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EDITORIAL

WELCOME FROM PROFESSOR FELICITY GERRY QC

Welcome to the latest issue of ANZSIL Perspective brought to you by your new editorial team. Look for our team 'yearbook' style line up at the end of this journal. This is the first issue since the decision to take Perspective 'live'. It is now a free access and publicly available resource online and no longer just for ANZSIL members.

We hope that this interaction with the wider international law community will enable ANZSIL *Perspective* to grow. As an editorial team, we are working towards a new vision for *Perspective*. In addition to a regular monthly round-up of commentary on international law issues, we aim to publish contributions on topical issues on a rapid turnaround. If your submission is topical or time-sensitive, please indicate this clearly. All contributions will be treated with appropriate editorial care, as pieces are now publicly available on the website rather than just within the ANZSIL community.

As we all know, governments across the globe have responded to the COVID-19 pandemic with expansive emergency powers. It is even more important in these unprecedented times to consider the international law implications of the various responses to date and of the issues that will confront the international community as it emerges.

I am delighted to present the free access articles in this issue as follows:

- **Alan Hemmings:** ***Antarctic Governance in a Time of Coronavirus***
- **Ash Murphy:** ***COVID-19 and the UN Security Council: should we expect an intervention?***
- **Jonathan Rees and Felicity Gerry:** ***Joint Criminal Enterprise in the Kosovo Specialist Chambers***
- **Penelope Ridings:** ***Managing the Impact of COVID-19 in Western and Central Pacific Fisheries: Balancing Protection of Peoples with Resource Conservation through International Law***
- **Susan Harris Rimmer, Emma Palmer and Jacob Montford:** ***Interrogating the Definition of Women Human Rights Defender.***

The process going forward is as per the current guidelines but please look out for changes in the near future. **The deadline for the next ANZSIL *Perspective* is 11 June 2020.** The current call for *Perspectives* and submission details are on the ANZSIL *Perspective* webpage.

The views expressed in contributions to ANZSIL *Perspective* are those of the authors. Those views are not necessarily shared by ANZSIL or the Editors of *Perspective.*

PERSPECTIVES

Antarctic Governance in a Time of Coronavirus[1]

By Alan D. Hemmings

Antarctic governance under the Antarctic Treaty System[2] is achieved through two annual decision-making meetings. The Antarctic Treaty Consultative Meeting for the Antarctic Treaty and Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol); the Commission for the Conservation of Antarctic Marine Living Resources for the Convention for the Conservation of Antarctic Marine Living Resources. Consultative Meetings are rotated through Consultative states; Commission Meetings are held in Hobart. Decision-making in both is by consensus of those present.

The difficulty that presents itself in 2020 is that the global pandemic of Covid-19 has closed down (or seems likely to) the diplomatic meetings at the heart of Antarctic governance. The May Consultative Meeting in Helsinki was cancelled; the prospects for the late October Commission Meeting in Hobart are poor (three of its intersessional advisory group meetings, scheduled for June and July, are already cancelled). For both Consultative and Commission meetings, intersessional work through electronic means is confined to matters of a technical nature. Substantive decision-making only occurs at the Consultative and Commission meetings in person, and the mandate for intersessional work is generated there. The next Consultative Meeting is scheduled for France in 2021. Whether this meeting (likely the second half of the year) proves possible remains an open question. Like much else, it may depend on when a vaccination becomes available.

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[1] Editor: NL

[2] '"Antarctic Treaty system" means the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments'. Madrid Protocol, Art 1(e).

Covid-19 appeared during the second half of the 2019-20 Antarctic operating season, during which tourism vessels (most alarmingly the *Greg Mortimer*) returned from the Antarctic Peninsula with cases onboard; national programme stations went into winter lockdown; and states began to think about how they would manage Antarctic activity in the 2020-21 Antarctic season. Tourism is plainly dead for the immediate future, so issues of visitation of 'Gateway' ports such as Hobart and Lyttleton and stations in the Antarctic are eased. But what about transit by vessels and aircraft of Antarctic programmes? Is Christchurch able to safely receive the thousands of people associated with a normal New Zealand, American and Italian operating season; likewise Hobart with Australian and French personnel?

Given risks of human-seal viral transmission, reports that Covid-19 has been detected in big cats raise flags. Presumably, all states will wish to minimise risks in Antarctica from resupply, through fieldwork, to waste disposal. Many of these matters are addressed in the Madrid Protocol's technical annexes and within the purview of its Committee for Environmental Protection (CEP). However, the CEP hasn't met, because the Consultative Meeting was cancelled. Accordingly, no collective discussion, let alone advice to the Consultative Parties to formally agree something, was possible. The Consultative Meeting itself might have been expected to adopt instrument(s) in relation to the crisis – procedural Decision, hortatory Resolution, or legally mandatory Measure. This might have been around ship visits to Antarctic stations, precautions to avoid infection of wildlife, or constraints on any tourism or yacht activity that may still occur. It seems a significant systems failure that no collective response has been possible.

If the Commission is unable to meet in Hobart (the challenges posed to delegates, Australian authorities and the citizens of Hobart hardly require elaboration), then will it be possible to make the annual area-specific catch allocations through what are termed as Conservation Measures? There would plainly be economic consequences. Without a meeting, presumably the Commission cannot take other management decisions in relation to dozens of fishing vessels in the Convention area. Onboard observation and challenge inspections will themselves present problems. Postponing the Commission into 2021 is problematical; can it be done early enough to not leave a gap? As with the

Consultative Meeting, there are no precedents for remote decision-making by the Commission.

So, are there any options to address the cancellation of the Consultative Meeting and the possibility of cancellation of the Commission Meeting? An obvious response might be the convening of virtual meetings, of a cut-down nature but enabling decision-making. For the Commission, this might allow no more than roll-over of the previous years catch allocations. Virtual meetings have not been done before and even the *decision* to do it need to be made electronically.

If physical meeting is inescapable – to at least take decisions to *subsequently* move to electronic decision-making – there is one obvious option. All Antarctic states maintain high level representation at the UN in New York. In the past, subsets of Antarctic states have discussed particular Antarctic issues on the margins there. Nothing prevents Antarctic states from using their representatives in New York as surrogate Antarctic representatives. Nobody need travel, and technical support can be provided from home states and the two Antarctic secretariats electronically. Consultative Meetings under Article IX of the Antarctic Treaty,[3] and Commission Meetings under Article XIII of the Convention,[4] are not restricted to particular times or places.

About the author: Alan D. Hemmings is a polar specialist with a particular focus on Antarctic geopolitics and governance. He is an Adjunct Associate Professor at the Gateway Antarctica Centre for Antarctic Studies and Research at the University of Canterbury in Christchurch.

[3] Para 1: "at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty, including measures regarding ….

[4] Para 3: "The Depositary shall convene the first meeting of the Commission at the headquarters of the Commission. Thereafter, meetings of the Commission shall be held at its headquarters, unless it decides otherwise.

COVID-19 and the UN Security Council: Should We Expect an Intervention?[5]

By Ash Murphy

When the 2014 West African Ebola crisis reached its pinnacle the UN Security Council (UNSC) took the unprecedented step of declaring the outbreak an Article 39 threat to international peace and security – thus activating its most powerful tool under the UN Charter. Just six years on, COVID-19 has gripped the planet with unrivalled intensity, generating over 3 million cases and causing 205,000 deaths (at the time of writing). However, the UNSC remains in a guise of hibernation and has not yet adopted a meaningful position on what Secretary-General Guterres has called 'the most challenging crisis we have faced since the Second World War'. This inaction may appear inconsistent given the 2014 intervention, but is it surprising? In this post, I will explore whether or not we should be expecting the UNSC to engage COVID-19 through Article 39.

The UNSC's primary purpose is to maintain international peace and security, which historically meant addressing military conflicts in one form or another. Since the close of the Cold War, it is possible to trace qualitative changes to the nature of the threats engaged by the UNSC. In the early millennium, Resolution 1308 was adopted on the subject of HIV/AIDS, but its design carefully avoided activating Article 39. There was sufficient agreement between the Council members to include words like 'pandemic' and 'crisis', with the additional recognition that the UNSC would bear in mind its responsibility for the maintenance of international peace and security. The Council's remit remained relatively unchanged in this regard, and no further engagement with health threats took place until 2014.

In September of that year, the worst Ebola outbreak ever recorded made its way to the UNSC, with Director-General Chan of the WHO and a number of health experts distilling with chilling clarity how severe the situation was and would become without global intervention. Resolution 2177 echoed the gravity of these submissions and declared the

[5] Editor: CF

Ebola outbreak a threat to international peace and security. The text contained a number of directives which, although diplomatically constructed to avoid encroaching on state sovereignty, were plainly intended to impart an expectation of coordinated global action.

The adoption of Resolution 2177 was a significant turning point in the fight against the outbreak, with the international community heeding the call through resource sharing, capacity building, and financial aid. Arguments might follow that a comparable intervention could be useful in regard to COVID-19, but is such a prospect realistic?

The UNSC has always been defined by the five permanent members (USA, China, Russia, France, UK). They each hold a veto power over resolutions and have dictated the course of interventions according to their own politics. That is not to suggest they always act with hegemonic tendency, but the danger is never far removed and so we must gauge their interpretation of the current pandemic.

Professor Brunnée has recently argued there is a stark difference between the UNSC in 2014 and its 2020 iteration, stemming from the leadership, or lack thereof, coming from the USA. In 2014 President Obama presided over the White House and was prepared to argue, rally, persuade and cajole the permanent members to unite behind a common position. The outward-looking President Obama contrasts starkly with the current administration that has sought to re-align its posture across the international spectrum to become less involved.

States who appreciate the necessity of UNSC intervention may bring proposals forward, but the USA can, and has shown itself prepared to, insist on content that others could not agree to. France attempted to craft a resolution in early April, but this was quickly undermined by the USA insisting on references to the Wuhan virus. Subsequently threatened vetoes have caused a paralysis of the UNSC, revealing its defunct constitutional character that might ring the death knell for a COVID-19 intervention.

However, I would not so quickly write off the UNSC. In 2014 it took nine months for the permanent members to recognise the severity of the situation. Even President Obama's USA had to be convinced there was a need for UNSC involvement, and only when certain

thresholds were crossed was this understood. Frontline responders had to illuminate these thresholds prior to the adoption of Resolution 2177, marking the pivotal difference between that meeting and the one preceding Resolution 2176, which was unable to motivate the permanent members to expressly address Ebola under Article 39.

In the context of COVID-19 the thresholds that must be crossed to make the current administrations understand the need for coordinated global action are undoubtedly higher. Nevertheless, as the USA continues to become the worst affected country and global fatalities soar, a point may come when governments set aside their political differences. In such conditions, a decision not to veto is the only requirement. As the permanent members become further incapacitated, the recalcitrance of a veto becomes less plausible - to administrations and maybe voters too - increasing the chance of a resolution.

Waiting for a threat to reach saturation point before the permanent members will be convinced of the need to cooperate is not how the UNSC was envisaged to act. It should respond to threats before they are fully realised. Unfortunately, it rarely does. It took 9/11 for terrorism to find its way to Article 39. The 2014 Ebola outbreak claimed 2,500 victims before action was taken, and many thousands of lives have been lost in traditional conflict scenarios prior to intervention. The UNSC is a political body able to unite once a threat overshadows individual state positions. That point, despite the already colossal impact, has yet to manifest in regard to COVID-19.

Nevertheless, this pandemic is a threat to international peace and security, meaning we should expect the activation of Article 39 and the fulfilment of the UNSC's primary purpose to guard against such harm. In the absence of a global leader, it is our responsibility to argue, rally, persuade and cajole the permanent members to set aside their differences, sooner rather than later.

About the author: Ash Murphy is a lecturer in Environmental Law at the University of Chester, UK.

Joint Criminal Enterprise in the Kosovo Specialist Chambers[6]

By Jonathan Rees QC and Felicity Gerry QC[7]

Now that indictments have been filed with the Kosovo Specialist Chambers (KSC) for review by the Pre-Trial Judge, one of the issues on the KSC's horizon will be whether it adopts, as a basis for individual criminal responsibility, the extended form of joint criminal enterprise known as 'JCE III'.

By way of background, although the KSC is a 'hybrid' court, Article 3.2.d of the Law on Specialist Chambers and Specialist Prosecutor's Office (the KSC Statute) gives customary international law superiority over domestic law. Specifically, the basis for individual criminal responsibility in relation to Crimes Against Humanity under International Law (Article 13) and War Crimes under International Law (Article 14) is to be found *not* in the domestic substantive criminal laws in force under Kosovo during 1998-2000, but instead in Article 16.1 of the KSC Statute and its proper interpretation including as a matter of customary international law.

The terms of Article 16.1 of the KSC Statute are effectively identical to those in Article 7.1 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute). The interpretation of Article 7.1 of the ICTY Statute in *Prosecutor v Tadic*, IT-94-1-A, 15 July 1999 introduced 'the third category' of joint criminal enterprise cases (or "JCE III"), in which the *mens rea* requirement was said to be fulfilled where a person, although they did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk (see para. 220).

Will the KSC follow the ICTY in interpreting Article 16.1 of its statute to embrace the same wide constructed liability? There are good reasons why it should not.

[6] Editors: BC and HC

[7] Both Felicity and Jonathan are on the list of counsel at KSC.

The terms of Article 16.1 do not explicitly provide for JCE III. The ICTY Appeals Chamber read JCE III liability into Article 7.1 of the ICTY Statute on the basis that it was "'firmly established in customary international law'", yet JCE III has proved controversial.

It has been rejected by the Special Tribunal for Lebanon (see STL-11-01/I, 16 February 2011), the Extraordinary Chambers of the Court of Cambodia (ECCC) and the Rome Statute of the International Criminal Court (see Articles 25(3)(d) and Article 30 thereof). Particularly cogent criticisms were made by the ECCC in the case of *Nuon Chea and Khieu Samphan*, 002/19-09-2007-ECCC/SC, 23 November 2016.

These rejections are not consistent with the constant and uniform practice required to form a rule of customary international law. The ICTY's interpretation of its statute to embrace JCE III is therefore a shaky basis upon which to claim a pattern can be discerned or generality of practice identified as the International Law Commission has indicated is required for a rule of customary international law. It should be 'beyond any doubt' that such a rule is part of customary law so that the problem of adherence of some but not all does not arise (Secretary-General's Report for the ICTY Statute, 3 May 1993, para.34).

For JCE III, there is divergence at both international and domestic levels. As the ICTY Appeals Chamber itself has recognised, and was acknowledged subsequently by the UN International Residual Mechanism for Criminal Tribunals (the UNIRMCT) which continues the jurisdiction of the ICTY, there is no common approach amongst major domestic jurisdictions to 'the third form of joint criminal enterprise' (*Tadic*, ante at paragraph 225 and *Prosecutor v Karadzic*, MICT-13-55-A, 20 March 2019 at paragraph 436). Even within such domestic jurisdictions, notions of constructed liability along the lines of JCE III have proved controversial and divisive (see, for example, *R v Jogee* [2016] UKSC 8 at paragraph 81).

It is true, of course, that many of the arguments against JCE III have been made post-*Tadic* to both the ICTY Appeals Chamber itself and the UNIRMCT, and have been rejected by those chambers (see, for example, *Prosecutor v Dordevic*, IT-05-87/1-A, 27 January 2014 and *Karadzic*, ante). In rejecting these arguments, however, the ICTY was concerned with whether to reverse its own jurisprudence, stressing the need for legal certainty within its

own jurisdiction and a corresponding burden upon appellants to demonstrate 'exceptional circumstances' to justify a departure from its own earlier decisions. A similar approach has been adopted by the UNIRMCT.

Like the ICTY, whose Appeals Chamber repeatedly stressed that it was not bound by the decisions of other tribunals such as the ECCC, the KSC is not bound by the decisions of the ICTY Appeals Chamber. Unlike the ICTY, the KSC is not burdened by its own jurisprudence. It will have to find its own interpretation of the scope of Article 16.1 of the KSC Statute and the principles of individual criminal responsibility within customary international law.

A fine starting point would be to look again for that which is universal, constant and uniform and within that to balance the tension in principle between individual and constructed liability. Intention is a universally recognized *mens rea* attracting individual criminal responsibility, at both international and domestic levels. Constructed liability through foresight that another may commit a crime is less universally recognized, and, unlike intention, it should not be elevated to a status within customary international law that it does not deserve.

In *Jogee* it was suggested that foresight of what others might do can be evidence of a participant's true intention, but foresight alone does not act as a legal yardstick of individual criminal responsibility within a joint criminal enterprise.

Prosecutors ought to be capable of indicting with precision, based on evidence, those who are complicit without constructing liability or seeking extensions of law which are uncoupled from causation or any significant contribution.

Soon, the KSC may have the opportunity to make that plain and reject JCE III for good.

About the author: Jonathan Rees QC is admitted in England and Wales and practices in serious and complex crime, specialising in cases concerning criminal agreements (e.g. R v Evans & others [2014] 1 WLR 2817 reviewing the scope and boundaries of the common law offence of conspiracy to defraud). Jonathan practises from 5 Paper Buildings in London and Apex Chambers in Cardiff, and is a member of the List of Counsel for the Kosovo Specialist Chambers. **Felicity's** bio is below.

Managing the Impact of COVID-19 in Western and Central Pacific Fisheries: Balancing Protection of Peoples with Resource Conservation through International Law[8]

By Dr Penelope Ridings

COVID-19 and its impact on global supply chains has been a focus of recent discussions on the pandemic. International organisations such as the Food and Agriculture Organisation have sought to provide guidance on measures which can be taken to protect supply chains and the incomes of fishing communities, while maintaining appropriate fisheries control measures. The practical impact of COVID-19 on the Pacific tuna fishery has been highlighted, particularly in light of the economic reliance of small island developing States on tuna fisheries. There are significant concerns over the impact of the virus on Pacific island countries which to date have largely been COVID-19 free.

These issues have played out in the Western and Central Pacific Fisheries Commission (WCPFC), which is the regional fisheries management organisation responsible for conserving and managing the tuna stocks of the western and central Pacific region. WCPFC has adopted a number of conservation and management measures which have been affected by COVID-19. These include the requirement for 100% observer coverage on purse seine vessels operating in the Convention Area, the prohibition on purse seine vessels transhipping at sea, and the requirement for monitoring of all longline high seas transhipments by an on-board observer on either the fishing or carrier vessel. Various Pacific island countries have taken action in response to COVID-19 including the closure of borders, suspension of observer placements, suspension of port entry, and the designation of areas outside ports where transhipments can take place. Restrictions imposed as a result of COVID-19 have made it increasingly difficult for countries to comply with WCPFC requirements.

Concern over the effects of the pandemic on the health and safety of observers, most of whom are from Pacific islands, led the Forum Fisheries Agency (FFA) together with the

[8] Editors: AT and CF

Parties to the Nauru Agreement (PNA), to temporarily suspend in their waters the requirement for 100% observer coverage on purse seine vessels until 31 May 2020. This took immediate effect from the date of the FFA letter on 27 March 2020, which also requested that the WCPFC take compatible measures to suspend the operation of relevant WCPFC requirements.

Responding to this request posed challenges from a procedural perspective. The WCPF Convention provides for consensus decision-making, and if consensus cannot be reached, for a process of voting. To date WCPFC has taken all decisions by consensus. The WCPFC Rules of Procedure also provide for intersessional decision-making, including where the Chair, in consultation with the Vice-Chair considers that intersessional decisions are necessary. The intersessional decision-making procedures provide for circulation of proposals, a 40-day period to respond to the proposal, followed by entry into force 60 days after adoption. There was one occasion in 2011 when WCPFC took substantive intersessional decisions to extend conservation and management measures following the postponement of the 8th Commission meeting. There has not, however, been a situation where WCPFC has had to respond quickly to an emergency situation, such as that resulting from COVID-19.

Clearly in an emergency situation the WCPFC decision-making procedures were not going to be efficient or effective. The Chair of the Commission, Ms Jung-re Riley Kim, therefore proposed an expedited procedure according to which proposals were circulated for decision with responses requested from Members within 7 days. No Member objected to this expedited procedure which has to date been used three times in response to COVID-19. It was first used for a decision to suspend temporarily the requirement for observer coverage on purse seine vessels throughout the Convention Area until 31 May 2020. This was developed on the Chair's initiative in response to the FFA request for compatible measures. The proposal was adopted on 8 April 2020 with immediate effect and conveyed together with certain points of clarification which had been brought to the Chair's attention by Members.

Contemporaneously a Member of the Commission submitted a proposal under the same expedited procedure to address other issues arising from the impact of COVID-19

restrictions on transhipments in port and at sea. This raised issues for a number of Members over the adequacy of alternative monitoring mechanisms where observers were not present to observe transhipment events, a concern that has also been voiced by non-government organisations concerned with the sustainability of fisheries. The different views among WCPFC Members needed to be reconciled and the process highlighted the difficulty of developing and agreeing proposals intersessionally.

Following discussions among Members, the Chair advised on 20 April 2020 that the Commission had endorsed the part of the proposal which provided that where it was not feasible for a purse seine vessel to tranship in port, due to port closures and relevant access restrictions related to COVID-19, the vessel could be permitted to tranship at sea in waters under the jurisdiction of a port State in accordance with that State's requirements. The final part of the proposal concerning the suspension of the requirement for vessels transhipping at sea to have an observer on the carrier or the offloading vessel was adopted on 13 May 2020. All three WCPFC decisions are effective until 31 May 2020. Given the ongoing nature of the COVID-19 pandemic and resulting border and port restrictions, it is expected that the decisions will be extended for a further limited period.

Members of WPCFC have demonstrated willingness to be pragmatic and flexible in addressing an unprecedented situation. WCPFC took decisions using a novel procedure which responded to the need for urgent decision-making so that States were not put in the position of breaching their international obligations. It addressed the requirement for decisions to become binding 60 days after adoption by endorsing decisions which suspended the operation of obligations, clarifying the basis on which such suspensions would operate, and by not introducing new conservation and management measures. In this manner WCPFC sought to maintain the integrity of its rules, while taking into account the exigencies of the COVID-19 pandemic. It is an example of how international organisations can adapt to pandemic situations through recourse to international law.

About the author: Dr Penelope Ridings is a New Zealand Barrister and International Lawyer practising in the field of public international law, including law of the sea, fisheries, environmental law, international trade and investment law, and international dispute

settlement. She has extensive practical experience in developing, implementing and adjudicating international law, including appearing before the International Court of Justice in *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)*. She is currently the Legal Advisor to the Western and Central Pacific Fisheries Commission. During her career in the New Zealand diplomatic service, Dr Ridings led the Legal Division of the Ministry of Foreign Affairs and Trade (2011-2015) and the Ministry's Trade Law Unit (2004-2007). In 2015 she was granted the Member of the New Zealand Order of Merit (MNZM) for Services to the State. Dr Ridings is New Zealand's candidate for the International Law Commission for the 2022-2026 term.

Interrogating the Definition of Women Human Rights Defenders[9]

By Susan Harris Rimmer, Emma Palmer and Jacob Montford,
Griffith University Law School

International lawyers love a good crisis, argues Hilary Charlesworth, though this tendency can often impoverish the discipline of international law. So whilst all eyes are drawn to the pandemic, we alert you to the closing of civil society space in many parts of the globe, including for women human rights defenders. On 16 March 2020, a group of UN human rights experts said that ‘emergency declarations based on the COVID-19 outbreak should not be used as a basis to target particular groups, minorities, or individuals. It should not function as a cover for repressive action under the guise of protecting health... and should not be used simply to quash dissent.’ We should stay focused on the logics and mechanisms which seek to prevent human rights violations, especially in a time of crisis. We argue that a more meaningful and gendered definition of who deserves protection as a human rights defender is required to protect those local actors on whom the international human rights system depends.

Who defines the defenders?

Twenty-five years ago, governments stated in the Beijing Platform for Action that ‘women engaged in the defence of human rights must be protected’. Three years later, in 1998 UN General Assembly Resolution A/RES/53/144 adopted the *Declaration on Human Rights Defenders*. Its provisions drew from international human rights law treaties, including the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, to declare that:

> ‘Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels’ (Article 1).

[9] Editor: HC

The Special Rapporteur on human rights defenders has considered women human rights defenders to include both female human rights defenders, and other human rights defenders who work in the defence of women's rights or on gender issues (A/HRC/16/44, 2010). This work can often be less visible. The COVID-19 pandemic has seen sweeping restrictions on freedom of movement and association that can mask targeting of all HRDs, for example, in Hong Kong and China, but especially women. Some prisoners are released in Iran and Bahrain, but not others, including peaceful women human rights defenders. For example, Human Rights Watch reports that Nasrin Sotoudeh, Narges Mohammidi and Atena Daemi remain imprisoned in Iran. Those who seek to defend reproductive rights and personal safety of women have had hard-won progress reversed by government responses to the pandemic, denying access to contraception or repealing safe abortion laws. Current UNFPA data reveals that the pandemic has had terrible consequences for reproductive rights and intimate partner and family violence globally.

Who protects the defenders?

Along with limited visibility of women human rights defenders, the international system struggles to provide meaningful protection. The UN human rights mechanisms have long tried to respond to the targeting, harassment and disappearance of human rights defenders in many countries, but the number of incidents is rising. According to data from Front Line Defenders, in 2014 there were over 130 murders of human rights defenders. In 2016, the number rose to nearly double, totaling 281 killings in 25 countries. 49 percent of these HRDs were defending land, indigenous and environmental rights. About one third were women. In 2019, NGOs recorded 304 deaths.

Protection of human rights defenders is a wicked problem. Perpetrators of violations and abuses against defenders include the police, military, members of the judiciary, local authorities, state authorities, security services, paramilitary and other armed groups, the media, and corporations. These are also largely the actors that UN mechanisms call upon to protect human rights defenders. For example, the UN Secretary-General releases an annual 'Reprisals Report' directed to UN members, a public compilation of reported cases of intimidation and reprisals against those cooperating with the UN. Common

abuses include arbitrary arrest or detention, threats, harassment, judicial investigation, extrajudicial execution and murder. Human Rights Defenders have also paid the price for their activism in more subtle but nonetheless damaging ways—they have been dismissed from their jobs, evicted from their homes, defamed, ostracized, and stigmatized. Around the world, many human rights defenders struggle to continue their work in debilitating and deteriorating conditions caused by the pandemic. Women human rights defenders have also been subject to gender-specific acts of intimidation and violence including rape and other forms of sexual violence, much more often facing threats to their children.

Time for critical reflection

But defining who is a human rights defender, and particularly a woman human rights defender, is also a difficult task. Every aspect of the term 'Women Human Rights Defender' is deeply contested: who is a 'woman', what kind of rights, how the right is allowed to be 'defended'. This is not just a semantic exercise. The question of who is considered a women human rights defender has consequences for whether and how an individual is included in statistics and reports about human rights defenders, the harms they experience (and successes), who might benefit from 'protection' or even be eligible for academic fellowships and civil society programs, and potentially, who might be targeted for repressive counter-actions.

International law offers a framework for protecting women human rights defenders including UN resolutions, reports, guidelines and associated civil society and government protective processes, including academic fellowships. We argue that this system is insufficient to address the scale of the problem, and often relies on posthumous recognition: a person is identified as a human rights defender if they satisfy the international gaze after their death. This is due to the lack of definitional certainty in the term; the lack of specificity in what constitutes protection outside a narrow concept of physical security; and the lack of protection mechanisms available in many contexts.

Instead we should reimagine protection systems at local levels that increase agency and options based on deep consultation and context, and serious diplomatic interventions.

This is particularly the case for women human rights defenders, who may face intersectional and complex challenges during their work. Even the application of the international human rights defenders definition and approach may pose a challenge, if it favours charismatic male leaders of formal civil rights organisations, or publicises the identity of at-risk women, for example. As a minimum, we argue that those who assist the United Nations to raise awareness of violence and rights violations deserve a framework that protects their work, while respecting and promoting their agency.

This pandemic has retrained the international gaze to notice who are the emergency workers, who are the essential actors. During this pandemic and afterwards, human rights defenders will be taking on themselves the risk of raising up human rights violations to international notice. Amidst the crisis, let international lawyers focus on increasing the agency of the most fundamental actors in the human rights system.

About the authors: Associate Professor Susan Harris Rimmer is an Associate Professor at Griffith University Law School, Brisbane Australia, co-convenor of the Griffith Gender Equality Research Network (with Sara Davies) and a former Australian Research Council Future Fellow. She is co-editor of the R*esearch Handbook on Feminist Engagement with International Law* (Edward Elgar 2019 with Kate Ogg), author of *Gender and Transitional Justice* (Routledge 2010) and over 40 refereed works on women's rights and international law.

Dr Emma Palmer is a Lecturer at Griffith Law School. Her latest book is *Adapting International Criminal Justice in Southeast Asia: Beyond the International Criminal Court* (Cambridge UP, 2020). Emma was admitted as a lawyer in New South Wales and is a Director for Women's Legal Service NSW. Her research interests include international criminal law, international humanitarian law, human rights and social justice, transitional justice, corporations and commercial law, infrastructure governance, criminal law, and gender issues.

Jacob Montford is a final year Law student at Griffith University who won the Deans Prize for his Honours thesis entitled *Ripped at the Seams: A Feminist IPE Critique of Women Human Rights Defenders' Frameworks in Cambodia's Garment Sector*.

MEET THE EDITORIAL TEAM

FELICITY GERRY QC

Felicity Gerry QC (Editor – picture above) is on the lists of counsel for the ICC and KSC having come to international practice now her children are older. She is admitted in England and Wales and Australia (Victoria and the High Court Roll) and specializes in complex criminal law cases, generally involving an international element including terrorism, homicide, biosecurity and human trafficking. She has a particular interest in complicity as leading counsel in the UK Supreme Court decision in *R v Jogee* [2016] UKSC 8 and having led an amicus brief on CIL and complicity in the ICTY. She is Professor of Practice at Deakin University where she teaches a unit on Contemporary International Legal Challenges. Thus far, topics include Modern Slavery, Terrorism, Climate Change, War Crimes and Digital Defence law. She is widely published in diverse areas including women & law, technology & law and reforming justice systems. Her current PhD candidature is on *Transnational Feminisms and the Human Trafficking Dilemma.* She is excited to join the ANZSIL community and to bring together practitioners and academics in international law in ANZSIL *Perspective.*

BILL CAMPBELL QC

Bill Campbell QC is an honorary professor at the ANU College of Law having previously been General Counsel (International Law), Office of International Law in the Australian Attorney-General's Department. He was Agent and/or Counsel for Australia in a number of international cases including the *Whaling in the Antarctic* and the *Chagos Archipelago* cases before the ICJ. He sees the ANZSIL *Perspective* as a forum for the timely analysis of contemporary issues of international law, particularly those engaging the interests of New Zealand and Australia.

HOLLY CULLEN

Holly is an Adjunct Professor of Law at UWA and has been teaching and researching on international law topics for thirty years. She studied in Canada and the UK and has worked at universities in the UK and Australia. She has researched in human rights, non-state actors, international organisations, and international and transnational criminal law. Her current research includes modern slavery issues and a human rights framework for diplomatic protection. She is excited by the prospect of ANZSIL *Perspective* as a forum for voices across the region – an ongoing conversation on international law that connects us in our diverse places, professions and stages of career.

CHANNELLE FITZGERALD

Channelle Fitzgerald is a Senior Legal Officer in the Office of International Law in the Australian Attorney-General's Department, where she has advised the Government on international human rights law, international refugee law, law of the sea and international environmental law. Her areas of interest include Antarctica and marine biodiversity beyond national jurisdiction. Channelle hopes to see *Perspective* make an influential, useful and timely contribution to discussions on topical international law issues and provide early career scholars and practitioners an opportunity to engage in dialogue with the wider international law community.

DR NENGYE LIU

Dr Nengye Liu is a senior Lecturer at Adelaide Law School, University of Adelaide. Dr Liu is a law of the sea scholar, who has published extensively in the field. His current research centres on China's role in global ocean governance, with particular focus on the future development of international Polar law. He is keen to serve *Perspective* as a lively forum for exchange of timely and topical ideas on contemporary international law.

AMELIA TELEC

Amelia Telec is a Principal Legal Officer in the Office of International Law in the Australian Attorney General's Department. She has advised on a wide range of international law issues, including international litigation, maritime boundary delimitation and the intersection of international law and domestic regulation. She was one of the solicitors assisting the Financial Services Royal Commission inquiring into misconduct in the financial services sector in Australia in 2018 and has worked as a legal advisor to the Organisation for Economic Cooperation and Development. She would like to see ANZSIL *Perspective* provide a forum to explore the Australian and New Zealand perspective on current issues in international law, and promote the role of ANZSIL in providing such a forum for the Australian and New Zealand international law community.