ANZSIL
PERSPECTIVE

NOVEMBER 2020 **EDITION 19**

Australian and New Zealand
Society of International Law

CONTENTS

EDITORIAL

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

My editorial team and I are delighted to deliver the last ANZSIL *Perspective* for 2020 which maintains the consistently high level of contributions which we have shared with members since ANZSIL *Perspective* inception, and now freely available on the ANZSIL website for the international community.

This month we are very pleased to have four excellent contributions from a range of authors on some interesting and sometimes controversial topics. We look forward to our next edition in February 2021 and to the forthcoming year, whether by monthly or fast turnaround contributions.

As we move towards our revised conference arrangements, I hope that members and the wider international community will contribute to ANZSIL *Perspective* which is growing and, we hope, contributing to our regional representation in international law practice and academia. This month I am delighted that, once again, we have articles from a diverse range of authors giving voice to a diverse range of international law issues, including serious issues arising from the Brereton Report.

As you know, in my role as editor I am keen to encourage contributions from across our membership and the wider international legal community, especially those with emerging careers. I am also pleased that our contributions over the last year have included book reviews and discussion and responses to earlier publications so that *ANZSIL Perspective* has continued to contribute to debate and education. I look forward to the submissions for 2021.

Felicity Gerry QC (Editor)

The deadline for the next ANZSIL *Perspective* is 12 FEBRUARY 2021. The current call for *Perspectives* and submission details and guidelines are on the ANZSIL *Perspective* webpage.

PERSPECTIVES

The Brereton Report: War Crimes Allegations and Command Responsibility

Dr Melanie O'Brien, UWA Law School

On 19 November 2020, the Australian Defence Force released a report prepared after four years of investigation by Justice Paul Brereton. The Inspector-General of the Australian Defence Force Afghanistan Inquiry Report provides redacted details of allegations of war crimes committed by Australian Special Forces soldiers in Afghanistan between 2005 and 2016. There are many potential discussion topics within the report, such as prosecution procedural challenges, but only a few can be covered here. This perspective will focus on the relevant substantive law, and the issue of command responsibility that the report raises. I preface this analysis by saying that significant portions of the detail of the allegations in the report are redacted, and therefore any analysis is undertaken without knowledge of specific details. On the available details, there are allegations of 39 instances of unlawful killings, and two instances of cruel treatment, perpetrated by 25 soldiers.

Alleged War Crimes

With regards to the relevant substantive law, firstly it must be stated that the relevant law is that applicable in a non-international armed conflict. The conflict in Afghanistan involved coalition forces fighting against non-state armed groups including the Taliban and al-Qaeda. Consequently, the relevant international humanitarian law (IHL) that

applies is Common Article 3 of the Geneva Conventions, and Additional Protocol II to the Geneva Conventions (APII). The allegations in the report cover only two war crimes: unlawful killing of civilians or prisoners, and cruel treatment. These crimes would fall under prohibitions in Common Article 3, which provides that persons who are hors de combat (not or no longer taking active part in hostilities) shall be treated humanely, and it is prohibited to commit 'violence to life and person, in particular murder… cruel treatment and torture' against these protected persons. Article 4 of APII prohibits the same conduct, and provides for an obligation to protect the civilian population (Article 13).

In Australian domestic law, the applicable provisions are found in the *Commonwealth Criminal Code Act* 1995. All of the Australian war crimes provision apply extraterritorially (Division 15- Extended geographical jurisdiction, s.15.4 category D). Subdivision F of the Code covers violations of Common Article 3, committed in a non-international armed conflict. Within Subdivision F, s.268.70 proscribes the war crime of murder: causing the death of one or more persons who are *hors de combat*. This attracts a penalty of life imprisonment. This offence would apply to the killings of civilians and captured prisoners in the context as far as we understand them to have occurred: this seems to be that civilians or combatants are captured, tied up, and shot. The details are general, because of redactions. Subdivision F also contains s.268.72, the war crime of cruel treatment, under which it is an offence to 'inflict severe physical or mental pain or suffering upon one or more persons', who are *hors de combat*. Punishment for this crime is 25 years imprisonment. It is not clear precisely what conduct in the report is categorised as cruel treatment, so it is not possible to make an analysis of whether such conduct would also or alternatively amount to torture (s.268.73, 25 years imprisonment).

Command Responsibility

A significant aspect of the report is the issue of command responsibility. The report and, in his press conference, General Campbell, Chief of the Australian Defence Force (ADF), refer to 'moral responsibility' for commanders. The report notes that patrol commanders may be held accountable, but no other command level (e.g. troop/platoon, squadron/company or Special Operations Task Group (SOTG) should be held accountable. These commanders are said to only 'bear moral command responsibility and accountability for what happened under their command and control'. Further up the chain, 'responsibility and accountability does not extend to higher headquarters'. Given the importance of the military hierarchy, and the very role of command and control in the military, this allocation of mere 'moral responsibility' is not enough.

Command responsibility is a well-known and applied mode of liability in international criminal law, tracing back to the post-World War II *In Re Yamashita* case. Since then, charges under command responsibility have been brought and perpetrators convicted, across international and hybrid criminal courts and tribunals. These cases confirm the necessity of charging commanders with failure to properly supervise their subordinates as a means of prevention of the commission of war crimes. It is a crucial part of the military hierarchy that commanders are specifically tasked with controlling the behaviour of their subordinates and thus should be held accountable for failing to do what is necessary and reasonable to prevent and punish war crimes.

Generally, if investigation and prosecution proceeds, the International Criminal Court will have no interest in exercising jurisdiction over these soldiers. Australia is certainly able to prosecute the perpetrators and is demonstrating that it is willing. However, if no

prosecutorial action is taken against commanders, this may raise issues of potential ICC jurisdiction: have we fulfilled our obligations if we have not prosecuted commanders? While it is unlikely that the ICC would show interest in prosecuting, especially if the individual perpetrators are prosecuted and punished, the prospect is still there.

Despite the comprehensive nature of Australia's war crimes legislation, there is also the fact that Australia's command responsibility laws do not echo that of the Rome Statute and other international definitions of command responsibility. The international standard is that a commander knew or *should have known* about their subordinates' commission of war crimes (Art.28 Rome Statute), and it is accepted that superiors must take measures within their powers with a 'very high standard of foresight'. The Australian law (s.268.115) applies responsibility if a commander knew or was *reckless* as to the commission of crimes by subordinates. 'Should have known' and 'recklessness' are clearly two very different standards that may make it much more difficult to prove command responsibility under Australian law. The report states that commanders above patrol level did not know, nor were they reckless, about the commission of the alleged war crimes, so therefore there is no command responsibility. However, this ignores the responsibility of commanders to know what their subordinates are doing at all times. The report implies that blindly trusting subordinates and never questioning any reports through ten years of war is not reckless; whereas this conduct could well be argued to be reckless.

This Perspective only touches on the two major legal issues from the Brereton report, but there is much to explore about the context of the Report and as the prosecutions proceed in the future, particularly command responsibility.

About the author: Dr Melanie O'Brien is an award-winning teacher of International Humanitarian Law at UWA Law School, and a long-term volunteer in Australian Red Cross IHL Committees. She has published widely on accountability of military peacekeepers for criminal misconduct, including war crimes; including her book *Criminalising Peacekeepers: Modernising National Approaches to Sexual Exploitation and Abuse* (Palgrave 2017). She tweets @DrMelOB.

Brenton Tarrant and Trans-Tasman Prisoner Transfers

By Donald R. Rothwell

Should Brenton Tarrant be returned to Australia? Certainly that was the view of the then New Zealand Foreign Minister Winston Peters in August, who argued Tarrant should be returned to the country that raised him. Professor Al Gillespie of Waikato University has also promoted this view. The New Zealand Nationals leader, Judith Collins had another view, telling the *Sydney Morning Herald* in September that she was fearful that if Tarrant was returned to Australia "a flood of criminals in Australian jails could be sent the other way." Both Jacinda Ardern and Scott Morrison have been more circumspect. New Zealand has yet to make any formal request to Canberra regarding Tarrant's return to Australia, and Arden has not spoken about the matter since her October re-election. All Morrison has said is that he is open to considering any request from Wellington. Not only are Tarrant's crimes without precedent, so is his life sentence without parole. At present he will now live out the remainder of his natural life in New Zealand prisons. Tarrant was born and raised in Australia and lived in Grafton, New South Wales, before moving to New Zealand in 2017. Not since Hobart man Martin Bryant killed 35 people during the 1996 Port Arthur terror attacks has an Australian been responsible for mass murder on such a scale.

While Tarrant is an Australian citizen, Australia has no legal obligations to request his transfer. In the same way that foreigners who commit crimes in Australia are not required to be returned to their home countries on being sentenced for their crimes, there is no requirement that Australians be automatically returned home once a foreign court has handed down a sentence. Only once an Australian's foreign prison term has come to an end, including an early release as a result of a pardon or reduction in sentence

due to good behaviour, would they in the normal course of events be deported back to Australia.

Australia does have in place legal mechanisms for the transfer of foreign prisoners from Australia, and the return of Australians from overseas prisons under the International Transfer of Prisoners Scheme. There are currently 70 participating States in the scheme ranging from the United States, United Kingdom, and China to San Marino and Tonga. The legal framework for the scheme rests under either the Council of Europe Convention on the Transfer of Sentenced Persons, or separate bilateral treaties such as those Australia has with China, and Vietnam.

In 2015 the Human Rights Committee observed in the Hicks complaint concerning violations of the International Covenant on Civil and Political Rights that:

"Transfer agreements play an important role for humanitarian and other legitimate purposes, allowing persons who have been convicted abroad and agree to the transfer to come back to their own country to serve their sentence and benefit from, for instance, closer contact with their family."

For Australia, in 2018-19 a total of 34 transfers occurred under prisoner transfer processes. Australia sees benefits associated with prisoner transfer because it improves prospects for rehabilitation and reintegration into society, facilitates contact with family, and meets public expectations that Australians imprisoned overseas are able to serve out their prison term in Australia. There is also a cost efficiency as foreign prisoners are returned to their home country and are no longer a burden on the Australian prison system. However as New Zealand is neither a party to the Council of Europe scheme and

has no bilateral treaty with Australia there is no legal process that would allow for Tarrant's transfer to Australia.

The lack of a Trans-Tasman general prisoner transfer arrangement is a curious exception in what is otherwise a very close legal and political relationship. If New Zealand really wished to have Tarrant's situation resolved as soon as possible, it could simply adopt the Council of Europe scheme. However, given the unique circumstances of Tarrant's crime, there are certainly grounds for negotiating a bespoke arrangement to deal with this individual case. The sentence handed down against Tarrant really does mean life under New Zealand law. Unless there arises some unforeseen circumstances, the 29 year old can be expected to serve out his natural life in prison. This could be anywhere up to 40 to 50 years.

Australia has experience in negotiating bespoke prisoner transfer arrangements. The most prominent was the 2007 agreement with the United States for the return of David Hicks after he was convicted by a Guantanamo Bay Military Commission on terrorist related charges. Hicks returned to Australia and served out the remaining nine months of his sentence in Adelaide's Yatala Prison. Australia also sought to negotiate the return from Indonesia of Schapelle Corby after her 2005 conviction on importing cannabis into Bali. However, Indonesia was not prepared to permit convicted drug smugglers to be included in any separate prisoner transfer agreement with Australia and Corby served out her sentence in Bali and in 2017 was deported to Australia upon the expiration of her sentence.

With the re-election of the Adern government, there is now the prospect that Tarrant's future could become the subject of Trans-Tasman discussions. Australia would more

than likely not be attracted to an arrangement that only dealt with Tarrant given the significant costs associated with securing him in an Australian prison for life. Canberra would probably favour a bilateral treaty arrangement that would also facilitate the transfer of New Zealand prisoners in Australia. Suggestions that Tarrant could walk free in Australia, and New Zealand could find itself in a not dissimilar situation to how the two French agents convicted of the 1985 Rainbow Warrior bombing were eventually repatriated to metropolitan France after their stay on the French Polynesian island of Hao was cut short appear misplaced.

An Australia-New Zealand Transfer of Sentenced Prisoners Agreement would be mutually beneficial. Tarrant would be returned to Australia while New Zealanders imprisoned in Australia could be sent home. However, the floodgates would not be opened on Kiwi prisoners being transferred from Australia to New Zealand. There are numerous requirements that need to be met before an international prisoner transfer can take place, and maintaining connection with family is given high priority. Prisoners are given the right to refuse to consent to a transfer, and this would be a factor for New Zealand prisoners being held in Australia. The deportation of New Zealanders who are Australian residents upon having served goal time in Australian prisons has been a recent irritant between the Ardern and Morrison governments. The transfer of prisoners and deportation of non-citizens on character grounds are of course legally distinguishable, but they may become part of the wider bilateral diplomatic exchange. Tarrant has had a relatively low profile in Australia. Nevertheless, the Morrison government may be open to negotiating a longer term prisoner transfer deal as a means to resolving some ongoing issues in the Trans-Tasman relationship.

About the author: Donald R. Rothwell is Professor of International Law at the ANU College of Law, ANU. An earlier version of this comment was published in the *New Zealand Herald* on 11 September 2020.

Transnational feminisms: Trafficked women, death row, autonomy and systemic reform

By Felicity Gerry QC

This article is a summary of a preliminary paper presented to the ANZSIL Gender Sexuality and International Law Special Interest Group Series on 5 November 2020, with particular thanks to those who gave feedback. As Australia and New Zealand develop policy for the protection of trafficked persons, this article calls for a legal defence for trafficked persons which recognises the loss of autonomy which comes with being trafficked. It also calls for an audit of prisons globally to identify and exonerate women trafficked to commit crime, particularly those on death row.

In 2015, Mary Jane Veloso was reprieved from execution in Indonesia on the same death row as Australians Andrew Chan and Myuran Sukumaran. She was reprieved 30 minutes before she was due to be shot because she raised her status as a trafficked person who had been deceived into carrying drugs from the Philippines to Indonesia. Her trafficked status had not been considered at trial. Her lawyers in the Philippines used the human trafficking referral mechanisms to identify her recruiters who have since been convicted of trafficking others. The Philippine Supreme Court has recently decided that she can give evidence in her case against the recruiters from prison in Indonesia by deposition, as a form of dying declaration as she is on death row. She is likely one of many trafficked women in prison, including on death row, around the world for drugs offences. A study

in the UK led to reduced penalties for drug mules. Australia and New Zealand are in a good position to go further and move the issue from mitigation of sentence to non-liability. Both Australia and New Zealand have also committed to the abolition of the death penalty so each should be looking to its trafficked citizens at home and abroad - on death row and detained elsewhere, such as in Syrian camps. Domestic commitments are ineffective if trafficked persons are prosecuted and executed abroad.

Our recent study of a proposal to restore the death penalty in the Philippines for human traffickers highlighted not only how this would be a breach the 2nd Optional protocol to the ICCPR but also how it failed to comprehend the complexities of human trafficking law, particularly the principle of non-punishment. In April 2020, a United Nations Inter-Agency Coordination Group against Trafficking in Persons briefing paper set out recommendations for a more consistent, human rights-based application of the non-punishment principle which has been defined as follows:

'Trafficked persons should not be subject to arrest, charge, detention, prosecution, or be penalized or otherwise punished for illegal conduct that they committed as a direct consequence of being trafficked.'

Non-punishment requires law reform to move from prosecuting criminals to non-prosecution of trafficked persons who commit crime. Indonesia has committed to the non-punishment principle by Article 18 of Law 21 of 2007 on the Eradication of the Criminal Act of Trafficking in Persons issued by the Ministry of Women's Empowerment and the Department of Justice which reads as follows:

> Article 18: A victim who commits a crime under coercion by an offender of the criminal act of trafficking in persons shall not be liable to criminal charges.

The exoneration of Mary Jane Veloso is therefore both a question of international commitments to protect and assist trafficked persons but also of the application of domestic law. In Australia and New Zealand, in the absence of human trafficking as a legal defence, it is highly likely that trafficked women are currently facing trial without proper consideration of their trafficked status and have already been incarcerated in circumstances where they should not have been. This is not just a question of exercising a prosecutorial discretion not to charge but of having legal frameworks in place whenever there is an attempt to criminalise a trafficked person. It also requires a mechanism for appeals even where the time limit has passed.

Mary Jane Veloso's case also adds to the research by the Cornell Center on the Death Penalty Worldwide. Its report, *Judged for More Than Her Crime, A Global Overview of Women Facing the Death Penalty*, found that women who are sentenced to death are subjected to multiple forms of gender bias, with women seen as violating entrenched norms of gender behaviour more likely to receive the death penalty. In criminal justice systems this is a common tale for women in conflict with the law.

In the context of women trafficking drugs abroad, the international commitment to protect trafficked persons, in the form of the U.N. Trafficking in Persons Protocol, challenges criminal justice systems which seek to act as both prosecutor and protector. Since there are now mechanisms and experts who can assess trafficked status, the

practical approach to the implementation of international commitments to protect and not to prosecute trafficked persons is relatively simple:

- Use prosecutorial discretion not to prosecute trafficked persons who commit crime, because they have been exploited through the means and purposes of others (see UK CPS here).
- Make sure there is a complete defence for trafficked persons who commit crime if a decision is made incorrectly to prosecute (see below).
- Identify those persons already wrongly convicted and imprisoned and secure their release and exoneration. This requires an audit of prisons and, from the Cornell study, is particularly urgent on death row.
- Seek the return of trafficked citizens on death row as part of the duty to protect national subjects (as above).

This article considers the underlying approach to exoneration for trafficked women. I argue that this is an issue that calls for the recognition of women's autonomy.

In 2013, Hoshi considered 'two prisms through which the principle of non-criminalisation has been interpreted: (1) causation-based, which requires that the criminal act be a direct result of the trafficking situation; and, (2) compulsion-based, which requires that the criminal act is committed under a high degree of pressure from the trafficker(s).' Hoshi argued that the compulsion-based model provides insufficient protection for trafficked persons because it 'fails to grasp the subtle and nefarious methods by which traffickers can exert total dominance over trafficked persons' and also 'fails to recognise that a clear causal relationship between the criminal act and the trafficked status of the trafficked person may remain even after the trafficking situation has ended.' There is an additional point which is that, in the context of human trafficking, any duress type model,

whether policy (as Australia) or law (as the UK, Indonesia and Australia), effectively requires a trafficked person to suffer significant harm before any defence kicks in. The UK now has a complete defence in s. 45 of the *Modern Slavery Act 2015* for trafficked persons who commit certain offences based on the compulsion model. Schedule 4 excludes a range of serious offences, including for accessories, even though they may well be significantly exploited. Pre-2015 convictions have been quashed on appeal, not by extending duress but on a policy-based compulsion model. Protection is therefore incomplete as the prosecution of crime takes precedence over the protection of trafficked persons. Australia can do things differently and set an example for other states.

In 2016, research into Mary Jane Veloso's case suggested that the conceptual basis for her exoneration was that she was acting pursuant to the means and purposes of others and therefore was not acting voluntarily. The Indonesian law is a compulsion model as victim is defined in Article 1 as someone who has suffered harm or trauma caused by the trafficker. More recently, in an appeal in England and Wales which involved the manslaughter of a young woman by supply of a dangerous diet pill, the Court quashed the conviction following arguments that the actions of ingestion had the potential of being an intervening act, if they were ingested autonomously. The consideration of women's autonomy in criminal law is rare but it complements and extends Hoshi's research on causation, suggesting that the trafficked person does not cause the crime because they are not acting autonomously even if they consent to certain acts. They act pursuant to the means and purposes of others. In this sense a trafficked person is much more akin to an innocent agent but where it is accepted that the trafficked person

remains trafficked when deceived and / or when they lack the freedom or capacity to act autonomously.

The point is that the cause of the crime is the trafficker, and the trafficked person does not break that chain of liability, providing the offence committed is reasonably foreseeable, not where a trafficked person commits a separate offence of their own. This return to traditional criminal law principle is useful: as long ago as 1959, Hart and Honoré emphasized the significance of free, deliberate, and informed interventions for breaking the chain of causation. The criterion which they suggest should be applied in such circumstances is whether the intervention is voluntary, i.e. whether it is 'free, deliberate and informed.' But for women, it is more about autonomy than voluntariness because sometimes they make choices due to external factors of vulnerability, rather than being subject to duress as it is usually understood, and still fall within the definition of a trafficked person by, for example, abuse of vulnerability.

In Mary Jane Veloso's case, it is arguable that her acts were not free, informed or deliberate: the trafficked person may act deliberately but remain trafficked if they are deceived because they are not 'informed'. Compulsion to commit an offence is relevant because the person is not 'free'. This essentially negates the elements of the offence without the need for a defence, although a legal defence could spell this out clearly in order to ensure protection is complete. The impacts on autonomy are not limited to duress, compulsion or victimhood. They also extend to a woman deciding to commit a crime because of a situation of vulnerability relating to external economic of family or abusive factors. She may well be 'deliberate' and she may 'consent' to commit the crime but criminal responsibility lies firmly with the traffickers if she is not free, informed and deliberate.

Unless state laws, policies and procedures allow for safe confession by women to crimes with a non-liability outcome, the focus remains on criminal punishment of women who are not free (under duress/threats etc.), not informed (deceived) or not deliberate (involuntary). Here, abuse of vulnerability includes an acceptance that, even when a suspect knows she is committing a crime or consents to certain conduct, such as when she acts for the means and purposes of drug traffickers, she is not the cause of the crime and is not liable and not to be investigated as a suspect.

For women on death row, the research by the Cornell Center becomes instructive and demonstrate that trafficked women can be identified applying the criteria of 'free, informed and deliberate' as questions of fact, providing a foundation for non - prosecution and release. In the end the solution is for Australia to lead in the formulation of a complete defence for trafficked persons who commit crime based on causation as a voluntariness model, for Indonesia to release and exonerate Mary Jane Veloso and for all nations to review their laws and audit their prisons to release women whose autonomy has been compromised.

The Cornell Center hopes that its publication 'will inspire the international community to pay greater attention to the troubling plight of women on death row worldwide'. The research set out in this article considers the necessity to identify the particular cohort of women on death row who are trafficked persons and to ensure they are exonerated and released without being re-trafficked. I argue that the issue is one of women's autonomy, but criminal justice systems are still a long way behind. If Australia and New Zealand do not enact defences based on the causation / autonomy model suggested here, as signatories to UNTOC Human Trafficking Protocol, Australia and New Zealand are failing

to comprehensively implement the commitments to protect and assist trafficked persons.

About the author: 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.

Shipbreaking Industry - Responsibility of the Maritime Industry

By Mohammed Ali

Overview and Problem Definition

Shipbreaking is the term used to define the process of breaking up old ships. It involves the activity of removing reusable materials, such as steel scraps, furniture, electronic materials etc. found in a used ship. Under Article 2.10 of *the Hong Kong International Convention for the Safe and Environmentally Sound Recycling (Hong Kong Convention)*, the term 'ship recycling' is used instead of shipbreaking, because most of the materials found in an old ship can be reused and reprocessed.

International shipping companies own and use ships for their trade and finally sell them predominantly to Bangladesh, India, and Pakistan for breaking up. Karim, Alcaidea, Piniella and Rodriguez-Diaza in the context of business profit of maritime industry argue that these South Asian countries can offer attractive prices to shipowners as South Asian countries have no iron ore to support their growing steel demand. Shipbreaking has now become a multi-million dollar business for maritime industry. However, South Asian countries break ships on open beaches using dangerous manual methods that not only pollute the environment, but cause deaths and injuries to workers in the shipbreaking industry. The problems lead to argue for an international regulatory framework imposing liability on shipping industry for their profit and the objective of this paper is to argue for a liability insurance for shipbreaking with the aim of providing compensation to the victims.

Human Rights and Environmental Issues within the Shipbreaking Industry

The shipbreaking industry raises a number of controversies in South Asia. It is one of the main causes of environment pollution and violation of human rights. The World Bank has identified three major problems within the South Asian shipbreaking industry.

Firstly, shipping companies sell ships to developing South Asian countries without pre-cleaning the toxic materials from the ships. Therefore, their vessels remain contaminated with toxic substances, such as Polychlorinated Biphenyls, asbestos, lead paints, mercury, fuel deposits, and other harmful substances.

Secondly, the South Asian shipbreaking industry use the beaching method to break the ships and thus the ships are cleaned on shallow open beaches often near mangrove swamps. By using this method, they discharge all toxic substances into the seawater, resulting in air pollution, soil erosion, soil contamination and water pollution, contamination of coastal regions and loss of biodiversity. A field report suggests that the release of toxic waste has an impact on mangrove forests and threatens its habitat. Examples of the impact of pollution from the locations of shipbreaking industry are the 'toxic hotspots' or 'sacrifice zones' in Alang of India, Sitakunda of Bangladesh and Gadani of Pakistan.

Thirdly, ships are broken by using dangerous manual methods such as cutting ships with a fire torch and workers carrying steel plates on their shoulder. Such practices eventually cause frequent accidents leading to death and injuries to the workers. Statistics show the following reasons as causes of accidents: fire explosions due to unseen gas in the ship chamber (49%); the fall of plates and parts of ships in the process of scrapping (25%); inhalation of toxic gas (16%) and workers falling from ships (8%).

An International Report from International Metalworkers Federation states that "shipbreaking is one of the most dangerous occupations." This is also evident from various NGO reports. In November 2016, at least 28 workers died and more than 50 workers suffered injuries due to explosion in a ship beached in Gadani, Pakistan. In 2016, 22 deaths and 29 serious injuries of workers were reported in Bangladesh. In India, two people died by a fatal accident. Even in the first quarter of 2018, ten workers lost their lives, and two workers had severe injuries in Bangladesh. It is also reported that at a shipbreaking yard in Alang, India, at least two workers lost their lives due to a toxic gas leak.

Literature review in this area indicates that neither the international community nor the shipping companies have taken ownership of the problems caused in the shipbreaking industry. Shipping companies do not want to bear the high cost of safe and proper disposal since they can earn millions of dollar selling ships to South Asian countries by externalising the cost of shipbreaking. They often ignore that developing countries lack the resources required to upgrade their standard of shipbreaking. Thus, unless shipowners are adequately regulated by an international regulatory regime, the problems identified in this section will continue.

Gaps in the Legal Framework

Individual state mechanisms have so far been unsuccessful without any pressure from an international framework. The shipping companies bypass the location of shipbreaking countries that require strict regulatory compliance. Between 2005 and 2006, when India focused on stricter regulations, the business of Bangladesh rose sharply with more ships for breaking.

Until 2009, the only international safeguarding mechanism was the *Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (Basel Convention)*. The *Basel Convention's* objective is to reduce the generation of waste and restrict the movement of waste, i.e. by keeping it closest to the place of production. However, shipowners circumvent the Convention by arguing that the Basel Convention only applies to transfer of wastes and a ship is not waste. The core problem is a definitional one, namely, whether ships can be defined as wastes. Article 2(1) of the *Basel Convention* defines 'waste' 'as substances or objects, which are disposed of, or are intended to be disposed of, or are required to be disposed of by the provisions of national law.'

Therefore, to transform a ship to waste depends on whether the owner or the management company "intends" the ship to be "waste". Thus, the onus is on the owner or the management company to declare that the ship is on its last journey for dismantling. The intention has to be interpreted from the express or implied activities of the immediate owner and if the immediate owner does not do so the Basel Convention cannot be applied.

In response to the difficulty of applying the Basel Convention on old ships, the International Maritime Organisation (IMO) developed the Hong Kong Convention. According to the *Hong Kong Convention*, flag states must prepare an Inventory of Hazardous Materials (IHM) for each ship before starting their commercial operation. The IHM requires detailed information about toxic substances contained in the ship. As per Regulation 5(4) of *The Regulation for Safe and Environmentally Sound Recycling of Ships*, after lifecycle of a ship, flag states are required to supply the IHM to the shipbreaking industry or the recycler. The *Hong Kong Convention* has introduced this

"cradle to grave approach" for ensuring occupational safety and health. Every shipbreaking or recycling industry has to then prepare a ship-specific plan (the plan) for recycling with respect to a ship's IHM. Under Article 16 of *the Hong Kong Convention*, the plan is required to include all the information regarding management of hazardous materials identified by the IHM. Therefore, under the Hong Kong Convention, the shipbreaking industry is required to meet certain standards in "the area of planning" and "training to workers" in case of emergency operation, preparedness of accidents and spills, etc.

Despite the Hong Kong Convention introducing new approaches specifically to shipbreaking, in practical terms, it is yet to enter into force, mainly because the South Asian countries have not ratified the Convention. Their principal argument is, the Convention does not include a mandatory obligation on the shipping companies for 'pre-cleaning' the ships before sending them off to developing countries for dismantling. Instead, the *Regulation for Safe and Environmentally Sound Recycling of Ships* provides "ships destined to be recycled shall conduct operations in the period prior to entering into the ship recycling facility to minimise the amount of cargo residues, fuel oil, and wastes remaining on board." This means shipping companies have no liability to pre-clan their ships before the ships start their last journey.

Way Forward

The problem in imposing liability for the human rights violation and environmental damage on the shipping industry has to be resolved by an international regulatory framework. For instance, the problem of finding the last owner while selling a ship for dismantling will need to be resolved so that responsibility can be placed on the shipping

industry. This will pave the way for safeguarding human and environmental rights within the shipbreaking industry. Mandatory regulations are required in order to bring about a meaningful change in the corporate behaviour of the shipping industry. The ship owners should have responsibility from the perspective of their involvement in the shipping business for the safe and sustainable working environment for dismantling ships and in case the existing mechanism fails to prevent the problems, they must compensate the victims.

Maritime industry is depended on the industry for maintaining their average fleet and so the developing countries for the business profit and livelihood for their workers. However, an industry-setting standard is required in order to protect human and environmental rights. Drawing analogy from other global events that brought about successful regulatory changes, the International Maritime Organisation (IMO) should push the international community to introduce a global shipbreaking liability insurance under a legal framework. For example, under the IMO led *Civil Liability Convention* (CLC) 1992, insurance is mandatory for inter-state transport of oil. Tracking the last owner of a ship, an important objective of the insurance would be to pay compensation to the victims. The global regulation to introduce such insurance would explicitly mention that without an insurance, a shipping company is not allowed to sell a ship for breaking. If a ship were sold without insurance, the last holder of insurance would be liable. The insurance would be governed by international maritime insurance industries.

Importantly, the proposed insurance is not only to introduce compensatory liability on the ship sellers but it is also to persuade the industries complying with the requirements of the *Hong Kong Convention*'s cradle to grave approach as discussed before. The insurance would thus supplement the global existing framework since the *Hong Kong*

Convention that deals only with occupational safety and health without any policy on the issue of compensation for workplace injuries and fatalities. Nevertheless, the IMO may require support from major shipping nations to trigger such a mechanism. But it is good that the European Union has been very proactive to regulate their shipping industries. The EU has already introduced the *European Union Ship Recycling Regulation* and there is a strong support to introduce a similar shipbreaking liability insurance within the EU.

Mohammad Zulfikar Ali is a judicial officer. He joined Bangladesh Judicial Service in 2008. Serving in different positions, he has recently been promoted as Additional District and Sessions Judge. Previously he worked as a corporate lawyer in Bangladesh. He has published a number of papers in national and international journals. His recent publication is, *Effectiveness of the Hong Kong International Convention for the Ship Recycling Industries in India, Bangladesh and Pakistan*. He is an AusAID scholar. Now he is a PhD candidate at Curtin Law School (CLS), Curtin University, Perth, WA. His PhD focuses on regulating human and environmental rights abuse within the global ship recycling industry. He has also been working as a teaching assistant at CLS.