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CONTENTS

EDITORIAL

Welcome to the MAY 2021 issue of ANZSIL *Perspective*.

My editorial team and I are pleased to publish the latest insightful contributions to the ANZSIL *Perspective* online platform www.anzsilperspective.com where you can find all our latest *Perspectives* and our archive. In addition to accessing our publications, please let us know if you have any suggestions regarding accessibility of the new site.

As ANZSIL *Perspective* continues to grow, we look forward to monthly or fast turnaround contributions which can particularly reflect our regional representation in international law practice and academia.

We are particularly keen to encourage book reviews as well as articles on areas of interest to the ANZSIL membership, based in Australia and New Zealand as well as topics with broader international law implications.

This month we are very pleased to have three excellent perspectives on the election of ICC prosecutor Karim Khan QC, COVID-19 and Trade-Related Security Exceptions and Respect for International Humanitarian Law Beyond the Battlefield.

As ever, we are keen to encourage contributions from across our membership and the wider international legal community, especially early career researchers such as doctoral candidates, postdoctoral researchers and legal professionals who have recently entered practice. I am also pleased that our contributions in 2020 included discussion and responses to earlier publications so that ***ANZSIL Perspective*** is also contributing to continued debate and education. I look forward to the submissions for June 2021.

Felicity Gerry QC (Editor)

The deadline for the next ANZSIL *Perspective* is 18 June 2021. 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.*

When consultations fail to deliver consensus – electing the third ICC Prosecutor by unprecedented vote

By Phoebe Copeland and Keilin Anderson

On 12 February 2021, the Assembly of States Parties (ASP) of the International Criminal Court (ICC) elected Karim Khan QC as the Court's next Prosecutor. The election followed a series of formal consultations between States Parties, which were constructive and narrowed the field, but ultimately failed to identify a consensus candidate. As a result, the election of the Prosecutor was resolved by secret ballot for the time since the establishment of the Court in 2002. Khan will replace outgoing Prosecutor, Fatou Bensouda, on 16 June 2021 and will serve a nonrenewable term of nine years as Prosecutor. Khan's election comes at an important juncture for the Office of the Prosecutor (OTP) particularly in light of the recent report of the Independent Expert Review (IER), with 130 of the 384 recommendations of the report specifically addressing the performance and effectiveness of the OTP.

Application process and shortlisting of candidates

On 3 April 2019, the Bureau of the ASP established the Committee on the Election of the Prosecutor. The Committee, assisted by a panel of independent experts, was tasked to assess applications for the position of Prosecutor, establish and interview a longlist of candidates, produce a shortlist of three to six of the most highly qualified candidates, and prepare a final report outlining how the shortlisted candidates meet the requirements for the position. Under the *Rome Statute of the International Criminal Court* (Rome Statute), the Prosecutor must be of 'high moral character' and be 'highly competent in and have extensive practical experience in the prosecution and trial of

criminal cases'. In addition, the Terms of Reference of the Committee required candidates to have 'demonstrated management experience' and an 'in-depth knowledge of national or international criminal law and public international law'.

On 30 July 2020, the Committee delivered its final report appraising an unranked shortlist of four candidates for Prosecutor: Morris Anyah (Nigeria/US), Fergal Gaynor (Ireland), Susan Okalany (Uganda) and Richard Roy (Canada). However, a number of States Parties raised concerns about the shortlist, with some noting that it would be beneficial to have additional candidates with greater civil law and management experience. After much discussion, the Bureau of the ASP agreed to release a longlist of candidates for further consideration by the Committee. On 25 November 2020, the Committee delivered a revised report with appraisals of five additional candidates: Carlos Castresana (Spain), Karim Khan (UK), Francesco Lo Voi (Italy), Robert Petit (Canada) and Brigitte Raynaud (France). To enable sufficient consideration of the additional candidates and formal consultations by States Parties, the election, initially scheduled for December 2020, was delayed until early 2021.

Consultations and the search for consensus

Article 112(7) of the Rome Statute provides that 'every effort shall be made to reach decisions by consensus in the Assembly and the Bureau'. For the election of the Prosecutor, this process seeks to ensure, to the extent possible, that the Prosecutor enjoys the support of all States Parties. In the absence of consensus, the Prosecutor is to be elected in a secret ballot by an absolute majority of the ASP.

The first two ICC Prosecutors, Luis Moreno Ocampo and Fatou Bensouda, were elected by consensus. However, on this occasion State Parties were unable to reach consensus despite four rounds of formal consultations. Throughout the consultation process, States and civil society expressed a range of views about the relative strengths of the

candidates' qualifications and moral character, including those candidates identified by States Parties as most preferred. There was also some doubt about the approach to be taken to the Canadian candidates, Petit and Roy, on account of article 42(2) of the Rome Statute, which requires the Prosecutor and Deputy Prosecutor (who is currently Canadian) to be of different nationalities. These issues made it more difficult for the ASP to reach consensus on a single candidate, even though Khan led in all four formal consultation rounds, closely followed by Gaynor. As a result, the ASP moved to elect the Prosecutor by secret ballot—a first in the Court's history. Khan, Gaynor, Castresana and Lo Voi were each nominated by their respective States of nationality, meaning they were the only four candidates on the secret ballot. In the second round of voting, Khan was elected with 72 votes —10 more than the 62 votes required for an absolute majority.

Who is Karim Khan?

Karim Khan is a UK barrister currently serving as Special Adviser and Head of the Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD). Khan has considerable experience in the prosecution of domestic and international criminal cases and has appeared before various international criminal courts and tribunals (including the ICC) as a prosecutor as well as victims and defence counsel. In its revised report, the Committee on the Election of the Prosecutor noted Khan's command of international criminal law and practice and his understanding of the global context in which the ICC operates. In his application for Prosecutor, Khan promised to 'refocus and re-energise' the OTP by consolidating existing relationships and 'restoring trust with States Parties'.

What next for the Office of the Prosecutor?

Whilst the search for Khan's replacement will not commence until 2029, the process leading to his election could impact future ICC elections and perhaps elections to

international courts and organisations more broadly. The request to release the Committee's longlist of candidates, differences of view concerning the candidates' relative qualifications and moral character, and the subsequent failure of the ASP to reach consensus, have led to calls from civil society for a more rigorous vetting process and a campaign to #Electthebest.

In the meantime, Khan will lead the OTP through what is bound to be a challenging nine year term. Khan must navigate a range of politically and legally sensitive matters currently facing the Court, including the recent decision of the Pre-Trial Chamber regarding the Court's territorial jurisdiction in the Situation in Palestine. As noted, Khan's election also coincides with the release and implementation of the report of the IER which proposed 384 recommendations to strengthen the performance and effectiveness of the Court, including the preliminary examination process of the OTP. With the recent adoption by the ASP of a Resolution to establish a Review Mechanism for the implementation of the IER's recommendations, Khan assumes his role during a time of significant reflection and likely reform for the OTP, and the Court more broadly.

About the Authors: Phoebe Copeland (Senior Legal Officer) and Keilin Anderson (Legal Officer) work at the Office of International Law in the Australian Government Attorney-General's Department.

The COVID-19 Pandemic and Trade-Related Security Exceptions: An Analysis of the Flexibility under International Law

By Muhammad Zaheer Abbas, PhD

The COVID-19 pandemic has raised serious concerns about affordable and equitable access to the needed health technologies. The patent-based pricing model of health technologies further exacerbates these concerns. This paper critically evaluates Article 73(b) of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO TRIPS Agreement) to answer the key question: whether this safeguard provision can be invoked by WTO Member States in response to COVID-19 in order to improve access to critically needed health technologies. This is an important question because access to health technologies is a matter of life and death in a pandemic situation.

Since its first detection in Wuhan, China, in December 2019, COVID-19 has emerged as a massive global pandemic disease. On January 30, 2020, the World Health Organization (WHO) declared the outbreak as a Public Health Emergency of International Concern. The WHO declared COVID-19 a pandemic on March 11, 2020. In this context, on April 4, 2020, Carlos Correa, the Executive Director of the South Centre, wrote an open letter to Director-Generals of the WHO, WTO, World Intellectual Property Organization (WIPO) to highlight the concern that obligations of the WTO Member States under the TRIPS Agreement present a hurdle in timely advancement and universal supply of Corona vaccine and related medical technologies. The exclusive rights granted to patent owners negatively impact the affordable and universal supply of innovative health technologies by allowing supra-competitive pricing and by imposing restrictions on massive-scale manufacturing across the globe. Correa appealed to Director-Generals of the WHO, WTO, and WIPO to support use of Article 73(b) of the TRIPS Agreement to 'suspend the

enforcement of any intellectual property rights (including patents, designs and trade secrets) that may pose an obstacle to the procurement or local manufacturing of the products and devices necessary to protect their populations'. Subsequently, some other scholars and commentators like Henning Grosse Ruse-Khan, Imogen Saunders, Nirmalya Syam, and Emmanuel Kolawole Oke discussed the possibility of invoking the national security exceptions in the WTO regime.

Article 73(b) of the TRIPS Agreement, which mirrors Article XXI of General Agreement on Tariffs and Trade (GATT), allows WTO Member States to temporarily suspend their intellectual property commitments. It is essentially a safeguard clause which reads as:

> Nothing in this Agreement shall be construed:
>
> …
>
> (b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations;

This TRIPS flexibility allows WTO Member States to suspend their substantive obligations by providing the justification of protecting their essential security interests. The trade-related security exceptions were initially drafted in the Charter for an International Trade Organization (ITO) or Havana Charter 1948. Military and strategic interests formed the core of security exceptions as negotiations for these exceptions occurred in the broader context of the Cold War between the U.S. and the Soviet Union. Security exceptions from the failed ITO Charter were transplanted into the General Agreement on Tariffs and Trade (GATT) under Article XXI. The same security exceptions were later transplanted

into TRIPS Agreement under Article 73. The vague language of the provision drafted in the Cold War period suggests that the strategic rivals wanted to retain wide discretion and flexibility in security matters.

The WTO Member States enjoy a wide margin of discretion because of the broad scope of the ambiguous phrases like 'which it considers', 'essential security interests', and international 'emergency' used in this clause. The use of security exceptions is, however, not totally self-judging as it is reviewable and subject to dispute-settlement proceedings by the WTO Dispute Settlement Body (DSB). The recent Panel Report, *Russia – Measures Concerning Traffic in Transit* provided a comprehensive interpretation of security exceptions and set out a two-step framework: the existence of a war, emergency or other basis for invoking the provision, which is subject to objective determination; and the necessity of the trade-related security measure, which is subject to a good-faith test. Though the good-faith test has not been formulated clearly, diplomacy and invoking members' good faith are considered as the best constraint on trade-related security measures.

Over the past 74 years, the language of the security exceptions has remained unchanged though the concept of national security has evolved over time. Since the end of the Cold War, the global economic order has changed, as within the same multilateral trading system major strategic rivals are also economic competitors. Over recent decades, the concept of essential security has broadened well beyond military threats and the adversarial interstate paradigm. In contrast to the originally envisaged traditional security agenda of stopping armed conflict and resisting aggression, most of the contemporary expansive and multifaceted national security policies adopted by governments worldwide are aimed at addressing a wide array of security risks including climate change, environmental degradation, natural disasters, cyber threats resulting

from malicious cyber-enabled activities, human trafficking, drug trafficking, immigration, and infectious pandemic diseases. In the recent past, the Trump administration broadly used security concerns to defend the U.S. trade agenda under the rationale that 'national security is economic security'. The U.S. used national security as justification for its steel and aluminium tariffs.

The concept of national security is broadening over time to cover a range of contemporary security risks. Carlos Correa suggested the use of this exceptional measure keeping in view the current global scenario. This global pandemic has not only caused death, suffering, fear, and distress but also serious economic harm. COVID-19 poses a serious threat to the economic security of nations across the globe and threatens Member States with social, economic, and political instabilities. Health and security are interrelated concepts as the Constitution of the WHO recognized in 1948, stating that 'the health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States'.

Keeping in view the scale and seriousness of the threat posed by the COVID-19 pandemic, WTO Member States can possibly define security broadly in the wake of the COVID-19 health crisis as the current WTO regime allows the Member States to determine or define exceptions. The WTO Member States reached a consensus in the Doha Ministerial Declaration 2001 that 'each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency'. The threats posed by the current pandemic arguably justify the use of this safeguard provision. The WTO Member States may benefit from the ambiguous phrases like 'which it considers', 'essential security interests', and international 'emergency' used in this clause by linking the health emergency with economic security. The use of security exceptions, however, remains a less attractive policy option for WTO Member States lacking sufficient

domestic manufacturing capacity. The long-standing issue of technology transfer remains a substantial barrier in making effective use of security exceptions and several other public health flexibilities provided under the WTO regime.

About the Author: Muhammad Zaheer Abbas, BA/ LL.B (Hons)/ LL.M (IIU Pakistan), PhD (QUT Australia), is a Postdoctoral Research Fellow at Faculty of Business and Law, Queensland University of Technology (QUT), Brisbane, Australia. In this role, the author is working with Prof. Matthew Rimmer on his Australian Research Council Discovery Project 'Inventing the Future: Intellectual Property and 3D Printing' (Project ID: DP170100758). muhammadzaheer.abbas@connect.qut.edu.au

Ensuring Respect for International Humanitarian Law Well Beyond the Battlefield

By Dr Eve Massingham, University of Queensland and

Dr Marnie Lloydd, Victoria University of Wellington

States have a responsibility to create an environment conducive to all States' capacity to build respect for the laws of armed conflict (also known as international humanitarian law or IHL). This is just one expression of the obligation found in Common Article 1 to the Geneva Conventions (and Additional Protocol I and III thereto), to respect and ensure respect for IHL. As is explored further in the recently published volume *Ensuring Respect for International Humanitarian Law*, there are a number of different ways in which States fulfil this obligation, and challenge it, in their conduct with regard to other States and other entities. The obligation to respect and to ensure respect for IHL is often met through a State carrying out its activities in compliance with other obligations in international law, rather than being explicitly considered and cited. That said, some recent actions of both New Zealand and Australia have given further impetus to the argument that States should clearly check their actions against Common Article 1 when making decisions about their engagement with other States or private actors.

In January 2021, it was reported that Australia had 'approved at least 14 permits for the export of military goods to Saudi Arabia and the United Arab Emirates' in the preceding 18 month period. Given the humanitarian situation in Yemen caused by the armed conflict, this is not the first time in recent years that reports of Australian weapons being sold to the United Arab Emirates Armed Forces has attracted attention. The reports have also questioned Australia's sale of military goods to Turkey because of the humanitarian suffering in Syria.

Preventing the transfer of weapons to actors who may use them to commit serious violations of IHL is one of the key roles the obligation to ensure respect for IHL can play. The sale of weapons to parties to the conflicts in Yemen and Syria has particularly brought this topic to the attention of the media in a number of jurisdictions, including notably in the United Kingdom where a civil society organisation brought successful judicial review proceedings against the government concerning the transfer of arms to Saudi Arabia. By virtue of their being a party to the Arms Trade Treaty, some States have a specific obligation under Article 7 of that Treaty not to transfer weapons covered by the treaty where there is an overriding risk of them being used to commit or facilitate a serious violation of IHL. However, in addition to this specific obligation, the general obligation found in Common Article 1 to the Geneva Conventions, to ensure respect for IHL would require States not to allow weapons (or component parts) produced by them to end up in the hands of those who would use them in violation of IHL.

That Australia needs to give thought to these issues is acknowledged by the Government. In October 2019, then Defence Minister, Linda Reynolds, advised that she had asked for 'a pause' and for 'Defence to consult… before any new or pending export permits to Turkey are considered'. This was required in light of the actions of the Government of Turkey in Northern Syria which, she noted, were 'causing great civilian suffering' and further could 'significantly undermine the huge gains made... including [by] Australia' in the conflict in that region. However, despite assurances by the Department of Defence that the process of export applications takes into account 'international obligations' (which one assumes includes Australia's obligations under the Arms Trade Treaty), as well as suggestions that the export permits issued may not have actually been for items with a military purpose, it is not clear that Common Article 1 is a specific reference point for the Department of Defence.

A related issue concerning the Saudi-led coalition's hostilities in Yemen emerged in New Zealand in February 2021. It was reported that a gas turbine business unit of Air New Zealand, in which the New Zealand Government is a 52% shareholder, had been servicing Royal Saudi Navy vessels with parts and engine repairs through a third party contract. Political and civil society commentary initially queried whether New Zealand should be considered complicit by aiding or assisting in war crimes and raised concerns about corporate compliance with human rights. Air New Zealand officials quickly apologised and stopped work, setting out improved steps for 'ethical considerations' in future contract reviews. Prime Minister Jacinda Ardern described the contract as 'not passing the sniff test'. However, the debate and a Ministry of Foreign Affairs and Trade enquiry quickly turned to the domestic issue of whether the Air New Zealand business unit had obtained government authorisations for the contract or had breached export control orders. Despite it being highly relevant, the legal duty to respect and ensure respect for IHL, an undertaking implemented through New Zealand's Geneva Conventions Act 1958, was not publicly discussed.

In one sense, Prime Minister Jacinda Ardern's comment that the Saudi contract did not pass the 'sniff test' gives too little weight to what is an international legal obligation. In another sense, given the contested scope of the Common Article 1 obligation and, therefore, the limits to its practical enforceability, the duty is in practice rendered rather aspirational. It *can* really come down to a 'sniff test'. Going ahead with the provision of goods or services that fails the sniff test precisely evidences insufficient diligence having been taken to purposefully check the actions against the legal duty to ensure respect for IHL.

Ongoing monitoring and assessment of the situation when a state is providing military assistance is key because the conduct of hostilities is dynamic and the situation –

including the respect or not for IHL – can change. Once the assisting State – Australia or New Zealand in these cases – becomes aware that the receiving State or actor may be violating IHL in its military activities, the assisting State may be required to reconsider its provision of assistance, limit that assistance or obtain certain assurances, or halt the assistance entirely. Given that in the case of Yemen, the involvement of the Saudi-led coalition in the commission of IHL violations is well-documented, one of the most straightforward ways to take positive action and pass the right message of disapproval would be not to become involved in any actions that could support the operations in the first place.

Both the Australian and New Zealand examples suggest that diligence in IHL compliance, including ensuring respect for IHL, can best be achieved with a whole of government approach. This necessarily includes business relationships, and an understanding that concern for humanitarian considerations during armed conflict is not only a matter for the defence forces or humanitarian organisations working in conflict zones. In both these recent Australian and New Zealand situations, checking proposed actions against Common Article 1 was both relevant and legally required.*In this blog post the authors have sought to highlight some recent case examples where the obligation to ensure respect for IHL is at play for Australia and New Zealand. The authors will be joined by fellow authors of Ensuring Respect for International Humanitarian Law to talk more about these topics during a panel of the forthcoming 2021 ANZSIL Conference.*

About the Authors:

Marnie Lloydd is a Lecturer at Te Herenga Waka/Victoria University of Wellington, New Zealand. She researches and teaches in the areas of the law of armed conflict, counterterrorism, forced displacement, and humanitarian law and policy. She previously worked as a Delegate and Legal Advisor with the International Committee of the Red Cross and as an independent legal consultant with the UNHCR. Marnie is a member of New Zealand's National IHL Committee and serves on the Board of Experts of the Asia-Pacific Journal of International Humanitarian Law.

Eve Massingham is a Senior Research Fellow with the School of Law, The University of Queensland. Eve's current research focuses on the diverse ways in which the law constrains or enables autonomous functions of military platforms, systems and weapons. She is the co-editor of *Ensuring Respect for International Humanitarian Law* (Routledge, 2020) and she has published a number of book chapters and journal articles in the fields of international humanitarian law and international law and the use of force. Prior to joining the University of Queensland, Eve spent most of her career with the International Red Cross and Red Cross Movement.