieved in the context of Guinea. Specifically, the recommendations were: that the UN Security Council should “remain seized” of the situation; that the national and international community should look into how to reform the army and judiciary; that a truth seeking exercise be initiated to “shed light” on Guinea’s “painful past”;\(^49\) that the ICC should consider investigating; that reparations should be paid; and that named individuals should be targeted for sanctions.\(^50\)

It is unlikely that this problem can easily be resolved, for it is structural to the UN COI process when given such a mandate. UN COIs focused on individual accountability operate during or immediately after a conflict with, in part, the goal of providing updated information to the international community upon which decisions can be made. And this information is demanded in short order. But most transitional justice reforms—systemic, post-conflict reforms—take a great deal of time to investigate if they are to be of value to future reform initiatives. Moreover, an investigation of individual criminal wrongdoing is a very different task than a structural investigation. Even if timing were not an issue, there would be issues of procedure, standard of proof, probably a different group of experts would be needed for the criminal law portion of the investigation and the systemic investigation, and so on.

In the result, the Guinea Report offers two forms of findings or recommendations. First, it offers a series of recommendations which we already knew applied, which form the standard taxonomy of transitional justice, which go into virtually no detail about how they should be applied in the context of Guinea, and which offer little justificatory analysis regarding why these general recommendations apply equally in Guinea as they have in cases in the past. Second, the COI offers a series of criminal findings that are not in fact criminal. Instead, the findings of individual criminal responsibility are merely a guide for future criminal investigators.

This brings us to a complaint that could be applied to virtually all contemporary UN COIs: if what was wanted and needed was a criminal investigation, then why take the time and risk losing or contaminating the evidence by establishing a costly UN COI that cannot make criminal findings? On the contrary, if what was required was a systemic review of the causes of conflict and possible solutions thereto, considering that UN COIs cannot make criminal findings, why focus on criminal wrongdoing to the exclusion of other factors?

Perhaps the unsurprising result is that such UN COI reports would seem to have had a fairly small impact on subsequent reform initiatives or prosecutions. Indeed, one sees few examples of UN COIs leading to or even influencing the beginnings of specific, structural, internal reforms in the nations

\(^{49}\) See ibid at Executive Summary, page 3.

\(^{50}\) Ibid at Executive Summary, page 3; pages 55-59, paras 254-71.
investigated. For example, while the Darfur COI is generally seen as a great success, no major alleged perpetrator stands before the ICC for prosecution. Indeed, two years after the Darfur COI the Human Rights Council appointed a “High-Level Mission” to investigate the human rights situation, it found that the Government of Sudan had “manifestly failed to protect the population of Darfur from large-scale international crimes” and that little progress had been made since the COI’s report.\(^51\)

Following the release of the Guinea COI report, just like in the follow-up to the 2009 Goldstone COI and the DRC Mapping Exercise, there has been little critical discussion of how it is enlightening or valuable for courts in particular—rather than for human rights practitioners or for the UN Security Council—to have a COI investigate government abuses we all knew took place and find that the government, and in particular the government’s civilian and military leaders, were possibly responsible for the abuses.\(^52\) In today’s globalized world, access to modern technology including government and even private satellite imaging of conflict zones,\(^53\) the Internet, Twitter, digital photography and media, camera-phones etc., coupled with freedom of movement of individuals, activists, and various specialized UN and NGO human rights monitoring bodies, mean that with or without a UN COI the international community is generally aware when killings and abuses are taking place. What we tend not to know is how to stop the killings or how to prevent future episodes. We also tend not to know whether these killings amount to crimes and this last point is why, in part, we seem to have UN COIs—although Human Rights Watch, for example, has recently been excellent in shedding light on these discussions. In any event, just because we do not know whether or perhaps what crimes are being committed during a conflict does not mean that UN COIs should be tasked with clarifying the situation. For as we have seen UN COIs by their


\(^{52}\) Other fact-finders could also offer the service in lieu of COIs: see for example Human Rights Watch, “Bloody Monday: The September 28th Massacre and Rapes by Security Forces in Guinea” (2009), online <http://www.hrw.org/sites/default/files/reports/guinea1209web_0.pdf> [Bloody Monday]. Still, this does not mean that the Guinea COI did not or could not serve a purpose: it shed more detailed light on the abuses, bringing them out into the open and to international attention, and giving, to some extent, the right to truth to those victimized by the government.

\(^{53}\) NGOs and others—even the actor George Clooney—are now using private satellites to capture images of conflict and human rights abuses and track events as they unfold. For the organization Clooney co-founded, see Satellite Sentinel Project (the world is watching because you are watching), online: <http://www.satsentinel.org/>. For an example of analysis based on the use of satellite technology, see Human Rights Watch, “Syria: New Satellite Images Show Homs Shelling” (2 March 2012), online: <http://www.hrw.org/news/2012/03/02/syria-new-satellite-images-show-homs-shelling>. 
own admission cannot credibly and reliably make findings of criminal guilt, or make findings that criminal wrongs have taken place. And the first thing that UN COIs should strive to achieve—their primary benefit—is the production of a report that credibly and reliably makes findings of fact that are not likely otherwise available.

But let us take this argument one step further. It is not just that UN COIs should not make findings based on criminal tests because it is confusing, extremely resource and time intensive, requires a very specific type of information which detracts significantly from the investigation of other aspects of a conflict or its causes, and there is no evidence of its legal or factual benefit to courts. It is also that the process of “qualifying crimes” based on criminal tests is contrary to the law. Let us now examine this assertion.

UN COIs are infused at every stage and level with the law: they are created by a legal body (Human Rights Council for example) within a legally constituted intergovernmental organization (the UN is a treaty body) via a legal (and limiting) mandate, which obliges them to produce credible, fair reports analyzing wrongful actions and even criminal responsibility. In short, they are legal (or if one likes, “quasi-legal” in common law parlance) entities and as such have reciprocal legal duties. Even when UN COIs maintain that they are “non-judicial” in nature, this simply makes them non-courts, it does not make them immune from abiding by certain legal limitations. As the UN Secretary General’s Report to the UN General Assembly entitled Delivering Justice asserted:

The Secretary-General fully accepts that relevant international law, notably international human rights, humanitarian and refugee law, is binding on the activities of the United Nations Secretariat, and is committed to complying with the corresponding obligations...”

In this way UN COIs—much like their common-law counterparts, common law COIs—are distinct from independent NGO human rights investigations. When it comes to UN COIs, virtually any reasonable conception of legality would surely demand the UN abide at minimum by its own treaty norms and those customary norms that resulted from its treaties or, for example, the UN Declaration on Human Rights. By contrast, while Human Rights Watch should and arguably does abide by these same standards, there is not the same legal pull to do so.

Moreover, in practical terms the UN Human Rights Council cannot expect that individuals or governments will abide by the terms of the International Covenant on Civil and Political Rights (ICCPR)—particularly given its importance as one of the documents in the “International Bill of Rights”—without itself abiding by the due process or fair trial requirements of the treaty

---

54. See Delivering Justice, supra note 30 at para. 11(c).
55. See ibid and especially supra, note 30 for further detail and the UN’s affirmation.
found in Article 14 of the ICCPR that apply in general to law-givers. It would
make a mockery of the UN legal system if its own legal bodies were not bound
by its own human rights treaties and the various customary duties that UN
bodies so often enforce or oversee. Put more directly: the (international) rule
of law would be rendered a hollow shell if those with the legally-mandated
authority to monitor or enforce the law were not themselves responsible for
obeying those same laws.

The implication for our purposes is that UN COIs cannot make findings
of wrongdoing based on criminal law tests for two reasons: first, because they
cannot make findings with a sufficient degree of certitude to justify a criminal
finding; and second, because they legally cannot make findings that otherwise
appear to be criminal or have criminal-like implications on individuals. Let us
now evaluate these two assertions.

First, UN COIs cannot legally make findings on a beyond a reasonable
doubt standard or a similar standard required for findings of criminal guilt.
Quite simply, UN COIs are not trials, do not purport to be trials or to abide by
the necessary standards of due process to make criminal findings. As Justice
Goldstone repeatedly asserted with regard to his 2009 Gaza COI, “[i]f [the Gaza
COI] was a court of law, there would have been nothing proven.”56 Indeed,
even if Goldstone had felt otherwise UN COIs are not capable of fulfilling the
legal obligations associated with a criminal trial. For example, Article 14(1) of
the ICCPR states: “All persons shall be equal before the courts and tribunals.
In the determination of any criminal charge against him, or of his rights and
obligations in a suit at law, everyone shall be entitled to a fair and public hearing
by a competent, independent and impartial tribunal established by law.”57 [Emphasis
added.] Put another way, when criminal wrongs are implicated vis-à-vis
individuals, then those individuals are entitled to a fair and public hearing by
an impartial tribunal. And the UN Human Rights Committee—the monitoring
body of the ICCPR—has repeatedly asserted that Article 14 and the right to
a fair and impartial proceeding applies equally to criminal and non-criminal
forums—in other words, to legal fora whether criminal or “administrative”

56. See Gal Beckerman, “Goldstone: ‘If This Was a Court of Law, There Would Have
Nothing Proven’”, The Jewish Daily Forward (16 October 2009), online: <www.forward.com/
articles/116269>; see also Goldstone’s Reconsideration, supra note 45. It should also be noted that
the choice between “judicial” and “not judicial” represents a false dichotomy. Indeed, the
processes and procedures of COIs evince this fact: they are flexible and rarely look like a court
room, nevertheless they claim independence, fairness, impartiality, and attempt to provide
certain due process guarantees. For this reason Canada, for example, will often call COIs
“quasi-judicial” bodies, whereby the rules of the criminal justice system do not fully apply,
yet nevertheless certain legal guarantees exist. See for example See Russell J Anthony and
Alastair R Lucas, A Handbook on the Conduct of Public Inquiries in Canada (Butterworth & Co.:
Toronto, 1985) at 158.
57. International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, art 14, Can
TS 1976 No 47, 6 ILM 368 [ICCPR].
This is to say that international human rights require UN COIs to meet the due process standards of “fair and public hearing”—including those associated with a trial, such as the presumption of innocence until proven guilty,59 the individual right to response to charges against an individual,60 right to be respond or be heard,61 to examine witnesses,62 etc., particularly when making findings based on the elements of or tests for international crimes.

But UN COIs—are indeed all COIs—are not set-up like trials. And actual trials of international criminals take many years or even decades, often just to hear a single case. At trial, individuals are accorded the opportunity to a full and fair defence, to confront all charges and accusations and to bring forth their own witnesses. For a UN COI to implicate numerous individuals would take even longer even without focusing on any other non-criminal transitional justice aspects of the situation such as reform, reparations, or even various human rights abuses—and if that kind of time was available, then it would be better to have an actual court of law conduct the trials.

Now, it might be argued that UN COIs can make such legal findings as the Guinea COI’s mandate demanded because, technically, they are making findings of “possible” breaches of international criminal law as opposed to findings of criminal guilt and thus are not bound by trial-like due process standards. But this is incorrect for two reasons. First, if a public body cannot claim criminal responsibility beyond a reasonable doubt, it should not make public claims of criminal wrongdoing based explicitly on criminal law tests. Second, when it comes to UN COI findings of international criminal wrongdoing as judged against international criminal law tests for wrongdoing, such

59. See ICCPR, supra note 57 at Article 14(2).
60. To take one example, the Convention of the Rights of the Child, Article 12(2), requires that children be afforded “the opportunity to be heard in any judicial and administrative proceeding likely to affect them.” See United Nations Convention on the Rights of the Child, UNTS Vol 1577, p 3, art 12(2) (entered into force 20 November 1989) [UN CRC].
61. Cross-examinations or the right to respond is not simply a procedural nicety for the sake of the accused; it has substantive effects and benefits. Sometimes accused persons are in a better position to identify or foresee issues of witness credibility than neutral arbiters such as commissioners. Moreover, providing the opportunity for accused to address their concerns during the proceedings limits the degree to which such accused can later criticize the conduct of proceedings, which they participated in. As stated in Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Program, volume I, at para 7.79, <online: www.oilforfoodinquiry.gov.au>, citing at fn 349 Annetts v McCann (1990) 170 CLR 596, 600-1, 609-10, 619: “[the main requirement of procedural fairness in relation to an Inquiry is that it] cannot lawfully make any finding adverse to the interests of [a person] without first giving [that person] the opportunity to make submissions against the making of such a finding.”
62. See ICCPR, supra note 57 at Article 14(3)(e).
findings will always come across as definitive rather than “possible”. Indeed, all too often when it comes to large scale UN COIs, the distinction between non-criminal findings of “possible” criminal guilt and criminal findings of guilt breaks down in practice. Let us evaluate these two propositions.

First, international human rights rules—and the most basic notions of due process—bar not just definitive findings of criminal guilt but determinations that taint individuals with the stigma associated with criminal guilt on a standard lower than that commonly associated with criminal trials. For example, it has been argued that “the presumption of innocence as enshrined in Art 6(2) of the European Convention on Human Rights prohibits a declaration by a public official that somebody is responsible for criminal acts before the competent court has reached such a conclusion.” The all-important reputation of an individual is to be preserved from public indictment, at least as it concerns criminal actions, until a trial. Unless a UN COI can act as a trial and make

---

63. It is not just UN inquiries that, in general, should not make findings of criminal or even civil culpability. For support in the Canadian and Australian contexts, see Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (Butterworths: Australia, 2001) at 164-5: “the presumption of innocence seems to require that people be free from the stigma of a public finding of criminal guilt other than a finding made by a criminal court and supported beyond reasonable doubt by admissible evidence.” In Canada, for example, COIs into individual criminal responsibility would similarly not be permitted: “Commissions may not make findings of criminal responsibility or civil liability. Provided they do not go that far, they may reach conclusions about whether the conduct of an individual was improper.” See Ed Ratushny, *The Conduct of Public Inquiries: Law, policy and practice* (Toronto: Irwin Law, 2009) at 27. See also Allan Manson & David Mullan, “Introduction”, in Allan Manson & David Mullan, eds, *Commissions of Inquiry, Praise or Reappraise?* (Toronto: Irwin Law, 2003) at 7: “In particular, one of the major tasks of many commissions of inquiry will be that of conducting their operations in a way that allows them to assess blame without trespassing into the proper domain of courts of civil and criminal jurisdiction.”


65. As a judicial review of a famous Canadian COI stated: “It is true that the findings of a commission cannot result in either penal or civil consequences for a witness….Nonetheless, procedural fairness is essential for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.” See Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System in Canada—Krever Commission), [1997] 3 SCR 440 at para 55 [Canada Krever Commission].

66. It might be asked: but what of individuals charged of criminal offences, many of whom are named publicly? Is the UN COI not doing the same thing? The short answer is no (see *supra* note 63). UN COIs are pronouncing on responsibility for crimes on some legal standard—indictments only provide for reasonable grounds to stand trial. Moreover, when an individual is indicted then the legal-criminal analysis plays out before a court of law. That is, the evaluation
findings on a beyond a reasonable doubt standard—which, again, it cannot—it cannot pronounce on distinctly criminal responsibility. Legality thus prohibits COIs from making not just criminal findings but also findings that appear to be criminal or have criminal-like reputational implications for individuals.

Indeed, there is bad (legal) precedent for allowing UN COIs to enter too far into the criminal law arena. In Canada, the closer a large-scale ad hoc COI comes to a criminal investigation, the more criticism it is likely to receive from experts or the judiciary: “commissions of inquiry are not supposed to be determining civil guilt or civil responsibility or criminal guilt, they are supposed to be fact-finding investigations leading to recommendations....”67 As one prominent expert has stated about the over one hundred years of experience with COIs in Canada: “ad hoc investigations seem to be most appropriate when we intuit that we have a problem with a particular system; they have been less effective in investigating individual blameworthiness.”68 [Emphasis added.]

Both the trial and COI processes generally start with the idea of a wrong having taken place, and people tend to focus on that wrong throughout the processes. But the court focuses on the wrong in order to make a legal determination of guilt based on criminal-legal standards and to punish or recommend punishment for the offending party based on its findings. Neither UN nor most domestic COIs are empowered to do that, and the procedures are not in place either to protect fully the rights of the ‘accused’ or to allow for determinative findings of fact and guilt. As a result, Professor Kent Roach has argued that COIs have a “distinctive ability...to hold organizations and society accountable”, as opposed to holding individuals accountable or meting out punishment as a court might do.69

In Canada, COI fact-finding is thus not to be confused with a trial process, even an informal one. That is, not just from a legal perspective but also from a practical perspective COI fact-finding should not be about collecting evidence to make legal determinations of criminal guilt and it should not be doing in practice what it cannot do in theory. Fact-finding in the context of COIs should therefore not be about using criminal tests for wrongdoing, if even to make

---

68. Manson and Mullan, supra note 63 at 483.
69. Though certainly individuals might also be called publicly to account. See generally Kent Roach, “Canadian Public Inquiries and Accountability”, in Philip C Stenning, ed, Accountability for Criminal Justice (Toronto: University of Toronto Press, 1995) at 269.
non-criminal proclamations about individual complicity in international crimes. Instead, the general lesson from Canada has been that fact-finding should refer to the process of unearthing evidence that informs us of what happened not so as to punish (or list) individuals but rather with a view to preventing its repetition.\textsuperscript{70} Of course, it will always be a tricky task to accomplish the latter without verging on the former. In part, the intention is what matters: the focus and intent should not be to punish or investigate individuals, but rather to detail what happened and how it might be prevented in the future. There will still, depending on the mandate of the COI, be the possibility that individuals will be investigated or decried for wrongdoing. But here, what is important is that while a COI might still make a finding of wrongdoing, this is not to be done in the criminal sense but rather by some other standard, be it moral, professional, or communal. In Canada, for example, a COI

will examine individual and institutional conduct and may conclude that some conduct was inappropriate. Such a conclusion, however, has no legal [criminal] consequence. Nor is it reached to embarrass or attempt to “punish” anyone. It would be made only to explain what happened and to avoid similar unfortunate consequences in the future.\textsuperscript{71}

Violations of normative standards are not a concomitant of violations of criminal standards or criminal wrongs. Normative standards will not make reference to “war crimes” or “crimes against humanity” or other crimes. The former are violations that UN COIs can reasonably apply, the latter are tougher or impossible to apply for such a body. In practice this means that, in Canada for example, a COI might find a wrongful death, but it cannot find whether this death resulted from first-degree murder or something lesser. To apply the label of first-degree murder implies a specific \textit{mens rea} (the specific intent to kill), and while a gunshot wound can speak to a wrongful death, it does not necessarily follow that first-degree murder took place—the death may have resulted by accident or self-defence rather than the specific intent of an identified individual to kill.

The COI then uses the idea of something having happened that the community does not approve of—perhaps a wrong having been perpetrated on a group of people, or an armed conflict between groups, or the economic collapse of a nation—not to punish an individual but to analyze how and why that wrong happened with a view to preventing its recurrence and, perhaps, helping society move forward safely and peacefully. Individual misconduct does not have to play a role in the investigation, for the investigation can be into policies and structures and not individuals. But even where the investigation touches on individual actions, there is a distinction to be made here between

\textsuperscript{70} See Manson and Mullan, \textit{supra} note 63 at 483; Ratushny, \textit{supra} note 63 at 196-197; Justice Gomery, \textit{supra} note 67, especially at 796.

\textsuperscript{71} See Ratushny, \textit{supra} note 63 at 196-7.
inquiries investigating systemic problems that touch on misconduct and those focused solely or primarily on individual criminal actions—it is time that the UN internalized this distinction.

Second, even if this is incorrect and UN COIs can legally make findings of possible guilt on a standard lower than beyond a reasonable doubt, UN COI findings of possible criminal responsibility are so confusing that in practice they amount to findings of criminal guilt. This is also prohibited because the relevant institutional (due process) protections are not and cannot be in place in UN COIs to make such seemingly determinative findings. For example, where a UN COI is consistent in asserting that “possible” criminal responsibility be ascribed to an individual or government, UN COI findings tend to suggest actual guilt in other ways. It is because the reports are commissioned to shed authoritative light on events that are being reported on elsewhere, because they come from the an important office of the UN (Human Rights Council or Security Council), and in particular are written by bodies (COIs) that are legally constituted, have legal obligations, and deal with legal findings, that these reports are widely treated as highly determinative findings of actual rather than possible criminal guilt, particularly given that they are using criminal law tests to ground their findings. Of course, it certainly does not help that mandates such as that of the Guinea COI, it will be recalled, require the COI to “determine responsibilities” and “identify those responsible”, as opposed to using equivocal qualifiers such as “possible” (“identify possible perpetrators”). The end result is that it is only natural to presume those listed or implicated individuals to be guilty after a COI finding—rather than

72 I have made a similar argument in the context of the 2009 Goldstone COI. See Nesbitt, supra note 9 at Part D, II: Language, Precisions and the Standard of Proof, pages 174-187. In particular, I discuss how the language used to support the Goldstone COI’s findings, like others COIs before it, is often conclusive rather than equivocal (they are guilty rather than they may be guilty, they did commit a crime rather than they may have) while eliding the standard of proof and the degree of certainty of the COI’s conclusions in other ways.


74 It has been argued that UN reports often form the basis for government legal and policy opinions, often without recourse to any other sources given that the capacity to verify on the ground the veracity of the claims is limited. Halink, supra note 73 at 30 and fn 83.
continuing to “presume them innocent” until trial. We thus see in practice that, for example, rarely is complaint heard when UN COI findings are used to support subsequent travel bans or asset freezes on individuals, something that happens with a fair degree of regularity at the international and national level.

Indeed, even if the mandate of the COI is couched in more equivocal terms (“possible responsibility”), as currently constructed the UN COI process and the veracity of a COI’s findings are highly likely to be confusing to anyone who might read or seek to rely on a report, because why would an expensive, politically supported COI be doing (investigating criminal wrongs) and not doing (pronouncing on criminal wrongs) precisely the same thing? Indeed, if contemporary UN war crimes COIs operate in territories where it is suspected that there are ongoing breaches of international criminal law, then by merely making findings of suspicion of criminal wrongdoing these UN COIs are not officially, according to their own rhetoric, doing anything but parroting a reasonable suspicion that already existed. What happens when the COI reports are released, I would argue, is that the assumption in the international community becomes that UN COIs must be accomplishing something in their investigations of criminal wrongdoing—they cannot possibly be paying that much for a parrot! As such, findings of wrongdoing measured explicitly against the standards of international criminal law will, in this context, always look like criminal law findings or something very close thereto, which again is necessarily a judicial finding. Put simply, if the purported criminal wrong is defined by the criminal definition of that wrong, then a finding by a large

75. The Universal Declaration on Human Rights, GA Res 217(iii), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 at Article 12, offers: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” See also ICCPR, supra note 57 at Article 17; UN CRC, supra note 60 at Article 16.

76. We have already seen that the Darfur and Guinea COIs, as but two prominent examples, passed along lists of names to the ICC for future prosecution. The Darfur COI also led the UN Security Council to enact a sanctions regime—including travel bans and asset freezes—against Sudan and specific named individuals. See UN SCR 1591 (29 March 2005). As is required, countries—including Canada—subsequently updated their domestic sanctions in response to enact travel bans and asset freezes on the named individuals. See SOR/2005-122 (2 May 2005), Regulations Amending the United Nations Sudan Regulations, online: <http://publications.gc.ca/gazette/archives/p2/2005/2005-05-18/pdf/g2-13910.pdf at pages 956-958>. Quite simply, when UN bodies such as COIs make findings about criminal guilt, the world takes notice. As argued by Halink, supra note 73: the International Court of Justice has “attribute[d] greater weight to UN materials than to other secondary evidence such as NGO reports and press statements” (at 26) and has viewed their findings as “virtually conclusive” (27) as contrasted with other forms of evidence offered by the parties.

77. Indeed, some COIs have by necessity taken explicitly legal and quasi-legal decisions (Thomas M Franck and H Scott Fairley, “Procedural Due Process in Human Rights Fact-Finding by International Agencies” (1980) 74 AJIL at 308). At the very least, they now deal with criminal law tests, that is, they support their findings with specific reference to whether or not actions meet the elements of various international crimes (mens rea, actus reus, etc.).
scale ad hoc UN COI of said wrong will necessarily be confused with a criminal finding of wrongdoing. And again, UN COIs cannot make or be seen to make criminal findings of wrongdoing.

It might be argued that by not “naming names”, this obstacle is overcome. But hiding the name of a purported criminal is not the same as hiding his or her identity, particularly in international criminal law where superiors are implicated in the actions of their battalions, and “widespread and systematic” abuses will by necessity attach to the public figures at the top of the civilian and military chain of command. Even when names are hidden, they are generally turned over to other bodies like the Security Council, which is responsible for things like asset freezes, or to the ICC, where the names might become public, as happened with some of the names in the case of Darfur. As previously discussed, the names are not merely passed on to the ICC for consideration; they are passed on in the context where a UN COI has already pronounced on responsibility for crimes against humanity.

Finally, the one area where UN COIs are fairly regularly criticized by academic and other commentators is with respect to the application of the law to the relevant parties, in particular that a UN COI got the international criminal law wrong, or performed a perfunctory legal analysis with respect to one or more of the relevant crimes. However, to date such scholarly criticisms tend to treat the legal failure as a moderate setback—a consideration for future UN COIs to improve upon—that does not in the end discredit the partiality of the UN COI or speak to the potential of the system of UN COIs to properly perform the task.

This is precisely where such analyses are wrong. The failures are not the result of a series of mere oversights on the part of successive UN COIs; indeed, recently at least the commissioners tend to be very intelligent individuals with

78. This is only common sense and forms a regular presumption in a great many legal systems. For example, when protecting the identity of “confidential informants” in Canadian law, it is insufficient to simply remove the person’s name when evidence is disclosed; for the individual’s protection, other evidence that would tend to identify the witness would also be vetted out.
80. Ibid at 35: “Even where the Commission applied the law accurately, however, some of its legal conclusions are problematic.”
81. Ibid at 50 again provides an ideal example: “Despite its best efforts, then, the Commission appears to have been unable to completely cleanse itself of the stain of its politicized birth... That partiality in no way discredits the Commission’s work; its reports provide the most detailed and compelling account of the Libyan conflict to date.” [Emphasis added.] See also Micaela Frulli, “Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry” (2012) Journal of International Criminal Justice 10.
a great deal of expertise who have put a lot of thought and effort into the process and have large, professional staffs at their disposal. Rather, the failures are inherent to the structure of UN COIs. As has been argued, UN COIs are not courts of law with the time, resources and specificity of mandate to focus on individuals and follow through until a verdict is reached years later. In addition, UN COIs tend to have reporting timelines measured in months rather than the numerous years allotted to the trial of war criminals. They are simply not capable of performing this task. Certainly, the near constant lack of territorial access hurts UN COIs as well. As a result, for UN COIs there will always be choices to make about what incidents to investigate or not, or whom to investigate or not, or how much detail to provide with respect to the various abuses committed. It will be impossible to investigate all incidents; the best that can be hoped for is some reasonably balanced decision as to what parties and types of incidents should be considered, which undoubtedly will nevertheless be contested as it always has been. But even in the ideal situation, there again is not the time and resources for UN COIs to investigate in detail the wide array of abuses committed by various people in various groups and then to provide fully reasoned legal analyses about all of the complex legal issues involved and, taking the next step, associate these findings with the COI’s specific findings of fact. Most UN COIs will fully acknowledge this reality. But this reality is to be contrasted with the fact that UN COIs will necessarily face scorn lest they provide detailed, fully-supported legal analyses, both about responsibility and about legal interpretations of complex areas of the law, much of which is currently unsettled before the international courts and tribunals.

It is not then so much a failure of any particular UN COI to articulate fully or even satisfactorily the law in every complex and debated area of international criminal and humanitarian law. Rather, it is the structure of UN COIs that prevents them from satisfying reasonable public expectations with regard to

82. For a discussion of this dynamic and particularly the lack of territorial access, see Michael Nesbitt, supra note 9, especially at 170-171, and citing in particular Sydney D Bailey, “UN Fact-Finding and Human Rights Complaints” (1972) 48 Int’l Aff 250 especially at page 266.
83. For an in-depth discussion of the investigative choices made by the Goldstone COI—and the criticisms that followed—see Nesbitt, supra note 9 at 165-167.
84. Ibid.
85. Ibid.
86. See Heller, supra note 79, quoting the Libya COI, supra note 7 at para. 8: “the legal regimes applicable to the crimes and violations under review here comprise a complex arena of international law and the jurisprudence on some issues is not altogether settled...the findings and conclusions with respect to specific crimes and violations must be read in that light.” It should be noted that the three commissioners for the Libya inquiry were experts on the criminal/humanitarian law side of things, and included Philippe Kirsch, the first President (chief judge) of the ICC. A judge of international criminal law, in other words, could not provide more conclusive legal findings given the time, resources, and broad mandate, though it might be said that they did not try to do so.
all of the complex factual and legal determinations of wrongdoing pertaining to broad patterns of abuses committed by many individuals. Legality surely demands transparency and complete, fully reasoned decisions if UN COIs are to implicate individuals' reputations. UN COIs would seem to be structurally incapable of providing this level of analysis at least as it concerns patterns of widespread criminal, humanitarian and human rights abuses by multiple parties belonging to multiple groups.\(^87\)

Now, other fact-finding missions with other goals may have different requirements than those applicable to UN COIs—the analysis herein necessarily applies only to contemporary large-scale, *ad hoc* UN COIs. But the result for such UN COIs remains: because by virtue of their mandates they are expected to provide conclusions and legal analyses like a court of law yet cannot meet the requirements of legality required of courts either in their processes or because they cannot fully articulate the relevant criminal law as it applies to implicated individuals, they should not attempt to make “possible” or real criminal findings based on the elements of those crimes.

What then would be the difference between the sort of contemporary COIs discussed to this point and a non-criminal COI? First and foremost, we can say that in both cases it is likely that a violation of normative standards—say human rights standards—triggers the investigation, only in a COI a criminal test for wrongdoing is not used to make findings that relate necessarily to international criminal wrongs. Moreover, as one famous judicial review of a Canadian COI articulated, there are “moral, legal, scientific, social or political” as well as “professional ethical” standards of conduct on which one can normatively evaluate the behaviour of others.\(^88\) In contrast, UN war crimes COIs tend to go through the elements of a crime and associate the factual findings with the legal requirements. In a COI, the facts collected in regard to the breach, say of certain normative standards, must be those that help explain *why* an event took place, and what allowed it to take place.\(^89\) In contrast to a war crimes oriented COI, the goal then is not primarily related to fighting impunity and promoting accountability, to punishing or threatening to punish the wrongdoing, though again that wrongdoing might be the impetus of and/or the starting point from which to analyze measures that can be taken to avoid future wrongdoing.

\(^87\) Moreover, when crimes are not actually prosecuted, legal conclusions pertaining to crimes will always be subject to increased second-guessing even when they are well-founded.

\(^88\) See *Canada Krever Commission*, supra note 65 at paras 19 and 62.

\(^89\) Kent Roach has stated with respect to Canadian COIs that: “a public inquiry has a greater capacity [than do courts] to engage in quasi-legislative activity by openly articulating new standards of proper conduct and applying them to past events. Such departures from adjudicative standards may not seem fair to individuals who are criticized, but they may help stimulate organizational reform.” Roach, *supra* note 69 at 272.
2. How and Why are the Current Mandates of UN COIs Justified and are these Justifications Tenable?

The explanation for why, despite these above criticisms, the terms of reference of UN COIs continue to focus in particular on international crimes is worth exploring at this time because it demonstrates that while the intention behind the criminal law purpose for COIs is benevolent, the justification is weak. I believe that the explanation for why UN COIs have developed in such a way as to focus so heavily on accountability and individual wrongdoing in particular is that there is a current tendency to see the commission of the most serious international crimes as a threshold for humanitarian action or even intervention in its various forms—including interventionist economic policies or fact-finding missions—while the fight against such crimes has come to represent a moral or legal obligation. Indeed, the fight against impunity more broadly can now be described as a “political project”.  

Certainly in the wake of genocides in the former Yugoslavia and Rwanda the importance of reawakening a collective humanitarian spirit to ensure that genocides “never again” took place while the world watched was understandable. So it is likewise understandable that, as UN COIs grew-up during this period and began to take on increased prominence, they began to be seen as a viable option for fighting impunity and contributing to accountability.  

The interventionist humanitarian political project—one determined to prevent genocide and other mass atrocities—was subsequently formalized in the Rome Statute for the ICC and in the Responsibility to Protect Doctrine (R2P doctrine) of the early 21st Century. The ICC made the assertion that

90. Alex de Waal, “How to End Mass Atrocities”, New York Times (9 March 2012): “Once an abstract obligation, stopping genocide has become a political project. Building on the humanitarian interventionism of the 1990s, a vast anti-genocide movement...is stirring students and movie stars alike...It enjoins “us” — that is, the United States and the United Nations — to lead the response to mass atrocities.” The goal is not merely to “stop any massacres but also to herald justice and democracy.”

91. In particular, the Yugoslav COI brought COIs to prominence as a method of investigating war crimes and is now also associated with the tribunal it recommended be created: the International Criminal Tribunal for the Former Yugoslavia.

92. Documents such as the 1995 United Nations, Guidelines for the Conduct of United Nations Inquiries into Allegations of Massacres (New York: Office of Legal Affairs, United Nations, 1995) at para 9, state that the terms of reference for an ad hoc COI should surely include a determination as to whether a “massacre” has taken place; likewise, it asserted that UN COIs should identify those involved in the commission of those massacres. As the 2006 UN Secretary-General Report on Impunity, supra note 27 at Summary, page 2, stated, “the trend is towards an increase in such [ad hoc COI] missions.”

93. The responsibility to protect came from a group of major foundations—and Canada—that together founded the International Commission on Intervention and State Sovereignty in 2001, which was to consider the duty of humanitarian intervention. See International Commission on Intervention and State Sovereignty, The Responsibility to Protect, online:
war crimes, crimes against humanity and genocide were the “most serious” of crimes. The R2P doctrine drew on the Genocide convention’s assertion regarding the obligation to prevent and punish those responsible for the most serious crimes, but expanded the list of relevant crimes to coincide with those under the jurisdiction of the ICC, so that states had an obligation to prevent and punish “genocide, war crimes, ethnic cleansing and crimes against humanity.”

The R2P doctrine can be seen not merely as a possible expansion of the Genocide convention’s obligation, but also as affirming the limitations on humanitarian intervention. So for example, in January 2009 UN Secretary-General Ban-Ki Moon issued a report entitled Implementing the responsibility to protect, which makes the connection between R2P and existing notions of the aforementioned crimes clear, but also makes the limitation to the doctrine clear: to even threaten military intervention, what is needed is the invocation of R2P or the Genocide convention, which in turn requires evidence that genocide, war crimes, ethnic cleansing or crimes against humanity is taking place. As such, the primacy of those “most serious” crimes over other economic and human rights abuses became abundantly clear; and the implication was that the responsibility to protect citizens relates primarily to these serious crimes, and the responsibility to intervene exists only when violence can be legally and criminally categorized by one of said crimes. It follows that the greatest criticism that can be bestowed on a country—the one carrying the greatest

---

94. See the Rome Statute, supra note 26 at Article 5(1): “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community....”

95. See the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, GA Res 260 (III) A (1948), at Article 1: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

96. See 2005 World Summit Outcome, supra note 93 at para 138.

97. The default position is that sovereign equality of states as articulated in the UN Charter, at Article 2(1), as well as the principle of “non-intervention in the internal affairs of states” from Article 2(7) apply. See Charter of the United Nations, 26 June 1945, Can TS 1945 No 7. See Report by the Secretary-General, Implementing the Responsibility to Protect, UN Doc A/63/677 (12 January 2009). See especially paras 2, 3, and 10(b) [Implementing the Responsibility to Protect]. Note that we are thus left with the same conundrum as existed when the UN was in its infancy, that being a complication between the duty of non-intervention and a need to intervene—or justify UN COIs—where human rights abuses are suspected.
moral indignation, requiring the most international attention, but also the only one carrying the threat of possible legal intervention—is to accuse a country of one of these crimes.

In the wake of the establishment of the ICC and then the R2P document, in the past decade other new UN documents were drawing from the experiences in Darfur,98 Gaza and elsewhere, to influence the direction of UN COIs by solidifying the idea that UN COIs are intimately related to the responsibility to protect. Such documents were not like the plethora of “guidelines” for fact-finders that were promulgated in the 1990s and early 2000s. Instead, these more recent UN documents of the mid-2000s drew on the humanitarian political project, which again asserted that there was a moral or even a legal imperative to take action where war crimes, crimes against humanity and genocide were taking place.99 These documents thus related more to what UN COIs can or should do—“fight impunity”—rather than how they should do it or the principles by which fact-finders should abide, which was the focus of many of the guidelines and principles of the 1990s.100 The cumulative result was that UN COIs should themselves pursue a “comprehensive” investigative strategy coupled with a primary focus on individual criminal accountability so as to fight impunity, ensure that the international community is not once again running afoul of its “never again” promises, and ensure that threats of


intervention carry the weight of legal credibility. \(^{101}\) We must, in other words, fact-find early on in the conflict to assuage our guilt and make sure that there is no obligation eventually to “protect” or to intervene militarily.

As a result, UN COIs now prioritize the fight against impunity. Indeed, it has gotten to the point where many UN institutions in the field of human rights are judged on their ability to combat impunity, in particular with respect to the most serious crimes. Whether or not they serve other purposes can take on a secondary role, and whether or not those tools or institutions are well suited to combating impunity is rather secondary: the more attempts to end impunity the better until we reach a critical mass. \(^{102}\)

To sum up, this process of privileging those who attempt to combat impunity has tended to limit the discourse regarding what needs to be done in the wake of mass atrocities and what UN COIs might do: first and foremost, we must promote accountability, which is a legal as well as a moral obligation. International crimes became, by necessary implication, privileged over other wrongs for humanitarian reasons; and each time the threat of such crimes presents itself, naturally the thinking goes to determining, by whatever means necessary, whether such crimes are being perpetrated. We are thus left with a scenario where we need a criminal finding to justify various forms

\[^{101}\] For example, the UN Secretary-General Report on Impunity, supra note 27 (especially at 19) surveyed a number of \textit{ad hoc} UN COIs in order to demonstrate that, “the commissions of inquiry and fact-finding missions can play an important role \textit{in combating impunity.}” [Emphasis added.] Such strategies can be seen repeated in the reports and methodologies of the UN COIs responding to the Arab spring in 2011 as well as other UN COIs from this time period. Such documents relating to the UN COI experience in the wake of the 1990s and early 2000s experience with fact-finding, transitional justice, and international criminal prosecutions, retained the focus on “truth telling” but put a premium on criminal findings as an area of priority. It has been said of the Goldstone Report that: “The Goldstone Report follows in a recent tradition of detailed fact-finding missions that investigate conflicts that have drawn global concern. In this sense the report does not single out Israel. Rather, it demonstrates the importance of prosecuting war crimes, no matter where they occur, as a way of solidifying the growing body of international law that will help to curtail such actions in the future.” See Jules Lobel, “International Law and the Goldstone Report”, in Adam Horowitz, Lizzy Ratner, and Philip Weiss, eds, \textit{The Goldstone Report: The Legacy of the Landmark Investigation of the Gaza Conflict} (Nation Books: New York, 2011) at 343-4.

\[^{102}\] Goodman and Jinks have called the “kitchen-sink approach” to human rights promotion. That is, where “[a]dvocates call for almost every conceivable form of pressure and inducement to be exploited in dealing with human rights violators without contemplating negative interactions between mechanisms that undergird those multiple tactics.” See Ryan Goodman and Derek Jinks, “Social Mechanisms to Promote Human Rights: Complementary or Contradictory?” in Thomas Risse, Stephen C Ropp, and Kathryn Sikkink eds, \textit{From Commitment to Compliance: The Persist Power of Human Rights} (Cambridge: Cambridge University Press, 2012) at 3-4. In other words, just because we have numerous types of fact-finders, monitoring missions, and other bodies at our disposal does not mean that they should all necessarily be tasked with responding to every conflict. According to Goodman and Jinks, the danger is that “combining mechanisms will, under certain conditions, reduce the overall social effect to levels below what any individual mechanism could have achieved in isolation.” \textit{Ibid} at 3.
of humanitarian response, or to give the Security Council the ammunition it often requires to authorize military or economic intervention; but we cannot make criminal findings without a trial.

This process of requiring a criminal finding before criminal trials are possible has arguably introduced a *mens rea*—specific intent—problem. Genocide, a specific intent crime, can justify intervention, but specific intent cannot be known until the facts have been presented at trial and associated with a particular individual who has that intent. As we have seen, we thus need to take a non-criminal view of genocide to justify an intervention, but genocide itself is now defined by a criminal standard; there is almost bound to be confusion. As a result, UN COIs confront a factual problem: bodies such as UN COIs—the bodies that are left to make the non-criminal findings on criminal standards in order to fight impunity and justify the threat of intervention—are cursed with having to confront a contradiction inherent in their modern purpose for existence.

Because the goal is human rights-centric, it has perhaps been the case that UN COIs have escaped criticism—perhaps, an argument might go, it is better to focus on areas where human rights are abused rather than on the mechanisms such as UN COIs where rights are promoted. It is indeed hard to be wholly critical of the political agenda that has spurred this move toward focusing on international criminal wrongdoing whenever and wherever it is taking place. Indeed, the idea is, at least in part, the result of a benevolent attempt by international norm entrepreneurs to improve international human rights compliance through the creation of a system that seeks to ensure international action or the threat thereof, at the very least, in cases of serious human rights abuses.

The problem even here is that in the international domain those individuals who are criminal law-focused tend to align with those lawyers and advocates who specialize in human rights and due process. The result has tended to be that rather than having a division between prosecutors and human rights advocates, as occasionally happens domestically where the law and order agenda meets the civil rights agenda, in the international arena the positions of both groups are mutually reinforcing. Criminal prosecutions are required for a law and order agenda, but human rights advocates are not generally focusing on the rights of a single or several accused, but rather on the many abuses perpetrated against a society. I suspect that this has contributed to a situation where norms that favour prosecutions or fighting impunity are not challenged, where there is an unquestioning presumption of fit between international human rights and international criminal goals, as discussed by Darryl Robinson in the context of the ICC.\(^\text{103}\) Criminal-centric approaches have thus dominated the interventionist and rebuilding or rule

of law discourse, but these approaches have been supported by human rights advocates, and *vice versa*, such that two somewhat different agendas have melded into one common practice within which there is little room for dissent. As a result, institutions like COIs created to deal with human rights abuses, where crimes are obviously taking place, can exhibit the theoretical and practical consequences of trying to do too much with a limited resource, or undertaking the wrong thing—criminal investigations—while not ideally suited to the task.

In the end, by judging COIs by the benevolence of their intention and not by their processes, we are undermining and misusing a mechanism that might be put to better use. What all of this teaches us is that we can be critical of the practice of UN COIs if not the intention, and in practice we must not define future UN COIs as war crimes investigations. If we wish to promote peace and stop future human rights abuses we must look carefully at the systems in place. A non-criminal finding that an individual was possibly criminally liable will not change that which needs changing and prevent a recurrence of violence. That is of course not to say that accountability and the fight against impunity are not tremendously important, but to stress that UN COIs are not the institution to promote accountability for criminal wrongs. For UN COIs, with greater expectations comes greater responsibility. When it comes to COIs, there is the legitimate expectation that people should be treated fairly and in accordance with basic notions of due process, which precludes findings of criminal guilt or possible guilt that would tend to implicate individuals.

The tendency of UN COIs to adopt the goals of the broader human rights movement of which they are key institutions has extended beyond the fight against impunity and to the entire transitional justice movement. Transitional justice as a concept, and indeed as its own political project, rose to prominence in the 1990s and early 2000s, a timeline that roughly corresponds with the rise to prominence of the fight against impunity. With this in mind, let us now turn to the problems associated with the rise of what I will call the holistic transitional justice inquiries, a practice that is as benevolent and fraught as was the adoption by COIs of the fight against impunity.

---

104. Legal philosopher Lon L. Fuller discussed just this issue with respect to the limits of adjudication, stating that adjudication was not best suited to resolving polycentric problems of the sort that often appear internationally. UN COIs are so suited, though they, unlike adjudication, are not ideally placed to make criminal pronouncements on the guilt of a party. For Fuller’s discussion, see Lon L. Fuller, “The Forms and Limits of Adjudication” in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, Rev’d ed (Oxford: Hart Publishing, 2001).

105. It is to say, however, that it is better that such reports and assertions be left to the numerous credible NGOs conducting fact-finding in such situations (see for example Human Rights Watch, “Bloody Monday”, *supra* note 52). And better yet, courts of law should be left to make legal determinations of criminal or civil wrongdoing.
3. The problems with the holistic transitional justice purpose for UN COIs

Two prominent examples of holistic transitional justice UN COIs are Justice Goldstone’s 2009 Gaza COI model and the so-called DRC Mapping Exercise, both of which incorporated the pursuit of many of the tasks associated with the standard transitional justice taxonomy, including: fighting impunity and promoting accountability through the promotion of criminal trials; promoting civil, political and to a more limited extent social and economic rights; institutional reform, primarily in the security, justice and political sectors; economic reform; building reparations programs; promoting peace; ending or avoiding conflict; offering a history of the conflict in pursuit of the right to truth; promoting economic development; encouraging demobilization, disarmament and reintegration of combatants into society; as well as the promotion of gender and racial equality, and so on. But while the UN seems to treat “comprehensive” mandates of this nature as a natural and laudatory undertaking for its large-scale COIs, the practice is unworkable for several reasons.

First, UN COIs that attempt to address all or virtually all of the tasks associated with the standard transitional justice taxonomy tend to run into the problem that conflicting procedures are required to pursue various transitional justice tasks. Procedurally, not all tasks can necessarily be performed in tandem by the same body, even when they would otherwise superficially seem to be complementary or to be in pursuit of the same goal. Not only can such an approach lead to procedural conflicts, making the process more cumbersome if not impossible for the COI, but pursuing such procedurally contradictory tasks runs the risk of undermining the credibility of the COI’s procedures and thus its findings.

Second, the holistic transitional justice inquiry represents too unfocused a strategy for one mechanism to undertake and still provide actionable insight. The result of holistic transitional justice inquiries is often a thin investigation related to many of the transitional justice goals with the corollary being that the COI recommendations provide little actionable insight as a result of the lack of specificity and focus. Moreover, when virtually all the goals associated with transitional justice are expected to be addressed by a UN COI, the UN COI often loses sight of the broader picture or ultimate purpose of the post-conflict inquiry—to encourage peace and reconciliation. Given these constraints, UN COI reports tend to present a checklist of standard transitional justice cures to conflict situations instead of using the ideas developed by the transitional justice field to focus the report on the most pressing issues reasonably investigated by one large, ad hoc investigative body. Let us examine in turn these two claims a little more closely.

106. See DRC Mapping Exercise, supra note 1; Goldstone Report, supra note 4.
107. See Secretary-General Report on Impunity, supra note 27 at 3.
The first claim is merely the largely axiomatic assertion that it can be damaging to try and do more with one mechanism than that mechanism is capable of doing;\textsuperscript{108} doing so is bad (legal) institutional design. In the words of Robert S. Summers, legal philosopher Lon Fuller quite reasonably thought that the processes and forms of socio-legal ordering have a certain inner integrity that needs to be studied and understood. \textit{If this integrity is not grasped—if social architects merely assume that the institutional means at hand is infinitely pliable and can be bent to just any purpose—then that means is sure to be misused}. For example, when adjudication is bent to serve the ends of negotiation and mediation, misuse often results.\textsuperscript{109} [Emphasis added.]

This very concern was seen to play out in the earlier discussion of using COIs to investigate criminal wrongdoing—an end to which such institutions cannot be bent. But the concern applies equally to the other elements of the standard transitional justice taxonomy, including the seemingly endless need to provide a definitive historical narrative of conflicts. Take as one small but prominent example the case of the 2007 Goldstone Report into events in the Gaza Strip and West Bank, where the commission received outsized—though not necessarily unjustified—criticism for its six-page historical overview of the conflict.\textsuperscript{110} In relation to the historical overview of the conflict, Moshe Halbertal, a thoughtful critic of elements of the Goldstone Report, asserted:

\[\text{[t]he commission should not have dealt with the context leading to the war; it should have concentrated on its mandate, which concerned only the Gaza operation. By setting its findings about the Gaza war in a greatly distorted description of the larger historical context, it makes it difficult for Israelis—even of the left, where I include myself—to take its findings seriously.} \textsuperscript{111}\]

Whatever one thinks of the Goldstone Report or its six page historical overview, its credibility was surely undermined by the claims of bias that resulted from its attempts to do something—contextualize the dispute with reference to its long history—that it could never hope to properly accomplish given its other transitional justice obligations and, in any event, was never

\textsuperscript{108} As Philip Alston has said in this regard, “those States Members of the Commission [on Human Rights] which are serious about improving the 1235-related procedures must acknowledge that the same mandate cannot effectively serve a diversity of undefined purposes....” Philip Alston, ed, The United Nations and Human Rights: A Critical Appraisal (New York: Oxford University Press, 1992) at chapter 5, page 169.

\textsuperscript{109} Robert S Summers, Lon L Fuller (Stanford: Stanford University Press, 1984) at 77. Summers is referring in particular to Fuller, supra note 104.

\textsuperscript{110} See Goldstone Report, supra note 4 at chapters II and III. See also chapter V on the “Blockade: Introduction and Overview.”

the primary goal of establishing a COI.\textsuperscript{112} Had the Goldstone Report focused on another of its primary tasks, such as uncovering systemic causes of the conflict, its findings and methodology would at least have been harder to criticize in this one way. When UN COIs are given limited time, access and resources and simultaneously required to offer historical overviews of complex situations, interrogate systems of government, military, police and justice and recommend reform, as well as investigate patterns of individual criminal and state criminal behaviour, the inevitable result is that neither the broader transitional justice narrative and recommendations nor the individual criminal findings are detailed in a particularly thorough manner.

In the end, the pursuit of this arguably secondary purpose—putting the conflict in historical context—opened the COI to blanket criticisms of partiality regarding its operations as a whole based on the failures in only one area. The more a COI attempts to accomplish, the greater the chances of error that will, invariably, undermine the credibility of the whole enterprise. Thus, procedural or factual irregularities that occur in the pursuit of a COI’s secondary purposes can undermine all of the procedures and findings of the COI. For example, whereas the focus of a report might be first and foremost on human rights abuses, by offering a historical recapitulation of years of conflict—as was done in the Goldstone Report—a COI can open itself to criticism of bias with respect to all of its findings, not just its historical findings. In such a situation, the UN COI can be left defending its findings and procedures associated with the historical endeavour, rather than focusing on its findings on recent human rights abuses and, one hopes, possible solutions thereto.

The second—and more compelling—concern about holistic transitional justice inquiries is that their recommendations tend to be non-specific and to mirror the standard taxonomy of transitional justice, rather than provide a tailored path forward. The 2010 DRC Mapping Exercise inquiry provides an excellent example of just this problem.

The Mapping Exercise is undoubtedly a thorough, precisely worded, highly professional report, yet it nevertheless remains a particularly stark example of the problems associated with holistic transitional justice inquiries. It was first conceived of in 2006 by the UN Secretary-General, when, in his 21st report to the Security Council,\textsuperscript{113} in response to the long-standing conflict—one might say a civil war—in the DRC, he “indicated his intention to dispatch a human rights team to [the] DRC to conduct a mapping exercise of serious violations committed between 1993 and 2003.”\textsuperscript{114} The suspected and previously documented abuses basically run the gamut of human rights and international humanitarian/criminal law violations, from widespread

\textsuperscript{112} For further discussion of this issue see Nesbitt, supra note 9 at 157-165.


\textsuperscript{114} See DRC Mapping Exercise, supra note 1 at Annex III, Terms of Reference, 542.
sexual violence to the use of child soldiers. It should be noted that the inquiry took place after literally hundreds of NGO and UN reports had covered the ongoing conflict in the DRC, as had previous expert panels and UN inquiries only a short time before;\textsuperscript{115} the ICC is investigating the conflict and has in fact issued indictments and a recent conviction,\textsuperscript{116} and the International Court of Justice had also heard a case on the conflict.\textsuperscript{117} The Mapping Exercise was thus seen as a—or perhaps as another—umbrella investigation intended to map out the human rights terrain that existed in the country at the time.\textsuperscript{118}

In its final report, the DRC Mapping Exercise took three pages merely to define the term “transitional justice”, thus unintentionally shedding light on the compendious scale of the task associated with the holistic transitional justice type of inquiry. Quoting the UN \textit{Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies},\textsuperscript{119} it stated that transitional justice encompassed “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”\textsuperscript{120} According to the Mapping Exercise report, such efforts aim both to “combat impunity” and “to promote the dynamics for reform and reconciliation within societies recovering from armed conflicts or a period marked by large-scale abuses.”\textsuperscript{121}

\textsuperscript{115} The Mapping Exercise’s own list of reports consulted was over 30-pages. See \textit{ibid} at Annex II, “List of Documents on the Democratic Republic of the Congo Consulted by the Mapping Team”, at 510-41.

\textsuperscript{116} See \textit{Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo}, ICC-01/04-01/06-2901, Judgement of Trial Chamber 1 (10 July 2012) (International Criminal Court), online: <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf>.


\textsuperscript{118} Included were not just past abuses and their causes and consequences. The Mapping Exercise’s Terms of Reference stated that, “MONUC’s current human rights mandate provides the umbrella for the mapping exercise” and, as a result, the Mapping Exercise was carried out under the human rights mandate of MONUC. See \textit{DRC Mapping Exercise, supra} note 1 at Annex III, Terms of Reference, 542. Specifically, the mandate was to, “conduct a mapping exercise of the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003.” \textit{Ibid}. Relative to other UN COIs, the mandate was fairly specific as to what the Mapping Exercise was to achieve by conducting its inquiry: “[t]he Mapping Team will assess the existing capacities within the national justice system to deal with such human rights violations that may be uncovered...Taking into account on-going efforts by the DRC authorities, as well as the international community’s support, the Mapping Team shall formulate a series of options aimed at assisting the government of the DRC in identifying appropriate transitional justice mechanisms to deal with the legacy of these violations, in terms of truth, justice, reparation and reform.”


\textsuperscript{120} \textit{DRC Mapping Exercise, supra} note 1 at 447, para 989, citing \textit{ibid}, para 8.

\textsuperscript{121} \textit{DRC Mapping Exercise, ibid} at 447, para 991. Again quoting a Report by the UN Secretary-General on transitional justice and the rule of law, the Mapping Exercise Report finds that
From this starting point, the Mapping Exercise then attempted to accomplish all of these transitional justice tasks while simultaneously holding firm to the assertion that it was somehow also merely a precursor to the actual implementation of all of these transitional justice goals through future transitional justice initiatives:

[the Mapping Exercise] functions perfectly as a preliminary step prior to the formulation of transitional justice mechanisms, whether they be judicial or not, to enable the identification of challenges, the assessment of needs and better targeting of interventions. It can also be found in international and hybrid jurisdictions, where it is used to better...devise global investigation and prosecution strategies.122 [Emphasis added.]

In other words, the Mapping Exercise was both a transitional justice inquiry and a precursor to a series of more focused transitional justice inquiries because it could never hope to accomplish all of the relevant transitional justice tasks. The familiar result was that the Mapping Exercise report offered general recommendations in lieu of specifics. For example, the report recommends a series of more focused inquiries, and that prosecutions, reparations, truth-seeking, institutional reform, and vetting be undertaken—as did Goldstone’s Gaza inquiry. But one could have predicted ahead of time the general types of reforms that were recommended simply by perusing the standard taxonomy of transitional justice.125 If the standard list of “transitional justice” tools is so consistently relevant, there is little value-added by including in the recommendations sections of UN COI reports that there is a need for the implementation of such tools.

Moreover, given that COIs are supposed to be consultative and contextual it is remarkable that the recommendations are all general in nature and look almost identical across nearly all inquiries over the past fifteen years or so. The field of transitional justice has already offered a framework solution for transitional justice mechanisms are “both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.” See DRC Mapping Exercise, ibid at 448, para 994, citing 2004 Secretary-General Report on the Rule of Law and Transitional Justice, supra note 99 at para 8.

122. DRC Mapping Exercise, ibid at 36, para 94. The report goes on to say that: “[o]ne of the major premises is that mapping remains a preliminary exercise that does not seek to gather evidence that would be admissible in court, but rather to ‘provide the basis for the formulation of initial hypotheses of investigation by giving a sense of the evidence.’” [Emphasis added.] Ibid at 36, para 95. Elsewhere, the report stated that its aims were, “to assist the Congolese authorities and civil society in defining and implementing a strategy that will enable the many victims to obtain justice and thereby fight the widespread impunity. This should also enable the mobilisation of other international resources to address the principle challenges faced by the DRC with regard to justice and reconciliation.” Ibid at 35, para 91.

123. For further discussion of this point related to the DRC Mapping Exercise, see Michael Nesbitt, “(Re-) Mapping the Congo, Circa 2010” (2010) 4:2 Rights Review 3.
countries transitioning to peace in terms of problem definition and solutions across geography and between cultures, but at a general level the transitional justice taxonomy—the solution—needs to be contextualized, first through inquiry. For a COI to add to the knowledge base that already exists, it is clearly insufficient merely to repeat the prevailing wisdom even if it does so with a little additional detail. Rather, there is a need for greater consultation, improved specificity, and increased focus in the COI reports such that they go well beyond what can already be found in the general transitional justice literature. One might add the need for some thinking outside the now-traditional transitional justice taxonomy.\(^{124}\)

In the end, in trying to do all things transitional justice, the Mapping Exercise did none of it with the specificity necessary to advance significantly any one of the aforementioned transitional justice tasks. Instead, the Mapping Exercise’s report acted as a policy document, which “mapped” the landscape and provided the specific areas where future efforts should be focused. But again, we knew before the Mapping Exercise was established where the transitional justice focus lay, and the conclusions once again merely reiterated the need for prosecutions, reparations, reform, etc. There were undoubtedly some benefits to the whole enterprise and certainly some insights, the least of which was to consolidate a burdensome amount of information from previous inquiries into one document—three years, a host of well-trained experts, a wonderful commissioner, high expectations, and millions of dollars were bound to bring something to the table. But such benefits—which included bringing to light new information in addition to collating disparate studies and data—were marginal and relatively diffuse given the time, money and expertise devoted to the Mapping Exercise.

We see through this representative example that UN COIs are not capable of fulfilling the overambitious, holistic mandates that they are so often burdened with today; they cannot be about everything transitional justice is about and simultaneously provide the contextual insight necessary for specific reform and follow-up. Going forward, some tough choices in terms of narrowing their purposes and goals would seem to have to be made.

IV. CONCLUSION

UN COIs operate in extreme political environments, but are infused throughout by law. As a result, they are also bound by legal strictures—by legality and substantive legal (treaty and customary) limitations. Indeed, it is this very commitment to legality which lends credibility and legitimacy to the system of UN COIs and makes them seem like a fair and impartial alternative

to the politically-polarized environments in which they operate. With this in mind, while mandating UN COIs to indict individuals and nations for violations of international criminal and humanitarian law might seem laudable and even virtuous, it does not make for good law or, as a result, effective practice. Indeed, even the assumption that UN (war crimes) COIs’ inquiries make for good politics does not necessarily hold true: although it superficially sounds like the right idea is in place when UN COIs fight suspected war criminals, if UN COIs cannot make criminal judgments based on criminal standards, it is not always clear that what they offer in terms of insight and reform recommendations are of sufficient value to justify the time, money and faith that is put into them by transitional justice experts and the UN itself. Either way, the end result is that the contemporary incarnation of UN COIs is untenable: UN COIs should not act as quasi-criminal investigations that make findings of wrongdoing with reference to the elements of international crimes, nor should they report on everything, or even most things, in the standard transitional justice taxonomy.

This situation might appear to leave us in a morass, for great hope is placed in the institution of UN COIs. Yet this paper suggests that these bodies as they are now seem to have no place in the modern world of international fact-finding. Nevertheless, there is still hope for UN COIs. However, whatever hope is placed in UN COIs will have to be tempered by the structural and legal limitations of the investigative bodies. More precisely, future large-scale, *ad hoc* UN COIs will have to: be more focused than today’s holistic transitional justice COIs, using their size and relatively good funding to go deeper rather than more broadly in their analysis while placing greater scrutiny on their purposes and processes; and refrain from investigating international criminal wrongdoing, instead focusing on achievable goals within the legal ambit of legal-administrative bodies, including possibly other forms of non-criminal wrongdoing (state responsibility, professional wrongs, human rights abuses, etc.) or on the causes of conflicts and possible solutions thereto.
Cold Comfort: Arctic Conflict, Environmental Protection and the Limits of Law
Christopher K. Penny*

I. Introduction ........................................................................................................... 124

II. Armed Conflict in the Arctic .............................................................................. 126
   1. Military Operations in the Arctic, Past and Present ................................. 127
   2. Current Arctic Security Concerns ............................................................ 130

III. International Law and Arctic Conflict ............................................................ 135
   1. Jus Ad Bellum .......................................................................................... 135
   2. LOAC ................................................................................................. 138

IV. LOAC and the Arctic Environment ................................................................. 140
   1. LOAC Environmental Protection Framework ........................................ 140
      A. General LOAC Targeting Principles .................................................. 140
         i. Distinction, Feasible Precautions, and Proportionality ................. 141
         ii. General LOAC Principles Provide Limited Wartime Environmental Protections ......................................................... 142
      B. Specific LOAC Environmental Provisions ......................................... 145
         i. Defining “Widespread, Long-term and Severe” ............................. 146
         ii. Scope of LOAC Environmental Protections ................................. 148
      C. Precautions against the Effects of Attacks ........................................ 152
   2. Practical Implications .............................................................................. 153
      A. Petroleum and Oil Supplies, Vessels, and Facilities ......................... 153
      B. Nuclear-Powered Submarines ............................................................ 163

* Christopher K. Penny is an Associate Professor at the Norman Paterson School of International Affairs at Carleton University. His teaching and research focus on the content and role of international legal principles governing the use of force, in particular the Law of Armed Conflict. As a senior reserve military legal officer, he has also served in multinational military operations and participated in various international disarmament negotiations. This article is written solely in his academic capacity.

© 2017 Journal of International Law and International Relations
Vol 13 No. 2, pages 123-178. ISSN: 1712-2998.
I. INTRODUCTION

Armed conflict in the Arctic is not inconceivable. Significant military battles have previously been fought in this region, belying its pristine and peaceful popular image. World War Two alone saw thousands of combat deaths above the Arctic Circle\(^1\), on land, in the air, and on and under the sea.

While intervening decades have been much more restrained, national military forces with substantial combat capacity have always remained in the Arctic. Throughout the Cold War, states continued to use this region in various ways to prepare for armed conflict, and to deter it, from the widespread construction of defensive military infrastructure to the permanent stationing of combat forces, through to extensive atmospheric testing of high-yield strategic nuclear weapons.

Ongoing changes to the Arctic climate have enhanced the economic and strategic significance of this region, while also lessening the challenges and increasing the importance of regional military operations. Although Arctic militarization is not a new phenomenon, over the past decade many regional states\(^2\) have dramatically increased their Arctic military presence and operational capabilities, or announced their intention to do so. This strategic focus has even extended beyond regional actors, with other states also increasing their capacity for Arctic operations.

It is important to note that, at present, these developments do not portend imminent, or even likely, armed conflict. Although various sources of inter-state tensions exist in the Arctic, from competing resource claims to contested territory, there are strong indications both that these can be managed or resolved peacefully and that regional states remain committed to doing so.

---

\(^1\) For this Article, ‘the Arctic’ refers to the region north of the Arctic Circle (approximately 66° 33’ northern latitude). This is not the only definition in popular usage (e.g. another is the area north of the tree-line); however, the conclusions of this Article apply regardless of the particular definition used.

\(^2\) The eight states with Arctic land territory are Canada, Denmark (Greenland), Finland, Iceland, Norway, the Russian Federation, Sweden and the United States of America.
Nonetheless, tensions between regional states have risen in recent years, particularly since the still-contested Russian annexation of the Crimean Peninsula. In addition to maintaining and increasing their often-substantial Arctic military capabilities, most of these states have also recently participated in large-scale national or multinational Arctic combat training exercises. These developments cast doubt on absolute assertions that future inter-state relations in the Arctic will necessarily remain peaceful or that regional states themselves believe this to be true, despite their best intentions. Instead, they illustrate that the Arctic is not immune from larger geopolitical tensions.

Despite growing academic attention to these developments, their implications nevertheless warrant further study. This Article addresses aspects of this larger issue that have been particularly under-studied, namely the international legal principles that would apply to modern inter-state Arctic conflict, their practical implications, and the potential for their future refinement. More specifically, it focuses on the Law of Armed Conflict [LOAC], the specialized body of law that would govern the actual conduct of any future hostilities in the region and, in particular, the limited protections it would offer for the Arctic environment.

Following this introduction, Part II of this Article addresses the historical place of the Arctic as a battleground, its ongoing militarization and various potential sources of regional inter-state tensions and possible future conflict.

---


5 One article that does address some of these issues is Ashley Barnes and Christopher Waters, “The Arctic Environment and International Humanitarian Law” (2011) Canadian Yearbook of International Law 213 (citing an early draft of this current Article).
Part III reviews the international legal framework that would apply to the initiation and prosecution of any such conflict. Part IV builds upon this general foundation, assessing the various LOAC principles that would shield the Arctic environment during hostilities and their limited practical implications (though, it should be noted at the outset, there are no ‘Arctic-specific’ LOAC principles). Potential mechanisms for further protecting the Arctic from the effects of any future armed conflict, and their own limitations, are assessed in Part V, followed by a brief concluding section.

A pragmatic understanding of the challenges of applying LOAC in an Arctic context also illustrates the limitations of its environmental protections more broadly. The Arctic environment is fragile, arguably more so than that of many other areas of the globe. Its inhabitants may also be more deeply affected by environmental damage, across a wider area, than civilian populations in some other regions. Although this has led some scholars to argue that “most military action would ultimately be circumscribed in the Arctic once the environment is factored into the target assessment”\(^6\), this conclusion is misplaced. While LOAC establishes important protections, it necessarily balances humanitarian and military considerations and only mitigates the most egregious environmental effects of armed conflict.

This Article highlights the substantial dangers inherent in any potential Arctic conflict, *even one fought in full compliance with existing law*. As regional militarization continues, it is essential to recognize that international law does not prohibit armed conflict in this region, nor will it prevent substantial resulting environmental harm once conflict has begun. While Arctic conflict remains unlikely, at present, it is a serious mistake to believe that existing law would provide meaningful comfort to the Arctic environment in the event that it did occur.

II. ARMED CONFLICT IN THE ARCTIC

Extensive inter-state armed conflict has previously taken place above the Arctic Circle, along with countless peacetime military activities, including recent large-scale national and multinational combat training exercises. This Part reviews these developments and their broader contemporary context. It begins with an historical overview of Arctic conflict and the ongoing process of regional militarization, followed by examination of potential sources of future regional inter-state tensions.

\(^6\) *Ibid* at 235.
1. Military Operations in the Arctic, Past and Present

The history of Arctic armed conflict is lengthy, and likely stretches back to the earliest periods of human habitation. For example, there is no question that conflict occurred following European contact with regional Indigenous populations. Although isolated conflicts also arose across intervening eras, it was not until the twentieth century that the region began serving as a battlefield on a significantly greater scale.

Arctic conflict reached its twentieth-century zenith during the Second World War, when the region witnessed extensive mechanized fighting. Regional land, air and sea battles resulted in thousands of combat deaths and extensive destruction. Some of these battles related to belligerents deliberately seizing and holding Arctic territory, or attempting to do so, particularly in Finland, Norway and the Union of Soviet Socialist Republics [USSR]. Other fighting arose due to the use of the Arctic for transiting personnel and material to other theatres of conflict or simply as a battlefield of opportunity; in particular, Allied naval convoys sailed frequently to northern Russian ports, leading to substantial related naval warfare. Although overshadowed by the

---


8. For example, Norse settlers clashed with local Inuit populations in Greenland and elsewhere. See, e.g., ibid at 192.


10. For example, following the 1939 Soviet invasion of Finland, land battles took place in its Arctic regions, and elsewhere, in what became known as the ‘Winter War’. Arctic locations in Norway also hosted significant battles following the 1940 German invasion of this country, some involving various other Allied forces as well. These Norwegian Arctic operations included ground fighting around the port of Narvik and on the island of Spitzbergen, and numerous supporting sea engagements off the Norwegian Arctic coast. See, e.g., Chris Mann and Christer Jörgensen, Hitler’s Arctic War: The German Campaigns in Norway, Finland and the USSR, 1940-1945 (New York: St. Martin’s Press, 2002).

11. These Allied convoys began in 1941 and continued through to May 1945, sailing in particular to Murmansk and Archangel. (Though Archangel itself lies below the Arctic Circle, naval approaches require lengthy transit through Arctic waters.) Most of these convoys sailed from North Atlantic ports into the Barents Sea, though some also entered the Arctic using the Bering Strait. In total, over 70 convoys involving approximately 1500 merchant ship sailings traversed the eastern Arctic convoy route, with additional naval escorts, with a much smaller number using western approaches. Millions of tons of vital wartime goods were delivered to the Soviet Union by these convoys—in particular, aircraft, other military vehicles, arms and foodstuffs. The strategic importance of these convoys led to substantial Arctic naval warfare, as Germany sought
destruction in other Second World War theatres, Arctic hostilities nonetheless involved widespread loss of life and materiel.  

Even with the absence of large-scale Arctic conflict since the Second World War, the shadow of it has remained throughout the late twentieth century and into the twenty-first. Inter-state resource tensions have at times led to more restricted conflicts; for example, localized fisheries disputes from the 1950s into the 1970s involved deployments of British naval and air assets to the waters and airspace around Iceland. More generally, all regional states have retained an Arctic military presence, with many keeping or establishing permanent military bases, some of which had existed for decades before the Second World War.  

The Cold War involved extensive Arctic military activities by various states. The Soviet Union, in particular, boasted a large combat-capable regional naval presence, with the Northern Fleet (still) headquartered in Severomorsk. It also operated a large-scale Arctic military testing ground at Novaya Zemlya where, among other things, Soviet authorities conducted 130 atmospheric and

their interdiction using submarines, surface combatant vessels and supporting aircraft, often operating from bases in occupied Norway. See, e.g., B.B. Schofield, The Arctic Convoys, (London: Macdonald and Jane’s, 1977) at 141-151. See also Mann and Jørgensen, ibid. at 116-157. This, in turn, motivated further battles for territorial control, such as the failed but extensive German efforts to capture Murmansk. Germany also used Arctic supply convoys, among other things to support its operations against Murmansk. See, e.g., ibid. at 121-22.

12. Allied Arctic convoys alone lost over 80 merchant ships, and over 600,000 tons of military cargo, along with 21 escorting warships. Related German losses included almost 40 surface ships and submarines. See, e.g., Schofield, ibid. See also Mann and Jørgensen, ibid. In addition to the substantial attrition relating directly to the Arctic convoys and the land battles noted above, the region also witnessed other major naval and air operations and resulting losses. For example, almost 1000 men died in a single Arctic engagement in late 1944 when the Royal Air Force sank the German battleship Tirpitz in Norwegian coastal waters near Tromsø. See, e.g., Mann and Jørgensen, ibid at 150-1; Schofield, ibid at 196-7. Almost twice as many men died in the earlier sinking of the German battleship Scharnhorst off the North Cape of Norway, during a failed attempt to intercept an Allied Arctic convoy. Mann and Jørgensen, ibid. at 143-6.

13. See, e.g., John Marriott, “The 1975-6 Cod War,” (1976) 121:3 The RUSI Journal at 45. While limited, the ‘Icelandic Cod Wars’ nonetheless led to the deliberate ramming of some British vessels by Icelandic gunboats. Ibid.

14. For example, Canadian Forces Station Alert was established in the 1950s, only 817 kilometres from the geographical North Pole. This permanently manned signals-intelligence facility remains in operation. Government of Canada, Royal Canadian Air Force, Canadian Forces Station Alert, online: <www.rcaf-arc.forces.gc.ca/en/8-wing/alert.page> (accessed 10 June 2015).
sub-surface nuclear explosions at the North Test Site.\(^{15}\) The United States also maintained a substantial Cold War Arctic military presence.\(^{16}\)

Both principal Cold War antagonists conducted frequent armed patrols throughout the Arctic, as did numerous other states, regional and otherwise, involving regular air and naval activities and, to a lesser extent, land maneuvers. Although its pervasive ice necessarily restricted surface naval activity, the Arctic lent itself to extensive submarine operations. Nuclear-powered submarines, in particular, could remain under the polar ice cap at length, something not possible for their diesel/electric counterparts.\(^{17}\) American and Soviet submarines operated throughout the Arctic during most of the Cold War. Other states likely also conducted significant Arctic submarine operations, in particular France and the United Kingdom.\(^{18}\)

Arctic military operations did not end with the Cold War. Although the years immediately following its termination led many states to reduce their regional military presence, this trend has largely reversed. Many states continue to conduct Arctic military training exercises, which often extend well beyond improving their ability to undertake peacetime constabulary functions.\(^{19}\)

In fact, since the end of the Cold War, the Arctic has hosted multiple large-scale combat training exercises. Recently, the Norwegian-led Arctic Challenge Exercise 2015—an extensive multinational fighter jet exercise involving over 4,000 personnel—including training in “everything from

---


\(^{16}\) The United States did not conduct actual nuclear tests in the Arctic, although there was one test just south of the region, in the Aleutian Islands. It did deploy nuclear weapons to the region, though (one of which may remain lost under the ice following a 1968 B-52 crash off the coast of Greenland). See, e.g., Byers, *supra* note 3 at 246. More generally, the United States used the region extensively to prepare for and defend against potential Soviet attack. Among other things, in the 1950s the United States established Thule Air Base in north-western Greenland, with the consent of Denmark. See, e.g., *ibid* at 247. During the same period, along with Canada, the United States also began constructing the Distant Early Warning (DEW) Line, a series of over 60 radar and communications installations across the North American Arctic. See, e.g., Adam Lajeunesse, “The Distant Early Warning Line and the Canadian Battle for Public Perception,” (2007) 8:2 Canadian Military Journal 51.

\(^{17}\) Though, even for nuclear-powered submarines, specific design features—such as a hardened sail—may be required to do so safely. See, e.g., Huebert, *The Newly Emerging Arctic Security Environment*, *supra* note 3 at 20. This ice provided substantial protection against detection and possible attack, including for submarines carrying strategic nuclear missiles.


\(^{19}\) See, e.g., Åtland, *supra* note 3 at 153, 155, and discussion of more recent exercises below.
weapon delivery, both against grounded and airborne targets, and combating simulated anti-air artillery, to low-level flying and mid-air refueling.\textsuperscript{20} On a far larger scale, Russian military forces conducted Arctic combat exercises earlier that same year involving over 45,000 military personnel and dozens of naval surface combatants and submarines.\textsuperscript{21}

In addition to these and other large-scale exercises, various states have also maintained and often increased their routine Arctic military activities. For example, regional Russian bomber patrols have resumed, following a post-Cold War lull, frequently prompting North American and Nordic interceptor responses.\textsuperscript{22} Surface naval patrols also continue, as do overt and, no doubt, also covert, submarine operations.\textsuperscript{23}

Over the past decade, there has been a significant and growing military presence in the Arctic, along with corresponding equipment and infrastructure investment. Many regional states have substantially increased their military capacity for Arctic land, sea and air operations, or announced their intention to do so, including Canada, Denmark, Norway, Russia and the United States.\textsuperscript{24} Some states from outside of the region, such as China, have also increased their Arctic operational capabilities.\textsuperscript{25} Regardless of the rationale for doing so, state militaries are preparing in different ways for the possible future use of armed force in the Arctic, including by increasing the personnel patrolling or stationed in the region and strengthening the ability of these and other forces to conduct actual combat operations in its harsh conditions.

2. \textit{Current Arctic Security Concerns}

While these recent developments have typically been justified by defensive rather than offensive military considerations, the cumulative effect may still

\begin{itemize}
\item[\textsuperscript{21}] Thomas Grove, “Russia starts nationwide show of force,” Reuters, (16 March 2015), online: <http://www.reuters.com/article/us-russia-military-exercises-idUSKBN0MC0JO20150316>. This unannounced Russian military activity appears to have been in response to a national Norwegian Arctic exercise, Joint Viking. \textit{Ibid}.
\item[\textsuperscript{22}] See, e.g., Åtland, \textit{supra} note 3 at 155; Byers, \textit{supra} note 3 at 251.
\item[\textsuperscript{23}] Indeed, the United States Navy still operates a specialized Arctic Submarine Laboratory. See, e.g., Arctic Submarine Laboratory: The Center of Excellence for Arctic Matters for the U.S. Submarine Force, online: <http://www.public.navy.mil/subfor/uwdc/asl/Pages/default.aspx> (accessed 10 June 2015). Although located in San Diego, the Arctic Submarine Laboratory also conducts various activities in the Arctic itself, including exercises. \textit{Ibid}.
\item[\textsuperscript{24}] This recent activity is documented in greater detail in various sources, including Åtland, \textit{supra} note 3 at 152-7 (characterizing this as an “emerging security dilemma”); Byers, \textit{supra} note 3 at 249-50; Hubert, \textit{The Newly Emerging Arctic Security Environment}, \textit{supra} note 3 at 4-22. Although much of this recent activity has focused on expanding the constabulary capabilities of Arctic states, not all of it has (including the military exercises discussed above, which have often involved extensive combat simulation).
\item[\textsuperscript{25}] See, e.g., Byers, \textit{ibid} at 254-256.
\end{itemize}
be a “security dilemma”, heightening rather than reducing overall regional insecurity.\textsuperscript{26} It is important to stress that there is still little immediate threat of armed conflict being fought in the Arctic. Nonetheless, in addition to these military activities themselves, various other sources of regional insecurity do remain, including territorial and resource disputes, in addition to the broader threat that the Arctic could be affected by spillover from otherwise unrelated inter-state conflicts.

Arctic state territory\textsuperscript{27} is largely already demarcated, reducing—but not eliminating—territorial claims as a basis for potential conflict.\textsuperscript{28} Most remaining regional territorial disputes are unlikely to be sources of conflict. For example, Canada and Denmark can be expected to address peacefully the status of Hans Island, the only remaining Arctic land dispute.\textsuperscript{29} Yet, other Arctic territorial and jurisdictional claims relating to maritime regions continue to pose security concerns for many regional states.\textsuperscript{30}

One potential source of future territorial disputes remains the contested Canadian claim to sovereignty over waters incorporating key elements of North-West Passage transit routes. The Canadian claim to Arctic archipelagic land territory is itself not generally contested, apart from Hans Island; rather, the issue is the legal status of related waters. Canada has controversially drawn a single baseline around its entire Arctic archipelago, thereby characterizing all landward waters as internal and part of its state territory along with those extending 12 nautical miles seaward (rather than drawing separate baselines around each island, and claiming only the waters 12 miles seaward of each line as territorial sea). Related outstanding legal issues concern the contested status of the North-West Passage as an international strait.\textsuperscript{31}

Any future Canadian attempt to regulate, restrict or prohibit foreign passage through these contested waters, beyond those measures clearly

\textsuperscript{26} See, e.g., \textit{Åtland}, \textit{supra} note 3 at 161-162.

\textsuperscript{27} At international law, state territory includes land, internal waters (i.e. waters landward of coastal baselines), territorial seas (i.e. waters up to 12 nautical miles seaward of baselines) and superjacent airspace. See, e.g., John Currie, \textit{Public International Law}, 2d ed. (Toronto: Irwin Law, 2008) at 266-9.

\textsuperscript{28} As the still-contested 2014 Russian annexation of Crimea and related events indicate, inter-state armed conflict can still arise even when territorial status has been previously agreed.\textsuperscript{29} See, e.g., Government of Canada, Foreign Affairs, Trade and Development Canada, Canada and Kingdom of Denmark Reach Tentative Agreement on Lincoln Sea Boundary (28 November 2012), online: <http://news.gc.ca/web/article-en.do?nid=709479> (accessed 10 June 2015) (noting “continuing discussion intended to arrive at a mutually satisfactory solution” to this final outstanding boundary issue). See also Byers, \textit{supra} note 3 at 4, 10-16. Canada and the United States also have yet to delimit their maritime border between Alaska and the Yukon Territory, though a peaceful settlement between these long-term allies can similarly be expected. See, e.g., \textit{ibid} at 56-91.

\textsuperscript{30} See, e.g., \textit{Åtland}, \textit{supra} note 3 at 161.

\textsuperscript{31} See, e.g., Byers, \textit{supra} note 3 at 128-170 (for a detailed overview of legal issues concerning Arctic straits). See also \textit{Åtland}, \textit{ibid}. The legal merits of these claims are beyond the scope of this Article.
permitted by the law of the sea governing international straits, would be a potential source of inter-state conflict if forcefully implemented or opposed. Conflict could also result from similar controversial Russian claims regarding other Arctic waters.

Inter-state tensions could also arise over access to Arctic resources in areas clearly beyond national sovereignty. Among other things, regional states are currently engaged in delimiting extensive and potentially conflicting jurisdictional claims over continental shelf resources which, among other things, almost certainly contain vast oil and natural gas reserves.

To date, these states have used institutional and legal mechanisms to pursue their various claims, through submissions to the Commission on the Limits of the Continental Shelf. Negotiation has been favoured in many other regional territorial differences. These are strong indications of the continued potential for peaceful international law-based resolution of outstanding Arctic territorial and resource disputes, the importance of which is stressed by all regional states.

Arctic-specific institutional relationships between these states—notably the Arctic Council—provide a further significant framework in which to pursue their various claims, through submissions to the Commission on the Limits of the Continental Shelf. The continued potential for peaceful international law-based resolution of outstanding Arctic territorial and resource disputes, the importance of which is stressed by all regional states.

32. For example, in the late 1940s, the (then) contested status of the Corfu Channel as an international strait led to the death of numerous British naval personnel and the restrained but still unlawful subsequent use of force by the United Kingdom. See, e.g., Corfu Channel Case (United Kingdom v Albania), Merits, [1949] ICJ Rep 4 [Corfu Channel]. More recent tensions between Iranian military forces and American warships transiting the Straits of Hormuz indicate that serious security concerns can still arise even where an international strait is well established.

33. See, e.g., Byers, supra note 3 at 128-170 (for discussion of these Russian claims).

34. For example, the Icelandic Cod Wars, discussed above (supra note 13 and related text), arose from contested claims to fisheries jurisdiction.

35. States may exercise jurisdiction (though not sovereignty) over seabed resources up to 200 nautical miles from their baselines. The physical existence of a continental shelf beyond this threshold may support additional resource claims (though, again, this would not extend to sovereignty over the territory itself). See, e.g., United Nations Convention on the Law of the Sea, 10 December 1982, in force 16 November 1994, 1833 UNTS 3 [hereinafter UNCLOS] at arts. 77-85. See also Byers, supra note 3 at 92-127.


37. Such as the Hans Island dispute between Canada and Denmark, discussed above (supra note 29 and related text).

38. See, e.g., Åtland, supra note 3 at 146.

39. Founded in 1996, the Arctic Council was established to “provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic Indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.” Arctic Council, Joint Communique of the Governments of the Arctic Countries on the Establishment of the Arctic Council, 19 September 1996, Ottawa, Canada, online: <www.arctic-council.org/index.>
advance this goal. One must therefore not overstate the potential for related regional conflict. As the Intergovernmental Panel on Climate Change notes, in addressing the regional security implications of climate change:

[...]there is little evidence the changing Arctic will become a site for violent conflict between states. At present, political institutions are providing forums for managing resource competition, new transportation practices, and boundary disputes, but anticipated increased stresses will test these institutions in the future [emphasis added].

Major national strategic interests will remain as potential future sources of inter-state tension, though, even if all regional territorial, transportation and resource challenges are resolved or managed peacefully. The scale of Arctic territory itself poses significant security challenges for many regional states. Canada alone possesses thousands of kilometres of Arctic coastline. For some states, the opening of formerly ice-bound sea routes will increase the proximity of potentially unfriendly state and non-state actors to their Arctic territory; for example, China has already operated an icebreaker in Arctic waters and is increasing its capacity to do so. Rapid changes in the Arctic environment have substantially altered the regional security status quo, and this uncertainty itself brings risk.

It is important to note that potential sources of future Arctic conflict extend well beyond related territorial, transportation and resource disputes, a factor that can often be overlooked or minimized in regional security assessments. As Franklyn Griffiths observes, “the use of force in the Arctic is unlikely today...

php/en/about-us> (accessed 10 June 2015) at para. 1. It is nonetheless important to note that the footnote to this paragraph expressly provides that “[t]he Arctic Council should not deal with matters related to military security.” Ibid.

Indeed, Byers concludes that there is “no state-to-state competition for territory or resources in the Arctic, and no prospect of conflict either.” Supra note 3 at 5. See also Franklyn Griffiths, “Arctic Security: The Indirect Approach,” in James Kraska, ed, Arctic Security in an Age of Climate Change (Cambridge: Cambridge UP, 2011) 3 at 3-4 (summarizing the views of various contributors). This certainty has not always extended to state military forces themselves, though; for example, in 2008, Russian Lieutenant-General Vladimir Shamanov stated that “[a]fter several countries contested Russia’s rights [to] the resource-rich continental shelf in the Arctic, we have immediately started the revision of our combat training programs for military units that may be deployed in the Arctic in case of a potential conflict.” Åtland, supra note 3 at 153.


See, e.g., Byers, supra note 3 at 254-256 (although Byers concludes that “China does not pose a military threat in the Arctic”).
Conflict between states for other reasons could still involve using the Arctic as a battlefield or military transit route, as occurred during the Second World War. For example, a major Cold War conflict would likely have involved strategic targeting of Soviet Arctic naval facilities by the United States.

Although the risk of direct conflict between major military powers has attenuated since this time, tensions between these and other Arctic states have nonetheless risen substantially in recent years, particularly since the still-contested Russian annexation of the Crimean peninsula in 2014 and related military activities in eastern Ukraine. Indeed, these increasing tensions appear to have been a significant factor propelling large-scale combat training exercises by Russian forces as well as those of various members of the North Atlantic Treaty Organization, in the Arctic and elsewhere. Though certainly not a herald of impending conflict, these exercises do belie the notion that these states themselves are convinced that their disputes will necessarily be resolved peacefully, or that they will not spill over into the Arctic, despite their stated best intentions.

Arctic spillover concerns could also apply to other types of conflicts. For example, in a larger conflict between regional and non-regional actors, the Arctic military facilities of the former, in particular, moveable combat assets located therein, might become important strategic targets for the latter. Arctic transit routes, particularly air and sea corridors, might also be used by belligerents, inviting corresponding enemy attack, as occurred during the Second World War.

As with this latter example, it is worth noting that future Arctic combat operations need not involve regional actors at all. For example, some of the principal Second World War Arctic belligerents, notably the United Kingdom and Germany, were not themselves Arctic states.

As its ice cover recedes, the potential military uses of the Arctic by regional and other states will only increase. Indeed, it cannot be seriously doubted that had the Arctic been ice-free during the Second World War, there would have been substantially more convoys and other military activities in, over and under its waters—and far greater resulting death and destruction.

To be sure, none of this portends the inevitability of further armed conflict in the Arctic. At present, this does not even appear likely, let alone imminent, particularly large-scale fighting between major military powers. That said, a future inter-state use of armed force in the Arctic is not inconceivable either, whether initiated by design, miscalculation or accident.

43. Supra note 40 at 6.

44. See, e.g., Grove, supra note 21 (though noting that the Norwegian Joint Viking exercise was planned prior to the Crimean annexation).
III. INTERNATIONAL LAW AND ARCTIC CONFLICT

With this in mind, it is useful to consider the international legal framework that would apply to any such Arctic conflict, to understand the role that law might play in either restricting its outbreak or minimizing its resulting implications for the environment. More practically, addressing these principles will also assist state armed forces undertaking future combat training exercises or other military activities in the region, helping to ensure that international legal considerations remain an integral component of all military operational planning, even as it relates to the Arctic.

To do so, the following Part reviews the two different legal regimes most applicable to the initiation and conduct of any future inter-state use of military force in the Arctic, *jus ad bellum* and LOAC, respectively. This is followed in Part IV by a more detailed examination of specific LOAC environmental protections.

1. *Jus Ad Bellum*

*Jus ad bellum* governs the use of force in international relations. This legal regime does not categorically prohibit resort to military action in the Arctic. Instead, several scenarios may permit lawful state uses of armed force in this region.

As its central principle, Article 2(4) of the *Charter of the United Nations* requires that “[a]ll [UN] 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”.45 This treaty-based prohibition on the (non-consensual) inter-state use of force has also crystallized as customary international law, binding all states.46 Its two generally recognized lawful exceptions permit the use of necessary and proportionate military force either in self-defence or pursuant to ‘Chapter VII’ UN Security Council authorization.47

This legal regime generally prohibits states from using military force against other states. However, it is also clear that lawful uses of military force in the Arctic remain possible, particularly in response to prior unlawful armed

---

45. 26 June 1945, in force 24 October 1945, 1 UNTS XVI (as amended) [*UN Charter*].
47. See, e.g., *UN Charter*, supra note 45 at arts 42 and 51. Though their precise scope is contested, there is no question that these both constitute accepted exceptions to the general prohibition on the use of force. Additional possible exceptions, including humanitarian intervention, remain controversial. See, e.g., Gray, *ibid*. See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford UP, 2004) [*UK LOAC Manual*] at 2-3.
attacks by other states. Among other things, this could include any state, regional or otherwise, defending its own vessels or aircraft during lawful Arctic transit—for example, against military measures undertaken against them to prevent their access to a recognized international strait—or forceful measures undertaken by a coastal state against an unidentified submerged submarine operating in its Arctic internal or territorial waters. Though far less likely, this would also include a regional state defending its own Arctic territory from invasion, alone or with the assistance of allies.

As a result, a state decision to engage in Arctic conflict could be entirely lawful. Indeed, international law might even sanction the first use of actual armed force in the Arctic—for example, in self-defence against enemy military forces lawfully stationed in or transiting the region, in the context of a larger conflict initiated elsewhere by that other state.

There is no general legal restriction on the stationing of such military forces in the Arctic. Absent specific treaty commitments or domestic legal constraints, regional states are generally free to position their own military forces within their own Arctic territory, and they continue to do so. These states may also consent to other states using their Arctic territory on a temporary or longer-term basis, for basing, training or other military purposes, which is also a common practice.

There is considerable potential for a lawful Arctic military presence and, therefore, for the positioning of potential future military targets throughout this region.

48. ‘Armed attack’ is a threshold requirement for self-defence established in Article 51 of the UN Charter, ibid. The UN Security Council could conceivably also authorize force in the region for the maintenance of international peace and security.

49. For example, in April 2015, in a case (potentially) involving two Arctic states, Finland dropped small depth charges to warn what might have been an unidentified (but suspected Russian) submarine operating in its territorial waters. See, e.g., “Finland drops depth charges in ‘submarine’ alert,” BBC News, 28 April 2015, online: <http://www.bbc.com/news/world-europe-32498790>. Sweden responded to similar concerns relating to apparent foreign submarine activities in its coastal waters in late 2014. Ibid.

50. Any defensive use of force must be necessary to eliminate the ongoing enemy attack and proportionate to this goal. See, e.g., Gray, supra note 46 at 148-55. There is no absolute requirement that it be confined to the same geographical area of the initial aggression, though this will often be the case, particularly for low-intensity conflicts.

51. For example, military activities in parts of the Norwegian Arctic have been limited through the Treaty concerning the Archipelago of Spitsbergen, 9 February 1920, in force 14 August 1925, 2 LNTS 7 [Spitsbergen Treaty]. This treaty binds all Arctic states, among others, and establishes that “[s]ubject to the rights and duties resulting from the admission of Norway to the League of Nations, Norway undertakes not to create nor to allow the establishment of any naval base in the territories specified in Article 1 [i.e. the Spitsbergen Archipelago] and not to construct any fortification in the said territories, which may never be used for warlike purposes.” Ibid at art 9. See also Byers, supra note 3 at 256-7.

52. For example, as noted, supra note 16, the United States operates Thule Air Base in north-western Greenland.
States, whether regional or not, may also lawfully conduct military activities, including sovereignty patrols, intelligence gathering operations or even large-scale live-fire combat exercises, in various other Arctic areas, in particular those outside the jurisdiction of other states—for example, on, in or above the High Seas (i.e. the area beyond 200 nautical miles from coastal state baselines).\(^{53}\) Significant parts of the Arctic Ocean will remain High Seas, open to military use by all states, even if all outstanding regional territorial and jurisdictional claims are accepted.

Most state military activities may actually be conducted as close as 12 nautical miles from the coastlines of other states, without their consent.\(^{54}\) Innocent passage of foreign military vessels through territorial waters would entail even closer proximity, as would their transit passage through territorial or internal waters comprising international straits (which, among other things, might be the case for the North-West Passage).\(^{55}\)

Lawful military uses of the Arctic may also encompass actual inter-state combat operations. Hostile military engagements can extend almost anywhere on the globe outside of the territory of neutral states. This includes not only belligerent-state territories themselves, but also other areas such as the waters and related airspace of the High Seas.\(^{56}\) Hostile military activities may also be conducted in the exclusive economic zones of neutral states.\(^{57}\) Indeed, in some circumstances, armed conflict may even extend to neutral-state territory itself.\(^{58}\)


\(^{54}\) If coastal states have claimed a territorial sea measuring less than the maximum 12 nautical miles from their baselines permitted by UNCLOS (ibid at art 3), this distance may be even smaller. The legal requirement of “innocent” passage does not apply outside of the territorial or archipelagic waters of coastal states (see, e.g., UNCLOS, ibid at arts 17, 19); however; military activities in other areas must still be conducted with “due regard” for the rights of affected states (see, e.g., UNCLOS, ibid at arts 58(3), 87(2)).

\(^{55}\) See, e.g., UNCLOS, ibid at arts 17, 19 and Part III, “Straits used for international navigation” (in particular art. 38). While coastal states may suspend innocent passage temporarily, for security reasons, transit passage may not be so limited. See, e.g., UNCLOS, ibid at arts 25(3), 44. See also related discussion in Corfu Channel, supra note 32.


\(^{57}\) See, e.g., San Remo Manual, ibid., at para. 10. Any such activities must nonetheless give “due regard” to the economic rights of the neutral states affected and to the protection of the environment. Ibid. at paras. 34-35. See also UK LOAC Manual, ibid at 351(para.13.6.1).

\(^{58}\) See, e.g., San Remo Manual, ibid at para 22 (when that state has not taken measures to address a “serious and immediate threat” posed by the presence of another belligerent on its territory). See also UK LOAC Manual, ibid at 352 (para 13.9E).
Arctic military activities are not constrained by international law in the same manner as those in Antarctica. Article 1(1) of the Antarctic Treaty\(^{59}\) expressly establishes that:

> Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.\(^{60}\)

There is no such prohibition on Arctic military activities, nor is there any comparable treaty at all. The lengthy history of Arctic ‘bases and fortifications’, ‘military maneuvers’ and ‘testing’—to say nothing of actual combat—bely any assertion that states consider the Arctic off-limits to armed conflict (thereby also precluding any argument that such a prohibition exists at customary international law\(^{61}\)). Instead, regional state militaries continue to openly prepare for this possibility by, among other things, conducting large-scale Arctic combat training exercises.

### 2. LOAC

In the event that small- or large-scale Arctic hostilities do arise, for whatever reason, LOAC would govern their conduct regardless of the initial or ongoing legality of the overall use of force for any particular state under the jus ad bellum regime.\(^{62}\) The deliberate distinction between these bodies of law ensures that military personnel from all belligerents will be held to the same basic legal standard during their respective combat operations.\(^{63}\)

LOAC will govern any non-consensual inter-state use of force in the Arctic.\(^{64}\) The general threshold for its application is an ‘armed conflict’, which

---

59. 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).
60.  Ibid. Article 1(2) establishes that this “shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.”
61. For further discussion of this issue also see Part V.4 below.
62. This distinction is particularly important where jus ad bellum claims are themselves disputed, as they frequently will be, particularly during conflict itself. Individual military personnel are generally not in a position to judge the respective legal merits of such claims. For example, this might apply to a military confrontation arising from the contested legal status of the waters of the North-West Passage.
63. Subject, to a limited degree, to individual treaty commitments. However, key LOAC provisions are considered customary law, applicable to all states. For an authoritative (albeit not determinative) assessment of this customary body of law see, e.g., Jean-Marie Henckaerts and Louise Doswald-Beck, eds, Customary International Humanitarian Law (Cambridge: Cambridge UP, 2005) and updated materials online: <https://www.icrc.org/customary-ihl/eng/docs/home> (accessed 10 June 2015) [Customary IHL].
64. This Article addresses the potential inter-state use of force in the Arctic and assesses applicable LOAC in this specific context. Nonetheless, albeit not currently foreseeable, any future internal fighting in Arctic areas of regional states would also be governed by LOAC, though its substantive content would vary. See, e.g., UK LOAC Manual, supra note 47 at 383-410. See also
Arctic Conflict, Environmental Protection and the Limits of Law

does not require a formal declaration of war or even any resulting combat deaths. Instead, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State [emphasis added].”

Although there are no Arctic-specific LOAC provisions, this body of law would clearly apply to any full-scale inter-state war as well as to other more-limited military engagements in the region (for example, the reciprocal use of force between a coastal state and a foreign naval vessel transiting contested Arctic waters). When applicable, LOAC establishes various protections against the effects of hostilities both for civilians and combatants, including, among other things, general legal standards for military targeting, as well as more specialized principles applicable to particular weapons and tactics.

In doing so, LOAC deliberately and necessarily balances military and humanitarian considerations. While seeking to mitigate the harmful effects of armed conflict, where possible, it does not—and cannot—eliminate them. Appreciating this balance is the key to understanding the nature and extent of LOAC protections, whether in the Arctic or anywhere else.

United Nations Environment Programme, Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law (Nairobi: United Nations Environment Programme, 2009) [hereinafter UNEP] at 10. This latter issue is beyond the scope of this Article.

See, e.g., Common Articles 2 and 3 of the four Geneva Conventions of 1949, supra note 4; Additional Protocol I, supra note 4 at art 1(3); Additional Protocol II, supra note 4 at art 1(1). Some LOAC provisions also apply during peacetime (e.g. LOAC dissemination obligations). See, e.g., Additional Protocol I, supra note 4 at art 83.

See, e.g., Prosecutor v Dusko Tadic, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, online: ICTY <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> at para 70 [emphasis added]. Note that the latter two circumstances generally describe non-international armed conflicts, which are beyond the scope of this Article. This language is also consistent with the definition of armed conflict proposed by Marie G. Jacobsson, the Special Rapporteur appointed in 2013 by the International Law Commission [ILC] to address legal issues concerning environmental protection and armed conflicts. Second ILC Rapporteur Report, supra note 53 at 72. The implications of the ongoing ILC assessment of this issue—which has also included provisional adoption of related draft principles by the ILC Drafting Committee as well as broader discussion within the ILC as a whole—are discussed in greater detail below, in particular infra notes 231-33 and related text, and in various notes in Part IV concerning specific LOAC environmental protections.

See, e.g., Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict, 2d ed. (Cambridge: Cambridge UP, 2010); IHL Handbook, supra note 56; UK LOAC Manual, supra note 47. See also Customary IHL, supra note 63.

See, e.g., Dinstein, ibid at 4-6 (LOAC “amounts to a checks-and-balances system, intended to minimize human suffering without undermining the effectiveness of military operations”); IHL Handbook, ibid at 37-38 (LOAC “is a compromise between military and humanitarian requirements”); UK LOAC Manual, ibid at 21 (para 2.1)(LOAC “is intended to minimize the suffering caused by armed conflict rather than impede military efficiency”).
IV. LOAC AND THE ARCTIC ENVIRONMENT

A significant practical concern arising from any potential use of military force in the Arctic is its likely detrimental environmental impact, and numerous general and specific LOAC principles relate to this issue. The following Part reviews the LOAC environmental protection framework and then applies it to illustrative Arctic conflict scenarios. As it demonstrates, full LOAC compliance will not necessarily prevent substantial environmental degradation resulting from an Arctic conflict.

1. LOAC Environmental Protection Framework

Some LOAC environmental protections result simply from considering environmental factors when applying its general targeting principles. Others arise from additional specialized environment-specific legal provisions. These two related regimes are outlined separately below.

a. General LOAC Targeting Principles

All military forces are required to comply with general LOAC targeting principles during their attacks.69 These principles—in particular, distinction, feasible precautions, and proportionality—are established through key LOAC treaties, notably Additional Protocol I, as well as customary international law.70 Although the United States—a significant Arctic military power—is not a Party to Additional Protocol I, it generally accepts the application of these basic targeting principles to its own military operations.71

In the case of naval and aerial warfare, these general protective principles do not necessarily apply as a matter of treaty law, even for Parties to Additional Protocol I; Article 49(3) limits their application to warfare with collateral civilian effects on land or involving attacks directed against land-based military objectives.72 Nonetheless, there is a reasonable argument that these

69. ‘Attack’ refers to any “acts of violence against the adversary, whether in offence or in defence.” Additional Protocol I, supra note 4 at art 49(1).
70. One hundred and seventy-four states are Parties to Additional Protocol I, including all Arctic states except the United States. See, e.g., ICRC: Treaties and States Parties to Such Treaties, Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, online: <www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470> (accessed 10 June 2015) [Treaties and States Parties: Additional Protocol I]. For the customary status of these principles see, e.g., Customary IHL, supra note 63. See also Second ILC Rapporteur Report, supra note 53 at paras. 148, 154, 161.
71. See e.g., Customary IHL, ibid at Rules 1, 14, 22 (and, in particular, related state practice). See also Jeff A. Bovarnik et al., Law of War Deskbook (Charlottesville, VA: The Judge Advocate General’s Legal Center and School, 2011) at 139-157 (illustrating that some substantive differences may nonetheless remain in the interpretation and application of these general principles).
72. Supra note 4. This Article establishes that “[t]he provisions of this section [i.e. General Protection against Effects of Hostilities, which incorporates Articles 48 to 67] apply to any land,
principles have also crystallized as customary law, for all states, even in this broader context.\footnote{For example, the 1994 San Remo Manual, supra note 56—a non-binding but authoritative set of expert guidelines concerning naval warfare—incorporates all three principles. See also IHL Handbook, supra note 56 at 491-94. The Customary IHL study by the International Committee of the Red Cross did not address the customary rules applicable to naval warfare, precisely because of their recent restatement in the San Remo Manual. Supra note 63.}

i. Distinction, Feasible Precautions, and Proportionality

The principle of distinction requires that attacks be directed only against lawful military objectives.\footnote{Additional Protocol I, supra note 4 at art 48 establishes this ‘basic rule’. See also Rule 1 of Customary IHL, ibid.} Additional Protocol I, Article 52(2), establishes that:

[i]n so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.\footnote{Ibid. But see Bovarnik, supra note 71 (outlining less-restrictive US understanding).}

Enemy military personnel and civilians participating directly in hostilities are also generally considered to be lawful subjects of attack.\footnote{Religious and medical military personnel are generally protected against attack. See, e.g., Geneva Convention I, supra note 4 at art 24. See Additional Protocol I, ibid at art 51(3) concerning direct civilian participation in hostilities.} Directing attacks against other civilians or civilian objects—that is, “all objects that are not military objectives”\footnote{Additional Protocol I, ibid at art 52(1).}—is prohibited.\footnote{Ibid at arts 51(2) and 52(1).}

Even when attacking lawful military objectives, military forces must take all feasible precautions to protect civilians and civilian objects from the effects of these attacks. Additional Protocol I establishes that, “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”.\footnote{Ibid at art 57(1).} This requires that:

those who plan or decide upon an attack shall […] take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in
any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.\textsuperscript{80}

A further principle, proportionality, requires that even if the target is a lawful military objective and all feasible precautions to minimize civilian effects have been taken by the attacking force:

an attack shall be cancelled or suspended if it becomes apparent that [...] the attack 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.\textsuperscript{81}

This latter concept addresses the issue of ‘collateral damage’, that is, damage incidental to an otherwise lawful military attack (rather than a direct attack against civilians or civilian objects, which would already violate the principle of distinction).

Taken together, these general LOAC principles do not prohibit negative collateral civilian effects during military operations. Instead, states must strive to avoid such effects, directing their attacks only against valid military objectives. Anticipated collateral civilian effects from these attacks must always be limited, to the extent feasible, and must never be excessive when compared to their anticipated military advantage. At international law, violating these principles may give rise not only to state legal responsibility but also, at times, to individual criminal responsibility for those engaging in or ordering the attack in question.\textsuperscript{82}

ii. General LOAC Principles Provide Limited Wartime Environmental Protections

When addressing wartime environmental protections, it is not the case that the entirety of the natural environment always constitutes a ‘civilian object’ (i.e. that it cannot ever constitute a valid ‘military objective’ subject to lawful attack). Instead, elements of the natural environment—for example, land formations—may be considered military objectives so long as they meet the general legal standards for classification as such, as outlined above.\textsuperscript{83}

\textsuperscript{80} Ibid at art 57(2)(a)(ii).
\textsuperscript{81} Ibid at art 57(2)(b).
\textsuperscript{82} See, e.g., ibid. at art. 85(3). See also the Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002, 2187 UNTS 90 [hereinafter Rome Statute] at art. 8. Domestic prosecution is also possible and frequently required.
\textsuperscript{83} Many states made interpretive declarations to this effect upon ratifying Additional Protocol I; for example, Canada declared that “a specific area of land may be a military objective if, because of its location or other reasons specified in the Article [i.e. Article 52(2)] as to what constitutes a military objective, its total or partial destruction, capture or neutralization in the circumstances governing at the time offers a definite military advantage.” Treaties and States Parties: Additional Protocol I, supra note 70. France and the United Kingdom, among others, also
Absent contextual classification as a military objective, however, the natural environment might be characterized as a civilian object, given the negative definition of this concept as ‘all objects that are not military objectives’. Semantically, although one might consider a particular natural formation as an ‘object’, it is difficult to characterize the environment as a whole in this manner. Nonetheless, Additional Protocol I implies that the environment should be considered as such, at minimum where damage to it can be expected to affect the health and survival of the civilian population.84

To the extent that the environment itself or particular aspects thereof are properly considered civilian objects, military forces are required to take all feasible precautions to limit the effects of their military operations upon them under general LOAC targeting principles, in addition to those precautions taken to protect civilians and (other) civilian objects. Here, feasibility may be understood as “that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.85

made similar declarations, Ibid. See also Dinstein, supra note 67 at 204-5. This is consistent with provisional ILC Draft Principle II-1(3) which states that “[n]o part of the [natural] environment may be attacked, unless it has become a military objective.” International Law Commission, Protection of the environment in relation to armed conflict: Text of the draft introductory provisions and draft principles provisionally adopted so far by the Drafting Committee, UN Doc A/CN.4/L.870, 22 July 2015 [ILC Draft Principles].

84 See, in particular, Article 55 (‘Protection of the natural environment’), which is located in a Chapter entitled ‘Civilian Objects’. Supra note 4. This provision is discussed in more detail in Part IV.1.ii below. See also Bothe et al., “International law protecting the environment during armed conflict: gaps and opportunities,” (2010) 92:879 International Review of the Red Cross 569 at 577; Customary IHL, supra note 63 at 143 (Rule 43); Dinstein, ibid at 198, 204-5; “Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Against the Federal Republic of Yugoslavia,” 13 June 2000, International Criminal Tribunal for the Former Yugoslavia, online: <www.icty.org/sid/10052> (accessed 10 June 2015) [ICTY OTP Report] at para 18; UNEP, supra note 64 at 13. But see International Law Commission, Report of the International Law Commission: Sixty-seventh session), Official Records of the General Assembly, Seventieth Session, Supplement No. 10, UN Doc. A/70/10 [ILC Report] at paras 143, 154 (noting that some ILC members expressed concerns over transposing civilian protections to the environment and the difficulties that might arise for the principle of distinction). The Special Rapporteur had earlier proposed recognizing the environment itself as “civilian in nature”, but accepted that removing this reference might avoid confusion. Ibid at para 167. See also Second ILC Rapporteur Report, supra note 53 at paras 147-151. This express wording was subsequently not included by the ILC Drafting Committee in its provisional Draft Principles (though, as noted above, provisional Draft Principle II-1(3) still establishes protections for the environment ‘unless it has become a military objective’. Ibid.).

Even with such precautions, it is nonetheless clear that any armed conflict will necessarily have harmful collateral environmental implications. These effects will vary dramatically, depending upon the context; however, among countless other possibilities, one can reasonably expect substantial environmental harm to result from common wartime factors such as the use of explosive weapons, the related destruction of vehicles and buildings, the maneuvering of large military formations and other general battlefield damage and pollution.

At minimum, any negative collateral environmental implications of military attacks, whatever they may be, must be considered under the general LOAC proportionality principle if they directly and negatively affect civilians and this could and should have been foreseen at the time of attack. To the extent that the environment itself is considered a civilian object, foreseeable direct harm to it would also have to be taken into account, regardless of any related detrimental impact on actual civilians. Indeed, the International Court of Justice [ICJ] has concluded that “[s]tates must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.”

That said, substantial foreseeable detrimental environmental consequences—even those with corresponding negative civilian effects—will not necessarily render an attack on a valid military objective unlawful. Once all feasible precautions have been taken, the proportionality principle requires only that these consequences be weighed, in conjunction with all other anticipated collateral civilian effects of the attack, against the expected military advantage, to determine whether they would be excessive under the circumstances. It is only in this latter case that general LOAC targeting obligations would prohibit an attack with negative environmental consequences.

In making this comparative assessment, it is important to note that the applicable legal standard is likely that of a “reasonable military commander” (rather than, for example, a human rights or environmental activist). Nonetheless, as suggested by the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia,

86. *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion [1996] ICJ Rep 226 at para 30 (though it is not entirely clear that the ICJ was addressing LOAC conceptions of necessity and proportionality, given its prior related reference to the *jus ad bellum* concept of self-defence). See also *ICTY OTP Report, supra* note 84 at para 18. This is consistent with provisional ILC Draft Principles II-2 (“[LOAC], including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the [natural] environment, with a view to its protection”) and II-3 (“[e]nvironmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity”). *ILC Draft Principles, supra* note 83.

87. See, e.g., *ICTY OTP Report, ibid* at para 50 (noting expressly that “[i]t is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury to noncombatants”).
in order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate. At a minimum, actions resulting in massive environmental destruction, especially where they do not serve a clear and important military purpose, would be questionable.\(^{88}\)

b. Specific LOAC Environmental Provisions

In addition to these general targeting principles, LOAC also establishes explicit environmental obligations which may serve to further limit the degree of acceptable environmental harm during armed conflict.\(^{89}\) Of particular note, Article 35(3) of Additional Protocol I establishes that “[i]t is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”.\(^{90}\)

This general obligation is reaffirmed in Article 55(1), which requires that:

\[
\text{[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.}^{91}\]

These principles clearly bind all Parties to Additional Protocol I.\(^{92}\)

Considerable doubt remains about whether these treaty-based obligations have also crystallized as customary international law, binding all states (particularly, though not exclusively, in the specific context of the use of nuclear weapons).\(^{93}\) Indeed, the United States—the only Arctic state not

\(^{88}\) Ibid at para 22 (assessing proportionality in light of various additional environment-specific LOAC provisions). See also Second ILC Rapporteur Report, supra note 55 at paras 161-2.

\(^{89}\) In practice, one might reasonably argue that general LOAC principles continue to provide more effective protection. See, e.g., ICTY OTP Report, ibid at para 15 (“these [environmental] effects are best considered from the underlying principles of the law of armed conflict such as necessity and proportionality”); UNEP, supra note 64 at 28 (noting that these general provisions “provide significantly more comprehensive protection than the norms of IHL that protect the environment per se”).

\(^{90}\) Supra note 4.

\(^{91}\) Ibid. The implications of the first sentence of this provision are discussed in greater detail below, infra notes 108-09 and related text.’

\(^{92}\) Absent applicable treaty reservations, which do not apply for any Arctic States Parties to this treaty. See, e.g., Treaties and States Parties: Additional Protocol I, supra note 70.

\(^{93}\) See, e.g., Customary IHL, supra note 63 at Rules 44 and 45 (supporting customary status); John B. Bellinger III and William J. Haynes II, “A US government response to the International Committee of the Red Cross Customary International Humanitarian Law study” (2007) 89:866 International Review of the Red Cross 443 at 455-65; (rejecting customary status). See also Barnes and Waters, supra note 5 at 220 (supporting customary status); Dinstein, supra note 67 at 199
Party to Additional Protocol I—rejects this characterization.\textsuperscript{94} The ICJ itself has recognized only that “[t]hese are powerful constraints for all the States having subscribed to these provisions.”\textsuperscript{95}

In any event, whether customary or not, the conjunctive nature of these environment-specific provisions significantly limits their practical reach. That is, the environmental harm arising from particular methods or means of warfare must be intended or expected to be ‘widespread, long-term and severe’ before these specialized prohibitions apply.

\textbf{i. Defining “Widespread, Long-term and Severe”}

This conjunctive phrasing magnifies the importance of the precise definition to be given to each of these terms. Despite their significance, though, the meaning of these terms is not established within Additional Protocol I.\textsuperscript{96} Nor have its Parties subsequently adopted agreed definitions. As a result, the meaning of these terms remains subject to considerable debate.\textsuperscript{97}

Drawing on the intention expressed by states while negotiating Additional Protocol I, their subsequent implementation of these provisions, similar concepts within other LOAC treaties, and related academic and other commentary, the following definitions offer a workable standard from which to apply and assess these environmental protections:

- **‘widespread’**: in terms of some hundreds of square kilometers;
- **‘long-term’**: a matter of many years, likely decades; and,
- **‘severe’**: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

(opposing customary status); \textit{IHL Handbook, supra} note 56 at 133-4 (customary status “worth considering”); \textit{ILC Report, supra} note 84 at paras 144, 150 (noting some doubt about customary status). No similar prohibition is established in \textit{Additional Protocol II, supra} note 4. But see provisional ILC Draft Principle II-1(2)(“[c]are shall be taken to protect the [natural] environment against widespread, long-term and severe damage”). \textit{ILC Draft Principles, supra} note 83.\textsuperscript{94}

\textsuperscript{94} See, e.g., Bellinger and Haynes, \textit{ibid}. See also Bothe et al, \textit{supra} note 84 at 573.

\textsuperscript{95} Nuclear Weapons, \textit{supra} note 86 at para 31 [emphasis added]. See also Dinstein, \textit{ibid}. at 206. But see ICTY OTP Report, \textit{supra} note 84 at para 15 (concluding that “Article 55 may, nevertheless, reflect current customary law”, despite recognizing that the ICJ “appeared to suggest that it does not” in Nuclear Weapons).\textsuperscript{95}

\textsuperscript{95} In contrast, definitions for the related concepts of ‘widespread, long-lasting and severe’ were established for the purposes of \textit{ENMOD, supra} note 4; however, its Annex expressly provides that these definitions are “intended exclusively” for the purposes of \textit{ENMOD}. \textit{Ibid}. Nonetheless, its definitions of ‘widespread’ and ‘severe’ likely provide a reasonable foundation for understanding the identical terms in \textit{Additional Protocol I}, in contrast to its deliberate use of ‘long-lasting’ rather than ‘long-term’ as the third standard. This issue is discussed in greater detail below, \textit{infra} notes 118-123 and related text.\textsuperscript{96}

\textsuperscript{96} See, e.g., related discussion in Barnes and Waters, \textit{supra} note 5 at 219-19; Dinstein, \textit{supra} note 67 at 209-12. The future work of the ILC may involve a detailed analysis of these terms. See, e.g., \textit{ILC Report, supra} note 84 at para 141.
Although all three definitions remain contested, it is the meaning of ‘long-term’ that is particularly controversial. Some commentators advocate a much more restrictive definition of “several months, or approximately a season”; however, this Article adopts a broader understanding as there is little question that ‘long-term’ was originally intended to address damage lasting for a much longer period, and this is generally how it has been understood and applied by states.

Viewed cumulatively, there is no question that the ‘widespread, long-term and severe’ standard establishes an extraordinarily high threshold for the type of anticipated or intended environmental damage that would lead to prohibitions on related methods and means of warfare. This is deliberate, recognizing that all armed conflicts can reasonably be expected to have serious environmental implications, as discussed above. Indeed, the committee report addressing the negotiation of this Additional Protocol I standard concluded that “[i]t appeared to be a widely shared assumption that

---

98. For example, Dinstein, *ibid* at 211, concludes that ‘widespread’ “may well be less than several hundred square kilometers”, and the drafters of these provisions appeared to understand ‘severe’ largely in the context of its effects on the civilian population (as discussed in greater detail below, *infra* note 111).

99. Drawing on the definition of ‘long-lasting’ (rather than ‘long-term’) established for ENMOD. See, e.g., UNEP, *supra* note 64 at 5 (albeit accepting that ‘decades’ is the current standard (*ibid.* at 12). See also *IHL Handbook, supra* note 56 at 132 (appearing to define ‘long-term’ as analogous to ‘long-lasting’ within ENMOD); Barnes and Waters, *supra* note 5 at 218-19 (concluding that “it is possible to justify employing either”). See also further discussion of the relationship between Additional Protocol I and ENMOD terminology below, *infra* notes 118-123 and related text.


101. See supra note 84 at para 15.

102. This is the case even if one accepts the interpretation of ‘long-term’ as constituting ‘months or a season’ rather than ‘decades.’ For example, Stephan Oeter concludes, in the *IHL Handbook, supra* note 56 at 131, that this concerns environmental damage “which considerably exceeds the battlefield damage to be regularly expected in a war.” See also *ICRC Commentary, supra* note 100 at para 1454; *ICTY OTP Report, supra* note 84 at para 15.
battlefield damage incidental to conventional warfare would not normally be prescribed by this provision.”

As a result, the United Nations Environment Programme [UNEP] has concluded that, “[i]n practice, this triple cumulative standard is nearly impossible to achieve, particularly given the imprecise definitions for the terms ‘widespread,’ ‘long-term’ and ‘severe.’” Many others have echoed similar concerns.

Nonetheless, this Additional Protocol I standard effectively establishes a fixed upper limit for the potentially lawful environmental effects of particular means and methods of warfare, complementing the general proportionality principle. Applying only the latter, there may be some attacks for which ‘widespread, long-term and severe’ environmental consequences would still not be ‘excessive’ in light of their projected military advantage; however, as a result of these specialized environmental principles, the methods and means of warfare expected or intended to produce such effects would nonetheless remain prohibited.

ii. Scope of LOAC Environmental Protections

That said, neither Article 35 nor Article 55 expressly prohibits environmental harm with widespread, long-term and severe consequences. Instead, these provisions prohibit only ‘methods and means of warfare’ which may themselves be expected or intended to have such effects. ‘Methods and means’ may be understood to “include weapons in the widest sense, as well as the way in which they are used.”

This wording contrasts with the language of other civilian protections, where it is the anticipated overall effects of an attack that must be considered rather than those resulting only from the ‘methods and means’ employed. For example, Article 51 prohibits all attacks anticipated to cause excessive collateral civilian effects. Instead of also prohibiting attacks expected to cause ‘widespread, long-term and severe’ environmental damage, Article 55 requires only that ‘care shall be taken’ to protect against such damage, while expressly

103. Committee III Report, supra note 100 at 269 at para 27.
104. Supra note 64 at 4. See also UNEP, ibid at 11.
105. See, e.g., Bellinger and Haynes, supra note 93 at 459 (“too broad and ambiguous to serve as a useful guideline for states”); Bothe et al, supra note 84 at 576 (“[a]t least if interpreted in the light of the negotiating history, it seems next to impossible that the threshold could be reached by conventional warfare”); Dinstein, supra note 67 at 210 (“a hurdle which may prove too hard to surmount”); ICTY OTP Report, supra note 84 at para 15 (“it would appear extremely difficult to develop a prima facie case upon the basis of these provisions”).
106. The latter of which would apply only if the environment was properly considered a civilian object or if these environmental effects would have further foreseeable civilian consequences.
107. ICRC Commentary, supra note 100 at para 1402. The negotiating record nonetheless indicates that ‘methods and means of warfare’ was intended to be more inclusive than ‘methods or means of combat’. Committee III Report, supra note 100 at para 20 at 267.
prohibiting only the methods and means of warfare that are themselves anticipated to lead to this result.

Clearly, this is a controversial semantic distinction. Indeed, commentators frequently submit that Articles 35 and 55 must be read as prohibiting all attacks with ‘widespread, long-term and severe’ foreseeable collateral environmental effects. However, the distinction may become important in cases where it is the inherent nature of the otherwise lawful military objective itself that might be expected to cause environmental harm (e.g. a nuclear-powered enemy submarine) rather than the particular methods and means of destroying it (e.g. a nuclear weapon).

In any event, it should also be noted that the purpose of these provisions is not necessarily to protect the environment for its own sake. Article 55(1) clearly suggests that protecting the civilian population itself is its underlying goal, as it addresses environmental damage that ‘thereby prejudices the health or survival of the [civilian] population’ (although this qualification can be explained by its location within the Chapter of Additional Protocol I specifically entitled ‘Civilian Objects’).

That said, the obligation established in Article 35 is not so (expressly) constrained, and is now frequently understood more broadly, that is, to not require an additional civilian nexus. Nonetheless, this broad understanding must be tempered in light of the committee report on the negotiating record of this provision, which concluded that “[w]hat the article is primarily directed to is thus such damage as would be likely to prejudice, over a long term, the continued survival of the civilian population or would risk causing it major health problems.”

The Statute of the International Criminal Court [Rome Statute] lessens (but does not eliminate) these semantic concerns by criminalizing certain types

---

108. See, e.g., Dinstein, supra note 67 at 204; UNEP, supra note 64 at 11 (though both also argue that these provisions would nonetheless have little practical effect).
109. This issue and its practical implications are addressed in further detail in Part IV.2 below.
110. See, e.g., ICRC Commentary, supra note 100 at paras 1441, 1462; UNEP, supra note 64 at 11. See also Dinstein, supra note 67 at 203 (submitting that Article 55 highlights but “is not reduced to” situations prejudicing civilians).
111. Committee III Report, supra note 100 at 269 (para. 27). It is important to note that this comment specifically concerned the general environmental protections established in Article 35(3) (rather than those found in Article 55(1)). In this context, ‘health’ concerns the population as a whole (rather than individual civilians), and is “used in a broad sense in connexion with survival to indicate actions which could be expected to cause such severe effects that, even if the population survived, it would have serious health problems, such as congenital defects which produced deformed or degenerate persons. Temporary or short-term effects were not contemplated within the prohibitions of this article.” Ibid at para 82 at 281, referring to Article 55, but clearly relevant to the committee understanding of health in Article 35 as well. This is also consistent with the committee understanding of the ‘severe’ threshold as relating to “the severity of prejudicial effect of the [environmental] damage to the civilian population”. Ibid at para 27 at 268.
112. Supra note 82.
of attacks intended to cause serious environmental harm, separate from any express consideration of their impact on actual civilians and without reference only to ‘methods and means of warfare’. During international armed conflicts, Article 8(2)(b)(iv) establishes the war crime of:

[i]intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated[.]

While significant, this is nonetheless an exceedingly high standard, requiring knowledge that the environmental impact from an attack would be not only ‘widespread, long-term and severe’ but also ‘clearly excessive’ in relation to its anticipated military advantage.114

Importantly, this Rome Statute wording further implies that the environment itself should not be considered a civilian object or, at least, not one warranting the same level of protection as other such objects. Otherwise, the provision would not require reference to ‘widespread, long-term and severe’ at all. Instead, it would simply prohibit damage to the natural environment that is ‘clearly excessive’ in relation to the anticipated military advantage, which is the criminal standard applicable to intentionally damaging (other) civilian objects.

This limited understanding is also consistent with the deliberate Additional Protocol I restriction of many general LOAC targeting principles to warfare with land-based collateral civilian effects. Even its general treaty obligation to ‘take care in warfare to protect the environment from widespread, long-term

113. Ibid. Article 5(1) establishes general ICC jurisdiction over war crimes, which are defined in Article 8. Interestingly, there is no corresponding crime established in the context of non-international armed conflict at arts 8(2)(c) and (e). But see Second ILC Rapporteur Report, supra note 53 at para 140 (noting that lack of ICC jurisdiction “does not necessarily imply that it would be lawful to cause such damage” in a non-international armed conflict).

114. See, e.g., Dinstein, supra note 67 at 206-7. See also ICTY OTP Report, supra note 84 at para 21; UNEP, supra note 64 at 30. A further limitation is that many states are not Parties to the Rome Statute (including two key Arctic states, the Russian Federation and the United States).

See, e.g., ICRC, Treaties and States Parties to Such Treaties, Rome Statute of the International Criminal Court, 17 July 1998, online: <https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=585> (accessed 10 June 2015). Similarly, the grave breach regime of the 1949 Geneva Conventions establishes a very high cumulative standard for potential individual criminal responsibility relating to “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”. See, e.g., Geneva Convention I, supra note 4 at art 50; Geneva Convention II, supra note 4 at art 51; Geneva Convention IV, supra note 4 at art 147 (though applicable only to property otherwise protected by these treaties). This language is echoed in the Rome Statute, supra note 82 at art 8(2)(a)(iv).
and severe damage’ does not unambiguously apply to naval or aerial warfare in the absence of such effects.\textsuperscript{115}

However, the 1994 \textit{San Remo Manual on International Law Applicable to Armed Conflicts at Sea}—a non-binding but authoritative set of expert guidelines—also provides that:

[m]ethods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.\textsuperscript{116}

The ‘relevant rules of international law’ would capture the various LOAC principles noted above, as well as the related \textit{Rome Statute} provisions—none of which establish absolute environmental protections—if and when these are applicable to naval warfare.

The International Committee of the Red Cross [ICRC] (and others) assert that a similar “due regard” standard of environmental protection has crystallized as customary international law, and that “[i]n the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimise, incidental damage to the environment.”\textsuperscript{117}

Further LOAC principles relevant to Arctic environmental protection arise from the 1976 \textit{Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques [ENMOD]}.\textsuperscript{118} Unlike the various

\textsuperscript{115} It is only established in Article 55 of \textit{Additional Protocol I} (supra note 4), which is expressly limited by Article 49(3), and does not also appear in Article 35. But see Dinstein, supra note 67 at 205 (noting that “it can hardly be gainsaid that the Protocol’s protection of the natural environment applies to all types of warfare”—though without addressing this textual difference between the two Articles).

\textsuperscript{116} Supra note 56 at para 44. The latter standard echoes similar language in the 1949 Geneva Convention grave breach regime, concerning the destruction of property, discussed supra note 114. See also Second ILC Rapporteur Report, supra note 53 at para 186.

\textsuperscript{117} See, e.g., \textit{Customary IHL}, supra note 63 at 147-151 (Rule 44). See also Bothe et al, supra note 84 at 575. Even if this is the case, though, it is unclear what, if anything, it would add beyond the protections arising as a result of general LOAC targeting obligations (i.e. distinction, proportionality, and, in particular, feasible precautions), if these are understood to apply (which is the position of the ICRC—see, e.g., \textit{Customary IHL}, \textit{ibid} at Rule 43). The ICRC further submits that the “[l]ack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions;” however, this relates specifically to \textit{feasible} precautions (which already requires the avoidance or, in any event, the minimization of environmental consequences). \textit{Ibid} at Rule 44. See also Barnes and Waters, supra note 5 at 221-23. This latter issue is discussed in more detail below, infra notes 135-36 and related text.

\textsuperscript{118} ENMOD, supra note 4. Although not universally supported, its 76 Parties include all Arctic states except Iceland. See, e.g., ICRC, Treaties and States Parties to Such Treaties, Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976, online: <www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=460> (accessed 10 June 2015).
obligations discussed above, this treaty addresses only the deliberate use of “environmental manipulation techniques”\textsuperscript{119} rather than the incidental environmental effects of other types of warfare. Each Party to ENMOD “undertakes not to engage in military or any other hostile use of [such] techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.”\textsuperscript{120}

ENMOD predates Additional Protocol I\textsuperscript{121} (and, obviously, the Rome Statute) and their terminological differences are important and intentional. ENMOD prohibits techniques with ‘widespread, long-lasting or severe effects’, a disjunctive standard that is substantially more restrictive than these subsequent treaties. In addition, while the identical terms ‘widespread’ and ‘severe’ may share similar meanings across various instruments, ENMOD utilizes ‘long-lasting’ instead of ‘long-term’ as its third standard, which is expressly understood as “lasting for a period of months, or approximately a season”.\textsuperscript{122} This is a markedly different criterion than the ‘years and likely decades’ contemplated by ‘long-term’ in Additional Protocol I.\textsuperscript{123} These substantive differences clearly indicate that negotiating states subsequently intended to establish a separate and much more permissive legal standard for collateral environmental damage during warfare versus that arising from the deliberate use of environmental manipulation techniques.

c. Precautions against the Effects of Attacks

Complementing these various general and specific legal obligations applicable to their own military operations, states are also required to take further precautions against the effects of enemy attacks that may be directed against them. This additional defensive obligation requires taking, “to the maximum extent feasible [...] necessary precautions to protect the civilian

\textsuperscript{119} That is, “any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.” ENMOD, \textit{ibid} at art 2. Examples of prohibited techniques might include deliberately causing earthquakes or tsunamis or changes in climate patterns. \textit{Ibid} at Annex (Understanding relating to article II).

\textsuperscript{120} \textit{Ibid} at art 2. This qualified standard implies that environmental modification techniques without such effects may remain lawful means of attack; they are clearly not prohibited by ENMOD.

\textsuperscript{121} ENMOD was adopted in late 1976 while Additional Protocol I negotiations were ongoing.

\textsuperscript{122} ENMOD, \textit{supra} note 4 at Annex. This also includes the following interpretive understandings from the ENMOD Committee of Experts: “‘widespread’: encompassing an area on the scale of several hundred square kilometres; [and] ‘severe’: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.” \textit{Ibid}. The Annex expressly provides that these definitions are “intended exclusively” for the purposes of ENMOD.

\textsuperscript{123} See, e.g., ICRC Commentary, \textit{supra} note 100 at para 1452; Dinstein, \textit{supra} note 67 at 198-202, 209-12.
population, individual civilians and civilian objects under their control against the dangers resulting from military operations.”

At minimum, in an environmental context, this will require that states take precautions against those environmental effects of attacks that can be expected to have direct civilian consequences. If the environment itself is considered a civilian object, this also requires specific consideration of the possible effects upon it regardless of other collateral civilian implications. In either case, the qualification of ‘feasibility’ substantially limits the practical scope of this additional defensive legal obligation, as it does for the precautions required of those actually conducting the attacks.

2. Practical Implications

Although these LOAC principles will provide a theoretical legal shield for the natural environment during any Arctic conflict, their actual resulting protections may nonetheless be severely constrained in practice. To illustrate these limits, the following section applies these protective principles to two specific potential conflict scenarios, namely, attacks directed against enemy petroleum and oil supplies, and related vessels and facilities, and those targeting nuclear-powered enemy submarines.

\[\text{a. Petroleum and Oil Supplies, Vessels, and Facilities}\]

Enemy operational oil stores—for example, naval shipyard fueling stations—will generally constitute lawful military objectives during armed conflict, whether in the Arctic or elsewhere. Oil is essential to mechanized combat operations and can easily be characterized as making ‘an effective contribution to military action’, whether in use or providing a tactical reserve to support future enemy operations. Their ‘total or partial destruction, capture or neutralization’ will almost always provide the attacking force ‘a definite military advantage’.

Absent their capture—which would clearly be preferable from both military and environmental perspectives—destruction of enemy oil stores will generally be required. Targeting these oil stores will likely also have foreseeable

\[\text{footnotes}\]

124. Additional Protocol I, supra note 4 at art 58(c). More specific, related provisions established in paragraphs (a) and (b) are also qualified “to the maximum extent feasible”. Ibid.
125. This is consistent with the general Article 55 obligation to take care to protect the environment, which is not restricted solely to the conduct of attacks.
126. Neither of these examples concern deliberate environmental manipulation and so ENMOD is therefore not applicable to the following assessment.
127. For brevity, ‘oil’ will be used for the remainder of this Article. Military forces often use the acronym ‘POL’ (petroleum, oil and lubricants).
128. See, e.g., Dinstein, supra note 67 at 105 (on the general status of oil facilities as military objectives during armed conflict). See also ICTY OTP Report, supra note 84 at paras. 18, 22, 38. Indeed, as an example, ‘Oil Refining and Distribution Facilities’ were one of the target sets used by coalition forces during the 1991 Gulf War. Ibid at para 44.
collateral environmental implications. Although attacking forces will be required to mitigate environmental damage, where feasible, their ability to do so may be quite limited. One precaution might involve attempted incineration of the oil, rather than simply releasing it directly into the environment (though this is likely not without negative environmental consequences itself); however, there may be few additional feasible precautions available to limit environmental effects while still ensuring effective denial of these resources to the enemy.\textsuperscript{129}

Attacks against oil supplies may and likely will cause significant environmental harm, as illustrated by Israeli military operations in Lebanon in 2006. In particular, attacks by Israeli forces near the el-Jiyeh power facility in Lebanon destroyed land-based oil storage tanks and led to the reported release of 10,000 to 15,000 tons of oil\textsuperscript{130} into the Mediterranean Sea. This caused a kilometres-wide oil slick, polluting over 150 kilometres (approximately two-thirds) of the Lebanese coast, with additional substantial sea-floor contamination near the el-Jiyeh facility itself, and serious corresponding negative implications for marine life and civilians alike.\textsuperscript{131}

There is little question that releasing a large volume of oil in the Arctic will also cause substantial harm. The Arctic ecosystem is fragile, arguably more so than that of many other areas of the globe, making it particularly susceptible to negative effects from oil and other pollution.\textsuperscript{132} This negative environmental impact will likely be magnified, in scope if not also in severity, if the oil cannot be contained on land and it also pollutes Arctic waters. Oil degradation may be slowed considerably by cold Arctic water temperatures and clean-up may also be significantly more difficult.\textsuperscript{133}

These are important concerns, and any foreseeable direct environmental harm will need to be considered at the time of attack. There is therefore a strong argument for more detailed scientific assessment of the likely environmental

\textsuperscript{129} In a limited conflict, and with the necessary time, weaponry, skill and intelligence, an attacking force might conceivably eliminate fuel distribution capacity while leaving the supplies themselves intact; however, this is neither a long-term solution nor feasible in many circumstances.

\textsuperscript{130} One ton is equivalent to approximately 1000 litres, depending upon the type of oil released.


\textsuperscript{132} See, \textit{e.g.}, Barnes and Waters, \textit{supra} note 5 at 223-232.

\textsuperscript{133} See, \textit{e.g.}, \textit{ibid.} at 226-7; Byers, \textit{supra} note 3 at 200.
effects of Arctic military operations. The greater the available knowledge of potential environmental implications from particular attacks, including those against oil supplies, the more foreseeable these implications become.  

The ICRC even submits that the “[l]ack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking [feasible] precautions.” Nonetheless—even if one accepts this controversial legal proposition—once all such feasible precautions have been taken, it is still only the expected or intended collateral environmental and other civilian consequences that must be weighed by a military commander at the time of attack, rather than purely speculative ones, whether as a result of general or environment-specific LOAC targeting obligations.

Even if these foreseeable environmental effects are substantial, and they likely will be, it does not necessarily follow that an attack would be prohibited by general LOAC targeting obligations on this basis. Instead, to require its cancellation pursuant to these principles, this collateral impact must be excessive when weighed against its anticipated military advantage (as assessed by a ‘reasonable military commander’). It is difficult to conclude that attacking enemy military oil stores located in Arctic operational theatres during an inter-state conflict would necessarily—or even usually—be prohibited on this basis.

134. See, e.g., Dinstein, supra note 67 at 198 (noting a “growing understanding of long-term risks”). See also ICTY OTP Report, supra note 84 at para 23 (discussing the difficulty of assessing environmental effects of attacks); Second ILC Rapporteur Report, supra note 53 at para 161 (recognizing that scientific advancements may contribute to future understandings of proportionality).


136. Though these various environmental issues should also be incorporated into mandatory reviews of LOAC compatibility for new weapons and tactics conducted pursuant to Additional Protocol I (supra note 4 at art 36).

137. If the LOAC proportionality principle even applies absent (other) foreseeable effects on civilians and civilian objects.

138. But see the Human Rights Council Commission of Inquiry on Lebanon assessment of the Israeli el-Jiyeh attack, which concluded that “Israel violated its international legal obligations” and, “[w]hether the attack was justified or not by military necessity, the fact remains that the consequences went far beyond whatever military objective Israel may have had.” Supra note 131 at paras 219-220. However, in reaching this conclusion, the Commission did not undertake any assessment of the military advantage issue (and it was also addressing a limited conflict fought primarily between a state and a non-state armed group and the destruction of an otherwise civilian target (rather than a military oil facility)). Ibid. See also Barnes and Waters, supra note 5 at 234 (arguing that “[w]hile disrupting oil supplies may be of military significance, it is not likely to outweigh the harm that could be caused indirectly to the civilian population by way of environmental impact”). In contrast, see ICTY OTP Report, supra note 84 at para 21 (concluding that “[t]he targeting by NATO of Serbian petro-chemical industries may well have served a clear and important military purpose”).
Although the collateral environmental implications of such attacks might be heightened in an Arctic context, so too might their resulting military advantage. Oil stores are important military targets, the destruction of which could restrict, delay or even prevent future hostile operations. In the Arctic, enemy replenishment of this necessary military resource may and likely will be more difficult than in many other locations, rendering its destruction that much more valuable.

When assessing proportionality, it is also the overall effects of an attack that must be considered. In many instances, the total collateral implications of an Arctic attack—that is, environmental concerns coupled with other foreseeable civilian effects—might well be lower than those for similar attacks in many other theatres, given comparatively low population densities—particularly as LOAC clearly gives greater weight to protecting actual civilians and (other) civilian objects. For example, the United Nations General Assembly focused primarily on the human-related environmental effects of the el-Jiyeh oil spill, as did the Human Rights Council Commission of Inquiry on Lebanon.

It is important to appreciate that Arctic civilians—particularly Indigenous peoples—may be more deeply affected by environmental damage, across a wider area, than civilian populations in some other regions. This may need to be factored into the proportionality assessment for any Arctic military operations that might affect such civilians. However, even if one accepts this heightened sensitivity, it does not automatically follow that all such collateral civilian implications would therefore be excessive.

The protections established in Additional Protocol I prohibiting attacks against “objects indispensable to the survival of the civilian population” do not apply in this context (or to any of the other examples discussed in this Article). These LOAC protections apply only where the attack in question was undertaken “for the specific purpose of denying them [i.e. ‘objects indispensable to the civilian population’] or their sustenance value to the

---

139. See, e.g., UN General Assembly Resolution 69/212, “Oil slick on Lebanese shores” (19 December 2014) [hereinafter UNGA Resolution 69/212(2014)] at para 3, noting that this oil spill “has had serious implications for livelihoods and the economy of Lebanon, owing to the adverse implications for natural resources, biodiversity, fisheries and tourism, and for human health in the country”.

140. See, e.g., supra note 131 at para 219. See also ICTY OTP Report, supra note 84 at para 20.

141. See, e.g., Barnes and Waters, supra note 5 at 230-232 (although the related conclusion, ibid at 230, that “the restrictions placed by [LOAC] on methods of warfare in the Arctic are in no way undermined where military actions occur in areas completely isolated from human settlement” is too strong).

142. If such groups were deliberately targeted for destruction, it is possible that environmental degradation could be considered as a factor in related genocide charges (see, e.g., UNEP, supra note 64 at 31-2 (discussing treatment of this issue by the Prosecutor and Pre-Trial Chamber of the International Criminal Court)); however, this issue is beyond the scope of this Article.
civilian population or to the adverse party, rather than to the incidental effects arising from attacks on otherwise lawful military objectives.\textsuperscript{143}

The environmental damage caused by attacks against enemy military oil stores would often not reach the ‘widespread, long-term and severe’ threshold either, even with a more expansive practical understanding of this standard in an Arctic context. Clearly, regional ecosystems might be affected more seriously by environmental degradation and might recover less quickly from it than those in many other areas.\textsuperscript{144} This might more easily support characterizing the collateral effects of attacks on Arctic oil stores as ‘severe’ or ‘long-term’ in some circumstances—though the latter, in particular, would still require effects lasting many years, and likely decades, and would often not be reached even in this context.\textsuperscript{145} However, the impact of these considerations is weakened substantially by their conjunctive context.

Whether or not the environmental effects of attacking military oil stores can be expected to be ‘severe’ and ‘long-term’, they would frequently not be ‘widespread’, particularly if confined to land. While locally significant, these effects would be unlikely to extend meaningfully to ‘hundreds of square kilometres’. Even if they extend to Arctic waters from the destruction of land-based targets, they often would not meet this cumulative threshold, particularly if the oil is ignited during or after attack, or other post-attack mitigation measures are taken by either the attacking or defending force.\textsuperscript{146}

During Additional Protocol I negotiations, some delegations proposed establishing additional special protections for oil storage and production facilities (as was done in Article 56 for dams, dykes and nuclear reactors\textsuperscript{147}). After consideration, these proposals were withdrawn. The commentary to Additional Protocol I by the ICRC itself notes, with respect to oil storage facilities and refineries, that “[e]xtending the special protection [of Article 56] to such installations would undoubtedly have posed virtually insoluble problems”.\textsuperscript{148}

While any potential environmental harm could still be eliminated by not establishing Arctic military oil stores at all, this is clearly not feasible (the

\textsuperscript{143} Supra note 4 at art 54.

\textsuperscript{144} See, e.g., Barnes and Waters, supra note 5 at 223-32.

\textsuperscript{145} The ‘severity’ threshold may also not be met, particularly if it is tied primarily to effects on the health of the civilian population.

\textsuperscript{146} See, e.g., UK LOAC Manual, supra note 47 at 76 (para. 5.29.2)(submitting that the threshold may not have been reached by the deliberate Iraqi release of “massive oil spills into the [Persian] Gulf” from a Kuwaiti oil terminal in 1991 (along with setting fire to hundreds of oil wells), discussed in more detail infra note 179 and related text). See also Greenpeace Mediterranean, supra note 131, noting the localized nature of the most severe and long-lasting consequences of the el-Jiyeh attacks (albeit alongside significant immediate negative environmental effects).

\textsuperscript{147} This provision is addressed in greater detail below, infra notes 183-186 and related text (in the context of attacks against nuclear-powered submarines).

\textsuperscript{148} ICRC Commentary, supra note 100 at paras 2149-50. Unlike dams, dykes and nuclear reactors, oil supplies and facilities were therefore not formally characterized as ‘objects containing dangerous forces’. See also UNEP, supra note 64 at 18.
key qualification of LOAC precautionary defensive obligations). In general, as discussed, states may lawfully station armed forces throughout their own Arctic territories. At present, maintaining this military presence necessarily requires ready and ongoing access to substantial oil supplies. For naval forces, these stores will necessarily need to be in very close proximity to Arctic waters.

In these circumstances, one significant feasible precaution that may remain available to defending forces would be to ensure the regional presence of trained personnel, civilian or military, with ready access to the specialized equipment and vessels necessary for post-release maritime oil recovery operations. Any such specialized vessels will be exempt from attack during armed conflict, to the extent that they are maintained and used only for these purposes. Nonetheless, the feasibility of actually engaging in any such recovery operations during an ongoing armed conflict may still remain limited.

To maintain operational effectiveness during an actual Arctic armed conflict, constant replenishment of regional oil supplies will also be necessary, whether by maritime tanker transport or other method (e.g. military airlift). Particularly in a larger conflict, in addition to regional replenishment, oil shipments through Arctic waters might also be intended for belligerent use elsewhere (i.e. in non-Arctic theatres), as was frequently the case during the Second World War.

Oil shipments destined for enemy military use will generally constitute valid military objectives during armed conflict. So too will aircraft, vessels or vehicles engaged in tactical refueling operations. Here too, attacking forces may have few feasible precautions available to mitigate the obvious negative environmental implications of attacks against such targets. For example, targeting oil tankers in less-sensitive regions may not be viable—and there is no guarantee that this would lessen overall collateral civilian implications.

Oil incineration might be considered as a mitigation option, along with the use of surface or sub-surface dispersants. Here, though, the peacetime example of the SS Torrey Canyon is instructive. In 1967, this fully-laden tanker ran aground off the United Kingdom, leaking oil through a hull breach.

149. See, e.g., San Remo Manual, supra note 56 at para 47(h) (protecting “[v]essels designated or adapted exclusively for responding to pollution incidents in the marine environment”).

150. For example, ongoing conflict delayed clean-up operations relating to the 2006 el-Jiyeh oil spill for five weeks. See, e.g., Greenpeace Mediterranean, supra note 131 at 8. States might also take measures to limit the potential spread of oil to Arctic waters, in the event of an attack against land-based oil stores.

151. This will be the case whether the transporting vessel or crew are themselves military or (otherwise) civilian.

152. Tactical delivery of oil to military forces in the midst of operations will be necessary during any conflict. This could include the use of air-to-air tanker aircraft, naval oilers or ground refueling trucks or related assets. Here, it is worth noting that Arctic Challenge Exercise 2015 included training in mid-air refueling, as discussed supra note 20 and related text.
Salvage efforts proved unsuccessful. To mitigate the resulting environmental harm, the Royal Air Force ultimately bombed and sank the abandoned ship, with particular efforts made to ignite the ship-borne and surface oil. This two-day operation involved numerous aircraft sorties, and required dozens of 1000-pound bombs to sink the ship along with the further dispersal of thousands of additional litres of jet fuel and napalm in an effort, only partially successful, to ignite the oil itself. Even with modern military technologies, one might reasonably question the feasibility of similar mitigation measures during actual armed conflict, given competing operational requirements and safety concerns.

Despite taking feasible precautionary measures, attacks against maritime oil shipments destined for use in the Arctic or elsewhere will certainly have detrimental environmental implications; for example, the Torrey Canyon itself still caused substantial coastal oil pollution in the United Kingdom as well as in France. Indeed, many tankers sunk during the Second World War continue to pose ongoing environmental concerns for nearby coastal states. For reasons discussed earlier, attacking such vessels in the Arctic may pose greater foreseeable environmental challenges than in many other regions.

Even significant foreseeable environmental consequences are not necessarily excessive, though. This argument is particularly strong where the effects of such attacks can be largely confined to the sea, without substantial (additional) civilian effects. In addition, while the potential environmental harm from destroying enemy oil supplies will rise in proportion to their quantity, so too will the military advantage accruing to the attacking force. Nonetheless, the ‘widespread, long-term and severe’ standard is not expressly restricted by questions of military advantage. The foreseeable effects of attacking an oil tanker may reach this threshold, particularly a large-capacity vessel damaged or sunk close to shore. For example, the 1989
grounding of the *Exxon Valdez* in Alaska spilled over 40 million litres of oil, with substantial negative effects on regional fish and bird populations (as well as on related civilian livelihoods). Many of these effects continue today.\(^{158}\) Indeed, the environmental impact of sinking *any* oil tanker in the Arctic will likely be substantial, though these effects will vary significantly depending, among other things, on the size of the vessel, the specific nature of the oil cargo and the effectiveness of post-attack mitigation measures.\(^{159}\)

That said, it is certainly not clear that the effects of every tanker sinking would *necessarily* reach the cumulative ‘widespread, long-term and severe’ threshold, particularly a smaller tanker sunk further offshore (or an even smaller naval oiler or air-to-air refueling aircraft). Importantly, state practice and *opinio juris* clearly support arguments that oil tankers may still be lawfully attacked during armed conflict, in at least some circumstances. Tankers were targeted frequently during the Second World War, when *hundreds* of such vessels were sunk.\(^{160}\) Tankers have been targeted in subsequent conflicts as well; for example, and in particular, during the so-called ‘Tanker War’ between Iran and Iraq in the late 1980s, well over 100 such vessels operating in the Persian Gulf were attacked, with many sinking as a result.\(^{161}\)

The *San* the release of approximately 220,000 tons of oil. *Supra* note 100 at para 155, fn 120 (though the commentary also refers to a period of between five and ten years for recovery of the affected ecosystem).


\(^{159}\) See, *e.g.*, Gearon et al, *supra* note 154.

\(^{160}\) Numerous such vessels lie in US waters alone. See, *e.g.*, NOAA, *supra* note 155. In some respects, resulting environmental harm might even be understood as general battlefield damage in a naval context. Certainly, this characterization could—and likely should—apply to oil spills resulting from attacks against other types of naval vessels, which may also cause considerable environmental damage over a long period of time—see, *e.g.*, *ibid.* (which also includes an overview of significant contemporary environmental threats resulting from oil pollution from various Second World War shipwrecks of other types of vessels).

\(^{161}\) See, *e.g.*, J. Ashley Roach et al, “Missiles on Target; The Law of Targeting and the Tanker War,” (1988) 82 Proceedings of the Annual Meeting (American Society of International Law) 154 at 156. See also *Oil Platforms (Islamic Republic of Iran v United States, Judgment, 6 November 2003, [2003] ICJ Rep. 161 at paras 23-25. See also Dinstein, *supra* note 67 at 197 (noting that “[a]s a result, in 1984 alone more than 2 million tons of oil were spilled into the sea”). That said, although this occurred after the adoption of *Additional Protocol I*, neither Iran nor Iraq was a Party to this treaty at the time; Iraq acceded in 2010, and Iran remains a non-Party. Treaties and States Parties: *Additional Protocol I, supra* note 70. In this context, related legal concerns may still arise as a result of the targeting of oil shipments as ‘war-sustaining activity’—that is, as economic targets rather than for more immediate military purposes (although this is not necessarily unlawful, particularly for states not Party to *Additional Protocol I*). See, *e.g.*, Roach et al, *ibid.*
Remo Manual itself does not expressly prohibit such attacks, despite listing numerous other protected classes of vessels.\textsuperscript{162}

While states could eliminate any potential environmental threat by never shipping oil to their Arctic forces, this is clearly neither realistic nor feasible. While other less-absolute mitigation options might include transiting materials on less sensitive routes or in smaller shipments, their feasibility also requires contextual assessment.\textsuperscript{163} So too would using alternative routes to ship oil to non-Arctic forces which, among other things, may be longer, more vulnerable to attack and pose greater overall threats to civilians.

Without such a prohibition on Arctic oil shipments, a significant legal imbalance with strategic military implications would be created by wholly insulating them from enemy attack. LOAC does not do so, reflecting its inherent balance between military and humanitarian considerations.

As regional oil-production capacity itself increases,\textsuperscript{164} related facilities— for example, drilling platforms—might themselves also be targeted by belligerents. In contrast to oil supplies and shipments, however, these facilities are less susceptible to general characterization as lawful military objectives (absent another military use, for example as a weapons platform).\textsuperscript{165} This is particularly clear in low-intensity conflicts anticipated to be of limited duration, recognizing that unrefined oil may be of limited immediate utility.

On the other hand, attacks against oil platforms are themselves not inherently unlawful, and, in a larger armed conflict, eliminating enemy oil production may and often will become a legitimate strategic military goal. Where oil platforms do constitute lawful military objectives, attacking forces will be required to mitigate collateral environmental effects, along with (other) civilian harm, to the extent feasible. While there may be some options to do so\textsuperscript{166}, avoiding all such consequences will not always be possible.

\textsuperscript{162} See supra note 56 at para 47. (“Classes of vessels exempt from attack”). In addition, targeting an oil tanker may well be understood in many circumstances as both ‘militarily necessary’ and ‘not wanton’ (and therefore not prohibited by Paragraph 44). As noted by Wolff Heintschel von Heinegg in the IHL Handbook, supra note 56 at 497, “one can only think of extreme and exceptional cases in which this prohibition would cover the use of methods and means of naval warfare”; however, he concludes that this “would, presumably, be the case if the belligerents massively employed weapons in an enclosed or semi-enclosed sea (like the Baltic Sea) and if the resulting severe damage to the flora and fauna in the entire ecosystem would last for decades.” Ibid.

\textsuperscript{163} Post-attack oil incineration or use of chemical dispersants may provide further mitigation options to defending forces as well, as would the regional presence of related specialized personnel and equipment (as noted above).

\textsuperscript{164} See, e.g., discussion in Byers, supra note 3 at 200-208.

\textsuperscript{165} For example, their destruction may not ‘offer a direct military advantage’. Particularly in a limited conflict, such attacks might also often violate jus ad bellum as being neither necessary nor proportionate. See, e.g., Dinstein, supra note 67 at 212.

\textsuperscript{166} For example, by attempting to prevent onward shipment of oil after production or disabling specific machinery rather than destroying the entire platform, in addition to post-attack mitigation measures discussed above. In some circumstances, states might also provide a
The 87-day British Petroleum oil discharge into the Gulf of Mexico, from the Deepwater Horizon, suggests that oil platform destruction could lead to substantial environmental degradation and civilian harm, at least in the event that related safety mechanisms also fail. This spill is estimated to have involved almost 800 million litres of oil.\textsuperscript{167} Extensive environmental damage also resulted from Iraqi destruction of over 600 (land-based) Kuwaiti oil production facilities in 1991.\textsuperscript{168}

That said, other historical examples suggest that attacks against oil platforms do not \textit{always} result in significant collateral environmental consequences. For example, the United States destroyed multiple such Iranian facilities in the Persian Gulf in the late 1980s, with little apparent large-scale environmental impact.\textsuperscript{169}

Even if extensive environmental degradation can reasonably be anticipated from a particular attack, it may not be excessive in light of the resulting strategic military advantage (though such a characterization is certainly possible). The attack would nonetheless be prohibited \textit{if} these foreseeable consequences would be ‘widespread, long-term and severe’.\textsuperscript{170} The ICRC Commentary to \textit{Additional Protocol I} itself concludes that “there is no doubt that Article 55 [...] will apply to the destruction of oil rigs resulting in oil gushing into the sea and leading to [such damage].”\textsuperscript{171}

The effects of some attacks against Arctic oil platforms might reasonably be anticipated to meet this threshold; however, others might not. Here, it is instructive that doubt lingers over whether the environmental damage caused by the Iraqi destruction of \textit{hundreds} of land-based Kuwaiti oil wells during the Gulf War met this cumulative standard.\textsuperscript{172} Iraqi responsibility for this and warning to cease production and engage platform safety mechanisms prior to an attack (which would also serve to protect civilian oil workers). This would be consistent with the \textit{Additional Protocol I} requirement that “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.” \textit{Supra} note 4 at art 57(2)(c).

\textsuperscript{167} Ramseur, \textit{supra} note 158 at 1. See also Gearon et al, \textit{supra} note 154. Byers also notes that British Petroleum estimated its total resulting costs from the Deepwater Horizon disaster at over $40 billion. \textit{Supra} note 3 at 200, 210.

\textsuperscript{168} See, \textit{e.g.}, Dinstein, \textit{supra} note 67 at 212-216.

\textsuperscript{169} Not all of these facilities were capable of oil production at the time of attack; however, the Nasr complex, attacked in 1988, “was functioning normally”. \textit{Oil Platforms, supra} note 161 at para 65. See also \textit{ibid} at para 46. While the ICJ rejected US self-defence justifications, it did not reach this conclusion based on any illegality of attacks against oil platforms \textit{per se}, nor did the Court discuss the environmental consequences of these attacks. See, \textit{e.g.}, \textit{ibid} at para 78.

\textsuperscript{170} Assuming that the targeting of military oil shipments is captured by the reference to ‘methods and means of warfare’.

\textsuperscript{171} \textit{Supra} note 100 [emphasis added]. There is nonetheless some doubt about the application of Article 55 in all such circumstances, as this provision is clearly restricted to attacks with land-based civilian effects; however, the related Article 35 obligation would likely still apply. In any event, it is worth noting that the ICRC conclusion is clearly circular.

\textsuperscript{172} See, \textit{e.g.}, Dinstein, \textit{supra} note 67 at 214 (noting that the damage was not ‘long-term’). This conclusion was also rejected by the US Department of Defence (discussed \textit{ibid}). See also ICTY
other wartime damage was subsequently imposed by the United Nations Security Council, but solely on the general basis of its unlawful invasion of Kuwait and not as a result of the illegality of this environmental harm per se.173

In summary, many potential attacks against Arctic oil stores, tankers and production facilities would be lawful despite their significant negative environmental consequences.

b. Nuclear-Powered Submarines

The practical limitations of LOAC environmental protections are further illustrated with reference to potential attacks against nuclear-powered enemy submarines operating in Arctic waters.174 During armed conflict, any such vessel would almost certainly constitute a lawful military objective and there will likely be very limited precautions available to mitigate the collateral effects of any attack against it; that is, there may be few effective or available weapons and the submarine will often need to be engaged and destroyed at the time and in the place it is first located. The legality of an attack will therefore generally turn on its anticipated collateral implications.

Many—if not most—submarines operating in Arctic waters will be powered by one or more internal nuclear reactors (as will many naval surface combatant vessels). Although the detrimental environmental consequences of destroying a nuclear-powered vessel could be extensive, they will nonetheless vary dramatically depending, among other things, on whether the reactor itself is damaged and whether its safety mechanisms are initiated and remain functional.

Operational nuclear-powered submarines have already sunk in Arctic waters, often without actually causing meaningful immediate environmental harm. For example, the Soviet attack submarine K-278 (Komsomolets) sank in 1989 with a functional nuclear reactor (and two nuclear-armed torpedoes) and it still lies in Arctic waters off the Norwegian coast. To date, it does not appear to have caused substantial radioactive pollution; its reactor was shut down prior to sinking, and the Soviet Union took further subsequent mitigation measures, including underwater repairs to its containment walls.175

OTP Report, supra note 84 at para 15; UK LOAC Manual, supra note 47 at 76 (fn 153) (noting that the damage was “probably” widespread and severe but “arguably not” long-term, even though it also included “massive oil spills into the Gulf”). But see UNEP, supra note 64 at 13.

173. United Nations Security Council Resolution 687 (3 April 1991) at para 16. See discussion in Dinstein, ibid at 216. However, it should be noted that Iraq was not a Party to Additional Protocol I at the time.

174. The potential for such attacks exists, even in limited conflicts. For example, as noted above, supra note 49, Finland recently used small depth charges as a warning to an unidentified submerged object in its territorial waters (suspected to have been a Russian submarine).

Similarly, the 2000 sinking of K-141 (Kursk), another Soviet attack submarine, did not lead to obvious significant environmental effects; its reactor was not destroyed by the underlying torpedo-room explosion and shut down following automatic activation of an emergency safety system.  

That said, neither of these incidents resulted from an enemy attack during armed conflict. Any such conflict might significantly delay or even prevent meaningful post-sinking mitigation measures (such as the later salvaging of the Kursk, with the exception of its damaged bow, or the further isolation of the Komsomolets reactor). As a result, notwithstanding these two examples, one might reasonably expect that, during an armed conflict, an explosive attack directly affecting operation of the nuclear reactor and its safety mechanisms could cause substantially greater environmental harm.  

Indeed, the peacetime Soviet scuttling of K-27 in shallow waters of the Kara Sea has led to ongoing environmental concerns, despite its damaged reactor being prepared for sinking beforehand. So too has the 2003 sinking of the decommissioned K-159 while under tow in the Barents Sea. Similar concerns have also arisen from other Russian disposal of nuclear material in the Arctic—leading, among other things, to substantial international efforts to safely address decommissioned Soviet-era nuclear-powered vessels. That said, it is not clear that the destruction of a nuclear-powered submarine would necessarily have significant environmental consequences beyond the immediate area of the sinking itself.


179. See, e.g., Joint Norwegian-Russian Expert Group, supra note 177. See also Byers, supra note 3 at 207. Though, it should be noted, at least some of this attention resulted from concerns over nuclear proliferation rather than environmental consequences.

180. See, e.g., Iosjpe, Reistad and Liland, supra note 176 at 27 (although this report addresses submarine reactor failure during peacetime, it does also consider the potential failure of safety mechanisms).
Even if extensive collateral environmental consequences are foreseeable from such attacks, however, this would not necessarily be excessive. Indeed, this latter characterization is unlikely, as the related military advantage would always be substantial. For example, destruction of an enemy attack submarine could safeguard freedom of navigation and protect allied naval vessels and maritime supply lines from future predation, both in the Arctic and elsewhere. Other nuclear-powered submarines operating in Arctic waters carry multiple strategic nuclear-armed missiles— their destruction in the course of an armed conflict would remove an ongoing existential enemy threat.

It is not clear that the foreseeable environmental effects of attacking a nuclear-powered submarine of either type would necessarily be ‘widespread, long-term and severe’ either, given the conjunctive nature of this standard and the examples above. While radioactive pollution is by nature ‘long-term’, and may also be ‘severe’, it may be more difficult to characterize it as ‘widespread’ in all cases.¹⁸¹

In understanding and applying this provision, it is important to note that elsewhere Additional Protocol I specifically and expressly contemplates direct attacks against functioning nuclear reactors without establishing a blanket prohibition against them. Article 56(1) establishes special protections against attack, “even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population”.¹⁸² This must be a potentially lower threshold than the ‘excessive’ standard established by the proportionality principle, or the provision would be unnecessary.

This provision is clearly intended to protect the civilian population itself rather than prevent release of dangerous forces per se, despite their clear and significant foreseeable environmental implications.¹⁸³ Notably, this special protection from attack can itself be lost, albeit “only if [the reactor] provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support”.¹⁸⁴

¹⁸¹. See, e.g., ibid. This is not to suggest that such a characterization may not be possible in some circumstances, though, particularly in the case of a catastrophic reactor failure. That said, it is not immaterial that the Arctic has already witnessed at least 130 nuclear test explosions without causing severe regional environmental degradation. Indeed, some Russian scientists have even concluded that there are “no grounds” for “a wide scale decontamination programme” at Novaya Zemlya itself. IAEA, supra note 15 at 64, 124.

¹⁸². Additional Protocol I, supra note 4 [emphasis added].

¹⁸³. As a matter of treaty law, it likely also only applies to attacks against reactors on land or with other land-based civilian effects (as discussed above, supra note 72 and related text); but see Customary IHL, supra note 63 at Rule 42 (supporting the customary nature of related restrictions).

¹⁸⁴. Additional Protocol I, supra note 4 at art 56(2)(b). See also IHL Handbook, supra note 56 at 221-226. It is not unreasonable to view targeting enemy oil tankers in a similar light (i.e. no absolute immunity from attack), when they too can be expected to provide ‘power in regular, significant and direct support of enemy operations’ (particularly since these special protections do not apply to oil facilities at all).
Unlike this scenario, in the case of a nuclear-powered submarine it is not the reactor itself that is being targeted (though it would, in any event, clearly meet the Article 56 threshold for the loss of special protection against direct attack). Rather, any damage to the onboard reactor(s) and any resulting environmental effect would be the necessary collateral implication of targeting the larger enemy submarine as a whole. In short, these potential effects arise from the intrinsic nature of the military target itself.

Once it has been identified as a lawful target and all feasible precautions have been taken, it cannot be correct that LOAC would render a nuclear-powered submarine operating in Arctic waters immune from lawful attack solely on the basis of potential negative environmental consequences inherent in its own design. Nor is it reasonable to argue that states intended this result. After all, this body of law specifically countenances direct attacks against land-based nuclear reactors—in some cases even when they can be expected to release dangerous forces causing severe losses to the civilian population.\textsuperscript{185}

Here, the ongoing contemporary use of these and other nuclear-powered naval vessels in the Arctic and elsewhere belies any argument that they are generally viewed as legally prohibited due to the foreseeable negative environmental effects of their potential wartime destruction. It is also difficult to imagine that any reasonable military commander would refrain from destroying such a target during an armed conflict solely on the basis of the potential harmful environmental effects of doing so.\textsuperscript{186}

Again, these environmental effects could be avoided by never locating nuclear-powered submarines (or surface warships) in Arctic waters. In the event of an armed conflict involving a regional state or otherwise being fought in the Arctic, though, this is likely not a feasible precaution. Nor is it a legal requirement. There is no treaty or customary international legal prohibition on the presence of nuclear-powered submarines (or other military vessels) in the Arctic, whether in peacetime or during armed conflict. Such submarines frequently transit these waters, and they have been doing so for decades. Indeed, many are actually based in the region, in particular the numerous Russian nuclear submarines forming an integral part of the Northern Fleet.

In summary, extensive environmental destruction could result from an Arctic conflict, whether from attacks against oil supplies or nuclear-powered submarines, or from a vast array of other potentially harmful military activities—even if all Arctic belligerents comply fully with their existing LOAC advantage. It is difficult to imagine that the release of dangerous forces themselves sufficient to cause this result would generally not also cause ‘widespread, long-term and severe’ environmental consequences.

\textsuperscript{185} The absurdity of the counter-argument is highlighted where the submarine in question carries multiple strategic missiles armed with nuclear warheads, though the argument nonetheless applies to all nuclear-powered enemy military vessels, submarine and surface combatant alike.
While this law may help to reduce the harmful environmental effects of armed conflict, it will not eliminate them. Nor was it ever intended to do so. War is, after all, an inherently destructive human enterprise.

V. LIMITED POTENTIAL FOR INCREASED ARCTIC PROTECTIONS

A pragmatic appreciation of LOAC highlights its considerable practical limitations and provides the foundation necessary for considering potential additional mechanisms to protect the Arctic environment against the effects of armed conflict. The following Part discusses various options to do so—namely, through existing *jus ad bellum* or international environmental law, new treaty or customary legal provisions or voluntary *ad hoc* restrictions on Arctic military operations. Although a detailed examination of these additional protective measures is beyond the scope of this Article, the following assessment nevertheless demonstrates their own significant practical limitations.

1. *Jus ad Bellum*

Importantly, in some cases, state legal responsibility may still attach for wartime environmental destruction resulting from LOAC-compliant behaviour. In particular, observing this body of law will not insulate a state that has violated its underlying *jus ad bellum* obligations by initiating an aggressive war or a more limited unlawful use of force. At international law, there is no question that “[e]very internationally wrongful act of a State entails the international responsibility of that State.” In turn, related reparation “must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”

---

187. Indeed, the UK Ministry of Defence specifically concludes that “[t]hese [environmental] provisions do not automatically prevent certain types of military objectives such as nuclear submarines or super tankers from being legitimate targets”. *UK LOAC Manual*, supra note 47 at 76 (para. 5.29.3) [emphasis added and reference removed].

188. Though clearly important, mechanisms to further manage or reduce political tensions between regional and other states, and thereby to lessen the potential for Arctic conflict in the first place, are beyond the scope of this Article.


190. *Chorzów Factory*, ibid at 47. See also *ILC Articles*, ibid at art 31(1) (“[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally
For example, as noted earlier, the United Nations Security Council imposed Iraqi responsibility for environmental and other damage caused as a result of its unlawful 1990 invasion of Kuwait, pursuant to Resolution 687, without finding that Iraq had also violated its LOAC obligations. Significantly, in the subsequent assessment of this damage by the United Nations Compensation Commission [UNCC], Iraqi responsibility for reparations attached to all damage arising from its invasion, including that resulting from coalition military operations conducted against Iraqi forces. Successful resulting UNCC claims against Iraq for compensation relating to environmental damage alone totaled over $US 5 billion.

Clearly, post-conflict remedies for some wartime environmental destruction do exist, and the resulting responsibility for states acting wrongfully may be substantial. Nevertheless, it is important to note that, in practice, the formal establishment of state legal responsibility for jus ad bellum violations remains unusual, let alone doing so for resulting environmental harm.

2. International Environmental Law

More generally, when discussing potential additional Arctic protections, it is important to situate LOAC within its larger international legal context. While this body of law applies during armed conflict—and, when applicable, should be considered lex specialis—this does not necessarily preclude the concurrent application of complementary general international legal principles (in addition to the obvious ongoing application of jus ad bellum).

Instead, this displacement will occur only when specialized LOAC principles are irreconcilable with otherwise-applicable general legal obligations, although LOAC may also provide a basis to interpret and possibly restrict the substantive content of these general principles during armed conflict. For example, while international human rights law establishes a general individual right not to be arbitrarily deprived of life, which

\[191. \text{See supra note 173 and related text.}
\]
\]
\[193. \text{See, e.g., UNEP, ibid at 27.}
\]
\[194. \text{See, e.g., Gray, supra note 46 at 15-24 (discussing ICJ, Security Council and General Assembly practice).}
\]
\[195. \text{See, in particular, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, [2004] ICJ Rep 136 at para 106. When addressing the relationship between human rights law and LOAC (IHL), the ICJ concluded that “there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” Ibid.}
continues to apply during armed conflict, it is LOAC (non-)compliance that will determine arbitrariness in this specialized context.\(^\text{196}\)

As a result, when addressing wartime environmental protections one must not only apply LOAC (and \textit{jus ad bellum}) but also take into account possible additional legal requirements resulting from general international environmental law.\(^\text{197}\) That said, it is not clear that this body of law will provide any meaningful additional practical protections for the Arctic environment during armed conflict, at least as it is currently understood and applied by states. Although there is a range of opinion on this issue, not all states even accept that international environmental law treaties continue to apply during armed conflict, absent specific provision to this effect.\(^\text{198}\)

Certainly, every state has a legal obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States”.\(^\text{199}\) More specifically, the ICJ has recognized “the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control”.\(^\text{200}\) Indeed, with specific reference to general environmental treaties, the Court further concluded that:

States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.\(^\text{201}\)

That said, it appears likely that the environmental damage addressed in this Article could still be justified on the basis of necessity and proportionality in

\(^{196}\) Ibid. See also Nuclear Weapons, supra note 86 at para 25. The effect of this is to substantially reduce the resulting legal protections for civilians during wartime. For example, an attack killing a large number of innocent civilians would not violate general LOAC targeting principles (discussed in more detail above, in Part IV.1.i) if it was directed against a lawful military objective, all feasible precautions were taken to avoid this result and these and other collateral civilian effects were not excessive when weighed against its expected military advantage.

\(^{197}\) See, e.g., ILC Report, supra note 84 at 108; UNEP, supra note 64 at 5. See also provisional ILC Draft Principle II-1(1) (“[t]he [natural] environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.”). ILC Draft Principles, supra note 83.

\(^{198}\) See, e.g., Customary IHL, supra note 63 at Rule 44 (noting “insufficient uniformity on this issue”). See also Bothe et al, supra note 84 at 579-591; UNEP, ibid at 34-40. But see Nuclear Weapons, supra note 86 at para 30.

\(^{199}\) Corfu Channel, supra note 32 at 22. See also Bothe et al, ibid at 586; UNEP, ibid at 40.

\(^{200}\) Nuclear Weapons, supra note 86 at para 29. The Trail Smelter Arbitration (United States v. Canada), (193101941) 3 RIIA 1905 recognized state liability for environmental harm caused on the territory of other states “when the case is of serious consequence and the injury is established by clear and convincing evidence.”

\(^{201}\) Nuclear Weapons, ibid at para 30.
many if not most instances, at least for states otherwise conducting themselves in accordance with *jus ad bellum* and LOAC requirements—even accepting the controversial argument that general international environmental obligations would otherwise prohibit it.

However, the United Nations General Assembly has left the impression that—even during armed conflict—international environmental law establishes that “the polluter should, in principle, bear the cost of pollution”. In numerous (non-binding) resolutions relating to the oil spill resulting from the 2006 Israeli attack on the el-Jiyeh power station in Lebanon, this body has requested that Israel “assume responsibility for prompt and adequate compensation” to Lebanon and other affected states. In 2014, the General Assembly acknowledged the conclusion of the Secretary-General that this remedial responsibility for environmental damage required Israel to compensate Lebanon in an amount of $US 856.4 million. Beyond citing general environmental principles, these resolutions make no mention of *jus ad bellum* considerations or specific LOAC violations that could underpin such Israeli legal responsibility.

Notwithstanding these absolute General Assembly statements, it simply cannot be correct that a state lawfully exercising the right of self-defence, within the bounds of LOAC, would remain responsible to an aggressor state for any resulting environmental degradation caused to that state, on the basis of general principles of international environmental law. Instead, these General Assembly resolutions should be understood as resting upon a prior unstated conclusion that Israel violated its *jus ad bellum* and/or LOAC obligations when it engaged this particular target in Lebanon. This would also be consistent with the approach of the United Nations Compensation Commission concerning Iraqi responsibility for environmental damage resulting from its unlawful 1990 invasion of Kuwait.


203. Discussed above, *supra* note 130-31 and related text.


205. See, e.g., *ibid* at para 4. See also “Oil slick on Lebanese shores: Report of the Secretary-General,” UN Doc. A/69/313 (14 August 2014) at para 10 (in preparing this report, the Secretary-General acted upon the request of the General Assembly and subsequent to its allocation of responsibility to Israel).

206. This Article takes no position on the legal validity of such a conclusion (or on the related question of the potential responsibility attaching to Lebanon for its own acts or those of Hezbollah). However, as discussed above, *supra* note 138, this is consistent with the 2006 conclusion of the Human Rights Committee Commission of Inquiry on Lebanon that Israel violated its LOAC obligations (albeit without any assessment of the potential military advantage gained by Israel with this attack). This Committee also (controversially) concluded that Israeli military actions “have the characteristics of an armed aggression”. *Supra* note 131 at para 61.

207. Discussed above, *supra* notes 191-93 and related text.
More broadly, many commentators nonetheless advocate ongoing state legal responsibility for environmental damage caused during armed conflict to the territory of non-belligerent states, and possibly also to areas outside of state jurisdiction, on the basis of general international environmental principles. This issue remains controversial. That said, it is not unreasonable to argue that, if such responsibility arises on the basis of general international environmental principles, it should also ultimately rest with the aggressor state responsible for initiating the conflict resulting in such damage, rather than a state defending itself in accordance with both *jus ad bellum* and LOAC requirements.

Article 21 of the non-binding but authoritative *ILC Articles on State Responsibility* clearly establishes that “[t]he wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.” The commentary to this Article, written by James Crawford, specifically notes that “the term ‘lawful’ implies that the action taken respects those obligations of total restraint applicable in international armed conflict [i.e. LOAC], as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence.” Indeed, the ICJ itself has concluded that “[t]he Court does not consider that the treaties in question [i.e. general environmental treaties] could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment.”

---

208. See, e.g., UNEP, *supra* note 64 at 40-46 (discussing various perspectives on the continued application of general international environmental principles during armed conflict). See also Bothe et al, *supra* note 84 at 570, 579-91.

209. The ILC is expected to address this issue as part of its ongoing assessment of environmental protections relating to armed conflict. See discussion *infra* notes 231-233 and related text. See also *Second ILC Rapporteur Report, supra* note 53 at paras 230-2. It has already indicated its view that invoking a circumstance precluding wrongfulness “is without prejudice to […] the question of compensation for any material loss caused by the act in question.” *ILC Articles, supra* note 189 at art 27(b).

210. This is also consistent with the general principles governing the UN Compensation Commission, discussed above, *supra* note 191-93. In addition, while controversial, necessity may also provide a lawful justification for non-compliance with general international environmental obligations by a state acting in self-defence, in some circumstances (should such general principles continue to apply). See, e.g., *ILC Articles, ibid* at art 25. Whether the general defence of necessity also applies to *prima facie* LOAC violations is beyond the scope of this Article (and unnecessary to its overall conclusions, given the scale of destruction that could result without relying upon it).

211. *Ibid*.

212. *Supra* note 189 at 167.

3. New Treaty Obligations

Recognizing the challenges of this current legal regime, states might consider additional new treaty obligations to expand Arctic environmental protections during armed conflict. This could be accomplished either by bolstering existing LOAC principles or with new legal commitments expressly limiting military operations in the Arctic; however, each of these legal options also has substantial practical limitations.

Strengthening general LOAC environmental obligations could provide additional legal protection for the Arctic and other sensitive regions. For example, this might involve lowering the current ‘widespread, long-term and severe’ threshold to also prohibit (means and methods of) warfare with more limited environmental effects. Alternatively, states might adopt more-restrictive definitions of these existing terms— for example, UNEP advocates using the ENMOD ‘months’ threshold instead of ‘decades’ to define ‘long-term’ within Additional Protocol I. 215

However, there appears to be little current widespread appetite amongst states to re-open this specialized legal regime. 216 Should LOAC renegotiation occur, it is also not clear that the resulting standards would necessarily be more protective than those currently in force. For example, in the specific context of wartime environmental harm, the most recent relevant negotiated provision— Rome Statute, Article 8(2)(b)(iv)—arguably adopted a much more accepting threshold, albeit for the more limited purpose of establishing individual criminal responsibility. 217

In any event, any new or clarified LOAC environmental principles would clearly not provide absolute protection for the Arctic. This entire body of law is premised on balancing military and humanitarian considerations. While some states might accept additional environmental restrictions within this balance, general agreement on absolute protections is not foreseeable nor would it be feasible; significant environmental destruction is the inevitable consequence of war. Put simply, at present it is not reasonable to expect that states will

---


215. Supra note 64 at 5 (although UNEP nonetheless accepts that ‘decades’ is the current standard; ibid. at 12).

216. See, e.g., Second ILC Rapporteur Report, supra note 53 at para 121 (noting that “States […] have taken a cautious approach and attempts to codify new [environmental] rules have generally been disavowed. This cautious approach should be placed in context, given that States were equally cautious in developing other areas of the law on armed conflict”).

217. Given this context, the more limited application may be understandable. See, e.g., Bothe et al, supra note 84 at 574. That said, it is illustrative that the proportionality principle in the same article was qualified only by reference to the ‘clearly’ excessive threshold, without further additional restrictions (as discussed above).
agree to always refrain from attacking the types of target discussed in this Article (or to argue that they have already done so).

More generally, a new treaty might instead prohibit military use of the Arctic, thereby avoiding or, at least, minimizing the effects of this LOAC balancing of humanitarian and military considerations. As discussed, the Antarctic Treaty already does so with respect to the southern pole, “recognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.”\(^{218}\)

Unfortunately, however, the Arctic is simply not analogous to its polar counterpart. Unlike Antarctica, it incorporates substantial land territories of major military powers, with corresponding strategic implications for them and for other states. The region also encompasses significant international transit routes, both air and sea, with growing military and civilian utility. Various combat-capable military forces are already stationed in the Arctic, and there is a lengthy and ongoing history of regional military exercises and operations—including actual armed conflict.

Demilitarization of all or part of the Arctic would require a radical change to the regional status quo. While it should not be dismissed out of hand, it is unlikely to be supported by all or even most relevant actors in the foreseeable future, particularly in light of their substantial recent investments in military uses of this region. Indeed, the official Arctic Council mandate expressly precludes any discussion of military matters, let alone supporting total demilitarization.\(^{219}\)

Prohibiting specific Arctic military activities may offer a less comprehensive alternative to full or partial demilitarization. For example, one proposal is to establish all or portions of the Arctic as a nuclear weapons-free zone.\(^{220}\) This too would require significant alteration of the status quo. Nuclear arms have historically been stationed in the region, including on ballistic missile submarines, and significant regional and other states retain this capability and would be reluctant to restrict it.\(^{221}\) If agreed, though, such a prohibition could eliminate some regional targets of strategic military importance; however, it

\(^{218}\) Supra note 59 at Preamble.

\(^{219}\) Arctic Council, supra note 39 at para 1 (establishing that while the Council should address “common Arctic issues”, it “should not deal with matters relating to military security”). But see Byers, supra note 3 at 253-4 (correctly noting that this restriction is political and not legally binding). Nonetheless, there has also been little state support for a Draft Convention on the Prohibition of Hostile Military Activities in Protected Areas, proposed by the International Union for Conservation of Nature. See, e.g., UNEP, supra note 64 at 20. See also Bothe et al, supra note 84 at 577.

\(^{220}\) For example, this was proposed by former Soviet President Mikhail Gorbachev and, more recently, the Canadian Pugwash Group, among others. Åtland, supra note 3 at 153. See also Byers, supra note 3 at 256.

\(^{221}\) Åtland, ibid. See also Byers, ibid at 258-9.
would not eliminate the potentially significant environmental consequences of Arctic conflict itself—nuclear warfare is not the only military threat to this region, and it is certainly not the most likely.

Restricting all surface military vessels from some areas of the Arctic Ocean has also been proposed. Absent total regional demilitarization, though, this too is likely not realistic. In particular, it would involve a dramatic practical restriction on the right of self-defence for Arctic states, particularly in the absence of a corresponding prohibition on submarine activity and nuclear weapons. Among other considerations, Russian submarines operating from the Kola Peninsula currently carry over fifty percent of Russian sea-based strategic nuclear missiles.

A more-limited treaty prohibition on nuclear-powered military vessels in the Arctic is likely also unworkable. Nuclear-powered submarines are particularly effective in this region and many surface naval vessels are also similarly powered. Various regional and other actors have recently made substantial investments in such vessels, including nuclear-powered icebreakers. More pointedly, the United States Navy does not currently operate any combat submarines that are not powered by nuclear reactors.

The formal requirement of state consent is a substantial limitation for any such treaty option. Even if some or all Arctic states agree to restrict or prohibit their own regional military activities, whether through the Arctic Council

---

222. See, e.g., Griffiths, supra note 40 at 5. See also Byers, ibid at 260 (discussing and supporting the proposal by Griffiths). However, Griffiths himself notes that “[t]here was no support” for this option from key Arctic states when he raised it in a 2010 NATO workshop. Ibid.

223. But see Byers, ibid at 261 (arguing that this “would protect and stabilize the deterrent provided by nuclear submarines”). See also Huebert, “Submarines, oil tankers and icebreakers”, supra note 18 at 810-11 (noting that general state agreement to prohibit Arctic submarine activities is unlikely).

224. Åtland, supra note 3 at 153.

225. Ironically, any such prohibition would likely also increase the regional use of oil-powered naval vessels and submarines (and the corresponding need to maintain larger Arctic oil supplies and related shipments). While states might also consider a prohibition on large-volume maritime oil shipments, this too would necessarily depend on the availability of feasible military alternatives. Byers also proposes a new treaty “for communicating and coordinating submarine traffic”, particularly to reduce the threat of collision between nuclear-powered submarines in the Arctic (and elsewhere). Supra note 3 at 190. However, even during peacetime this is likely not a workable solution for military vessels that rely upon stealth for protection and effect (and, potentially, strategic nuclear deterrence).


227. See, e.g., VCLT, supra note 214 at arts 2(1)(g), 26, 34. Clearly, ensuring compliance with any resulting treaty commitments is a further significant practical concern; for example, despite the Spitsbergen Treaty requirement that this Norwegian archipelago ‘never be used for warlike purposes’, discussed supra note 51, combat operations did take place there during the Second World War. See, e.g., Mann and Jörgensen, supra note 10 at 122. See also Second ILC Rapporteur Report, supra note 53 at paras. 210-223 (discussing demilitarized and nuclear weapons-free zones and noting that “it is not possible to conclude that demilitarized zones or nuclear-weapon-free
or another forum, they do not have the legal authority to restrict the use of Arctic areas outside of their own territory by other states. Nor do other states have the unilateral ability to impose such restrictions upon regional actors. To ensure complete effectiveness, any additional Arctic treaty protections would therefore require support from all potential Arctic belligerents, regional and otherwise, though a less-inclusive treaty might nonetheless influence the conduct of non-Parties in other normative ways, such as by stigmatizing particular activities.

4. Customary International Law

General principles further restricting Arctic military activities could conceivably also develop as customary international law. While such principles might reflect pre-existing or future treaty regimes, they need not do so. Instead, customary law ‘crystallization’ requires two elements: settled state practice and *opinio juris* (i.e. a subjective belief by states that the practice is required by law).

That said, new customary legal principles substantially restricting Arctic military operations are unlikely to develop in the foreseeable future. The extensive and growing military presence in this region belies any assertion that states consider it off-limits to peacetime operations or armed conflict—particularly given the not-infrequent conduct of regional combat training exercises. There is also little evidence to suggest that states currently accept restrictions on the conduct of Arctic hostilities beyond existing LOAC requirements.

Without regional state support, crystallization of new customary law specifically restricting military uses of the Arctic is not viable. To the extent that there are ‘specially-affected states’—that is, states whose practice and views are of particular importance to the formation of such legal principles—it would likely be the Arctic states themselves, which are currently engaged in extensive regional militarization. A regional or other state could also exempt itself from a future customary legal principle by maintaining itself as a persistent objector—for example, by opposing the establishment of a prohibition on nuclear-powered naval vessels in Arctic areas of the High Seas.

Absent Arctic-specific developments, further customary LOAC environmental principles could nonetheless still crystallize in future. Indeed,
the International Law Commission [ILC] is now engaged in an ongoing assessment of LOAC and other international law applicable to the “protection of the environment in relation to armed conflicts”. These deliberations could ultimately facilitate clarification of existing customary LOAC and other related international legal principles, along with the potential progressive development of new law as well.

Any resulting new principles enunciated by the ILC would remain authoritative but not legally binding absent their practical application and legal acceptance by states themselves. That is, their crystallization would still require state practice and related *opinio juris.* In any event, the initial Draft Principles provisionally adopted by the ILC Drafting Committee in 2015 suggest that the outcome of these deliberations will not involve a marked shift from existing customary international law, at least with respect to the law applicable during armed conflict.

5. **Ad Hoc Measures**

Absent a formal obligation to do so, states nonetheless remain free to voluntarily limit their Arctic military activities beyond the existing requirements of LOAC and other international law, whether unilaterally or otherwise. For example, the above concerns do not preclude political commitments to reduce the numbers or categories of conventional military assets in the Arctic or other related confidence-building measures. This may provide a reasonable basis for a further long-term incremental reduction of the potential for Arctic armed conflict.

Even during an ongoing armed conflict, warring states might agree to limit their hostilities to certain areas or to implement additional substantive environmental or other protections for the Arctic. LOAC itself encourages

---

231. The ILC decided to address this issue in 2013. See, e.g., *ILC Report, supra* note 84 at para 130.

232. The ILC itself cannot create customary international law, though its Draft Principles, when finalized, would likely be considered an authoritative subsidiary source of international law. It is also possible that these principles could serve as the basis for future multilateral treaty commitments, subject to state consent.

233. ILC clarification that customary environmental legal protections apply at all during armed conflict may nonetheless still be a significant outcome of this process absent any further progressive development of their substantive content. These provisional principles (*ILC Draft Principles, supra* note 83) are addressed in more detail above, primarily in various notes relating to specific LOAC obligations in Parts III and IV, along with related reports of the ILC (*ILC Report, supra* note 84) and Marie G. Jacobsson, its Special Rapporteur on this subject (*Second ILC Rapporteur Report, supra* note 53). The ILC and its Special Rapporteur are also considering additional environmental principles applicable after periods of armed conflict. See, e.g., *Second ILC Rapporteur Report, ibid.* at paras. 230-232.

234. See, e.g., Åtland, *supra* note 3 at 158-60. This may also provide a basis for potential future codification of these limitations.
these voluntary limitations.\textsuperscript{235} For example, and in particular, under the \textit{San Remo Manual} belligerents “are encouraged to agree that no hostile actions will be conducted in marine areas containing (a) rare or fragile ecosystems; or (b) the habitat of depleted, threatened or endangered species or other forms of marine life.”\textsuperscript{236} (Of course, this express ‘encouragement’ also bolsters legal arguments that there is otherwise no existing absolute LOAC prohibition on fighting in these areas).

International or domestic political pressure to accept such limitations may be effective in some cases, particularly with respect to conflicts either not relating to the Arctic or not involving regional actors.\textsuperscript{237} For example, non-regional belligerents might be encouraged to refrain from using Arctic waters for military transport or other activities that might invite environmentally harmful enemy responses. While this may offer meaningful protection in some circumstances, voluntary restraint may well be less effective in relation to other types of conflict, particularly larger confrontations involving, and especially between, Arctic states.

\textbf{VI. CONCLUSION}

Understanding the legal regime that would shield the environment during any such conflict paints a sobering picture, with implications extending far beyond the Arctic to any inter-state use of armed force. There is little question that the only way to fully protect the environment from the effects of armed conflict is to avoid fighting in the first place. If an Arctic conflict does arise, it would clearly cause significant environmental harm—\textit{even if all belligerents comply fully with their existing LOAC obligations}.

While this body of law might mitigate the worst environmental effects of armed conflict, it would not eliminate them. To suggest otherwise raises expectations for this body of law that cannot be met in practice, and it also detracts from other possible solutions, limited as they may be. Most importantly, though, it downplays the actual consequences of engaging in armed conflict in the first place.

\textsuperscript{235} See, \textit{e.g.}, \textit{Geneva Convention I}, supra note 4 at art 6 (recognizing the general right of belligerents to negotiate different (more restrictive) standards); \textit{Additional Protocol I}, supra note 4 at art 60 (addressing agreed demilitarized zones). See also Bothe et al, supra note 84 at 577.

\textsuperscript{236} \textit{Supra} note 56 at para 11. Barnes and Waters, supra note 5 at 230, observe that this “reinforces the proposition that precarious regions, such as the Arctic, enjoy a form of specially protected status” (though accepting it does not establish a legal prohibition on related military operations). See also provisional ILC Draft Principle I-(x): “States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.” \textit{ILC Draft Principles}, supra note 83. Provisional Draft Principle II-5 clarifies that the resulting protection only applies “as long as [the area] does not contain a military objective.” \textit{Ibid}.

\textsuperscript{237} More limited treaty regimes may also play a useful role in stigmatizing conduct and focusing political pressure on non-Party states to accept such \textit{ad hoc} limitations.
In the end, a realistic understanding of these costs may serve as an important deterrent to any use of armed force in the Arctic or anywhere else—particularly for a potential aggressor state that may one day be called to account for them.