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EDITORIAL



Welcome to the AUGUST 2020 issue of ANZSIL *Perspective*.

We are delighted at the increased interest in ANZSIL *Perspective* now it is openly available online. The interaction with the wider international community, bringing the perspective from this side of the globe is of real value. We are very pleased to have four excellent contributions this month and look forward to monthly or fast turnaround contributions as we move towards our revised conference arrangements.

As ANZSIL *Perspective* begins to grow, I think we can start to see that it is capable of enhancing regional representation in international law practice and academia. This month I am delighted that we have articles from a diverse range of authors giving voice to a diverse range of international law issues, sometimes controversial but always with an intelligent and thoughtful eye to both regional and international legal issues.

In my role as editor I am keen to encourage contributions from across our membership and the wider international legal community especially those with different voices, whether individually or in collaboration. The advantage of the current format for ANZSIL *Perspective* is that it allows for short pieces on a wide range of topics with a review process that can provide a platform for emerging expertise as well as established practitioners and academics.

Recognizing that the public platform for ANZSIL *Perspective* is new, the hope is that we can encourage scholars and practitioners at every level of experience and confidence to share their expertise, generate discussion and contribute to international law in our region and beyond.

Felicity Gerry QC (Editor)

The deadline for the next ANZSIL *Perspective* is 9 September 2020. The current call for *Perspectives* and submission details and guidelines 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

All is Fair in Law and War: Legal Cynicism in the Israeli-Palestinian Conflict

By Shiri Krebs

Can legal fact-finding processes into wartime actions resolve factual and legal disputes about these events? Despite the growing popularity of international and domestic legal fact-finding processes, recent examples demonstrate that the terminology and epistemology of international humanitarian law (IHL) can intensify the very factual and legal controversies they were designed to resolve. Some explanations for this unintended outcome of IHL-based fact-finding efforts relate to the legitimacy, credibility, and trustworthiness of the fact-finding bodies ([Bassiouni, 2001](#)). Other explanations are rooted in motivated cognition processes, leading individuals to reject facts inconsistent with their desired outcomes, prior beliefs, or their cultural and ideological commitments ([Kahan et al, 2009](#)). In a recent [article](#) published by the *Harvard National Security Journal*, I further develop these explanations, through a focus on the framing effects of legal labels on social beliefs about wartime events. In a nutshell, I argue that during intractable armed conflicts, using *legal labels* to frame or interpret facts is ineffective as an educational tool, and that *legal blame*—similar to other types of blame—triggers backlash, anger, and dissent.

To demonstrate this dynamic, I explore the killing of twenty-one-year-old Palestinian paramedic [Razan Al-Najjar](#) by Israeli fire on June 1, 2018, and the fact-finding processes that ensued. Her death triggered intense debates concerning the facts and circumstances of the shooting: was Al-Najjar the target of the Israeli fire, as several human rights organizations [concluded](#), or was the deadly bullet directed at other violent demonstrators, as the Israeli military [found](#)? Was she standing alone, with only other paramedics by her side, as some witnesses [reported](#), or was she standing in proximity to violent demonstrators, as the Israeli military [maintained](#)? Was her death caused by a [direct bullet](#), an [explosive bullet](#), or a [ricochet](#)? These factual disputes were closely linked

with disputes over the applicable legal rules, their interpretation and application. Together, the factual and legal disputes centered on one single question: whether Israeli soldiers committed *war crimes*. Some proclaimed that Israel had violated international law, and that Al-Najjar's death was a war crime. Others, however, maintained that Hamas was the only entity responsible for the commission of war crimes with respect to this event. Several investigations reached opposing legal conclusions, ultimately multiplying the number of issues subject to dispute. As of this writing, the facts remain uncertain, the legal debates mount, and meaningful accountability seems further away than ever.

Did the centrality of the IHL terminology, including the 'war crimes' label, enhance or contributed to the intensity of the controversies? Arguably, this particular IHL label has been so politicized in recent decades that it has a distinct and measurable negative impact on social beliefs about wartime events. To test this argument empirically, I designed a survey-experiment that measured the effect of war crime framing on beliefs about Palestinian fatalities among Jewish-Israelis, against various alternative framings. The experiment was conducted in Israel in January 2017 with a representative sample of 2,000 Jewish-Israeli nationals. Participants were presented with an executive summary of an investigation into a lethal military operation in the West Bank. After reading the factual summary of the events, participants were randomly assigned into one of four legal conclusions: the IDF soldiers (i) did not violate international law; (ii) violated international law; (iii) committed war crimes; or (iv) that no conclusions could be made. After reading the report's factual summary and legal conclusion, participants were asked several questions about the credibility of the report (its accuracy, objectivity, completeness, believability, and fairness), and their feelings towards the report, the victims, and the IDF soldiers (including anger, shame, empathy, and guilt). Additionally, demographic, political, social, and economic data was also collected.

The findings demonstrate that utilizing the label 'war crime' to describe military actions significantly decreases Jewish-Israelis' willingness to believe information about Palestinian casualties, and fails to stimulate feelings of empathy toward the victims. Jewish Israelis tend to reject facts described using the war crimes label, and are more likely to feel anger and resentment than guilt or shame. In other words, 'war crimes'

reports were perceived as false and triggered anger and resentment among Jewish Israelis. Consequently, such reports failed to generate feelings of guilt or empathy towards the victims by this specific audience. The following three charts visualize these findings using the data collected through the experiments.

Figure 1 shows that as the gravity of the legal conclusion intensifies (from ‘no violation’ to ‘no conclusion’, to ‘violation’, and to ‘war crime’), participants’ willingness to believe the facts decreases. A report adopting a ‘war crime’ finding was rated significantly lower on its credibility by Jewish-Israelis than reports adopting a ‘no conclusion’ or even an ‘IHL violation’ finding.

Figure 1. Facts Believability, by Legal Framing Condition

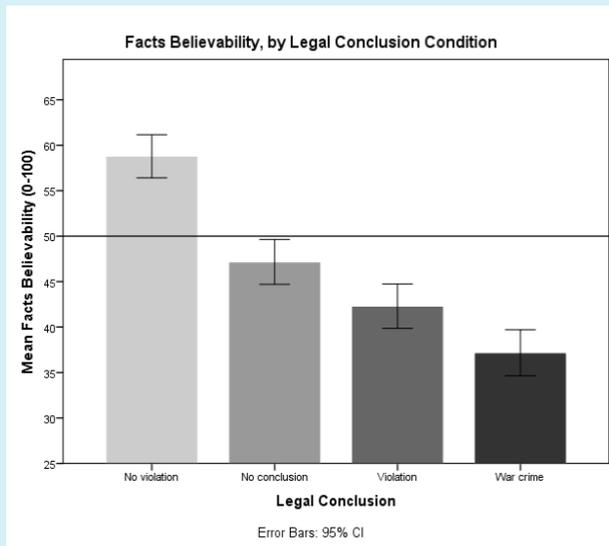


Figure 1 presents the mean values of the facts believability rating by legal framing condition. 95% CI’s shown.

Similarly, as shown in figure 2, participants’ feeling of anger towards the report and its findings increases significantly as the legal conclusion becomes harsher. The results show that a report adopting a ‘war crime’ legal conclusion resulted in a 22% increase on the anger thermometer over a report without a legal conclusion.

Figure 2. Anger towards the Report, by Legal Framing Condition

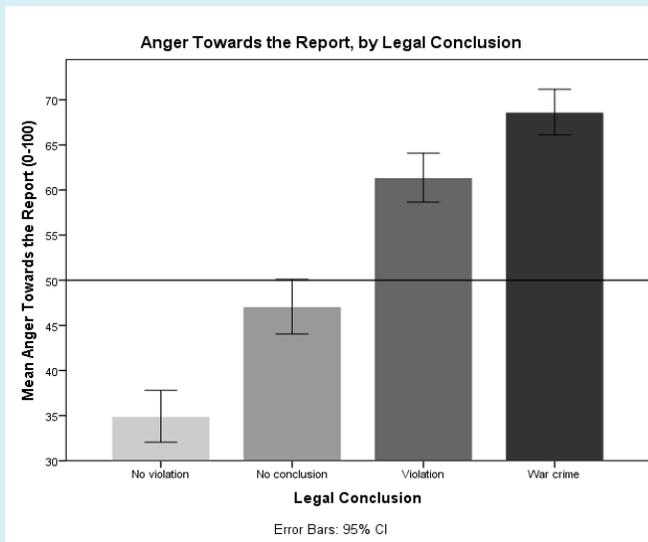


Figure 2 presents the mean values of the anger towards the report by legal framing condition. 95% CI's shown.

While the legal conclusion significantly influenced feelings of anger and resentment towards the report, participants' feelings of guilt and empathy for the victims remained low throughout.

Figure 3. Guilt Thermometer, by Legal Framing Condition

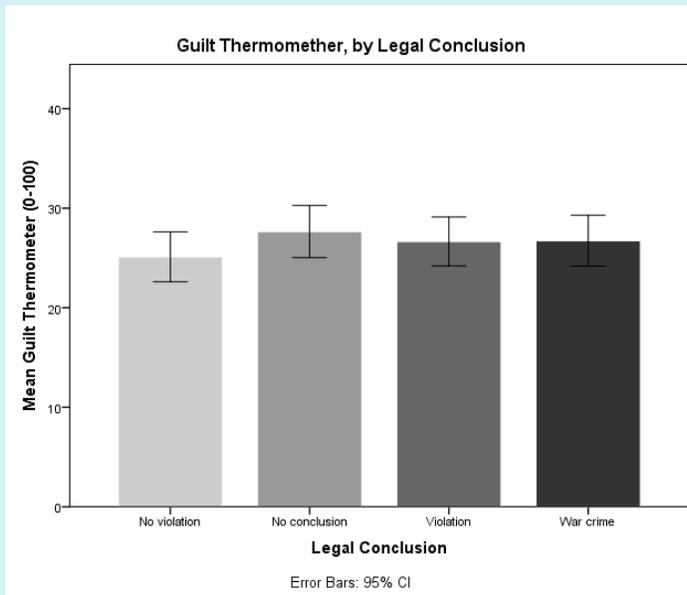


Figure 3 presents the mean values of the guilt thermometer, by legal framing condition. 95% confidence intervals' shown.

These findings demonstrate that the dominance of IHL terminology in fact-finding processes relating to wartime controversies has unintended and undesirable outcomes, which should be further explored and explained. As evidence of backlash and rejection of legal fact-finding reports mount, it is time to develop ways to evaluate their intended and unintended outcomes. In particular, we should reimagine the design of wartime investigations in order to improve the dissemination of their findings and mitigate processes of backlash and denial. Based on the experimental findings reported here, I attribute some of this backlash to the emphasis on legal conclusions by international and local fact-finding bodies, to their focus on legal accountability and blame, and to the lack of attention to institutional legitimacy and trust. These findings contribute to the broader debate about the role played by international law during armed conflicts. They suggest that rather than serving as an educational and informative tool, international law is perceived as a cynical political tool and a weapon in the propaganda war on public perception.

About the author: Shiri Krebs is Senior Lecturer and HDR Director, Deakin Law School. The research findings are detailed in Shiri Krebs, 'Law Wars: How Legal Labels Shape Beliefs about Wartime Controversies' (2020) 11(1) Harvard National

Australia Clarifies its South China Sea Legal Position in Responding to China

By Donald Rothwell

Australia's 23 July statement to the UN Secretary-General in formal response to a series of diplomatic exchanges between Malaysia, China and other states is the clearest to date on legal issues associated with China's South China Sea maritime claims. Diplomatically the statement is unremarkable, legally though, it makes Australia's position on some key issues very clear. It came at a time when Trump Administration officials were also speaking about the South China Sea. Secretary of State, Mike Pompeo, in a 13 July press statement asserted that "Beijing's claims to offshore resources across most of the South China Sea are completely unlawful...".

The Australian statement was made through the Secretary-General to the Commission on the Limits of the Continental Shelf (CLCS). Since the Commission began reviewing continental shelf submissions in 2001 there have been many such diplomatic exchanges. They have become a normal part of the process through which states formally assert diplomatic and legal positions arising from CLCS submissions under the 1982 UN Convention on the Law of the Sea (UNCLOS). Those positions can relate to both territorial and maritime disputes, and interpretations of UNCLOS. One of the most significant diplomatic exchanges was sparked by the 2009 joint Malaysian and Vietnamese CLCS submission resulting in a Chinese note verbale with an accompanying map showing China's nine-dash line. But it is Malaysia's December 2019 CLCS submission addressing its continental shelf claim in the South China Sea that resulted in the most recent flurry of 15 diplomatic exchanges between Australia, China, Indonesia, Malaysia, the Philippines, the United States of America, and Vietnam. Eight of these statements were made in June and July. Never before has there been such an intense exchange of views via the CLCS.

While Australia's statement is technically a response to the Malaysian CLCS submission, it directly addresses five Chinese notes from December 2019, and March, April and June 2020. Australia's statement is principally framed upon a legal interpretation of UNCLOS, with particular reference to the 2016 South China Sea Arbitral Award between

the Philippines and China, and China's subsequent practice and behaviour. In that respect the statement focusses on China's regional maritime claims and only marginally addresses territorial issues. Still, Australia makes two points in that regard.

First, Australia rejects China's assertion in its [17 April 2020](#) note that its sovereignty claims over the Paracel and Spratly Islands are 'widely recognised by the international community'. Australia is making clear that it does not recognise the claims of China or any other states to these islands and that they remain a matter of dispute. In this respect, there has been no change to Australia's longstanding position on the disputed status of the islands.

Second, Australia also makes clear that China's position that it exercises sovereignty over low-tide elevations is a matter of 'strong concern' as claims to such features are incompatible with international law because they do not form the land territory of a state.

Of greater significance is Australia's position with respect to China's maritime claims. Consistent with the South China Sea arbitration award, Australia rejects China's 'historic rights' argument as inconsistent with UNCLOS. Australia also makes clear its position with respect to China's attempt to draw either UNCLOS Article 7 or Article 47 baselines around its claimed South China Sea islands.

Here the Australian position is consistent with UNCLOS, which limits the drawing of Article 7 straight baselines to instances where a coastline is deeply indented and cut into, or where there are offshore fringing islands. Likewise, any attempt by China to draw Article 47 archipelagic baselines is also challenged by Australia on the grounds that China is not an archipelagic state as defined in Article 46.

As a result, Australia rejects China's attempts to claim a range of maritime entitlements such as an exclusive economic zone or continental shelf from these baselines. Australia also rejects equivalent Chinese maritime claims from submerged maritime features or low-tide elevations that have been artificially transformed by land building and associated activities. While Article 60 of UNCLOS does provide for the building of artificial

islands, such features do not generate any distinctive maritime entitlement akin to a naturally formed island as recognised under Article 121.

On 29 July China officially responded to Australia's statement by reasserting the position that it had previously taken with respect to sovereignty and maritime entitlements over certain South China Sea islands and maritime features, that its territorial sea baselines were consistent with UNCLOS and international law, and that it continued to reject the South China Sea arbitration award. China asserted that Australia's actions in "ignoring the basic facts of the South China Sea issue and denying China's land territorial sovereignty and maritime rights and interests" violated international law.

Australia's statement has sought to reinforce some of the fundamentals of UNCLOS which both Australia and China are parties to. The interpretations Australia has put forward are consistent with those adopted in the unanimous decision of the South China Sea arbitration. While some aspects of China's South China Sea claims find support in state practice, that practice is very limited and could not be construed as newly developed interpretations of UNCLOS or customary international law.

What is most significant about the statement is that it was made in the context of disputes where Australia has no direct interest, though Australia's indirect interest in the region is significant as reflected by the assertion of navigation rights through the South China Sea. Australia's position then is one of seeking to make a clear statement on its interpretation of the law of the sea, which in turn may place a halt upon the development of state practice contrary to UNCLOS. It also makes clear Australia's position with respect to some critical ongoing legal issues in the South China Sea arising from China's actions.

About the author: Donald R Rothwell is Professor of International Law at the College of Law, The Australian National University. He is co-author with Tim Stephens of The International Law of the Sea (2nd ed., Bloomsbury, 2016) and served as ANZSIL President from 2001-2005

Further Thoughts on Australia/Hong Kong Relations on Extradition and Other Matters in Transnational Criminal Law

By Liam MacAndrews¹

In the July edition of ANZSIL Perspective, Holly Cullen authored an informative article examining Australia's suspension of its Extradition Agreement with Hong Kong and, in particular, the surrounding framework of international law.

Since then, however, Hong Kong's relationships with Australia and other western nations on this and related topics have seemingly progressed further down the same trajectory.

Given the evolving nature of Australia's relations with Hong Kong in this regard, this article will seek to add some further thoughts to Adjunct Professor Cullen's analysis, as well as consider other implications of this developing situation under international law.

Background and recent developments

As a brief recap, on 9 July 2020, the Australian Government announced that it would suspend Australia's Extradition Agreement with Hong Kong, citing a fundamental change of circumstances as the basis for doing so.

The United Kingdom followed suit on 20 July, as did New Zealand on 28 July, and Germany on 31 July.

Then, in late July, China took similar action, suspending Hong Kong's Extradition Agreement with Australia (as well as those with the United Kingdom and Canada). At the same time, China also announced that it was suspending the 1996 Hong Kong/Australia Agreement on Mutual Legal Assistance in Criminal Matters ('MLA Agreement').

¹ All views expressed in the above article are the author's and do not necessarily reflect those of his firm.

Suspension

As relevantly pointed out by Professor Cullen, and in distinct contrast to Hong Kong's extradition agreements with Canada and New Zealand, the text of Australia's Extradition Agreement itself contains no provision that contemplates such an occurrence. Like Canada and New Zealand, the UK's agreement also contains a suspension clause. Hence, Australia is uniquely required to call in aid the principle of fundamental change of circumstances in order to justify its position under international law.

This article gratefully adopts Professor Cullen's elucidation of the legal requirements (as per article 62 of the Vienna Convention on the Law of Treaties and corresponding customary international law) required to sustain a claim of fundamental change of circumstances. The focus here will be the final criterion, namely that "[t]he effect of the change is radically to transform the extent of obligations still to be performed": a threshold which no doubt reflects the "exceptional character" of the rule (see p 42 [4]).

In this regard, it is relevant to recall that Australia's position states that "[t]he National Security Law erodes the democratic principles that have underpinned Hong Kong's society and the One Country, Two Systems framework."

Notwithstanding the ostensible relevance of political considerations noted by Professor Cullen (i.e. One Country, Two Systems) to the conclusion and maintenance of the Extradition Agreement, the legal bar to be met nevertheless remains high.

As held by the International Court of Justice ('ICJ') in Fisheries Jurisdiction (Germany v. Iceland) (at [43]), the change must have resulted in an increase in the burden of those obligations, such that they have become "something essentially different from that originally undertaken".

Whatever the legitimate misgivings Australia might have about the prospect of extraditing persons to a territory subject to, what it considers to be, laws that erode "democratic principles", this potentially does not transform its core obligations under the Agreement: surrendering persons, at the request of Hong Kong, to face prosecution or the enforcement of sentence. After all, if Australia is concerned that future extradition

requests from Hong Kong may relate to political crimes, or be tainted by suggestions of prosecution for political purposes, then existing legal mechanisms under the Extradition Agreement and the Commonwealth Extradition Act would enable any such request/s to be refused.

Alternatively, Australia may argue along the lines that the imposition of the National Security Law would, in effect, mean that it is obliged to carry out extraditions on the de facto request of China itself, something quite different than engaging with the separately administered region of Hong Kong only for this purpose.

However, it might be difficult to argue (expanding somewhat on the point made by Professor Cullen) that the burden of extradition obligations is changed by the integrity, or otherwise, of a requesting state's criminal justice system. As addressed by the Full Federal Court in Hermanowski v United States of America (at [47]), Australia maintains extradition relations with many nations with criminal justice systems of widely varying degrees of development.

In any event, China's reciprocal action in also suspending the Extradition Agreement could possibly render a definitive answer to the above discussion somewhat moot.

Suspension of the MLA Agreement

Again, Australia's MLA Agreement with Hong Kong does not deal, in terms, with the prospect of suspension. Further, public statements of Chinese officials do not appear to advance a specific legal ground for suspension (other than the assertion that the actions of the western nations in question "seriously violated international law").

There is an undoubted logical connection between the MLA Agreement (facilitating cooperation in the *investigation* of crime) and the Extradition Agreement (facilitating cooperation in the *prosecution* and *punishment* of crime). Notwithstanding this, it would seem similarly difficult to argue that the absence of a readily available bi-lateral international enforcement mechanism itself necessarily transforms the burden of cooperation in the investigation of other transnational criminal activity (if China were to itself assert a fundamental change of circumstances).

Additionally, countermeasures (see articles 49 to 54 of the Articles on State Responsibility) might be raised to justify this action, although it is unclear if China expressly invoked this rule. Whilst this issue itself could be the subject of more detailed discussion, it is observed that a core requirement of valid countermeasures is that they be undertaken solely to induce compliance by the other state with its international obligations. As also noted by the ICJ in Gabčíkovo–Nagymaros (at [83]-[85]), a question of proportionality would also arise. On face value, however, it would seem difficult to argue that suspension of the MLA Agreement is itself an inherently disproportionate response to suspension of the Extradition Agreement. Whilst the public statement of the Chinese Foreign Ministry spokesman would appear to leave open the possibility of countermeasures being invoked to justify this action, without knowing more than has been quoted in English-language media outlets, it is difficult to critically assess whether the requisite intention motivated China's suspension of the MLA Agreement.

So what? Could extradition and/or mutual legal assistance still occur between Australia and Hong Kong?

Although Australia and China's suspension of the agreements seem to convey clear statements of present intent on this issue, these actions do not preclude cooperation on transnational criminal investigations or prospective extradition to Hong Kong, and indeed China, as such. This is because both nations remain parties to numerous multilateral treaties—such as the United Nations Convention against Transnational Organised Crime and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances—which themselves provide standalone legal bases for extradition and mutual legal assistance in criminal matters under international and domestic law.

There also appears to be recognition, from both civil society and government, that cooperation with China on issues such as organised crime and drug trafficking is unquestionably important, regardless of which way the winds of political and diplomatic relations are blowing at any given time. It would appear difficult to argue otherwise.

However, it is worth noting the potential for political considerations to factor into decisions within any Australian extradition or mutual legal assistance process: the Attorney-General, a politician and member of the government of the day, is invested with statutory discretion to decide whether requests are accepted and acted upon by Australia. In this context and set against the current climate, it appears likely that collaboration on this front more generally will be stalled for the time being. This is a conclusion seemingly all the more apparent given China's tit-for-tat action in itself suspending the two agreements.

About the author: *Liam MacAndrews is a solicitor at Nyman Gibson Miralis, Sydney. He works in criminal defence, with a practice focussing on international and transnational cases/investigations, extradition, mutual legal assistance, and INTERPOL matters. Prior to this Liam worked as a legal consultant at the Extraordinary Chambers in the Courts of Cambodia.*

Allegiance is a Bond of Protection Not a Means through which to Deliver a Punitive Moral Judgement

By Sue Milne, Cate Read, Eamonn Kelly and Felicity Gerry QC²

Stranded in the al-Hawl refugee camp in Northern Syria for the last two years, Australian women and children have desperately been seeking repatriation to Australia. In response, the Australian Government has steadfastly resisted repatriation efforts and requests. Underpinning this stance is an inchoate assertion — a perception — that these women and children have transferred their allegiance to ISIS.

Rebecca Barber argued powerfully in the last ANZSIL Perspective that humanitarian aid must continue. We suggest that arguments of this nature provide a moral foundation upon which to advocate for the repatriation of Australian woman and children, with repatriation efforts being intrinsic to the provision of humanitarian aid. Further, we believe that domestic legal intervention is necessary to protect Australian woman and children from an arbitrary loss of the bond of protection owed by the State, pursuant to international legal concepts and the core principles of the nation state.

In our first article, we sought to deploy state duties of protection for the benefit of women and children in this camp by linking such duties to the principle of legality — an analysis that resonates with the recent UK decision to allow Shamima Begum's repatriation, for the purposes of deciding whether she can be stripped of her citizenship. Here, by way of provocation, we consider whether the Australian government's stance is arbitrary, insofar as it leads to a loss of citizenship — and, consequentially, lawful protection by the State — based on mere perceptions of transfer of allegiance.

Citizenship, membership, belonging

Australian citizenship is concerned with formal membership of the Australian community. Membership connotes belonging and a relationship between citizen and

² Views are the authors' own. Felicity and Eamonn have acted on behalf of Australian women and children being held in the Al-Hawl refugee camp in Syria.

community, as the sovereign body politic. Historically, at common law, being a 'subject' meant we 'belonged' to the body politic of the Crown, as demonstrated by our allegiance to the sovereign: the 'true and faithful obedience of the subject due to his Sovereign'.

The bond of allegiance carries reciprocal obligations, where the State has a duty to protect and the citizen owes allegiance: *Joyce v Director of Public Prosecutions* [1946] AC 347. This substantive bond resonates with the notion of citizenship: common to both is the power and capacity to protect.

How, then, is 'belonging' and the relationship between citizen and community to be determined? In the absence of other indicators framing the connection between the individual and the State, concepts of loyalty and allegiance have been adopted, not least through references to 'aliens' owing allegiance to a foreign state: *Singh v Commonwealth* (2004) 222 CLR 322, 382–3 [154] (Gummow, Hayne and Heydon JJ).

Furthermore, if one belongs it is possible that one cannot be excluded from belonging to the community as body politic, even in the absence of holding statutory citizenship. In *Love v Commonwealth*, a narrow majority of the High Court found that Indigenous Australians had a bond of spiritual and territorial connection to the land and, therefore, 'belonged'.

However, *Love* fails to provide a majority view on the broader nature of 'belonging'. The following have all been rejected as indicative of this bond: long-term resident and 'absorption' into the community (*Pochi v Macphee* (1982) 151 CLR 101); personal connection to Australia (*Shaw v MIMA* (2003) 218 CLR 28), and; birth in Australia (*Singh*-supra and *Koroitamana v Commonwealth* (2006) 227 CLR 31).

The prodigal citizen

Is the protection afforded by the State contingent upon the proper conduct of the citizen? In a general sense, history would suggest not: consider diplomatic intervention by the Australian Government in situations where Australian citizens have become entangled in the legal system of another State. In *Love*, Gageler J queried the appropriateness of describing the bond between an Australian citizen and the

Commonwealth as one of allegiance and *reciprocal* protection, as ‘reciprocity might imply conditionality’. If that is so, how might we interpret ‘reciprocity’? Is it an ‘exchange and mutual benefit’ or a bond necessarily characterised by the power differential that is inherent to the relationship between citizen and State?

Approaching ‘allegiance’ as a socio-political concept, Helen Irving argues that the citizen-state relationship is one of ‘singularity’ — that ‘[d]ual citizenship, while legally permitted sits uncomfortably with the idea that citizenship is defined by “allegiance”’. This, Irving suggests, ‘is the modern conundrum at the heart of schemes for citizenship revocation’. Is a citizen’s act of transferring allegiance to another State or entity, or the perception thereof, suggestive of his or her election to pursue single allegiance? If so, what significance is to be placed on a citizen’s invocation of State protection?

The principle of legality as the elephant in the room

In our first article, we argued that the principle of legality arises in the context of the State’s duty to protect in two specific instances. First, by way of allegiance, connecting the individual to the body politic of the State, an incidence of which is the duty to protect. This is a constitutional protection attached to the non-alien (*Pochi v Macphee*; *Love v Commonwealth*). Secondly, by way of the duty owed by the Commonwealth Executive to protect not only citizens but also aliens within Australia’s jurisdiction.

In the first context, a duty to protect is a fundamental characteristic of ‘belonging’, such that it is a barrier to revocation and (by extension) obstruction of the right to return (which cannot be arbitrarily removed). As a duty that resides within sovereign jurisdiction, in tandem with the operation of s 61 of the Constitution, the Courts have a constitutional role to play in reviewing the exercise of powers to revoke citizenship. This is to ensure that these laws, apparently enacted under s 51(xix), are compatible with the identification and nature of sovereignty and its link to belonging, from which the duty to protect arises.

In the second context, the jurisdiction of the State requires that everyone within the State’s jurisdiction — whether territorial or extra-territorial — is subject to, and owes a

duty of obedience to, the law, with the State owing a concomitant duty to uphold the law. We might arguably find further evidence of this duty within s 61 of the Constitution; an argument not dismissed by Tamberlin J in *Hicks v Ruddock*.

Conclusion

What does this mean for the women and children in the al-Hawl refugee camp? How might we characterise their citizenship, dual or otherwise, when still intact and not yet subject to formal revocation? If the State's duty to protect has been invoked but is not available — the only conclusion to be drawn from the Government's approach to date — then the question arises: Is there any substantive content left within the citizenship rights of these women and children? Are we witnessing the *de facto* revocation of their citizenship on the grounds of *perceived* 'belonging', rather than on a basis supported by the protection of law?

About the authors:

Eamonn Kelly is a barrister at the Victorian Bar, previously Senior Associate to the Honourable Justice Ginnane in the Common Law Division of the Supreme Court of Victoria. He practices in administrative, commercial, criminal and common law. He is particularly passionate about areas of the law concerning the proper exercise of state authority, whether in civil or criminal contexts, judicial or executive. Eamonn completed a Juris Doctor and a Master of Laws at the University of Melbourne, specialising in Transnational and International Law. He received several subject prizes, including the Frank Galbally Memorial Prize and the Raynes Dickson Memorial Exhibition for Advocacy. He edited the Melbourne Journal of International Law.

Felicity Gerry QC (ANZSIL Perspective Editor) is on the lists of counsel for the ICC and KSC, 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 or human rights element. She is also 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.

Sue Milne is a Lecturer in Law at the University of South Australia. With a background in legal research within the federal judicial sector, Sue has presented, lectured and published in this field. Sue is currently a PhD candidate researching the constitutional validity of citizenship stripping, with research interests in public law, mainly constitutional and administrative law, legal method and legal history.

Cate Read is a Trial Division Researcher at the Supreme Court of Victoria and is currently undertaking a Master of Laws at Melbourne Law School. She has undergraduate and graduate degrees in political science and law, with a particular focus on human rights law. Cate was admitted to the Australian legal profession in 2008 and has held a volunteer legal practising

certificate since 2009. She has worked as a volunteer lawyer at Fitzroy Legal Service and the Asylum Seeker Resource Centre, and has volunteered with the Health & Equality Policy Working Group at Thorne Harbour Health.