Prosecuting War Crimes at Balibo Under Australian Law: The Killing of Five Journalists in East Timor by Indonesia

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1. Introduction

The killing of five young 'Australian' journalists at the village of Balibo during the Indonesian invasion of Portuguese Timor in October 1975 has long been surrounded by controversy, obfuscation and intrigue.[1] While many suspected that British journalists Brian Peters and Malcolm Rennie, New Zealander Gary Cunningham, and Australians Gregory Shackleton and Anthony Stewart (the 'Balibo Five') were deliberately killed by Indonesian military forces, various Indonesian official explanations maintained that the journalists were either killed in the crossfire or in the heat of battle, or were active participants in the fighting which exposed them to attack. Long after the killings, controversy continued in Australia about whether the then Australian Government had forewarning of the impending attack,[2] and knowledge of the targeting of the journalists and their cause of death, including on the basis of secret defence intelligence information which was not publicly disclosed. [3]

While the Balibo Five were a mixture of nationalities, all were working for Australian media services and many had residential and other connections to Australia. Despite a number of Australian (executive) inquiries,[4] a United Nations investigation in 2000,[5] sustained pressure from the journalists' families and journalists' organisations, and even consideration of a diplomatic protection claim and an International Court of Justice case,[6] it was not until 2007 that a comprehensive judicial inquiry into their deaths was held. The NSW Coroner

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1 See Desmond Ball and Hamish McDonald, *Death in Balibo, Lies in Canberra* (2000).

2 See *Inquest into the Death of Brian Raymond Peters* (Unreported, Coroner's Court of New South Wales, Magistrate Pinch, 16 November 2007) at 70–4 ('*Peters Inquest*').

3 *Peters Inquest* (2007) at 75–100.

conducted an inquest into the death of Brian Peters, who was resident in NSW at the time of his death and thus fell within the NSW Coroner's jurisdiction to determine the cause of death of a NSW resident, even where committed outside NSW territory.[7] While the formal legal scope of the inquest was limited to reporting on the death of Brian Peters, the Coroner made it clear that the deaths of the other journalists were in circumstances practically identical to those of Peters.[8]

The inquest reviewed evidence from previous inquiries, and obtained new evidence from sources as diverse as the then Prime Minister Gough Whitlam, East Timorese witnesses, and previously undisclosed, confidential defence signals intelligence. The inquest was, however, frustrated by the refusal of relevant Indonesian nationals to appear or give evidence by video link. Controversy erupted when NSW police rather too strenuously 'invited' Jakarta Governor Sutiyoso (allegedly part of the attack on Balibo) to appear at the inquest — by letting themselves into his Sydney hotel room with a master key.[9] The Governor was on an official visit to NSW and, feeling insulted, immediately left Sydney. Australia's Department of Foreign Affairs and Trade objected that the Governor enjoyed State immunity as the head of a political subdivision of a foreign State[10] — although one wonders whether interviewing a local mayor would really impair the conduct of international relations or interfere in the sovereign equality, dignity or independence of Indonesia.[11] Following an exhaustive inquiry, the NSW Deputy Coroner found that Brian Peters, accompanied by the other journalists,

> died at Balibo in Timor-Leste on 16 October 1975 from wounds sustained when he was shot and/or stabbed deliberately, and not in the heat of battle, by members of the Indonesian Special Forces, including Christoforus da Silva and Captain Yunus Yosfiah on the orders of Captain Yosfiah, to prevent him from revealing

4 National Archives of Australia: Department of Foreign Affairs; A11697, Visits to Balibo April/May 1976: Report by Foreign Affairs officers Allan Taylor, David Rutter and Richard Johnson into the deaths of the five Australia-based journalists in Balibo in mid October 1975 (1976); one item only (finding an 'absence of any substantiated evidence about how exactly the journalists died' at 33). <http://naa12.naa.gov.au/scripts/ItemDetail.asp?M=0&B=4151833> accessed 11 June 2008; Commonwealth, *Report on the Deaths of the Australian-Based Journalists in East Timor in 1975*, Parliamentary Paper (1996) (tabled on 27 June 1996 and not printed; available on request from the House of Representatives Chamber Office); Department of Foreign Affairs and Trade, *Second Report on the Deaths of Australian-based Journalists in East Timor in 1975* (1999) (finding inconsistencies in the evidence about the killings and that the killings occurred during the fighting at 149); Inspector-General of Intelligence and Security, *Balibo Killings 1975 and Intelligence Handling: A Report of an Inquiry by the Inspector-General of Intelligence and Security* (2001) IGIS <www.igis.gov.au/balibo_summary.cfm> accessed 11 June 2008 (this report is a short summary of a classified report provided to the Minister for Defence).

5 In 2001, UN Transitional Administration in East Timor (UNTAET) investigators sought arrest warrants in relation to the Balibo killings for Mohammad Yunus Yosfiah, Christoforus da Silva, and Domingos Bere: *Trio sought for 1975 killings of journalists* (3 February 2001) BBC News Online <http://news.bbc.co.uk/1/hi/uk/1151463.stm> accessed 11 June 2008. The Indonesian Attorney-General denied the request in 2001 of the UN Special Representative in East Timor, Sérgio Vieira de Mello, to interview nine suspects in Indonesia. The Commission for Reception, Truth and Reconciliation in East Timor also subsequently urged further investigation of the killings, but Indonesian cooperation has not been forthcoming.

> that Indonesian Special Forces had participated in the attack on Balibo. There is strong circumstantial evidence that those orders emanated from the Head of the Indonesian Special Forces, Major-General Benny Murdani to Colonel Dading Kalbuadi, Special Forces Group Commander in Timor, and then to Captain Yosfiah.[12]

Magistrate Pinch also recommended that the Australian Government liaise with the next of kin of the Balibo Five to determine whether they wished the remains of the journalists to be left in Indonesia, or to be repatriated to Australia; and that a national industry-wide 'Safety Code of Practice' for journalists should be developed.[13]

The process and findings of the Inquest were widely regarded as credible because, unlike previous inquiries, it exercised judicial powers to compel the production of evidence, interviewed key new witnesses, disclosed previously unseen intelligence information, comprehensively reviewed the evidence (including the inconsistencies) from previous inquiries, and exhibited characteristics of judicial independence and impartiality, all of which built the confidence of the public and the victims' families. The transparency of the process supports the credibility of the finding that certain Indonesian military personnel were likely responsible for the killings, which were not accidental but part of a deliberate Indonesian strategy to conceal the Indonesian military's invasion of East Timor in October 1975. The inquest was also valuable in dispelling the more outlandish conspiracy theories about the knowledge or complicity of Australian officials in Indonesia's actions. It must be noted, however, that such matters were not expressly part of the Coroner's mandate; plainly, Australia played no part in the killings, but there is certainly some evidence in declassified official documents that Australian officials were aware of Indonesia's clandestine military activities in the border region in advance of the killings.[14]

The Coroner indicated that the killings may amount to war crimes under Australian legislation then in force which implemented Australia's obligations under (*inter alia*) the *Geneva Convention relative to the Protection of Civilian*

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6 By Eli Lauterpacht, the Australian Government's legal adviser in 1976: see National Archives of Australia: Department of Foreign Affairs; A10461, Correspondence files, two number series with 'LA' prefix, 1975-1977; LA5/2, Consular Miscellaneous – Legal Adviser – Timor – five journalists, 1976; note to Assistant Secretary, South East Asia, Department of Foreign Affairs from Eli Lauterpacht (Legal Adviser), "Timor: Journalists – Legal Notes", 20 May 1976, National Archives of Australia, A104461/3 (released September 2000) <http://naa12.naa.gov.au/scripts/ItemDetail.asp?M=0&B=4151548> accessed 20 June 2008.

7 *Peters Inquest* (2007) at 4, 6.

8 *Peters Inquest* (2007) at 5.

9 Karen Michelmore, *Official demands apology over Balibo* (30 May 2007) *The Australian* Online <www.theaustralian.news.com.au/story/0,20867,21819139-1702,00.html> accessed 11 June 2008.

10 *Foreign States Immunities Act* 1988 (Cth) s 3(3).

11 The essential rationales of State immunity: *The Schooner Exchange v McFaddon*, 11 US (7 Cranch) 116 (1812).

12 *Peters Inquest* (2007) at 129.

13 *Peters Inquest* (2007) at 130.

Persons in Time of War ('*1949 Fourth Geneva Convention*').[15] Such a view was based on submissions to the inquest to that effect,[16] which the Coroner accepted, although the Coroner did not consider the applicable law in detail. This article picks up where the Coroner left off and examines, on the basis of the facts established by the inquest, whether the killings legally amount to war crimes under the four *1949 Geneva Conventions* and the relevant Australian implementing legislation, the *Geneva Conventions Act* 1957 (Cth). In particular, it argues that an international armed conflict between Indonesia and Portugal existed in Portuguese Timor from 7 October 1975 onwards, to which the *1949 Geneva Conventions*, then in force between the State Parties, applied. Under that law, the killings of the five foreign journalists at Balibo on 16 October 1975 were 'wilful killings' amounting to 'grave breaches' of the *1949 Fourth Geneva Convention*, under which treaty-based universal jurisdiction to prosecute exists.

At the relevant time, Australia was a party to that Convention and had acted upon its obligation to establish extraterritorial criminal jurisdiction over war crimes by enacting the *Geneva Conventions Act* 1957 (Cth). That legislation recognised such grave breaches as Federal criminal offences and conferred criminal jurisdiction on State courts. Pursuant to a 1992 extradition treaty between Australia and Indonesia, the preconditions for making a request to extradite Indonesians suspected of such war crimes are fulfilled. However, under that extradition treaty Indonesia is entitled to refuse to extradite in respect of political offences, or to extradite its nationals, in which case it must submit the matter to its own prosecutors. A possibly insurmountable barrier to extradition or Indonesian prosecution is a limitation period on murder prosecutions under Indonesian criminal law.

Attention to the fate of five foreign journalists in an increasingly distant conflict is not intended to detract from the experience of violence suffered by hundreds of thousands of East Timorese under Indonesian occupation between 1975 and 1999. That history has been addressed elsewhere,[17] and continues to be pursued.[18] Despite the narrow focus of the coronial inquest on the events of a

14 See, for example the Secret Australian Eyes Only Priority Cables from the Australian Embassy in Jakarta to Canberra of 13, 15 and 16 October 1975: National Archives of Australia: Australian Embassy, Republic of Indonesia [Djkarta/Jakarta]; A10463, Correspondence files, multiple number series, 1964– ; 801/13/1 PART 15, Jakarta, Portuguese Timor, 11 Oct 1975–3 Nov 1975; cablegram to Canberra 'Portuguese Timor' 13 October 1975 (Ref No O.JA2376), cablegram to Canberra from Ambassador Woolcott 'Portuguese Timor' 15 October 1975 (Ref No O.JA2432) and cablegram to Canberra from Ambassador Woolcott 'Portuguese Timor' 16 October 1975, (Ref No O.JA2461).

15 *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 Oct 1950) ('*1949 Fourth Geneva Convention*').

16 Mark Tedeschi (Counsel Assisting the NSW Coroner), Closing Submissions to the Balibo Inquest, 29 May 2007; Ben Saul, Opinion for the Media Entertainment and Arts Alliance on the International Legal Protection of Journalists, for the NSW Coronial Inquest into Deaths at Balibo, May 2007 (tabled at the Inquest); Ben Saul, Opinion for the Australian Coalition for Transitional Justice in East Timor on Criminal Liability for International Crimes under Australian law in respect of East Timor, May 2007 (tabled at the Inquest).

single day at the one village of Balibo, the inquest also unearthed witness testimony about Indonesia's wider 'scorched earth policy which 'destroyed entire towns and anyone found there', with the burning of bodies 'the normal practice.'[19]

Nor should the story of the Balibo Five be understood as a narrow incident without broader implications, given that the killings raise a host of significant legal issues: the qualification of complex situations of violence under international humanitarian law as international or non-international conflicts (or both); the status and protection of journalists in armed conflict; the scope and potential first use of Australia's untested post-1957 war crimes legislation; the prospects for utilising extradition arrangements between Australian and Indonesia; questions of universal jurisdiction in the absence of custody of offenders; and the application of State immunities and doctrines of foreign act of State and non-justiciability to foreign war crimes. At the time of writing in mid-2008, the Australian Federal Police were still investigating whether to refer the matter to the Commonwealth Director of Public Prosecutions, and regardless of what decision is reached, the Balibo killings raise vital domestic and international law issues about accountability for unlawful violence in war.

2. The Armed Conflict in Portuguese Timor in 1975

In 1975, international humanitarian law was most well developed in its regulation of international (rather than non-international) armed conflicts. Whereas the many protective provisions of the four *1949 Geneva Conventions* regulated the conduct of international armed conflicts, only common art 3 of those four Conventions applied to non-international armed conflicts, and *1977 Additional Protocol II* had

17 See, for example Commission for Reception, Truth and Reconciliation in Timor-Leste, *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste: Executive Summary* (2005) at 44 (estimating 103 000 deaths between 1975 and 1999) and 108–111 (detailing violations of humanitarian law specifically); see also United Nations Transitional Administration in East Timor (UNTAET) *Regulation No 2000/11 on the Organisation of Courts in East Timor*, UNTAET/REG/2000/11 (entered into force 6 March 2000); UNTAET *Regulation No 2000/14 Amending Regulation No 2000/11*, UNTAET/REG/2000/11 (entered into force 10 May 2000); UNTAET *Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UNTAET/REG/2000/15 (entered into force 6 June 2000); Kofi Annan, *Identical Letters Dated 2000/01/31 from the Secretary-General Addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, UN Docs A/54/726 and S/2000/59 (2000) (containing the 'Report of the International Commission of Inquiry on East Timor to the Secretary-General'); United Nations Commission on Human Rights, *Report of the High Commissioner for Human Rights on the Human Rights Situation in East Timor*, UN Doc E/CN.4/S-4/CRP.1 (1999); Amnesty International, *Indonesia (East Timor): Demand for Justice* (1999) (AI-index: ASA 21/191/1999, 28 October 1999); Indonesian Commission on Human Rights investigations; Ben Saul, 'Was the Conflict in East Timor "Genocide" and Why Does It Matter?' (2001) 2 *Melbourne Journal of International Law* 477.

18 Suzannah Linton, 'Accounting for Atrocities in Indonesia' (2006) 10 *Singapore Year Book of International Law* 199; Hikmahanto Juwana, 'Human Rights in Indonesia' (2006) 4 *Indonesian Journal of International Law* 27.

19 *Peters Inquest* (2007) at 41.

not yet been negotiated to strengthen the very basic protections applicable in non-international conflicts.[20] Further, whereas 'grave breaches' of the four *1949 Geneva Conventions* gave rise to individual criminal liability for war crimes pursuant to treaty-based principles of quasi-universal jurisdiction, breaches of common art 3 were not identified as grave breaches, nor had international jurisprudence (as elaborated by the International Criminal Tribunal for the former Yugoslavia (ICTY) from the mid-1990s onwards) evolved to recognise breaches of common art 3 as violations of the laws and customs of war attracting customary criminal liability and universal jurisdiction. Moreover, most national legal orders which enacted war crimes legislation to implement the *1949 Geneva Conventions* only focused on breaches in international armed conflicts.

A. International Armed Conflict: Indonesia vs Portugal

For the above reasons, the qualification of the Indonesian invasion of Portuguese Timor in 1975 as an international armed conflict is decisive in establishing the existence of criminal responsibility under international (and therefore Australian) law for the killings of the five journalists at Balibo. Following the long history of Portuguese colonisation of East Timor, by 1960 (and still in 1975) Portuguese Timor attained the legal status of a non-self-governing territory under the *Charter of the United Nations* and was administered by Portugal. Both Indonesia and Portugal were State Parties to the *1949 Geneva Conventions* at the time of the Indonesian invasion in 1975.[21] Humanitarian law governing an international armed conflict applies if the conditions of common art 2 of the *1949 Geneva Conventions* are met:

> the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

An 'armed conflict' must thus exist between at least two State Parties to the Convention, but there is no requirement that the parties formally declare or recognise the existence of the conflict. This departs from the earlier law of 'war', which presupposed such formalities and allowed States to deny the existence of an

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20 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) ('*1977 Additional Protocol II*').

21 Indonesia acceded (without reservation) to the four *1949 Geneva Conventions* on 30 September 1958. Portugal signed the four *1949 Geneva Conventions* on 11 February 1950 and ratified them on 14 March 1961. A reservation upon signature, limiting the application of common art 3 to civil wars rather than all situations of armed rebellion, was withdrawn by Portugal upon ratification in 1961: *Annex A Ratifications, Accessions, Prorogations, etc, Concerning Treaties and International Agreements Registered with the Secretariat of the United Nations: No 973 Geneva Conventions Relative to the Protection of Civilian Persons in Time of War*, 394 UNTS 258 (1961).

armed conflict by asserting that they were merely engaged in police actions and the like. Indeed, the Conventions apply even to a partial occupation of territory met by no armed resistance. The existence of an armed conflict between States is a question of fact.[22] The International Committee of the Red Cross (ICRC) *Commentary* indicates that the drafters conceived of an armed conflict as follows:

> Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbrous machinery. It all depends on circumstances.[23]

In analysing application of common art 2 to the Indonesian invasion of Portuguese Timor in 1975, a number of factual complications arise: Portugal abstained from the fighting; a non-State actor, Fretilin, militantly resisted Indonesian forces; tension oscillated between full-scale hostilities and clandestine operations of lesser intensity; and prior to the invasion there were military confrontations amongst Timorese factions themselves.

It is highly likely that the Indonesian invasion of East Timor in October 1975 triggered an international armed conflict within the meaning of common art 2 and to which the *1949 Geneva Conventions* accordingly applied. Covert military operations by Indonesian forces had been underway inside East Timor from July 1975 onwards (in 'Operation Flamboyan'),[24] but at a minimum those smaller operations escalated into an armed conflict from 7 October 1975 onwards, when Indonesian forces crossed into Portuguese Timor and assaulted the village of Batugade, on the border between Indonesian West Timor and Portuguese Timor.[25] The overt use of military force, including naval and artillery bombardment, tanks and helicopters, on a significant scale by thousands of Indonesian troops within Portuguese Timorese territory from 7 October onwards,[26] with the intention to assume control of that territory, was sufficient to establish the existence of an international armed conflict.

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22 The existence of an 'armed conflict' under humanitarian law (*jus in bello*) is not dependent on also satisfying the test for an 'armed attack' under the law on the use of force (*jus ad bellum*, including the frameworks of self-defence and collective security).

23 Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (vol I, 1958) at 32.

24 Even earlier, from late 1974, Indonesia's Operation Komodo, involving Indonesia's Intelligence Coordinating Agency (BAKIN) and Indonesian Special Forces (Kopassandha), were involved in intelligence and propaganda operations within Timor in support of Apodeti's platform of integration with Indonesia: *Peters Inquest* (2007) at 15.

25 The NSW Coroner agreed with this assessment: *Peters Inquest* (2007) at 123. Other jurists also support that date as the commencement of an international armed conflict: see, for example Suzannah Linton, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor' (2001) 25 *Melbourne University Law Review* 122.

26 Evidence to the NSW Coroner suggested that by the end of September 1975, President Suharto had authorised up to 3800 Indonesian soldiers to be deployed in East Timor: *Peters Inquest* (2007) at 72.

While Indonesia sought to disguise its involvement in the attacks, by characterising those operations as attacks by pro-Indonesian Timorese militias such as the Timorese Democratic Union (UDT) and the Popular Democratic Association (Apodeti), assisted by Indonesian 'volunteers',[27] it is now no secret that those operations both directly involved Indonesian military forces, and were closely directed and controlled by Indonesia. The joint attacks on Balibo, Maliana and Palaka on 16 October 1975 were committed by three Indonesian Special Forces teams and two companies of regular para-commandos,[28] in addition to Timorese militias. The attack on Balibo itself involved around 700 personnel, more than half of them Indonesian forces and the remainder UDT fighters and so-called 'Partisans'.[29] It is not relevant in establishing the involvement of State armed forces that some Indonesian Special Forces adopted noms de guerre and disguised themselves as civilians (in jeans with distinguishing scarves), conduct which may in fact have breached the prohibition on perfidy (feigning civilian status) in international armed conflict.[30] Nor is it relevant that some of the Special Forces allegedly 'volunteered' for military operations, since as the Coroner noted, 'they were still under the command of senior Indonesian military figures such as General Yoga and Major General Murdani'.[31]

It is further not to the point that Portuguese forces abstained from fighting the advancing Indonesian forces. The Portuguese administration and its forces had withdrawn to the island of Atauro as a result of civil conflict between competing East Timorese forces from mid-August 1975. It had not, however, renounced its sovereign claim to title over the territory of Portuguese Timor,[32] and although its administrative control over that territory had been weakened to vanishing point, no better legal title had been established by October 1975. It is sufficient in establishing an international armed conflict that Indonesian forces intervened militarily on Portuguese territory, without Portugal's consent, with the intention to take military control of that territory to the exclusion of the proper Portuguese authorities. Further, that armed intervention soon resulted in partial,[33] and later total, occupation of Portuguese territory, which, as common art 2 makes clear, need not be met with armed resistance in order to establish the existence of an international armed conflict.

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27 General Murdani told Australian Ambassador Richard Woolcott on 15 October 1975 that Indonesian forces involved were 'volunteers': *Peters Inquest* (2007) at 73.

28 *Peters Inquest* (2007) at 18, 115 (such as Rajawali Company B in regular uniforms but without insignia).

29 *Peters Inquest* (2007) at 23.

30 *Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War of Land*, opened for signature 18 October 1907, [1910] ATS 8, annex art 23(b) (entered into force 26 January 1910) ('*1907 Hague Regulations*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3, art 37(1) (entered into force 7 December 1978) ('*1977 Additional Protocol I*') (reflecting custom even in 1975).

31 *Peters Inquest* (2007) at 123.

32 See Tedeschi, above n16 at 30.

33 *Peters Inquest* (2007) at 123.

B. A Non-International Armed Conflict: Indonesia vs Fretilin

Equally, it is not fatal to the existence of an international armed conflict between Indonesia and Portugal that the only active hostilities actually existed between Indonesia and a non-State armed force, the Revolutionary Front for an Independent East Timor (Fretilin), rather than Portugal. The attack on Batugade, which signalled the initiation of armed conflict, was in fact an attack on Fretilin forces defending the town. The Indonesian invasion as a whole was met with military resistance on a significant and organised scale by Fretilin, and the simultaneous attacks on Balibo, Maliana and Palaka, on 16 October 1975, were part of a broad Indonesian offensive against Fretilin forces involving a large number of Indonesian troops (up to 2000) and naval and artillery bombardments.[34]

It is difficult to characterise Fretilin forces as participants in an international armed conflict. Fretilin was not an irregular combatant force within the scope of art 4(2) of the *Geneva Convention Relative to the Treatment of Prisoners of War* ('*1949 Third Geneva Convention*').[35] Even if Fretilin fighters complied with the conditions of combatancy (command responsibility, carrying arms openly, wearing a fixed distinctive sign, and general conformity with humanitarian law), irregular militias or organised resistance movements must 'belong' to a State Party to the conflict under art 4(2). Given that Fretilin existed for the purpose of terminating Portugal's control over East Timor, it was plainly not a group acting under the control of, or connected with, Portugal in the relevant sense.[36] Further, Fretilin was an organised armed group at the time of the Indonesian invasion and did not qualify as a *levee en masse* in which civilians spontaneously resist an invading force.

Rather, the better legal characterisation is that the Indonesian invasion likely triggered a *parallel* non-international armed conflict between Indonesia and a non-State force (Fretilin) in the territory of a second State (Portuguese Timor — that is, Portugal).[37] Common art 3 of the *1949 Geneva Conventions* regulates armed conflicts 'not of an international character' and occurring in the territory of a State Party. Given that international conflicts are those occurring between two or more State Parties (common art 2), a literal interpretation of common art 3 suggests that a non-international conflict is any conflict not involving two or more States.[38] The provision thus potentially encompasses different types of non-international

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34 See, for example James Dunn, *Timor: A People Betrayed* (1996) at 203–4.

35 *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135, art 4(2) (entered into force 21 October 1950) ('*1949 Third Geneva Convention*').

36 Contrast Commission for Reception, Truth and Reconciliation in Timor-Leste, above n17 at 111 (appearing to regard Fretilin as the resistance movement of Portugal as the administering power and relevant State Party to the Geneva Conventions in international armed conflict).

37 The ICTY has accepted that complex conflicts may involve parallel international and non-international conflicts in the same territorial space: see *Prosecutor v Tadic (Appeals Chamber)* Case No IT-94-1-AR72 (2 October 1995) [77] (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ('Tadic (Appeals Chamber)').

38 See, for example *Hamdan v Rumsfeld* 548 US 557 (2006) at 66–8.

conflict: a classic civil war in which a rebel group attempts to overthrow its own government; a national liberation struggle by a self-determination movement to displace a colonial power in possession of colonised territory; internal unrest where multiple rebel groups fight one another within a State's territory (or indeed across State borders); and – as between Indonesia and Fretilin — a conflict between a State and a non-State group on the territory of a second State. Certainly the Australian Government's legal adviser in 1976, Eli Lauterpacht, appeared to view the conflict as non-international,[39] although no reasons were given and Lauterpacht contradictorily asserted that the journalists were entitled to prisoner of war (POW) status under the *1949 Fourth Geneva Convention*, which could only be so if an international conflict existed, since there is no POW status in non-international conflicts.

The violence must, however, reach the minimum legal threshold of an armed conflict to attract the application of common art 3. In *Prosecutor v Tadic*, the International Criminal Tribunal for the former Yugoslavia defined a non-international conflict within the meaning of common art 3 as involving 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[40] The test focuses on the twin requirements of (a) the intensity of the conflict and (b) the organisation of the parties to the conflict.[41] The two 'closely related criteria' of intensity and organisation are used 'solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law'.[42] Unlike the higher threshold for non-international armed conflicts under *1977 Additional Protocol II*, there is no requirement under common art 3 that the non-State group control territory; rather, as the International Criminal Court stated in 2007, the key requirements are that an organised armed group has the capacity to conceive and carry out military operations for a prolonged period.[43] Nor is it necessary that the State recognise the insurgents as belligerents, or that the insurgents exercise civil administrative authority over territory or possess the *de facto* characteristics of a State.[44]

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39 Lauterpacht, above n6 at [4].

40 *Tadic (Appeals Chamber)* Case No IT-94-1-AR72 (2 October 1995) [70]. This test has been 'consistently applied' by the ICTY: *Prosecutor v Limaj, Bala, and Muslin (Trial Chamber II)* Case No IT-03-66-T (30 November 2005) [83] ('Limaj (Trial Chamber II)').

41 *Prosecutor v Tadic (Trial Chamber)* Case No IT-94-1-T (7 May 1997) [562] ('Tadic (Trial Chamber)').

42 *Tadic (Trial Chamber)* Case No IT-94-1-T (7 May 1997) [562]; see also, for example *Rome Statute of the International Criminal Court* art 8(2)(d); *Limaj (Trial Chamber II)* Case No IT-03-66-T (30 November 2005) [87].

43 *Prosecutor v Dyilo (Pre-Trial Chamber I)* Case No ICC-01/04-01/06 (29 January 2007) [227]–[237] (Decision on the Confirmation of Charges).

44 While such factors are listed by the ICRC *Commentary* (Pictet, above n22 at 49–50) on common art 3 of the Geneva Conventions as relevant to distinguishing non-international armed conflicts from lesser violence, they are not essential conditions: see *Tadic (Trial Chamber)* Case No IT-94-1-T (7 May 1997) [562]; *Limaj (Trial Chamber II)* Case No IT-03-66-T (30 November 2005) [85]–[86]. It is well accepted that, as a humanitarian provision, common art 3 should be applied 'as widely as possible' (Pictet, above n22 at 50) and should not be restrictively interpreted.

The ICTY has noted that 'the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis'.[45] Relevant to the intensity of a conflict are factors such as:

> the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed.[46]

The historical evidence, the seriousness and spread of fighting across Portuguese Timor, the use of military weaponry by both sides, the protracted nature of the conflict over time and the attention of the Security Council to the situation all indicate that the violence was of sufficient intensity to rise to the level of a non-international armed conflict. The fighting between Indonesia and Fretilin in 1975 was plainly in the nature of 'severe combat' rather than mere 'police operations';[47] and was far more serious in scale than banditry, short-lived insurrection, terrorism or disorganised resistance. No minimum number of casualties is required to establish the intensity of the violence, and casualties sustained during the Indonesian invasion in 1975 are difficult to assess from the available historical evidence and given the intermittent nature of Fretilin's guerrilla hostilities and avoidance of set-piece engagements with Indonesian forces.

It is also evident from the historical record that Fretilin was sufficiently organised to be a party to the conflict. Factors relevant to the organisation of the parties include 'the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms'.[48] By 1975, Fretilin had an established chain of command and internal hierarchy, recruitment capability, training structures, supply routes, and organised logistical, weapons and funding capabilities. The number of fighters belonging to a party may also be a relevant but not determinative factor in considering both the organisation of the parties and the intensity of the violence, and estimates suggest that by December 1975 Fretilin had 20 000 personnel under its command (2500 professional soldiers, 7000 trained by the Portuguese, and 10 000 with brief military training).[49] Certainly many Fretilin fighters had earlier been conscripted into the Portuguese army and were accordingly drilled as professional fighters trained in modern weaponry, although newer Fretilin fighters lacked such experience.[50]

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45 *Limaj (Trial Chamber II)* Case No IT-03-66-T (30 November 2005) [90].

46 *Limaj (Trial Chamber II)* Case No IT-03-66-T (30 November 2005) [90].

47 A distinction drawn in *Ajuri v Israeli Defence Forces Commander of the Judea and Samaria Area* [2002] Israel Law Reports 1 at 5 (President Barak, Israeli Supreme Court (High Court of Justice) (Authorised English translation of official case report (HCJ 7015/02) in Hebrew).

48 *Limaj (Trial Chamber II)* Case No IT-03-66-T (30 November 2005) [90].

49 Dunn, above n32 at 258.

50 *Peters Inquest* (2007) at 55.

C. A Non-International Armed Conflict: Fretilin v UDT?

For some time prior to the Indonesian invasion in October 1975, numerous East Timorese factions had been fighting for control of East Timor: the pro-independence group Fretilin (and its predecessor, the Association of Timorese Social Democrats (ASDT)); the UDT, which also sought independence but with close ties to Portugal; the Apodeti, seeking integration with Indonesia; and other groups such as Trabalhista (Labour Party) and the Association of Timorese Heroes (KOTA) (although it must be noted that the latter three groups were small and without broad support). The onset of the civil conflict in early August 1975 with the UDT's occupation of government buildings in Dili, caused the withdrawal of the Portuguese administration and its forces to the island of Atauro by mid-August 1975, effectively ending the work of the Portuguese Decolonisation Commission.

The withdrawal of the Portuguese is one important indication that the fighting was sufficiently intense to amount to a non-international armed conflict, since the authorities no longer had the capacity to maintain law and order in the face of serious internal violence. In addition, there was military violence on a significant scale, by two well organised armed groups (with 1500 UDT troops facing 2000 Fretilin personnel), the use of mortars and artillery, and around 400 deaths in the main fighting in the capital Dili (and even if serious fighting lasted only three weeks).[51] While the International Committee of the Red Cross estimated that 1500 people may have died in the civil conflict as a whole, it has been suggested that most of them died from 'bitter tribal fighting'.[52] It may be doubted whether that communal violence was part of the organised armed conflict between UDT and Fretilin, but at the very least, hostilities between those two groups likely constituted a conflict.

Regardless of whether the intensity of the fighting crossed the threshold of a non-international conflict, active hostilities had concluded prior to the Indonesian invasion, after Fretilin defeated UDT forces in Dili by the end of August 1975 and soon pushed UDT forces across the border into West Timor.[53] It is therefore possible that any non-international armed conflict that may have existed between those two Timorese groups had, in practice, ceased by the time of the Balibo killings in mid-October 1975. Strictly at law, and for humanitarian reasons, international humanitarian law in non-international armed conflicts continues to apply 'beyond the cessation of hostilities until … a peaceful settlement is reached'.[54] However, even if that conflict was still technically in existence, in the sense that no peaceful settlement had yet been agreed (or because there was a prolonged lull in the fighting due to the depletion of the UDT's capabilities), the killings at Balibo did not occur in connection with that conflict; rather the relevant nexus was with the (potentially concurrent) international armed conflict. The continued existence of the civil conflict would certainly not prejudice the separate

51 Dunn, above n32 at 157–8, 184.

52 Id at 184–5.

53 Id at 158.

54 *Tadic (Appeals Chamber)* Case No IT-94-1-AR72 (2 October 1995) [70].

and parallel legal existence of the international armed conflict between Indonesia and Portugal which commenced in October 1975.

D. An International Armed Conflict: Indonesia vs Independent East Timor?

Following a change of regime in Portugal in April 1974, Portugal committed itself to decolonisation and recognised the right of the East Timorese 'people' to self-determination, with a universal secret ballot planned for October 1976 (to allow the population to express a free choice on its political future), and a Decolonisation Commission established to facilitate the process. Self-rule was envisaged by October 1978. While that process was disrupted due to the outbreak of the civil conflict, Fretilin's success in that conflict could be viewed as the expression of the free choice of the East Timorese people on the question of self-determination, sufficient to bring about *de facto* statehood for East Timor.[55]

By analogy, civil wars within existing States — that is, those that have already achieved self-determination — are sometimes conceptualised as a continuing or renewed expression of the self-determination of that independent 'people', who are entitled to choose their own political future, including through violence. The essential rationale of the rule prohibiting the intervention of other States in civil wars is precisely so as to avoid interference in such cases of internal self-determination. So too it might be argued that violent struggle for supremacy within a colonial 'people' is a valid expression of their self-determination — and which need not wait for a peaceful United Nations ballot. On this view, the subsequent Indonesian invasion initiated an international armed conflict with the newly created independent State of East Timor (rather than with Portugal).

That argument is not persuasive. In the first place, it may be doubted whether the factual preconditions for statehood under customary international law, and reflected in the 1933 *Montevideo Convention on the Rights and Duties of States*, existed by October 1975. Although East Timor possessed a defined territory and permanent population, it is doubtful Fretilin had succeeded in extending genuine administrative control over that territory and people by October 1975. The civil war caused the flight of around 80 per cent of administrative officials; the economy was in disarray; agriculture and commerce had stalled; and Fretilin was inexperienced in government, notwithstanding signs that Fretilin proved 'surprisingly effective in re-establishing law and order and restoring essential services' (at least in Dili).[56] Further, it was not until 28 November 1975 — after the attack on Balibo — that Fretilin itself declared the unilateral independence of East Timor, a situation which was not recognised internationally.

There is little evidence in State practice that the international community recognised the establishment of an independent East Timorese State by October 1975. The immediate United Nations Security Council and General Assembly

55 See, for example Peter Trotter, 'Like Lambs to the Slaughter: The Scope of and Liability for International Crimes in East Timor and the Need for an International Criminal Tribunal' (2001) 7 *New England International & Comparative Law Annual* 31.

56 Dunn, above n33 at 185.

resolutions condemning Indonesia's illegal invasion recognised that Portugal remained the 'administering power' in Portuguese Timor, [57] called for its territorial integrity to be respected, and acknowledged the right of the East Timorese people to freely exercise self-determination[58] (although in practice active international support for realising self-determination was scarce[59]). By recognising the right of the East Timorese to exercise self-determination, the assumption was that the right had not, as yet, been exercised; such that the legal position remained that the area remained a Portuguese non-self-governing territory.

As memory of Indonesia's invasion faded, for a time it even appeared that the international community, which had initially refused to recognise the Indonesian invasion as a valid acquisition of title to territory, might be moving towards gradual recognition of the stark and seemingly unalterable fact of Indonesian control. Support for resolutions condemning Indonesia in the United Nations dwindled by the early 1980s, to the point that Portugal was no longer confident in sponsoring any more resolutions to condemn Indonesia. As in the Indian invasion of Portuguese Goa (where Indian sovereignty is now unquestioned), Indonesian leaders such as Sukarno had long sought to justify anti-colonial violence as self-defence against colonial aggression, notwithstanding existing treaty arrangements.[60]

However, non-condemnation of Indonesia never evolved into legal recognition of Indonesian sovereignty over Portuguese Timor, although by January 1978 Australia had recognised that East Timor was under Indonesia's 'effective control' and therefore was 'de facto … part of Indonesia'.[61] Nor was the self-determination process sponsored by Indonesia ever regarded as legitimate by the international community[62] — in contrast to global acceptance of Indonesia's equally dubious 'act of free choice' which endorsed the integration of West Papua in 1969.[63] By 1995, the International Court of Justice reiterated in *Portugal v Australia* that East Timor remained a non-self governing territory, with its people entitled to self-determination.[64]

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57 *Resolution 384 (1975)*, SC Res 384, UN SCOR, 1869th mtg, UN Doc S/Res/384 (1975); *Resolution 389 (1976)*, SC Res 389, UN SCOR, 1914th mtg, UN Doc S/Res/389 (1976); *Question of Timor*, GA Res 3485(XXX), UN GAOR, 30th sess, 2439th plen mtg, UN Doc A/Res/3485(XXX) (1975) (72 votes to 10, with 43 abstentions). The UN General Assembly condemned the occupation as a breach of the *1960 Declaration on the Granting of Independence to Colonial Territories and Peoples.* Prior to 1999, seven subsequent resolutions on East Timor had been passed by the UN General Assembly, the last in 1982: see Matthew Jardine, *East Timor: Genocide in Paradise* (1995) at 36.

58 In accordance with art 1(3) of the *International Covenant on Civil and Political Rights* ('*ICCPR*'), States 'having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination': *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171, art 1 (entered into force 23 March 1976).

59 Commission for Reception, Truth and Reconciliation in Timor-Leste, above n17 at 50–3.

60 Donald Weatherbee, 'Portuguese Timor: An Indonesian Dilemma' (1966) 6 *Asian Survey* 683 at 692.

Further, the suggestion that military victory in an internal conflict is a valid expression of a people's self-determination has always been dubious, whether within an existing independent State or among still colonised peoples. International human rights law provides for peoples 'freely' to determine their political status,[65] and machinery (including the Trusteeship Council) is established under the *Charter of the United Nations* for advancing that right. There is no express requirement that peoples must *peacefully* choose their political status, but there has never been international agreement on whether the use of force by self-determination movements to realise the right is either permitted or prohibited.[66]

The exercise of the right (whether peacefully or forcibly against the colonial power) proceeds on the assumption that there exists an identifiable entity which possesses the authority and legitimacy to represent the 'people' as a whole, but there is little law concerning how such an entity comes to be authorised to speak on behalf of the 'people'. As in Palestine, fratricidal struggles for power within a people are not uncommon; and who could presently say whether Hamas in Gaza or Fatah in the West Bank represents the common will of the Palestinian people? Force of arms is scarcely an accurate indicator of popular will.

Likewise, the internal conflict between Fretilin and UDT prior to the Indonesian invasion in 1975 signalled competing and contradictory claims by different segments of the East Timorese population: with UDT seeking independence by negotiating with Indonesia to thwart Fretilin (and being manipulated by Indonesia in the process) and Fretilin seeking independence

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61 Australian Minister for Foreign Affairs, Andrew Peacock, Statement of 20 January 1978, cited in 'Recognition: Australian Practice in International Law' (1978-80) 8 *Australian Year Book of International Law* 273 at 279. Australia voted in favour of *Question of Timor*, GA Res 3485(XXX), UN GAOR, 30th sess, 2439th plen mtg, UN Doc A/Res/3485(XXX) (1975), condemning the Indonesian invasion, but later abstained from voting on *Question of Timor*, GA Res 31/53, UN GAOR, 31st sess, 85th plen mtg, UN Doc A/Res/31/53 (1976) and *Question of East Timor*, GA Res 32/34, UN GAOR, 32nd sess, 83rd plen mtg, UN Doc A/Res/32/34 (1977). Australia then voted against *Question of East Timor*, GA Res 33/39, UN GAOR, 33rd sess, 81st plen mtg, UN Doc A/Res/33/39 (1978) and recognised *de jure* the incorporation of East Timor into Indonesia on 14 February 1979 as part of seabed boundary negotiations. Australia later concluded the 1989 Timor Gap Treaty with Indonesia on the premise of Indonesian sovereignty over that area.

62 An unelected 'Regional Popular Assembly', appointed by a provisional government of pro-Indonesian political parties (which was established by the Indonesian occupation forces) passed a resolution on 31 May 1976 in favour of East Timor's integration into Indonesia: see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995) at 225–30.

63 Far from protesting, *Agreement Between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*, GA Res 1504(XXIV), UN GAOR, 24th sess, 1813th plen mtg, UN Doc No A/Res/2504(XXIV) (1969) noted a report on the "act of free choice" and, at [2], appreciated any assistance from international organisations 'to the Government of Indonesia in its efforts to promote the economic and social development of West Irian'.

64 *East Timor (Portugal v Australia)* [1995] ICJ Rep 90 at 106.

65 *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171, art 1 (entered into force 23 March 1976).

66 Cassese, above n62 at 151–2, although it may authorised in response to forcible suppression of the right by a colonial State: at 151, 153, 198.

through opposition to Indonesia. Fretilin's victory may have established its political authority as a pure fact of power, but it did not automatically embody the will of the people. In any conflict, military victory may flow from many considerations other than popular support: more and better weapons; superior training, organisation and command; or sheer brutality. Some of the most effective militant groups are those which do not feel constrained by the dictates of the popular conscience or public will. As a countervailing consideration, some have suggested that the new and brief Fretilin administration enjoyed popular domestic support immediately prior to the Indonesian invasion,[67] but that is a difficult assertion to verify in the absence of any of the usual political indicators of democratic participation, and amidst military mobilisation.

There are, then, real questions about whether Fretilin's military victory alone, and consequent unilateral declaration of independence, can be seen as sufficient to amount to a free and informed choice in determining self-determination. The purpose of holding free and fair ballots to determine a people's political status is to ensure that the collective right of self-determination reflects the cumulative individual choices of the group's members. Such a process ensures that an individual share in the group right is not subordinated to the preferences of a minority entity which claims to represent the group — but may well not. Certainly, as noted above, the international community never accepted Fretilin's victory and declaration of independence as constituting a valid exercise of self-determination; which was only finally realised in the 1999 ballot held by Indonesia under United Nations auspices.

There is therefore no real question of East Timorese statehood at the relevant time in 1975, nor any possibility that there then existed an international conflict between East Timor and Indonesia. In any event, any independent East Timor had not yet had time to become a party to the *1949 Geneva Conventions*, under which an international armed conflict could be recognised, and the 'clean slate principle' of the law of State succession would likely not regard the newly decolonised State of East Timor as inheriting the prior treaty obligations of Portugal,[68] unless a special exception for protective humanitarian treaties were to be accepted.[69] There may, however, be a question whether an international armed conflict existed at customary international law, paralleling common art 2 of the *1949 Geneva*

67 Dunn, above n33 at 186. Dunn, a former Australian Consul to East Timor, reported immediately prior to the declaration of independence that Fretilin's 'administrative structure had obvious shortcomings, but it clearly enjoyed widespread support or co-operation from the population, including many former UDT supporters.'

68 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections)* [1996] ICJ Rep 595 at 643–4 (Separate Opinion of Judge Weeramantry) ('Application of the Genocide Convention (Preliminary Objections)'); *Vienna Convention on Succession of States in Respect of Treaties*, opened for signature 23 August 1978, 1946 UNTS 3, art 16 (entered into force 6 November 1996). In addition, *1977 Additional Protocol I*, opened for signature 8 June 1977, 1125 UNTS 3, art 1(4) (entered into force 7 December 1978), recognising certain self-determination movements as parties to international armed conflicts, also had no application to a conflict in 1975 which pre-dated that Protocol's entry into force.

Conventions.[70] Even if that were so, any war crimes liabilities at customary law would likely not be recognised as part of Australian domestic law absent an incorporating statute.[71]

3. The Commission of War Crimes in International Armed Conflict

A. The Status of Journalists in International Armed Conflict

In international armed conflicts, war correspondents and journalists have long been recognised as civilians (non-combatants) under international humanitarian law. The traditional position is stated in art 13 of the 1899 *International Convention with respect to the Laws and Customs of War on Land*, and its annexed regulations:

> Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands, and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.[72]

This approach is embodied in subsequent humanitarian law instruments and reflected in State practice.[73] The key contemporary provision, art 4(A)(4) of the *1949 Third Geneva Convention*, specifies that POWs under that Convention include duly authorised 'war correspondents' who accompany armed forces, without being members of such forces, upon falling into the power of the enemy. The treatment of captured war correspondents as POWs does not imply that they are combatants under international humanitarian law. Such persons accompanying armed forces remain civilians but are accorded POW status in recognition of their close association with the armed forces.

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69 See, for example *Summary Record of the 1178th Meeting (2nd Part) of the Human Rights Committee, held at the Palais de Nations, Geneva, on Monday 19 October 1992*, United Nations Human Rights Committtee, 46th sess, 1178th mtg, UN Doc CCPR/C/SR/1178/Add1 (1992); *Application of the Genocide Convention (Preliminary Objections)* [1996] ICJ Rep 595 at 645, 651, 654–5 (Separate Opinion of Judge Weeramantry).

70 Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War* (2000) at 196: 'In view of the large number of states parties … and the status which the Conventions have acquired in the international community, the Conventions (at least in large part) are widely regarded as customary international law'.

71 *Nulyarimma v Thompson* (1999) 96 FCR 153 at 161 (Wilcox J) and 173 (Whitlam J).

72 *International Convention with Respect to the Laws and Customs of War on Land*, opened for signature 29 July 1899, [1901] ATS 131, annex art 13 (entered into force 4 September 1900).

73 Including the *1907 Hague Regulations*, opened for signature 18 October 1907, [1910] ATS 8, annex art 13 (entered into force 26 January 1910), and the *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 27 July 1929, [1931] ATS 7, art 81 (entered into force 19 June 1931); as well as in older evidence of state practice such as the Institute of International Law, *The Laws of War on Land* (1880), art 22 ('*Oxford Manual of 1880*'), and the *Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (1863), art 50, from the American civil war.

A journalist need not be technically designated a 'war correspondent' in order to fall within art 4(A)(4). The ICRC *Commentary* on this provision observes that the list of persons is only indicative and the provision could cover other categories which follow armed forces in a conflict under similar conditions. This may, for instance, include other media personnel (including technical staff and translators) who are not themselves correspondents as such. The key condition is that only war correspondents (or journalists) who 'have received authorization, from the armed forces which they accompany' are entitled to POW status upon capture. The possession of an identity card is not an indispensable condition of the right to be treated as a POW, but rather is evidence that the person has received the required authorisation.[74] For practical purposes, however, it would be prudent for correspondents to ensure that they have been issued such an identity card.

Should doubt arise as to whether a person (including a war correspondent) is entitled to POW status, art 5(2) of the *1949 Third Geneva Convention* provides that 'such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.' Status review need not be conducted by a judicial tribunal, although minimum procedural guarantees can be expected.

While POW status carries with it considerable protections in detention, on the other hand it renders the POW liable to be detained until the end of the conflict. It might be questioned whether this approach is desirable in relation to journalists, who are non-combatants attached to the armed forces and therefore would not pose a military threat to the detaining power if released.

Where a journalist is *not* authorised to accompany the armed forces, there is no entitlement to be treated as a POW. It is not correct, as the legal adviser to the Australian Government, Eli Lauterpacht, suggested in confidential advice in May 1976, that upon attempting to surrender, the Balibo Five were entitled to be taken into custody as POWs by Indonesian forces.[75]

Rather, in such cases, the journalist is to be treated in the same way as any other non-combatant under humanitarian law, as discussed below. Authorised war correspondents are similarly non-combatants immune from direct military attack, notwithstanding their additional special status as POWs upon capture.

B. Immunity of Civilians from Military Attack

Where an international armed conflict exists, independent journalists are recognised as civilians entitled to the same protections as other non-combatants. In particular, it is a fundamental rule of humanitarian law that parties to a conflict must distinguish between civilians (including journalists) and combatants, and between civilian objects (including media equipment and installations) and military objectives. Attacks may only be directed against combatants and military objectives, while civilians and civilian objects must not be the object of attack.

74 Jean de Preux, *Commentary on the Geneva Conventions of 12 August 1949* (vol III, 1960) at 65.

75 Lauterpacht, above n6 at [4]–[5].

Like other civilians, however, journalists enjoy no absolute immunity from injury. Where journalists are situated amongst or near combatant armed forces which are legitimate military targets liable to attack, their incidental or collateral killing in the course of such attacks will not be unlawful, assuming the attacking forces otherwise comply with the principles of humanitarian law (including considering the civilian casualties anticipated from launching an attack in relation to the overall military advantage). Such risk was heightened during the Second World War and up to the early 1960s because it was common for war correspondents and combat photographers to wear army-issue fatigues,[76] thus making it difficult for an adversary to distinguish them from combatants.

In practice, journalists who formally or informally accompany military units, or who wear military style dress, or who are near to military objectives, necessarily put themselves at risk of becoming incidental civilian casualties, notwithstanding their civilian status.[77] Further, there are examples in practice of military forces genuinely mistaking camera lenses as weapons from a distance. Civilian immunity is not absolute in such circumstances and nothing in humanitarian law confers greater protection on journalists than other civilians.

In this context, the Balibo Five necessarily placed themselves in acute danger by not heeding warnings about the risks of remaining in Balibo and in not availing themselves of available opportunities to leave.[78] Prior to the attack on Balibo, the evidence also suggests that Fretilin forces were billeted in the same 'Chinese House' where the journalists staying.[79] However, at the time when they were killed, the Chinese House was not a legitimate military objective, since Fretilin forces were by then retreating from the town and were a considerable distance away from that area. Further, the journalists were dressed in civilian clothing, were unarmed, and clearly identified themselves to the advancing Indonesian forces as 'Australians'.

Civilians (including journalists) lose their protection against attack only if they take a direct part in hostilities, and then only for the duration of such participation.[80] Taking part in hostilities does not imply that civilians are combatants entitled to the privileges and immunities of combatants, including POW status. It does, however, make such civilians legitimate military objectives for the duration of their participation in hostilities. What it means to take a direct part in hostilities is not entirely settled. The ICRC *Commentary* to *1977 Additional*

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76 William Orme, 'Journalists, Protection of' in Roy Gutman and David Rieff, *Crimes of War: What the Public Should Know* (1999) at 219.

77 Yves Sandoz et al, *Commentary on the Additional Protocols I and II of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC and Martinus Nijhoff, Geneva, 1987), para 3269.

78 As the NSW Coroner noted, *Peters Inquest* (2007) at 58: 'On the basis of the evidence before me the journalists themselves bear the responsibility for being alone in Balibo at the time the Indonesian and Partisan military forces entered.' On the facts, see *Peters Inquest* (2007) at 48–57.

79 *Peters Inquest* (2007) at 22.

80 The customary rule applicable to international armed conflict in 1975 was subsequently codified in *1977 Additional Protocol I,* opened for signature 8 June 1977, 1125 UNTS 3, art 51(3) (entered into force 7 December 1978).

Protocol I (reflecting customary law earlier in 1975) indicates that hostile acts or direct participation in hostilities 'means acts of war that by their nature or purpose struck at the personnel and matériel of enemy armed forces'. Examples of direct participation given in some national military manuals include serving as guards, lookouts, intelligence agents or spies, while indirect contributions by civilians — which do not lead to loss of protection — include providing logistical support (such as carrying food or messages, transporting munitions, or selling goods) or expressing sympathy for a party.[81] What is required is an immediate threat of actual harm to an adversary. However, civilians involved in some of these activities may be lawful incidental casualties of attacks on military objectives, such as against munitions convoys or factories in which civilians are working.

Merely spreading propaganda does not amount to direct participation in hostilities.[82] A media installation is similarly not a military target merely because it spreads propaganda, and attacking the media to undermine civilian morale is similarly impermissible.[83] Further, it is doubtful that a journalist who transmits military messages by radio for the benefit of a party takes a direct part in hostilities and thereby renders him or herself liable to attack. The better position is to regard the transmission equipment as a military objective, rather than qualifying the journalists as such as directly participating in hostilities. Where journalists and their equipment have already been captured, the threat of transmission has been neutralised and no further military attack is necessary or lawful. Alternative means of neutralising a target, short of lethal military operations, such as jamming transmissions, may be available in some cases.

Some Fretilin soldiers appeared to believe that the journalists were using a radio, but it is now established that the journalists did not possess any radio equipment at Balibo,[84] and their recording equipment may have been confused for radio equipment. While Greg Shackleton had earlier taken a military message to the Fretilin commander in Maliana, asking for troops to be sent to Balibo,[85] such conduct occurred before 16 October. Even if transmitting military messages is characterised as taking a direct part in hostilities, given that civilian immunity is lost only for such time as a civilian so takes part, Shackleton's earlier conduct 'did not affect his status as a civilian' on the day of the attack.[86]

There is a difficult question whether civilians, including journalists, are entitled to use force in self-defence when under military attack. Self-defence is not

81 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, (vol 1, 2005) at 22.

82 Alexandre Balguy-Gallois, 'The Protection of Journalists and News Media Personnel in Armed Conflict' (2004) 86 *International Review of the Red Cross* 37 (French original).

83 International Criminal Tribunal for the former Yugoslavia, Office of the Prosecutor, *Final Report to the Prosecutor on the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (2000) at [47], [55], [74]–[76]; see also Reporters Without Borders, *Propaganda-Oriented Media and International Humanitarian Law: Legal Memorandum* (2003) (prepared by Alexandre Balguy-Gallois).

84 *Peters Inquest* (2007) at 124.

85 *Peters Inquest* (2007) at 115.

86 *Peters Inquest* (2007) at 124.

available to a person engaging in mutual combat.[87] Thus journalists who decide to participate in hostilities — for example, by taking up arms when their convoy comes under attack — cannot claim self-defence, and it is doubtful whether journalists at risk of being lawful incidental casualties of a military attack could resort to arms in self-defence.

However, it is arguable that self-defence is lawfully available to a journalist who is deliberately and unlawfully attacked by military forces in violation of international humanitarian law, where the journalist uses necessary and proportionate force in order to protect him or herself from such a war crime. Since humanitarian law does not criminalise mere civilian participation in hostilities (other than in the limited circumstance of perfidy), the question will chiefly arise in national criminal prosecutions, although it may also be relevant in international proceedings if the defensive response itself amounts to a war crime.

C. Journalists as Protected Persons

Depending on the circumstances, journalists may be 'protected persons' under art 4 of the *1949 Fourth Geneva Convention* if they 'at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals'. Being 'in the hands of a Party' does not require being within its physical custody, but is used in an 'extremely general sense', including merely being in the territory of a party to the conflict or in occupied territory.[88]

However, certain civilians are not regarded as protected persons, including nationals of non-party States; nationals of neutral States in the territory of a belligerent State, and nationals of co-belligerent States (in both cases where their States of nationality have normal diplomatic representation in the State in whose hands they are), and accredited war correspondents.[89] Nationals of a neutral State present *in occupied territory* are protected persons regardless of whether their State of nationality has normal diplomatic representation with either the occupying power or the State whose territory has been occupied.[90]

Protected persons enjoy a range of humanitarian protections beyond the immediate protection from military attack enjoyed by all civilians as outlined above. The most serious violations of the Convention are regarded as 'grave breaches' of it (art 146) and constitute war crimes if committed against persons or property protected by the Convention.[91] All State Parties to the *1949 Fourth Geneva Convention* are required to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the Convention.[92] Each State Party is also required to search for such suspects and to bring them, regardless of their nationality, before its own

87 *United States v O'Neal* 36 CMR 189 (1966) at 191 (United States Court of Military Appeal).

88 Oscar Uhler and Henri Coursier, *Commentary on the Geneva Conventions of 12 August 1949* (vol IV, 1958) at 47.

89 *1949 Fourth Geneva Convention*, opened for signature 12 August 1949, 79 UNTS 287, art 4 (entered into force 21 October 1951).

90 Uhler and Coursier, above n88 at 48.

courts.[93] Alternatively, a State Party may hand such persons over for trial to another State Party which has made out a *prima facie* case against them.[94] These provisions of the Convention establish a system of treaty-based universal criminal jurisdiction over terrorism.

D. The Journalists at Balibo were Protected Persons

The journalists killed at Balibo in 1975 likely qualified as protected persons under the *1949 Fourth Geneva Convention*, as nationals of neutral States (Britain, Australia and New Zealand) in occupied territory; that is, in an area controlled by Indonesia following its invasion, and irrespective of the existence of diplomatic relations between Indonesia and their States of nationality. There may be a question whether Indonesia 'occupied' Balibo at the time of the deaths. As a matter of law, 'territory is considered occupied when it is actually placed under the authority of the hostile army'.[95] If, for instance, the journalists were killed in crossfire during hostilities between Indonesian and Fretilin forces, prior to Indonesia capturing Balibo, then no occupation had yet been established and the journalists could not be in the hands of any Occupying Power.

If, however, the journalists were killed after Indonesia had taken control of Balibo, as was accepted by the NSW Coroner on the evidence before the inquest, then they were most likely in the hands of the Occupying Power and thus were protected persons. A military occupation can be established in the immediate aftermath of a hostile contest for control of territory, notwithstanding that full civilian or administrative structures of occupation have not yet been established to substitute for indigenous ones. The *1949 Geneva Conventions* are to be interpreted in favour of giving effect to their humanitarian purpose so far as is possible.

Had the Balibo Five been killed on the Indonesian side of the Timorese border, even where the killings were connected to the conflict inside Timor, as nationals of neutral States in the territory of a belligerent State (rather than in territory occupied by it), the journalists would not qualify as protected persons and their killings would not constitute grave breaches attracting criminal responsibility and

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91 *1949 Fourth Geneva Convention*, opened for signature 12 August 1949, 79 UNTS 287, arts 146, 147 (entered into force 21 October 1951), and including at art 147: 'wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.'

92 *1949 Fourth Geneva Convention*, opened for signature 12 August 1949, 79 UNTS 287, art 146 (entered into force 21 October 1951).

93 *1949 Fourth Geneva Convention*, opened for signature 12 August 1949, 79 UNTS 287, art 146 (entered into force 21 October 1951).

94 *1949 Fourth Geneva Convention*, opened for signature 12 August 1949, 79 UNTS 287, art 146 (entered into force 21 October 1951).

95 *1907 Hague Regulations*, opened for signature 18 October 1907, [1910] ATS 8, art 42 (entered into force 26 January 1910) (also reflecting customary law).

universal jurisdiction. The killings would remain governed by ordinary Indonesian criminal law.

Such exclusion is predicated on the assumption that the killing of a national of a neutral State can be dealt with by the neutral State making a diplomatic protection claim on behalf of the injured national to the State in breach of protection obligations owed to foreign nationals in peacetime. Accordingly, it is further assumed that the special regime of international protection provided by universal jurisdiction over grave breaches is not warranted. Those assumptions are problematic, given that the State responsible for its own military killing a foreigner in its territory may well not be inclined to remedy the violation, and the international community is left without any lawful jurisdictional basis on which to pursue a criminal prosecution in other national courts and is thus faced with impunity.

In contrast, had the Balibo Five been war correspondents accredited to Portuguese forces, while such persons are not protected under the *1949 Fourth Geneva Convention*, their killings in equivalent circumstances (that is, when attempting to surrender) would still amount to a war crime under the grave breaches provisions of the *1949 Third Geneva Convention* concerning POWs.[96] Prior to capture, however, such a war correspondent is not relevantly 'in the hands of' the opposing State Party and the correspondent's killing during hostilities — even where the correspondent is deliberately and unlawfully targeted — would not additionally amount to a grave breach attracting criminal liability.

In this context, it must be noted that even if war correspondents or other journalists do not qualify as protected persons, whether for reasons of nationality, the place of the killing, or time of the conduct (during hostilities rather than after capture), then their deliberate killing would still likely amount to a war crime under general international law. Under customary international law, combatants are required at all times to distinguish between civilians and combatants during the course of hostilities, even where territory is not yet occupied and civilians are not yet within the hands of the party. This principle is accepted as so fundamental to humanitarian law that it is implicit in the *1949 Geneva Conventions*, though not specifically identified as a grave breach. One difficulty is that most national legislation in force in 1975 only enacted treaty-based grave breaches as war crimes in domestic law, and there is thus a gap between the existence of the international crime and its implementation in national legal systems.

E. The Deaths at Balibo Amounted to War Crimes

The evidence arising from the NSW Coronial Inquest suggests that the deaths of the five journalists at Balibo constitute 'wilful killing' by Indonesian armed forces, in turn amounting to grave breaches of the *1949 Fourth Geneva Convention* and attracting individual criminal responsibility under international humanitarian law. The *actus reus* of a wilful killing is, by an act or omission (and regardless of the

96 *1949 Third Geneva Convention*, opened for signature 12 August 1949, 75 UNTS 135, arts 129–130 (entered into force 21 October 1950).

means used), the taking of a life, or otherwise causing the death, of a protected person,[97] which act or omission is not otherwise justified by humanitarian law. It includes the intentional killing of non-combatants for whatever reason (including by failing properly to distinguish non-combatants from combatants, or launching indiscriminate attacks), the deliberate summary execution of a detainee without a fair trial, or the reprisal killing of civilians. The *mens rea* is an intention to kill or to injure in reckless disregard of life,[98] and it may be 'inferred from the circumstances to determine whether the accused foresees death as a consequence of his acts or omissions'.[99] A contemporary understanding of the crime also requires that the perpetrator was aware of the factual circumstances that established the protected status of the victim and the existence of the armed conflict.[100]

Based on the evidence at the Inquest, the NSW Coroner concluded that the journalists 'were not incidental casualties in the fighting: they were captured then deliberately killed despite protesting their status',[101] on the orders of the Indonesian field commander, Captain Yunus Yosfiah.[102] They were dressed in civilian clothing and unarmed; they were not Communist fighters; nor were they with Fretilin soldiers, who were by then either retreating or positioned at a fort some distance away; they were not killed in crossfire, by a mortar, or otherwise in the heat of battle; and they clearly identified themselves as Australians and as journalists, and raised their hands 'in the universally recognised gesture of surrender'. That the journalists may have been dressed by the Indonesians in Portuguese army uniforms and photographed holding weapons after they were killed[103] does not affect their status. From the available evidence it is therefore probable that the Balibo Five were victims of wilful killings, in that their deaths were intended by the perpetrators, who were aware of their protected civilian status at the time.

Not every killing in a territory afflicted by armed conflict will amount to a war crime, since ordinary criminal conduct can naturally persist alongside military hostilities. To qualify as a war crime the relevant conduct must be 'closely related to the armed conflict as a whole' or 'committed in the course of or as part of the hostilities in, or occupation of, an area'.[104] This nexus requirement does not,

97 *Prosecutor v Delalic, Mucic, Delic & Landzo (Trial Chamber)* Case No IT-96-21-T (16 November 1998) [424], [431] ('Celebici Case (Trial Chamber)').

98 *Celebici Case (Trial Chamber)* Case No IT-96-21-T (16 November 1998) [437]–[439]; see also *Prosecutor v Blaškic*, IT-95-14-T (3 March 2000) [153]; *Prosecutor v Delacic, Mucic, Delic & Landzo (Appeal Chamber)* Case No IT-96-21-A (20 February 2001) [422] ('Celebici Case (Appeals Chamber)').

99 Kriangsak Kittichaisaree, *International Criminal Law* (2001) at 143.

100 See, for example *Elements of Crimes*, Official Journal of the International Criminal Court, ICC Doc No ICC-ASP/1/3 (part II-B) (2002), art 8(2)(a)(i) ('War crime of wilful killing') (adopted by the Assembly of State Parties to the Rome Statute of the International Criminal Court on 9 September 2002, entered into force on that date).

101 *Peters Inquest* (2007) at 124.

102 *Peters Inquest* (2007) at 47.

103 *Peters Inquest* (2007) at 111.

however, demand that hostilities were 'occurring at the exact time and place of the proscribed acts'; nor does it limit war crimes to acts committed 'during combat'.[105] The nexus between the Balibo killings and the armed conflict underway in Portuguese Timor is clearly established on the facts accepted by the NSW Coroner, since those killings occurred in the direct context of a military operation to secure strategic objectives and for the purpose of suppressing reporting of the Indonesian military invasion. Whether the killings were endorsed by higher Indonesian military or political authorities is not relevant, since the nexus requirement does not require that the conduct 'be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict', given the purpose of criminal liability in upholding the obligations of individuals in armed conflict.[106] For this reason, and contrary to the suggestion of the Coroner and Counsel Assisting,[107] it is unnecessary to demonstrate that the killings were intended to advance the interests of a party to the conflict.

4. Australian Jurisdiction to Prosecute War Crimes

Under Commonwealth law in force in 1975, grave breaches of the *1949 Geneva Conventions* were crimes under Federal law over which the Australian courts had jurisdiction. The *Geneva Conventions Act* 1957 (Cth), as then in force, provided in s 7(1) that:

> A person who, in Australia or elsewhere, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the Conventions is guilty of an indictable offence.

Under the Act, grave breaches of the *1949 Fourth Geneva Convention* are identified as those listed in article 147 of the Convention.[108] As outlined above, such grave breaches include the war crime of wilful killing. The Act criminalises the various modes of criminal participation, so that not only those who killed the Balibo Five but also those who aided, abetted or procured the killings can also be held criminally responsible, although there is a question whether these common law concepts are as extensive in scope as, for instance, command/superior responsibility and joint criminal enterprise in international criminal law. Under the Act, as originally enacted, wilful killing carried a punishment of death or imprisonment for life or for any less term.[109] Liability to the death penalty was

104 *Tadić (Trial Chamber)* Case No IT–94–1–T (7 May 1997) [573]; see also *Tadić (Appeal Chamber)* Case No IT-94-1-AR72 (2 October 1995) [70]; *Prosecutor v Kunarac, Kovac & Vukovic (Trial Chamber)* Case No IT–96–23–T & IT–96–23/1–T (22 February 2001) [402]; *Prosecutor v Naletilić & Martinović (Trial Chamber)* Case No IT-98-34-T (31 March 2003) [225].

105 *Tadić (Trial Chamber)* Case No IT–94–1–T (7 May 1997) [573].

106 *Tadić (Trial Chamber)* Case No IT–94–1–T (7 May 1997) [573].

107 *Peters Inquest* (2007) at 123; Tedeschi, above n15 at 31: 'This mental element is the essential ingredient that distinguishes a war crime from a domestic crime that is incidentally committed by a member of an armed force against a civilian during a time of conflict.'

108 *Geneva Conventions Act* 1957-1973 (Cth) s 7(2)(d) (reprinted as at 19 December 1973).

109 *Geneva Conventions Act* 1957-1973 (Cth) s 7(4).

removed in 1973 and which substituted for life imprisonment.[110]

The Act reflects the scheme of treaty-based, quasi-universal jurisdiction embodied in the *1949 Geneva Conventions*.[111] The Act has 'extra-territorial operation according to its tenor.'[112] The universality of that tenor is indicated by the substantive offence itself (committed 'in Australia or elsewhere') and the further specification in the Act that it applies to persons regardless of their nationality or citizenship.[113] There is thus no requirement that the alleged perpetrator or victim be an Australian citizen (pursuant, for instance, to the more limited jurisdictional principles of nationality or passive personality), nor is there any requirement that Australia be a party to the international armed conflict in question (which might attract the protective principle).

Nothing in the Act predicates the exercise of criminal jurisdiction on some link between the alleged crime and Australia, nor on Australian custody of the offender. To proceed with a prosecution, it would therefore be possible to seek the extradition of an offender from another jurisdiction, assuming that extradition arrangements with the other jurisdiction exist and allow it. At international law, the *1949 Geneva Conventions* establish a 'prosecute or extradite' obligation on State Parties in relation to persons suspected of grave breaches.[114] As a practical matter, the obligation will be foremost engaged by a State with custody of an alleged war criminal, but the Conventions also envisage that another State Party may request extradition after making out a 'prima facie case'.[115] Nothing in the Conventions limits extradition requests to State Parties on whose territory the war crime was committed, such that it is possible for a third State Party to request extradition, particularly if the State of custody or commission is unable or unwilling to prosecute.[116] While at customary international law the exercise of universal jurisdiction *in absentia* may be doubtful,[117] as State Parties to the *1949 Geneva Conventions*, Australia and Indonesia have consented to waive any such objection.

110 *Death Penalty Abolition Act* 1973 (Cth) ss 4–5.

111 See, for example *1949 Fourth Geneva Convention*, opened for signature 12 August 1949, 79 UNTS 287, art 146 (entered into force 21 October 1951): 'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.'

112 *Geneva Conventions Act* 1957–1973 (Cth) s 6(2).

113 *Geneva Conventions Act* 1957–1973 (Cth) s 7(3).

114 See, for example *1949 Fourth Geneva Convention*, opened for signature 12 August 1949, 79 UNTS 287, art 146 (entered into force 21 October 1951): 'Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.'

115 There remains a controversy whether it is a right of, or a duty on, a third State so to act: Gerhard Werle, *Principles of International Criminal Law* (2005) at 63–4.

116 *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.

117 Doubts were incidentally expressed in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 at 76 (Joint Separate Opinion of Judges Higgins, Kooimans & Buergenthal) and at 40–2 (Separate Opinion of Judge Guillaume).

Part II of the *Geneva Conventions Act* 1957 (Cth) was repealed by the *International Criminal Court (Consequential Amendments) Act* 2002 (Cth) sch 3, following Australia's ratification of the 1998 *Rome Statute of the International Criminal Court* (ICC). The new legislation established prospective liability under Australian law in respect of international crimes within the jurisdiction of the ICC (including war crimes in international and non-international armed conflict, crimes against humanity, and genocide). However, pursuant to ordinary Federal principles of statutory interpretation,[118] the repeal of part of an Act does not affect its previous operation, including any liability incurred or any investigation, legal proceeding or remedy arising under that Act, unless the contrary intention appears in the repealing statute. The 2002 Amending Act does not express any intention to preclude war crimes prosecutions arising under the 1957 Act and prior to its partial repeal in 2002.[119]

A. Procedural Matters

Procedurally, the 1957 Act vests federal jurisdiction to prosecute grave breaches committed outside Australia in the State and Territory Supreme Courts.[120] Offences under the Act must not be prosecuted except by indictment in the name of the Attorney-General.[121] Although not specified in the Act, this section must refer to the Commonwealth Attorney-General.[122] If a question arises concerning the application of the *1949 Geneva Conventions* under art 2 of the Conventions, the Minister for Foreign Affairs may issue a certificate 'certifying to any matter relevant to that question is evidence of the matter so certified'.[123] Ordinarily, the Commonwealth Director of Public Prosecutions (DPP) would prosecute Commonwealth indictable offences,[124] exercising its discretion in accordance with its prosecution policy.

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118 *Acts Interpretation Act* 1901 (Cth) s 8.

119 The Explanatory Memorandum, International Criminal Court (Consequential Amendments) Bill 2002 (Cth) at 20 confirms the Parliament's intention that war crimes committed under Part II of the *Geneva Conventions Act 1957* (Cth) prior to its repeal in 2002 can still be prosecuted under that Act as it was then in force.

120 *Geneva Conventions Act* 1957-1973 (Cth) s 10(2) provides: 'The trial on indictment of an offence against this Act, not being an offence committed within Australia, may be held in any State and the trial on indictment of such an offence committed in a Territory may be held in any State or in that Territory.' Those courts must be Supreme Courts: s 10(5). The jurisdiction of State Supreme Courts is subject to the conditions and restrictions in s 39(2)(a) and (c) of the *Judiciary Act* 1903-1955 (Cth) and that Act applies generally to the war crimes offences: *Geneva Conventions Act* 1957-1973 (Cth) s 10(3)–(4).

121 *Geneva Conventions Act* 1957-1973 (Cth) s 7(6).

122 Despite prosecutions proceeding in State and Territory courts, they are in the exercise of Federal criminal jurisdiction and the use of the singular ('the' Attorney-General), in a sub-section following a reference to the Governor-General (*Geneva Conventions Act* 1957–1973 (Cth) s 7(5)) further indicate that the Commonwealth Attorney-General must issue any indictment.

123 *Geneva Conventions Act* 1957–1973 (Cth) s 8.

124 *Director of Public Prosecutions Act* 1983 (Cth) ss 6, 9.

There is also a right under Australian law to prosecute crimes privately,[125] a right which is 'a valuable constitutional safeguard against inertia or partiality on the part of authority'.[126] This includes in circumstances where the DPP has not yet considered whether to prosecute a matter, or even where it has decided not to prosecute the matter. Private prosecutions are subject to the statutory power of the Commonwealth DPP to take over such a proceeding, including by discontinuing it once it is taken over.[127] As matter of Commonwealth prosecution policy, the DPP will allow the private prosecution to proceed unless (a) there is insufficient evidence to continue, (b) it is improperly motivated or an abuse of process, (c) it would be contrary to the public interest, or (d) it would not be in the interests of justice for it to remain a private prosecution.[128]

Relevantly, subjective public interest considerations may include 'the maintenance of international relations', a consideration which could weigh against the DPP allowing any private prosecution to proceed against suspects in the Balibo deaths. On the other hand, upholding international humanitarian law through the pursuit of war crimes prosecutions, as required under the *1949 Geneva Conventions*, could equally be invoked as a factor in favour of the maintenance of international relations, since there is a strong international imperative to eliminate impunity for war crimes.

5. The Extradition Process

Ultimately, custody of a suspect is necessary to proceed with any criminal trial. Where suspects in the Balibo deaths are identified as present in Indonesia, it would be possible for Australia to seek to extradite the suspects to Australia to face trial on the war crimes charges identified above. Any decision to request the extradition of Indonesian suspects would need to follow the usual Australian procedures for extradition requests, pursuant to the *Extradition Act* 1988 (Cth). In brief, the process could be initiated by the Commonwealth DPP and an arrest warrant sought. The Attorney-General (or, in practice, the Minister for Justice and Customs) makes the (judicially reviewable) decision whether to make an outgoing extradition request, through diplomatic channels, to the Indonesian authorities.[129]

Under art 11 of the 1992 *Extradition Treaty between Australian and the Republic of Indonesia*,[130] an extradition request must be accompanied by the arrest warrant; a statement of offences and acts alleged; the text of the relevant law creating the offence as well as limitation periods; the applicable punishment; and an accurate description of the suspect's identity and any information which may

125 *Crimes Act* 1914 (Cth) s 13.

126 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477 (Lord Wilberforce).

127 *Director of Public Prosecutions Act* 1983 (Cth) s 9(5).

128 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2nd ed, 1990) at [4.10].

129 *Extradition Act* 1988 (Cth) s 40.

130 *Extradition Treaty between Australia and the Republic of Indonesia*, opened for signature 22 April 1992, [1995] ATS 7, art 11 (entered into force on 21 January 1995) ('*Extradition Treaty*').

help to establish the suspect's identity and nationality. In urgent cases, the Commonwealth Attorney-General's Department, on receiving an arrest warrant from the Commonwealth DPP, may seek a provisional arrest through Interpol or directly from Indonesia.

A. Dual Criminality: Indonesian Criminal Law

The 1992 Extradition Treaty between Australia and the Republic of Indonesia requires that persons shall be extradited for any act or omission constituting any of the offences enumerated in the Treaty and which are punishable by the laws of both countries by imprisonment of not less that 1 year.[131] Of the offences listed in the Treaty, for present purposes the relevant offences include 'wilful murder' and 'murder'.[132] In determining whether an offence is an offence against the law of both Contracting States, 'it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology'.[133] This provision, establishing a flexible equivalence between substantively similar offences, is important, since despite its obligations to criminalise war crimes under the *1949 Geneva Conventions*, Indonesia had not done so by 1975,[134] and offences against Indonesian military law alone do not enable extradition under the 1992 Treaty.[135] While Indonesia resolved in December 2005 to introduce war crimes into its Civil and Military Penal Codes,[136] it still has not done so.

As a result of the equivalence provision in the 1992 Treaty, Indonesian law need not have specifically recognised the *war crime* of wilful killing as such in 1975, as long as the basic offence of murder, in the circumstances of its commission at Balibo, was a crime under Indonesian law at the time. Indonesian

131 *Extradition Treaty*, opened for signature 22 April 1992, [1995] ATS 7, art 2(1) (entered into force 21 January 1995).

132 *Extradition Treaty*, opened for signature 22 April 1992, [1995] ATS 7, art 2(1)(1) (entered into force 21 January 1995); see also 'manslaughter' at art 2(1)(2).

133 *Extradition Treaty*, opened for signature 22 April 1992, [1995] ATS 7, art 2(3)(a) (entered into force 21 January 1995).

134 In 1971, Indonesia reported to the International Committee of the Red Cross that it had not taken any legislative action to repress grave breaches of the *1949 Geneva Conventions*: International Committee of the Red Cross, 'Respect of the Geneva Conventions: Measures Taken to Repress Violations' (Reports presented at the 20th International Conference of the Red Cross, Vienna, 1965 and 21st International Conference of the Red Cross, Istanbul, 1969) (reprinted 1971). While Indonesia has legislation implementing the *1949 Geneva Conventions*, it does not criminalise grave breaches: *Law 59/1958 Concerning the Ratification by the Republic of Indonesia of all the Geneva Conventions of 12 August 1949* (30 September 1958).

135 *Extradition Treaty*, opened for signature 22 April 1992, [1995] ATS 7, art 9(1)(b) (entered into force 21 January 1995). Since 1934 there was also a *Military Criminal Law Book for Indonesia* in force, inherited from the Dutch colonial power: Captain Djaelani, 'The Military Law System in Indonesia' (1973) 59 *Military Law Review* 177 at 177. The Book creates criminal offences for military personnel, but as a pre-1949 publication (although reissued in 1949), it did not refer to grave breaches of the *1949 Geneva Conventions* as such. On Indonesian military law and jurisdiction, see Linton, above n18 at 6–7.

136 Umesh Kadam, 'ICRC Report of International Humanitarian Law Activities in Asia-Pacific during 2005' (2005) 1 *Asia-Pacific Yearbook of International Humanitarian Law* 144 at 153.

criminal law derived from the 1918 *Netherlands Indies Criminal Code*, as amended upon Indonesian independence in 1946 and applied uniformly from 1958 throughout Indonesia.[137] Crimes punishable under the *Indonesian Penal Code*, as in force in 1975, primarily had a territorial application in Indonesia,[138] such that the ordinary crimes of murder[139] or manslaughter[140] had no extraterritorial application. Extraterritorial jurisdiction under the Code was limited, applying to specified crimes committed: (a) by any person outside Indonesia against State security, the dignity of the Presidency, the currency, or air safety; and forgery and piracy (thus reflecting a mixture of protective and universal jurisdiction under international law);[141] (b) by Indonesian nationals outside Indonesia against State security, the Presidency, public order or public authority, marriage, or vessels (reflecting mixed protective and nationality jurisdiction);[142] or (c) by Indonesian officials outside Indonesia (reflecting a limited nationality jurisdiction).[143] While members of the armed forces are explicitly defined as 'officials',[144] extraterritorial jurisdiction is only extended over specified offences,[145] none of which relevantly include killing. As a result, these limited bases of extraterritorial jurisdiction would not cover the killing of foreign nationals outside Indonesia by its military.

However, one further provision provides a basis for establishing that the Balibo deaths were crimes under Indonesian criminal law. Indonesian criminal law also applied to an act committed by an Indonesian national outside Indonesia where such act is 'deemed by the Indonesian statutory penal provisions to be a crime and on which punishment is imposed by the law of the country where it has been committed'.[146] The effect of that provision is to extend extraterritorial jurisdiction over acts done by Indonesian nationals abroad which would normally only be offences if committed in Indonesia, where the legal system of the place of the commission of the act recognises such act as a crime. Murder was undoubtedly such a crime under the penal law in force in Portuguese Timor in 1975.[147]

The commission of an (otherwise criminal) act in the execution of an official order issued by the competent authorities is 'not punishable' under the *Indonesian Penal Code* (art 51(1)) and thus obedience to superior orders is, to an extent, a lawful justification for a crime. However, an official order issued incompetently

137 An English translation of the *Indonesian Penal Code*, as enacted in 1952 and in force to 1976, was published by the Indonesian Ministry of Justice in 1982: Directorate-General of Law and Legislation Ministry of Justice (ed), *Penal Code of Indonesia* (1982) United Nations Human Rights Commission <http://www.unhcr.org/refworld/docid/3ffbcee24.html> accessed 12 February 2009 ('*Indonesian Penal Code*').

138 *Indonesian Penal Code* art 2.

139 *Indonesian Penal Code* art 340.

140 *Indonesian Penal Code* arts 338–9.

141 *Indonesian Penal Code* art 4.

142 *Indonesian Penal Code* art 5(1).

143 *Indonesian Penal Code* art 7.

144 *Indonesian Penal Code* art 92(3).

145 *Indonesian Penal Code* arts 413–37.

146 *Indonesian Penal Code* art 5(1).

147 Weatherbee, above n60 at 686: 'By Portuguese law Timor is an integral part of the Portuguese Republic with the administrative status of an Overseas Province'.

does not exempt from punishment, unless it was considered in good faith by the subordinate to be issued competently and its execution lied within the limit of his or her subordination.[148] Here, it is arguable that no order to commit a war crime may be competently issued, and further than no subordinate could have believed in good faith that its execution was within the limits of his or her authority as a member of national armed forces.

Where double criminality is satisfied, extradition may be granted under the 1992 Treaty irrespective of *when* the offence was committed, provided that it was an offence against the laws of both countries if it occurred prior to the entry into force of the Treaty.[149] Thus, if the deaths at Balibo were crimes under both Australian and Indonesian law in 1975, extradition may be granted.

B. Grounds for Refusal of an Extradition Request

Where the offence is committed outside the territory of the 'Requesting State' (here, Australia) by a non-national of that State, extradition may be granted at the discretion of the 'Requested State' (Indonesia).[150] That is a decision for the Indonesian authorities which cannot be pre-empted on any legal basis. While Indonesia has a right under the Treaty to refuse to extradite its nationals, where it so refuses it must, at the request of Australia, submit the case to its own competent authorities for prosecution.[151] If Indonesia does not have jurisdiction, then it must extradite the person.[152]

A person must not be extradited under the 1992 Treaty if the offence is a 'political offence' or, in the circumstances, an 'offence of a political character', and the decision of the authorities in the Requested State (Indonesia) is determinative.[153] In the 1992 Treaty, the only offence expressly excluded from the political offence exception is the taking or attempted taking of the life of a Head of State, Head of Government or a family member.[154] Otherwise the scope of the political offence exception is left to national law and there is no internationally accepted test for the defining 'political offences'.[155]

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148 *Indonesian Penal Code* art 51(2).

149 *Extradition Treaty*, opened for signature 22 April 1992, [1995] ATS 7, art 2(4) (entered into force 21 January 1995).

150 *Extradition Treaty*, opened for signature 22 April 1992, [1995] ATS 7, art 1(2) (entered into force 21 January 1995).

151 *Extradition Treaty*, opened for signature 22 April 1992, [1995] ATS 7, art 5(1), (2) (entered into force 21 January 1995).

152 *Extradition Treaty*, opened for signature 22 April 1992, [1995] ATS 7, art 5(3) (entered into force 21 January 1995).

153 *Extradition Treaty*, opened for signature 22 April 1992, [1995] ATS 7, art 4(1), (2) (entered into force 21 January 1995).

154 *Extradition Treaty*, opened for signature 22 April 1992, [1995] ATS 7, art 4(3) (entered into force 21 January 1995).

155 Christine van den Wijngaert, *The Political Offence Exception to Extradition: the Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (1980) at 191; Ivan Shearer, *Starke's International Law* (11th ed, 1994) at 320; Ivor Stanbrook and Clive Stanbrook, *Extradition: Law and Practice* (2nd ed, 2000) at 68.

Despite establishing universal jurisdiction — and unlike the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*[156] — the *1949 Geneva Conventions* do not remove the exception for war crimes; rather, extradition remains explicitly subject to national law.[157] In some countries it is now common *not* to characterise war crimes as political offences, either explicitly under extradition treaty provisions, or through national judicial approaches excluding violence against civilians that is indiscriminate or atrocious,[158] or too remote from, or disproportionate to, a political end.[159] Indonesian extradition law provides for the political offence exception,[160] but in a civil law system without binding precedent, or published decisions of the relevant district courts, the scope of the exception in Indonesian law is unclear, and it may provide a basis for rejecting an Australian extradition request.

The Treaty requires Contracting States to refuse extradition in a number of other situations relevant to the present case, including where the person is exempt from prosecution in the Requested State due to lapse of time, or where an act is only an offence against military law in the Requested State.[161] The latter ground is not applicable, since the killing of civilians was not merely an offence against military law or military discipline in Indonesia, but also amounted to a crime under the general criminal law. At the relevant time, the Indonesian military was subject to concurrent liabilities under military and civilian criminal law.[162]

Lapse of time may, however, provide a ground for the mandatory refusal of extradition. Under the *Indonesian Penal Code*, the right to prosecute lapses 15 years after the commission of crimes for which the penalty is capital punishment or life imprisonment.[163] Indonesia is not party to the 1968 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*,[164] and that treaty has only 50 State Parties and is not regarded as

156 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277, art 7 (entered into force 12 January 1951).

157 Uhler and Coursier, above n88 at 593.

158 *Ellis v O'Dea*, Record No 441 SS/1990 (30 Jul 1990), transcript, 36; *Della Savia*, Swiss Federal Tribunal (26 Nov 1969) 95 ATF I, 469; *Morlacci*, Swiss Federal Tribunal (12 Dec 1975), 101 ATF Ia, 605; *Re Extradition of Mahmoud Abed Atta* 706 F Supp 1032 (1989), aff'd 910 F 2d 1063 (1990).

159 *McGlinchey v Wren* [1982] IR 154; *Shannon v Fanning* [1984] IR 548; *Folkerts v Public Prosecutor* (1978) 74 ILR 498; *Kavic, Bjelanovic & Arsenijevic* 78 ATF, I, 39 (30 April 1952) (Switzerland); *Eain v Wilkes* 641 F 2d 504 (1981), aff'd 454 US 894 (1981); *Artukovic v Rison* 628 F Supp 1370 (1986), aff'd 784 F 2d 1354 (1986); *In re Nappi* (1952) 19 Int L Rep 375; *Ktir v Ministère Public Fédéral* (1961) 34 Int L Rep 123; *Re Kelly and MacFarlane* [1987] Nederlanse Jurisprudentie 931; *Gil v Canada* [1995] 1 FC 508.

160 *Law 1/1979 on Extradition* art 5.

161 *Extradition Treaty*, opened for signature 22 April 1992, [1995] ATS 7, art 9(a)–(b) (entered into force 21 January 1995).

162 See Djaelani, above n135 referring to the *Military Criminal Law Book for Indonesia* (1934) and the *Military Disciplinary Law Book for Indonesia* (1934), as supplemented by the *Military Disciplinary Regulation* (1949). While military criminal law operated as *lex specialis* to the civilian criminal law (at 178), that does not mean that liability 'only' arose under military law as required for the refusal of extradition under art 9(1)(b) of the 1992 Extradition Treaty.

163 *Indonesian Penal Code* art 78(1).

reflecting customary international law on the matter. The *1949 Geneva Conventions* impose no limitation period for war crimes prosecutions, and although it is arguably contrary to the object and purpose of the *1949 Geneva Conventions* to create impunity for war crimes following the lapse of time, the question is implicitly left to national implementing legislation. Indonesia has still not enacted any domestic war crimes legislation, let alone legislation removing limitation periods for war crimes, and so it would seem that the statutory limitation period would bar extradition.

The Treaty also provides discretionary bases for refusing extradition, including, relevantly, that extradition would be unjust, oppressive or incompatible with humanitarian considerations (considering, for instance, the age, health or personal circumstances of the person), or where the Requested State has decided in the public interest to refrain from prosecuting the person.[165] These are matters which will depend upon the individuals who are the subjects of an extradition request and the attitude of the Indonesian authorities, and provide wide discretionary grounds for refusal. Yunus Yosfiah, for instance, is nearing the age of 70, and although there are no reported health concerns, his increasing age, coupled with the lapse of time since 1975 and the staleness of evidence and witnesses, may provide bases for discretionary refusal of extradition (but not, however, prosecution in Indonesia itself).

C. State Immunity from Criminal Proceedings for Former Military Personnel

The prosecution of Indonesian military personnel in an Australian court potentially engages questions of foreign state immunity. If Indonesia extradited suspects to Australia, the matter can be shortly dealt with by treating extradition as a waiver by Indonesia of any immunity attaching to the activities of its military forces. On the other hand, the question of immunity still arises if, for instance, suspects are otherwise found within Australia and Indonesia does not consent to waive any immunity which may exist.

The *Foreign States Immunities Act* 1985 (Cth) provides for foreign state immunity from the jurisdiction of Australian courts in a 'proceeding',[166] but proceedings are defined not to include criminal prosecutions.[167] As the Australian Law Reform Commission explained in proposing the legislation:

> All the recent overseas legislation applies only to civil proceedings; criminal matters are specifically excluded. It is recommended that the same position be taken in the Australian legislation. *Problems arising with the application of penal or regulatory legislation to foreign states cannot be resolved through the*

164 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, opened for signature 26 November 1969, 754 UNTS 73 (entered into force 11 November 1970).

165 *Extradition Treaty*, opened for signature 22 April 1992, [1995] ATS 7, art 9(b), (d) (entered into force 21 January 1995).

166 *Foreign States Immunities Act* 1985 (Cth) s 9.

167 *Foreign States Immunities Act* 1985 (Cth) s 3.

> *application of any general formula, but depend on the particular legislation in question*. They are also matters which do not directly affect civil rights, and which have to be resolved primarily between the relevant governments or agencies and the foreign state in question. [emphasis added.][168]

Heads of State are explicitly entitled to the same immunities as diplomats under the combined provisions of the *Foreign States Immunities Act* 1985 (Cth)[169] and the *Diplomatic Immunities and Privileges Act* 1967 (Cth), which include absolute personal immunity from criminal jurisdiction while in office, and functional immunity for official acts after leaving office. However, the same express status-based treatment is not expressly accorded to other (lesser) State officials, such as military personnel, under the Australian legislation.

Rather, any criminal immunity enjoyed by former State officials for official acts performed on behalf of the State will arise at common law,[170] to the extent not modified by statute. Australian common law authorities on State immunity from criminal proceedings are sparse. Two key questions arise: the meaning of a 'foreign State' in a criminal proceeding, and the scope of any criminal immunity. On the first question, the legislative definition of a 'foreign State'[171] is likely to provide the relevant starting point for the modern common law approach in criminal proceedings. Armed forces are clearly part of the State, since they are 'closely bound up with the structure of the State' and are 'necessary concomitants of sovereignty'.[172] Further, individual members of armed forces enjoy the same immunity as the State itself: 'the foreign state is entitled to claim immunity for its servants as if it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents'.[173] The relevant issue is whether the individual acted 'for the purposes of the foreign state itself' rather than in a personal capacity.[174]

On the second question, while a theory of restrictive immunity governs civil proceedings under the Australian legislation, until recently absolute criminal immunity prevailed at international law[175] and in turn was arguably reflected in the common law. However, as the Australian Law Reform Commission noted above, the application of penal legislation to a foreign State 'depend[s] on the particular legislation in question'. The *Geneva Conventions Act* 1957 (Cth) is

168 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 100–1.

169 *Foreign States Immunities Act* 1985 (Cth) s 36.

170 Hazel Fox, *The Law of State Immunity* (2002) at 503.

171 *Foreign States Immunities Act* 1985 (Cth) s 3(3).

172 *Transaero Inc v La Fuerza Aerea Boliviana* 30 F 3d 148 (1984) at 153, citing *United States v Curtiss-Wright Export Corp* 299 US 304 (1936) at 318.

173 *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 at 281 (Lord Bingham); see also at 300–1 (Lord Hoffman).

174 Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at 16, citing: *Grunfeld v United States of America* [1968] 3 NSWR 36 at 38 (Street J); *Rahimtoola v Nizam of Hyderabad* [1958] AC 379; *Intpro Properties (UK) Ltd v Sauvel* [1983] 2 WLR 1; see also *Frazier v Hanover Bank* 119 NYS 2d 319 (1953) at 322.

175 Fox, above n169 at 20.

silent on State immunities, neither *expressly* recognising nor lifting them in respect of State armed forces or other officials.

By analogy, in *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 3)* the House of Lords recognised that a former Head of State was not entitled to claim State immunity for acts of torture committed while in office.[176] While the reasoning of the judges in *Pinochet (No 3)* was divided, the *ratio* appears to be that 'international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the Torture Convention conditions were satisfied and, at the same time, require immunity to be granted to those properly charged'.[177] Either States waived their immunity by signing the Torture Convention, or torture can never be characterised as 'official' acts attracting residual functional immunity.

Similarly, it is strongly arguable that the scheme of universal criminal jurisdiction over war crimes under the *1949 Geneva Conventions* is, by definition, directed principally towards the conduct of State armed forces, since States are the relevant parties to international armed conflicts under those Conventions and the principal belligerents. In that sense, State Parties to the *Geneva Conventions* must be understood as waiving State immunities from national criminal jurisdiction which would otherwise apply to State armed forces. In State practice, it would appear to be well accepted that foreign military personnel may be subject to the national war crimes jurisdiction of the forum State (putting aside specific issues arising from particular status-of-visiting-forces agreements). Alternatively, war crimes could be characterised as private rather than official acts and thus not within the scope of functional immunity, although that approach creates difficulties by providing a basis for the State to disavow the (delictual) responsibility of the State.

While international law is not automatically part of Australian law, it is a 'legitimate and important influence on the development of the common law'[178] and an ambiguous statute that has been enacted pursuant to, or in contemplation of, the assumption of international obligations should be interpreted consistently with Australia's obligations.[179] Accordingly, international law's restrictive approach to the functional immunities of foreign States in criminal proceedings is relevant in both developing the scarce Australian common law in the area, and in construing the *Geneva Conventions Act* 1957 (Cth) (given its silence on immunities). The 1957 Act, which implements the treaty scheme of universal jurisdiction over war crimes, must be understood to lift any former common law criminal immunities of State military personnel. Otherwise the regime of universal jurisdiction would be inoperative or ineffective, since the criminal liabilities established under the Conventions and domestic legislation would be procedurally

176 *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 ('*Pinochet (No 3)*').

177 *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 at 286 (Lord Bingham).

178 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 (Brennan J).

179 *S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 (per Gleeson CJ); see also *Polites v Commonwealth* (1945) 70 CLR 60 at 68–9 (Latham CJ).

barred by immunities in almost all cases (with the narrow exception of non-State personnel who commit war crimes in connection with an international conflict).

D. Foreign Act of State and Non-Justiciability

Assuming the hurdle of State immunity is surmountable, a final question arises whether killings by Indonesian military personnel in an international armed conflict qualifies as a foreign act of State which is not justiciable in an Australian court. The classic formulation of the doctrine 'precludes the courts of this country [the United States] from inquiring into the validity of the public acts of a recognised sovereign power within its territory';[180] and so refraining from judging foreign governments aims to 'respect the independence of every other sovereign State'.[181]

However, the doctrine is likely to be unavailable in relation to the Balibo killings. First, the killings were committed *outside* Indonesian territory and therefore do not fall within the traditional scope of the doctrine, which aims to respect *territorial* sovereignty. Second, acts in breach of fundamental norms of international law are arguably exceptions to the doctrine, particularly when involving infringements of basic human rights.[182]

It is also doubtful whether any wider doctrine of non-justiciability (encompassing but going beyond foreign act of State)[183] would bar an Australian prosecution. That notion of judicial abstention is engaged in circumstances where 'there are … no judicial or manageable standards by which to judge these issues'.[184] In contrast, in respect of the Balibo killings, the Australian war crimes legislation provides concrete legal standards against which to judge the liability of Indonesian personnel; there is, indeed, no 'judicial no-man's land' here.[185]

Another other basis of non-justiciability — that it would cause 'embarrassment' in Australia's relations with Indonesia,[186] is more troublesome, since it is clear that attempts to bring Indonesian military personnel to justice will cause friction with Indonesia. However, notions of 'embarrassment' are increasingly antiquated, particularly when the cause of embarrassment is said to be the prosecution of war crimes; and the finding of non-justiciability is on the basis of an unhealthy judicial deference towards the executive's desire to maintain good

180 *Banco Nacional de Cuba v. Sabbatino* 376 US 398 (1964) at 401; see also *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40: 'in general, courts will not adjudicate upon the validity of acts and transactions of a foreign State within that sovereign's own territory.'

181 *Underhill v Hernandez* 168 US 250 (1897) at 252 (Fuller CJ).

182 See, for example *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 at 278 (Lord Cross); *Kuwait Airways Corporation v Iraqi Airways Company* [2002] 2 AC 883 at 1080–1 (Lord Nicholls), 1101 (Lord Steyn) and 1108 (Lord Hope); *Hicks v Ruddock* (2007) 156 FCR 574 at [14]–[34] (Justice Tamberlin).

183 See, for example *Buttes Gas & Oil Co v Hammer* [1982] AC 888; *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 128 FCR 507.

184 *Buttes Gas & Oil Co v Hammer* [1982] AC 888 at 938 (Lord Wilberforce).

185 Ibid.

186 Ibid.

diplomatic relations — a desire which dominated Australian policy towards East Timor between 1975 and 1999, and which became a source of consternation in the Australian community. It is equally arguable that shielding war criminals from justice through the artifice of non-justiciability, in breach of Australia's and Indonesia's obligations under the *1949 Geneva Conventions*, risks far greater embarrassment to Australia's international relations than prosecuting them. As an American court recently observed, 'a decision … might well have implications for military and foreign policy, but that alone hardly makes the issue non-justiciable'.[187]

6. Conclusion

War reporting is an inherently perilous profession, but calculated risks are up-ended when military forces disregard the fundamental rules of war by deliberately targeting journalists. In 2007 alone, 172 journalists and media staff were killed around the world,[188] many in armed conflicts or other situations of heightened violence. From 2003 to May 2008, 245 journalists died in the conflict in Iraq alone.[189] Australian journalists too have been casualties in conflicts from Vietnam and Rhodesia to East Timor, Thailand, Iraq and Afghanistan, while the safety of journalists in nearby countries such as Indonesia and East Timor,[190] and the Philippines, remains of concern. Media casualties in conflict can be attributed to various causes, from the deliberate execution of journalists to poor training, reckless risk-taking and sheer bad luck.

In recent years, the increasing targeting of journalists as a tactic by some military forces provoked the United Nations Security Council to condemn such attacks as threats to international peace and security, and the Council has called on belligerents to accord civilian protection to journalists under humanitarian law.[191] Precisely because journalists serve such a critical function during armed conflict — exposing abuses on the battlefield where few others have access — 'they have become increasingly vulnerable as it became important to some authorities to

187 *Omar v Harvey* 479 F 3d 1 at 11.

188 *Journalists and Media Staff Casualties 2007* (2007) International News Safety Institute, <http://www.newssafety.com/casualties/2007.htm> accessed 11 June 2008.

189 *Journalists and Media Staff Casualties: Iraq* (2008) International News Safety Institute <http://www.newssafety.com/casualties/iraq.htm> accessed 11 June 2008.

190 *Media Safety: Indonesia* (2007) International News Safety Institute <http://www.newssafety.com/hotspots/countries/indonesiax.htm#Media%20Safety> accessed 8 March 2007; *Media Safety: Timor Leste* (2007) International News Safety Institute <http://www.newssafety.com/hotspots/countries/timorlestex.htm#Media%20Safety> accessed 6 April 2007.

191 *Resolution 1738 (2006)*, UN SCOR, 61st sess, 5613th mtg, [1]–[9], UN Doc S/Res/1738 (2006). For an overview of international attempts to protect journalists, see Michael Kirby and Lawrence Jackson, 'International Humanitarian Law and the Protection of Media Personnel' (1986) 9 *University of NSW Law Journal* (1)1; Dylan Howard, 'Remaking the Pen Mightier than the Sword: An Evaluation of the Growing Need for the International Protection of Journalists' (2002) 30 *Georgia Journal of International and Comparative Law* 505; Amit Mukherjee, 'Protection of Journalists Under International Humanitarian Law' (1995) 17 *Communications and the Law* (2)27.

"silence" negative information'.[192] Nowhere is this statement more accurate than at Balibo, where five journalists sought to expose an act of illegal armed aggression by Indonesia against its small, decolonising neighbour — and paid for the truth with their lives. Prosecuting war crimes at Balibo, even three decades later, is a small opportunity to erode impunity, strengthen the protection of journalists, and deter future such killings.

192 Ingrid Detter, *The Law of War* (2nd ed, 2000) at 323.