INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW

I. Introduction

As indicated in the last Review, the shift to a centre-right National-led Government at the end 2008 did not result in any immediate shifts in policy in this area.[1] However, over time there seems to be a slowing down in terms of priorities. For example, New Zealand still has not ratified the Third Additional Protocol[2] despite signing it in 2006. Ratification is dependent on minor legislative amendments to the Geneva Conventions Act 1958 and to the Flags, Emblems and Names Protection Act 1981. Similarly, there has been no progress with ratification of the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel.[3] Again ratification is dependent on a minor legislative amendment to the Crimes (International Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980.

There has been slightly more progress with the Protocols to the Convention for the Protection of Cultural Property in the Event of Armed Conflict.[4] As discussed in the last Review,[5] treaty examination of both Protocols was completed in 2008 along with the parent treaty. Not surprisingly, in light of the subject matter, that process was not contentious - the First Protocol prohibits the removal of cultural property from occupied territory and the restitution of illegally exported objects, while the Second Protocol sets out a system of enhanced protection for cultural property in armed conflict. Having been introduced to Parliament and referred to the Government Administration Committee in 2008, the Cultural Property (Protection in Armed Conflict) Bill was reported back to the House on 29 May 2009.[6] The Committee recommended the Bill be passed, subject to some amendments to the jurisdictional provisions, in order to avoid asserting universal jurisdiction over the crimes. The Bill was read a second time on 20 August 2009 but has not progressed since. Ratification will not occur until domestic legislation is in place.

1 T Dunworth, "Year in Review: International Humanitarian and International Criminal Law" (2008) 6 NZYIL 315 at 322.
2 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (opened for signature 8 December 2005, entered into force 14 January 2007).
3 Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (adopted 8 December 2005, entered into force 19 August 2010).
4 First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (opened for signature 14 May 1954, entered into force 7 August 1956); Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (opened for signature 17 May 1999, entered into force 9 March 2004).
5 T Dunworth, above n 1, at 320-321.
6 Cultural Property (Protection in Armed Conflict) Bill 2008 (275-2) (select committee report).

II. Cluster Munitions

In contrast to the foregoing, early ratification of the Convention on Cluster Munitions[7] was a stated priority for 2009. To that end, during April-May 2009, the treaty was subjected to parliamentary examination procedures,[8] and implementing legislation was prepared. As is well known, the way in which the international negotiations on the treaty were concluded had been notable for the involvement of civil society. The internal ratification and legislative processes in New Zealand continued that trend. A notable feature of the speeches in Parliament was the acknowledgement of the role civil society had played in the international negotiations, as well as in submissions made to the Select Committee during the internal processes.[9]

The Cluster Munitions (Prohibition) Act 2009 is commendable for its clear, straightforward provisions and should prove useful as a guide to other states as they consider implementing legislation. The Act sets out a range of criminal offences covering the basic prohibitions in the treaty itself. Jurisdiction over those crimes are asserted extra-territorially for New Zealand citizens, those ordinarily resident in New Zealand provided they are not a citizen of any other State, New Zealand corporate entities, and members of the Armed Forces.

As elaborated in the previous Review, the question of how the treaty would apply during joint military activities was a difficult one in negotiations. The treaty addresses deployments involving states parties in partnership with non-states parties to the treaty which might use cluster munitions (for example, the current deployment in Afghanistan). By virtue of art 21(3) of the treaty, provided there has been no direct involvement by nationals of states parties, such a joint activity would not by itself breach the "assist, encourage or induce" prohibitions of art 1(1)(c). This compromise, allowing for inter-operability, is now reflected in the New Zealand legislation. Section 10 sets out the various offences relating to cluster munitions, mirroring the prohibitions in art 1 of the treaty. Section 11(6) goes on to provide:

> A member of the Armed Forces does not commit an offence against section 10(1) merely by engaging, in the course of his or her duties, in operations, exercises, or other military activities with the armed forces of a State that is not a party to the Convention and that as the capability to engage in conduct prohibited by section 10(1).

Another interesting aspect of the domestic legislation is the inclusion of investment in cluster munitions as an offence. The treaty itself does not refer specifically to investment. However, it had long been the position of many in civil society that the prohibition on assistance in art 1(1)(c) of the Convention logically includes investments in cluster munitions producers. Indeed, in

7 Convention on Cluster Munitions (opened for signature 2 December 2008, entered into force 1 August 2010).

8 Foreign Affairs, Defence and Trade Committee *International Treaty Examination of the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions* (2008).

9 See for example, (21 July 2009) 656 NZPD 5181.

New Zealand, the question of investment in companies or funds which dealt with cluster munitions had arisen even before the treaty was concluded, when it was revealed that the New Zealand Superannuation Fund had investments in Lockheed Martin Corporation, a manufacturer of cluster munitions. However, the Fund announced its intention to sell those shares when New Zealand signed the treaty. During the internal treaty examination processes the Select Committee noted that not only the Government Superannuation Funds, but also the Natural Disaster Fund (Earthquake Commission) and the Accident Compensation Corporation Fund, had voluntarily divested stocks in companies involved in the manufacture of such munitions. The original Bill did not specifically prohibit investment but submissions on the point by the Cluster Munitions Coalition persuaded the Select Committee to recommend a specific prohibition, despite the Coalition's view that the general provisions would in fact cover investment.[10] Thus, as finally enacted, s 10(2) provides:

> A person commits an offence who provides or invests funds with the intention that the funds be used, or knowing that they are to be used, in the development or production of cluster munitions.

The Cluster Munitions (Prohibition) Act 2009 entered into force in December, paving the way for ratification by New Zealand on 23 December 2009.[11]

III. Tamil X Case[12]

At the heart of this case was the precise scope of the exclusion provisions in the United Nations Convention Relating to the Status of Refugees relating to international crimes.[13] Tamil X, a Sri Lankan citizen, arrived in New Zealand on 13 September 2001 and applied for refugee status. The Refugee Status Appeals Authority (RSAA) rejected his application on the basis that he fell within art 1F Refugee Convention, that is, there were serious reasons for considering that he was complicit in crimes against humanity committed by the Liberation Tigers of Tamil Eelam (LTTE), and he was thus excluded from the protection the Refugee Convention would otherwise have offered.[14] X had

10 Aotearoa New Zealand Cluster Munition Coalition "Submission to the Foreign Affairs, Defence and Trade Select Committee" (9 September 2009).

11 New Zealand therefore became one of original states parties when the Treaty entered into force on 1 August 2010.

12 *Attorney-General v Tamil X* [2010] NZSC 107.

13 United Nations Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954). Article 1F(a) provides that the Convention:

> shall not apply to any person with respect to whom there are serious reasons for considering that (a) he has committed a crimes against peace, a war crime, or a crime against humanity….

14 *Refugee Appeal No. 74796* 19 April 2006, Refugee Status Appeals Authority <http://www.refugee.org.nz/Fulltext/74796.html>.

been the Chief Engineer on board an LTTE owned and operated ship, the *MV Yahata*, which had been transporting weapons for the LTTE. Although X denied it, the Authority had made the factual finding that his:[15]

> engagement in the secretive smuggling operations of the LTTE was a fully knowing one and evidence of his dedication to the aims, objectives and methods employed by the LTTE. He knew that the items he helped smuggle into Sri Lanka would as likely be used in "conventional" warfare against the Sri Lankan Army as in perpetrating gross human right abuses against innocent civilians.

His application for judicial review was dismissed by the High Court,[16] but the Court of Appeal found that X ought not be excluded.[17] In reaching the conclusion that X was not complicit in the LTTE's criminal acts (there was no suggestion that X himself had been directly involved in any such international crimes), the Court paid close attention to the approach of the English Court of Appeal in two cases it had recently decided.[18] The Court held that the physical presence of X on the vessel, even in light of the implausibility of his account of how he came to be there, was insufficient to justify the inference that he had intended to be part of a joint criminal enterprise to perpetrate a crime against humanity. The Court said that "it was necessary to show that X was a party to the LTTE's illegitimate designs, that he contributed significantly to the LTTE's international criminal actions and did so with the intention of furthering them."[19]

The Supreme Court also found that X was not excluded from the protection of the Refugee Convention.[20] However, despite the coincidence of outcome (X was not excluded) the approach differed in important respects from that of the Court of Appeal. By this time, the United Kingdom Supreme Court had overturned the English Court of Appeal, finding that its approach was too narrow.[21] In its place, the United Kingdom Supreme Court articulated the view that exclusion would be on the basis of voluntarily contributing in a significant way to an organisation's ability to pursue its purpose of committing war crimes, aware that assistance will in fact further that purpose.[22] The New Zealand Supreme Court accepted this approach, thus endorsing a broader conception of the exclusion clause, the upshot being that it is easier to fall foul of the exclusion provision in the Refugee Convention. It is however, important to note that it is well accepted that mere membership

15 Ibid, at [65].

16 *X v Refugee Status Appeals Authority* HC Auckland, CIV-2006-404-4213, 17 December 2007, Courtney J.

17 *Tamil X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73.

18 *KJ (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 292 and *R (on the application of JS (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 364, [2010] 2 WLR 17.

19 *Tamil X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73 at [170].

20 *Attorney-General v Tamil X* [2010] NZSC 107.

21 *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [2010] 2 WLR 766.

22 Ibid, at [38].

of an organisation which commits war crimes or crimes against humanity is insufficient to give rise to exclusion. The Court concluded that for complicity, "no more need be established than that the accused had personal knowledge of such aims and intended to contribute to their commission."[23] Although the Court accepted that X satisfied this test, it did not find that he was thereby excluded from the Convention's protection. This was because, in this case, there had been no criminal act (the ship had been sunk en route) and, thus, as a matter of international criminal law, accomplice liability could not lie.[24]

The case is also notable for its consideration of the threshold for exclusion, or the standard of proof. Clearly, in an actual criminal trial, the standard of proof would be beyond reasonable doubt. The Convention, not being a criminal law instrument, uses the term "serious reasons for considering". The Supreme Court (again in line with its United Kingdom counterpart), said the Convention means what it says, and that is a standard above mere suspicion.[25]

IV. International Non-Aggression and Lawful Use of Force Bill

Drafted by Kennedy Graham of the Green Party, this Private Member's Bill was drawn from the ballot on 30 July and had its first, and only, reading on 19 August and 23 September 2009.[26] The Bill was voted down by 64 to 58 (National and Act against with Labour and the Maori Party voting with the Greens). Had it become law, the Bill would have created a crime of aggression in New Zealand domestic law, establishing a Special Prosecutor to prosecute such a crime. It would also have required the government to table the advice of the Attorney-General on any proposed military intervention at least seven days in advance.

One of the key objections of the National Government was that the Bill, if adopted in its precise form, would "effectively hand our foreign policy to the whims of a United Nations Security Council veto".[27] This is a reference to the terms of cl 6(1) of the Bill which defined an act of aggression as the:

> use of armed force by the State of New Zealand against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the purposes of the Charter of the United Nations.

Dr Mapp clearly considered that New Zealand's involvement with what might be termed a "humanitarian intervention" would run foul of such a provision. Dr Graham seemed to agree that the effect of the clause would be to prohibit a humanitarian intervention absent a Security Council resolution.

23 *Attorney-General v Tamil X* [2010] NZSC 107 at [69]-[70].

24 Ibid, at [75]-[76].

25 *Attorney-General v Tamil X* [2010] NZSC 107 at [39].

26 See K Graham "Stage-Fright in 'Godswon': The New Zealand Parliament and the International Non-Aggression and Lawful Use of Force Bill" (2008) 6 NZYIL 195-202 ["Stage-Fright"] and K Graham "Crimes of Aggression: a question of national integrity" (2009) 34(6) NZIR 18.

27 (19 August 2009) 657 NZPD 5742.

Unlike the National Government position, however, he was of the view that this was a positive step because humanitarian intervention, absent a Security Council Resolution, is contrary to contemporary international law.[28]

The domestic debate here then reflects, in part at least, the international debate on how aggression ought to be defined and the related issue of whether humanitarian intervention is lawful in the absence of a Security Council resolution. One of the consequences of enacting the Bill would have been to adopt an absolute and fixed position on the illegality of humanitarian intervention, which might not reflect a possibly evolving customary international law position. It would have been far from impossible to find an acceptable compromise, however, in which the statutory language could accommodate different views of the state and future of the relevant international law prohibitions.

The question of the legal opinion of the Attorney-General is also an idea that warranted further discussion. This was an important proposal – and one which has special resonance in the light of the Chilcot Enquiry in the United Kingdom. For these and other reasons, it is unfortunate that the Bill could not have been referred to Select Committee for further discussion and elaboration, rather than being simply abandoned.

V. Concluding Observations of the Committee on Torture

On 14 May 2009, the Committee on Torture issued its consideration of New Zealand's fifth periodic report to the Committee.[29] Of interest in this context is the concern expressed by the Committee about the precise terms of the Crimes of Torture Act 1989, in particular that proceedings under the Act may not be instituted without the consent of the Attorney-General.[30] This refers to s 12 of the Act which provides:

> (1) Subject to subsection (2) of this section, no proceedings for the trial and punishment of any person charged with a crime described in subsection (1) or subsection (2) of section 3 of this Act shall be instituted in any Court except with the consent of the Attorney-General.
> (2) A person charged with a crime against any of those provisions may be arrested, or a warrant for his or her arrest may be issued and executed, and that person may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General to the institution of a prosecution for the crime has not been obtained, but no further proceedings shall be taken until that consent has been obtained.

The Committee's concern seems to be that the consent provision might result in political interference with the conduct of any investigation or prosecution into an allegation of torture. It is true that in such an investigation,

28 Graham "Stage-Fright", above n 26, at 198.
29 Committee Against Torture "Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: New Zealand" CAT/C/NZL/CO/5 (2009) (Concluding Observations of the Committee).
30 Ibid, at [10].

there would be a danger of political interference. However, repealing the consent provision would not address this concern. If the Committee had explored further, it would have come to understand that even in the absence of a statutory provision, a prerogative power of nolle prosequi resides in the Attorney-General.[31]

However, the deeper concern (political interference in criminal prosecutions) remains given that these consent provisions are increasingly common in legislation,[32] as well as the problematic exercises of the discretion in cases in the past.[33] Perhaps the Committee's criticism will be the catalyst in drawing up guidelines for the Attorney-General in exercising discretion, whether based on statute or in the prerogative.

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31 P A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) 645-649.

32 See T Dunworth "From Rhetoric to Reality: Prosecuting War Criminals in New Zealand – The Ya'alon Case" (2007) 5 NZYIL 163 at fn 33 for a list of examples.

33 Committee Against Torture, above n 29, at [10] discussing the 2006 example of the attempted prosecution of Moshe Ya'alon.