



**Professor Ben Saul** BA(Hons) LLB(Hons) Sydney DPhil Oxford  
Challis Chair of International Law, Sydney Law School  
Whitlam and Fraser Chair of Australian Studies, Harvard University 2017-18

## **Parliamentary Joint Committee on Intelligence and Security**

18 October 2016

Dear Committee

### **Review of the Criminal Code Amendment (War Crimes) Bill 2016**

Thank you for receiving my submission. I am Challis Chair of International Law at the University of Sydney, with expertise in the research, teaching and practice of international humanitarian law (IHL) and international criminal law, including professional training of national militaries and humanitarian workers, and war crimes cases in international tribunals.

#### ***1. Targeting Members of Organised Armed Groups***

The Bill removes certain war crimes liabilities when targeting ‘members of an organised armed group’ in a non-international armed conflict. That concept is not defined in the Bill, other than to exclude those *hors de combat*. The Explanatory Memorandum explains, however, that the Bill aims to make Australian law consistent with IHL.

There has been considerable controversy in IHL about the targeting of members of organised armed groups. One authoritative touchstone, the ICRC’s *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (2009), states that a member of an organised armed group is not regarded as a civilian where the person individually assumes a ‘continuous combat function’, namely through a ‘lasting integration’ into the group, evidenced by ‘the preparation, execution, or command of [hostile] acts or operations’ (p. 34). It includes persons recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf’. The ICRC emphasises that ‘membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities’.

In contrast, ‘[i]ndividuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL’. Instead, they remain civilians assuming support functions’. Such persons could include ‘recruiters, trainers, financiers and propagandists’, as well as those involved in the ‘purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature’.

In the absence of further definition, there is a risk that the current language of the Bill could be over-expansively interpreted to enable the targeting of persons connected with armed groups who are not actually performing a continuous combat function, contrary to IHL.

Specifically, many of the factors listed at paragraphs 10 and 11 of the Explanatory Memorandum correctly identify combat-related functions evidencing membership (in the sense of a continuous combat function consistent with IHL). However, the last dot point in paragraph 11 goes further and potentially encompasses individual activities that might *not* constitute continuous direct participation in hostilities. These include ‘intelligence gathering, maintaining communications or providing engineering or logistics support’.

While gathering tactical military intelligence would constitute direct participation in hostilities, more strategic or general intelligence collection, unrelated to military operations, would not (ICRC, p. 35). Similarly, providing communications, engineering or logistics support for military operations would amount to direct participation, whereas the provision of such support for the non-combat activities of the group would not. The latter are indirect forms of participation in hostilities, and even if performed continuously they would not be sufficient to deprive the person of their civilian status and thus to characterise them as a targetable ‘member’ of an organised armed group.

Technically, under IHL those providing indirect support for an organised armed group cannot be regarded as ‘members’ in the sense of assuming a continuous combat function. As such, an IHL-consistent interpretation of the phrase ‘members of an organised armed group’ would not include persons providing indirect support to it, even if such support is continuous and such persons accompany the group. Members of organised armed groups cannot be targeted in the circumstances equivalent to those in which members of state armed forces in international armed conflict can be targeted, namely, regardless of whether they are combat personnel.

The ambiguity arises because the Explanatory Memorandum potentially invites certain forms of indirect support (under IHL) to be mischaracterised as direct support, and thus raises a potential inconsistency with both IHL and international war crimes liabilities.

**One simple solution is to amend the Bill to refer instead to ‘members of an organised armed group who perform a continuous combat function’.** This would make it unmistakably clear that the concept of ‘members of an organised armed group’ includes only those who are continuously and directly participating in hostilities, and excludes any wider category of ‘members’ who accompany or indirectly support such groups. (Alternatively, the Explanatory Memorandum could emphasise the necessity of a combat function.) This distinction is particularly important in conflicts involving terrorist groups, where there is a temptation to treat all persons supporting the group, even indirectly, as targetable.

## ***2. Proportionality***

The clauses on proportionality are broadly consistent with the proportionality rule under IHL. It should be emphasised, however, that the proportionality principle is not confined to ‘the time the attack was launched’ (as per the Bill’s clauses), but is rather a continuing obligation that endures throughout an attack. Specifically, article 57(2)(b) of Additional Protocol I of 1977 on precautions in attack requires that ‘an attack shall be cancelled or suspended if it becomes apparent that’ it would be disproportionate. The rule reflects customary IHL applicable in non-international conflicts.<sup>1</sup>

**Accordingly, it is recommended that the Bill could be amended to apply proportionality to both the time of launching, and the duration of, an attack.**

---

<sup>1</sup> ICRC Customary IHL Rule 15. Rule 15 provides that ‘constant care must be taken to spare the civilian population, civilians and civilian objects’. Article 13(1) of Additional Protocol II (1977) requires that ‘the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations’.

### ***Human Rights Implications: The Right to Life***

The Statement of Compatibility is correct in stating that Australia's human rights obligations may apply extraterritorially. While the Statement refers to a 'high standard of control', in international law the precise accepted standard is one of 'effective control', most commonly typified by the exercise of physical custody over a person or territorial occupation.

The Statement further notes that human rights obligations, including the right to life, continue to apply in armed conflict but may be 'displaced to the extent necessitated by IHL'. This characterisation of the relationship between human rights and IHL is not accurate, at least in relation to the right to life. In the *Nuclear Weapons Advisory Opinion* (1996), the International Court of Justice observed (at para. 25) that:

The test of what is an arbitrary deprivation of life ... falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

Accordingly IHL did not 'displace' the right to life, but rather was utilized to interpret the meaning of an 'arbitrary deprivation' under human rights law itself, thus harmonizing the relevant norms in both branches of law.

As such, where extraterritorial jurisdiction is exercised, Australia's right to life obligations continue to apply in armed conflict and are not displaced by IHL. Where a killing is unlawful under IHL, it will likely constitute an arbitrary deprivation of life under human rights law.

### ***Human Rights Implications: Non-Retrospectivity***

The international prohibition on retrospective criminal punishment can have no relevance to a domestic law that narrows but does not impose additional criminal liability.

Please be in touch if I can be of any further assistance.

Yours sincerely

[*Ben Saul*]