

THE INTERNATIONAL LAW ASPECTS OF THE CASE OF THE BALIBO FIVE

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On 16 November 2007, Ms Dorelle Pinch, as Deputy Coroner, found that the five Australian-based journalists at Balibo, the 'Balibo Five', had been deliberately killed by members of the Indonesian Special Forces to prevent them from revealing that such forces had participated in the attack on Balibo. On 9 September 2009, the Australian Federal Police announced that it was launching a 'war crimes' investigation into the killing. This article explores the international law questions facing the Australian Government in respect of the case. It argues that whilst complex international humanitarian law issues are involved, on the Coroner's findings the killings were truly war crimes under international law and Australia has the right to seek the extradition of the suspects from Indonesia or to call for their prosecution abroad.

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I INTRODUCTION

Few events have become as poignantly etched into the Australian psyche as the deaths of five Australian journalists in Balibo, Timor-Leste (or Portuguese Timor, as it was then known), who have become known in Australian folklore as ‘the Balibo Five’.¹

In 1975, Australians Greg Shackleton and Tony Stewart, Britons Brian Peters and Malcolm Rennie and New Zealander Gary Cunningham were Australian-based reporters in East Timor attempting to tell the world about the predicted Indonesian invasion of that country. At the time, Indonesia was denying that its soldiers were directly involved. These young journalists never got to make their world exclusive. Instead, they were killed in the remote village of Balibo following the invasion they were attempting to report on. Their families have always maintained that they were deliberately killed by Indonesian soldiers. Two Australian government inquiries put their deaths down to ‘cross-fire’ and ‘the heat of battle’.²

Their case, however, would not go away. To many in Australia and elsewhere, their deaths were a reminder of how the victims of military aggression are expendable in the face of a desire for good relations between states. Ms Tolfree (Mr Peters’s sister), through her lawyers, invoked a little used provision in the *Coroners Act 1980* (NSW) to ask for a coronial inquest based upon Mr Peters’s residence in New South Wales.³ On 16 November 2007, after hearing all the evidence, including that of a number of eyewitnesses on both sides of the attack on Balibo, Magistrate Dorelle Pinch made findings under s 22(1) of the *Coroners Act 1980* (NSW). She found the journalists were surrendering to the Indonesian forces by throwing their arms in the air and protesting their status as ‘Australians’ and ‘journalists’ when the order came from Captain Yunus Yosfiah of the Indonesian Special Forces that they be killed. It was only after they were killed that they were dressed in old Portuguese army uniforms, photographed to show they were active participants in the hostilities and then burnt to conceal they were killed by AK-47 weapons which were not used by the local forces.⁴

¹ *Inquest into the Death of Brian Raymond Peters* (Unreported, Coroner’s Court of New South Wales, Magistrate Pinch, 16 November 2007) 3, (‘*Coroner’s Findings*’).

² Under pressure, Foreign Minister Alexander Downer in 1996 appointed Mr Tom Sherman, former head of the National Crime Authority, to conduct an inquiry. Sherman was later called upon to conduct a further inquiry to review the evidence presented on 20 October 1998 by the ABC television program ‘Foreign Correspondent’: Tom Sherman, ‘Report of the Deaths of Australian-based Journalists in East Timor in 1975’ (June 1996); Tom Sherman, ‘Second Report on the Deaths of Australian-based Journalists in East Timor in 1975’ (January 1999).

³ *Coroners Act 1980* (NSW) s 13A(2)(a), as repealed by *Coroners Act 2009* (NSW). The corresponding section in that legislation is s 18(2)(a).

⁴ *Coroner’s Findings* (Unreported, New South Wales State Coroner’s Court, Magistrate Pinch, 16 November 2007) 111–13.

Her conclusion was expressed as follows:

Brian Raymond Peters, in the company of fellow journalists Gary James Cunningham, Malcolm Harvie Rennie, Gregory John Shackleton and Anthony John Stewart, collectively known as 'the Balibo Five', died at Balibo in Timor-Leste on 16 October 1975 from wounds sustained when he was shot and/or stabbed deliberately, and not in the heat of battle, by members of the Indonesian Special Forces, including Christoforus da Silva and Captain Yunus Yosfiah on the orders of Captain Yosfiah, to prevent him from revealing that Indonesian Special Forces had participated in the attack on Balibo.⁵

The Coroner stated that the findings in respect of the deaths of Messrs Rennie, Shackleton, Cunningham and Stewart would be in exactly the same terms. The Coroner indicated that she intended to refer the matter to the Commonwealth Attorney-General for consideration of potential breaches of div 268 of the *Commonwealth Criminal Code*.⁶ On 9 September 2009, the Australian Federal Police ('AFP') announced that it was launching a 'war crimes' investigation into the killings. The findings of the Coroner and the AFP investigation are unique. Never before in Australia has there been a Commonwealth prosecution for war crimes under the *Geneva Conventions Act*.⁷

This article considers the international law aspects of the case. It considers whether the killings were 'war crimes', *stricto sensu*, within the meaning of the *Geneva Conventions* of 1949.⁸ It also considers the international law obligations of the main states involved: Australia and Indonesia. It concludes that the killings, on the Coroner's findings, were likely war crimes under the *Geneva Conventions* and that both states have obligations to cooperate with each other in respect of the matter. By ratifying the *Geneva Conventions*, states parties have agreed that if one state party concerned makes out a prima facie case against a person suspected of committing war crimes, the State in whose territory the suspect is located must either extradite the individual or prosecute him or her before its own courts. Under international law the case of the Balibo Five should not be seen as being a dispute between states. Rather, the emphasis in the eyes of international law is on ensuring that *individual* perpetrators of international crimes, regardless of nationality or location, are held to account.

⁵ Ibid 129.

⁶ *Criminal Code Act 1995* (Cth) ('*Commonwealth Criminal Code*').

⁷ 1957 (Cth) ('*Geneva Conventions Act*').

⁸ *Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*') (collectively, '*Geneva Conventions*').

II THE *GENEVA CONVENTIONS ACT* AND AUSTRALIA'S JURISDICTION TO PROSECUTE WAR CRIMES

As at 16 October 1975 (the date of the killings in Balibo), the *Geneva Conventions Act* was in force. As the title of the *Act* suggests, the *Act* is based upon the four *Geneva Conventions*. The four *Conventions* were adopted at a diplomatic conference in Geneva on 12 August 1949 and entered into force on 21 October 1950. Australia has ratified the four *Geneva Conventions*. Today 194 countries are states parties to the *Conventions* and their provisions are (and were in 1975) generally regarded as reflecting customary international law. The *Geneva Conventions* that were adopted before 1949 were concerned with combatants only, not with civilians. As the International Committee of the Red Cross ('ICRC') *Commentaries on the Conventions* put it: '[t]he events of World War II showed the disastrous consequences of the absence of a convention for the protection of civilians in wartime'.⁹

This absence led to *Geneva Convention IV*, the *Convention* relevant to the case of the deaths of the five journalists at Balibo. All states parties to the *Geneva Convention IV* are required to enact 'legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches' of the *Convention*.¹⁰ Each state party is also required to search for such suspects and to bring them, 'regardless of their nationality, before its own courts'.¹¹ Alternatively, a state party may hand such persons over for trial to another state party which has made out a prima facie case against them.¹² Hence, it is frequently stated that the *Geneva Convention IV* (as in the case of all the *Geneva Conventions*) establishes and requires states parties to invest its courts with 'universal criminal jurisdiction' over war crimes, irrespective of the place of the crime or the nationality of either victim or perpetrator.¹³ This reflects the principle that because the international community as a whole has a collective interest in suppressing war crimes, all states parties, on behalf of that international community, have a responsibility and duty to exercise universal jurisdiction over suspects found in their jurisdiction irrespective of any link between the crime and that state party.¹⁴ As put by the *ICRC Commentaries*: '[t]he universality of jurisdiction for grave breaches is some basis for the hope that they will not remain unpunished and the obligation to extradite ensures the universality of punishment'.¹⁵

The principle of 'universal jurisdiction' is reflected in s 7(1) of the *Geneva Conventions Act* which provides that '[a] person who, in Australia or elsewhere, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the *Conventions* is guilty of an indictable offence'.

⁹ ICRC, *1949 Convention and Additional Protocols, and their Commentaries* (1958) 1 <<http://www.icrc.org/ihl>> ('*ICRC Commentaries*').

¹⁰ *Geneva Convention IV* art 146.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ See, eg, Gerhard Werle, *Principles of International Criminal Law* (Cambridge University Press, 2005) 57–65. Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 284–5.

¹⁴ See, eg, M Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational, 2003) 698–704.

¹⁵ *ICRC Commentaries*, above n 9, 587.

Section 6(2) of the *Geneva Conventions Act* makes it clear that the *Act* ‘has extra-territorial operation according to its tenor’. Further, by s 7(3) of the *Geneva Conventions Act*, s 7 applies to persons regardless of their nationality or citizenship. Finally, the jurisdiction to try for extraterritorial war crimes is not dependent on Australia being involved in the international armed conflict in question or the victim being an Australian citizen or resident. The *Act* reflects the scheme of universal jurisdiction embodied in the *Geneva Conventions*.

Section 10(2) of the *Act* vests federal jurisdiction to prosecute grave breaches committed outside Australia in the State and Territory Supreme Courts. Those State or Territory courts must be Supreme Courts.¹⁶ Offences under the *Act* must not be prosecuted in a court except by indictment in the name of the Attorney-General.¹⁷ Consequent upon Australia ratifying the *Rome Statute of the International Criminal Court*,¹⁸ div 268 (with prospective operation) was added to the *Commonwealth Criminal Code*. It introduced the crimes of genocide, crimes against humanity and war crimes broadly as defined in the *Rome Statute*. Part II of the *Geneva Conventions Act*, which includes the substantive offences at s 7, was repealed by sch 3 of the *International Criminal Court (Consequential Amendments) Act 2002* (Cth). The ordinary presumption in the case of the repeal of part of an Act is that this does not affect its previous operation, including any liability incurred or any investigation, legal proceeding or remedy arising under that Act, unless the contrary intention appears in the repealing statute.¹⁹ The Explanatory Memorandum to the 2002 Bill confirmed that Parliament’s intention was not to preclude a war crimes prosecution being initiated under the *Geneva Conventions Act* in respect of offences which occurred prior to its repeal in 2002.²⁰ Hence, a criminal indictment under the *Geneva Conventions Act* may still be initiated today in respect of offences committed in 1975.

III DO THE CORONER’S FINDINGS EVIDENCE THE COMMISSION OF THE WAR CRIME OF ‘WILFUL KILLING’ UNDER THE *GENEVA CONVENTIONS ACT*?

A Introduction

By s 7(2) of the *Geneva Conventions Act*, a grave breach of the *Geneva Conventions* will include any of the breaches listed in art 147 of *Geneva Convention IV*. Article 147 provides:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing ...

¹⁶ *Geneva Conventions Act* ss 10(1), (2), (5), as repealed by *International Criminal Court (Consequential Amendments) Act 2002* (Cth) sch 3.

¹⁷ *Ibid* s 7(6).

¹⁸ Opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) (*Rome Statute*).

¹⁹ *Acts Interpretation Act 1901* (Cth) s 8.

²⁰ Explanatory Memorandum, *International Criminal Court (Consequential Amendments) Bill 2002* (Cth).

Thus the war crime of ‘wilful killing’²¹ is a grave breach of *Geneva Convention IV* and involves the following elements:

- 1 The existence of a state of international armed conflict or occupation to which the Convention applies;
- 2 The existence of a sufficient nexus between the killings and that international armed conflict or occupation;
- 3 The victims are ‘protected persons’;
- 4 Their deaths are the result of a ‘wilful killing’;
- 5 The killings are not justified by any of the customary rules or defences applicable under the laws of war.

B *Was There an International Armed Conflict or Occupation to Which Geneva Convention IV Was Applicable?*

1 *Common Article 2*

Common art 2 of the *Geneva Conventions* states that:

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

In October 1975, both Indonesia and Portugal were High Contracting Parties of the *Geneva Conventions*. Indonesia acceded (without reservation) to the four *Geneva Conventions* on 30 September 1958. Portugal signed the four *Geneva Conventions* on 11 February 1950 and ratified them on 14 March 1961. There was no declaration of war between Portugal and Indonesia, so the issue is whether there was ‘any other armed conflict’ between Indonesia and Portugal.

2 *Was There a State of International Armed Conflict?*

The existence of an armed conflict between states is a question of fact. By art 142 of the *Convention*, the ICRC has a special position with respect to the execution of the four *Geneva Conventions* which must ‘be recognized and respected at all times’.²² The ICRC Commentaries are frequently relied upon in construing the *Conventions*. The ICRC Commentaries on art 2 indicate the following:

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

²¹ *Geneva Convention IV* art 147.

²² *Geneva Convention IV* art 142.

²³ *ICRC Commentaries*, above n 9, 28.

The evidence supports the existence of a state of international armed conflict from at least 7 October 1975.²⁴ Before then, civil unrest erupted in the former Portuguese colony between different forces. Some supported integration with Indonesia (the Timorese Democratic Union ('UDT') and Apodeti) and others, (The Revolutionary Front for an Independent East Timor ('Fretilin')), supported independence. Indonesia was then staunchly anti-communist and fearful of a Fretilin takeover. Shortly after July 1975, Indonesian operations included covert military activity in support of the UDT and Apodeti. This was termed Operation Flamboyan and was under the direction of Major General Benny Murdani, Head of Kopassandha and the senior intelligence officer within the Department of Defence and Security. Members of the Special Forces in theory 'volunteered' for Operation Flamboyan and they were divided into three teams: Team Susi, Team Tuti and Team Umi. Team Susi was under the command of Yunus Yosfiah. These Indonesian forces conducted several hit-and-run raids in East Timor. On 7 October 1975, Indonesia launched a major covert initiative to seize border enclaves in the name of the pro-integration partisan forces. This commenced with a successful attack at Batugade. The attack involved up to 2 000 Indonesian troops along with naval and artillery bombardment by Indonesian forces.²⁵ Fretilin forces withdrew into the hills towards Balibo and Maliana. According to the Coroner, from the time that Indonesian military forces assisted the partisan forces to drive Fretilin out of Batugade in early October, there was a large identifiable Indonesian military presence in East Timor engaged in armed conflict that was under the command of senior Indonesian military figures such as General Yoga and Major General Murdani. On the morning of 16 October 1975, following the fall of Batugade, the three separate Indonesian Special Forces teams supplemented by regular para-commandos and two companies attacked Maliana, Balibo and a marine battalion converged on the coastal town of Valaka. The Coroner concluded, 'I have no doubt on the facts before me that Indonesia, as one of the High Contracting Parties, was engaged in an armed conflict in East Timor.'²⁶ This was also the conclusion of others.²⁷

The situation as at October 1975, so far as the Portuguese forces were concerned, was that they had withdrawn to the island of Atauro following an attempted coup by the UDT in August 1975 in Dili.²⁸ The Portuguese authorities had planned a universal secret ballot for 1976 to allow the population to decide upon its new political direction. 'On 10 August 1975 UDT occupied the police headquarters and other administrative buildings in Dili in a concerted bid for power'.²⁹ On 11 August the UDT took command of the airports and radio

²⁴ The covert Indonesian invasion of 7 October 1975 is dealt with in the *Coroner's Findings* (Unreported, New South Wales State Coroner's Court, Magistrate Pinch, 16 November 2007) 14–16, 123, and is summarised in this paragraph.

²⁵ James Dunn, *Timor: A People Betrayed* (ABC Books, 1996) 204–5.

²⁶ *Coroner's Findings* (Unreported, New South Wales State Coroner's Court, Magistrate Pinch, 16 November 2007) 123.

²⁷ See, eg, Ben Saul, 'Prosecuting War Crimes at Balibo under Australian Law: The Killing of Five Journalists in East Timor by Indonesia' (2009) 31 *Sydney Law Review* 83, 86; Suzannah Linton, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor' (2001) 25 *Melbourne University Law Review* 122, 159.

²⁸ *Coroner's Findings* (Unreported, New South Wales State Coroner's Court, Magistrate Pinch, 16 November 2007) 15, which is the source for the summary given in this paragraph.

²⁹ *Ibid.*

transmitters. Portuguese and Timorese troops were confined to barracks. The Portuguese Governor condemned the coup and called for talks. Those Timorese troops who supported Fretilin left their barracks, taking their weapons with them. '[B]y the end of August 1975 Fretilin was in control of Dili.'³⁰ By October 1975 Fretilin forces had defeated the UDT forces who then withdrew into Indonesian territory. Portugal tried unsuccessfully to organise meetings for talks whilst Fretilin was in substantial control of East Timor.

The position in East Timor at the time of the Indonesian invasion on 7 October 1975 can best be characterised as one state intervening by the use of armed force in the internal conflict, and perhaps civil war, of another state. Such intervention by armed forces on the side of one of the forces engaged in the internal civil war within a state, without the permission of the recognised government of that state, will bring about an international armed conflict. This was recognised by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Tadić*,³¹ where the Tribunal held:

It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal conflict act on behalf of that other State.³²

The facts in East Timor suggest that both of the circumstances pointed to by the Appeals Chamber are satisfied. Indonesia intervened in the conflict in East Timor through its troops, including with the support of artillery and naval bombardments, thereby invading Portuguese territory in conjunction with partisan forces but without the consent of the recognised government of Portugal. It was accepted in *Tadić* that the intervention of the Serbian Army in the territory of Bosnia and Herzegovina, after that State's independence was recognised by the international community, meant that an international armed conflict had arisen.³³ It did not matter that the intervention was on behalf of, or in support of, the Bosnian Serb army which was involved in an internal civil war at the time in Bosnia. In the result, a state of international armed conflict had arisen at the time of the deaths of the Balibo Five.

3 *Was the Conflict between Indonesia and Portugal?*

Whilst it may be confidently asserted that there existed in a general sense an international armed conflict in East Timor at the time of the Balibo killings, an issue arises as to whether that conflict was between two High Contracting

³⁰ Ibid.

³¹ (*Judgment*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) ('*Tadić Appeal Judgment*').

³² Ibid [84]. See also *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T (3 March 2000) [76].

³³ *Tadić Appeal Judgment* (International Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [88]–[162].

Parties, being Indonesia and Portugal. This involves two issues: the absence of direct fighting between the armed forces of those countries and whether East Timor was still part of Portugal under international law. In respect of the first issue, it should not be regarded as relevant that Portuguese forces abstained from the fighting or that Fretilin led the armed resistance. Indonesian forces were using military violence on Portuguese territory without Portugal's permission. The *Geneva Conventions* expressly apply to occupations of territory that are not met by *any* armed resistance and hence apply even where there has been no armed conflict at all.³⁴

Similarly, the ICRC Commentaries in respect of art 2 of *Geneva Convention III* state that '[e]ven if there has been no fighting the fact that persons covered by the *Convention* are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial'.³⁵ The same reasoning as mentioned by the Commentaries suggests an international armed conflict will take place if there is intervention by the armed forces of one state in the territory of another even if there is no actual fighting between armies,³⁶ a fortiori where there was in fact armed conflict between the Indonesian troops and Fretilin soldiers. This was the conclusion of the Coroner³⁷ and it has the support of scholars in the field.³⁸

As to the second issue, it may be argued that, shortly prior to 15 October 1975, de facto power in East Timor rested with Fretilin rather than Portugal. Nevertheless, it is unlikely that under international law this brought about a newly created independent State of East Timor — being a state which was not at that time a High Contracting Party of the *Geneva Conventions*. Since 1960, under the auspices of the UN's work on decolonisation, the international community recognised Portuguese East Timor as a non-self-governing territory administered by Portugal. This had the result that the people of East Timor were entitled to an act of self-determination to determine their future status, whether as an independent nation or by way of integration with Indonesia.³⁹ This was accepted by Portugal after its regime change of 1974. Portugal had established the National Decolonisation Commission which had planned a universal secret ballot in 1976 for the people of East Timor to express their free choice as to its future political status. It was only when Indonesia's invasion appeared inevitable that Fretilin on 28 November 1975 made a declaration of independence which in turn was met by UDT declaring the integration of East Timor into Indonesia. Fretilin's unilateral declaration of independence was not widely recognised by the international community as constituting East Timor's act of self-determination or the creation of an independent state under the control of Fretilin.

³⁴ *Geneva Conventions* art 2.

³⁵ ICRC Commentaries, above n 9, 23.

³⁶ *Ibid.*

³⁷ *Coroner's Findings* (Unreported, New South Wales State Coroner's Court, Magistrate Pinch, 16 November 2007) 123.

³⁸ See Saul, above n 27, 86; Linton, above n 27, 159.

³⁹ See, eg, Antonio Cassese, *Self Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1996).

After Indonesia's attack on Dili in December 1975 both the Security Council (by resolutions dated 22 December 1975 and 22 April 1976)⁴⁰ and the General Assembly (by resolution dated 12 December 1975)⁴¹ not only condemned Indonesia's invasion and acknowledged the inalienable right of the East Timorese to exercise their right of self-determination, but also recognised that Portugal remained the 'administrating power' in East Timor. After referring to these UN resolutions, the International Court of Justice in *Case concerning East Timor (Portugal v Australia)*⁴² observed that Portugal was still regarded by the international community as the administering power of a non-self-governing territory even after Indonesia's purported annexation of East Timor.⁴³ No country other than Australia recognised Indonesia's takeover of East Timor after 1975.

In *Prosecutor v Milošević*,⁴⁴ the Trial Chamber of the ICTY held that one of the elements for determining precisely when Croatia reached statehood from the Socialist Federal Republic of Yugoslavia included the issue of whether Croatia had an effectively functioning government with ministers and other personnel which performed all sorts of usual governmental functions.⁴⁵ Fretilin's failure (certainly as at 16 October 1975) to have an effective functioning government with ministers further supports the proposition that the territory was still part of Portugal. Rather, East Timor remained a territory under the administration of Portugal so as to make Indonesia's invasion an armed conflict between two High Contracting Parties.

4 *Was There an Indonesian Occupation of East Timor?*

By common art 2, the *Geneva Conventions* also apply to the case of partial occupations of the territory of a High Contracting Party. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁴⁶ the ICJ observed that

under customary international law ... territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.⁴⁷

By 16 October 1975, at least Batugade was under the authority of the Indonesian army and hence there was a partial occupation of the Portuguese territory of East Timor. Whether Balibo also came under the occupation of Indonesia is considered below.

⁴⁰ SC Res 384, UN SCOR, 30th sess, 1869th mtg, UN Doc S/RES/384 (22 December 1975); SC Res 389, UN SCOR, 31st sess, 1914th mtg, UN Doc S/RES/389 (22 April 1976).

⁴¹ *Question of Timor*, GA Res 3485 (XXX), UN GAOR, 30th sess, 2439th plen mtg, UN Doc A/RES/3485 (XXX) (12 December 1975).

⁴² (*Judgment*) [1995] ICJ Rep 90.

⁴³ *Ibid* 103.

⁴⁴ (*Decision on Motion for Judgment of Acquittal*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-02-54-T, 16 June 2004).

⁴⁵ *Ibid* [106].

⁴⁶ (*Advisory Opinion*) [2004] ICJ Rep 136 ('*Occupied Palestinian Territory*').

⁴⁷ *Ibid* 167.

5 Conclusion

At the time of the killing of the Balibo Five, the *Geneva Conventions* applied because:

- 1 there existed an armed conflict between Indonesia and Portugal at least after 7 October 1975 consequent upon the use of armed forces by Indonesia in East Timor which continued until 15 October 1975; and
- 2 Indonesia had partially occupied the Portuguese territory of East Timor.

It should be noted that if a question arises concerning the application of the *Geneva Conventions* under common art 2 of the *Conventions*, a certificate from the Minister of State for Foreign Affairs certifying 'to any matter relevant to that question is prima facie evidence of the matter so certified'.⁴⁸ Hence, if need be, the Minister at trial may certify to certain matters such as the existence of armed conflict between the two High Contracting Parties, Indonesia and Portugal, as at 16 October 1975.

C *Was There a Sufficient Nexus between the Killing of the Balibo Five and the International Armed Conflict or Occupation?*

It is generally accepted that the commission of a 'war crime', constituted by the commission of a grave breach of the *Geneva Conventions*, requires that the following two general elements be satisfied:

- 1 the killing has occurred at the time and place of the international armed conflict to which the *Geneva Conventions* apply;
- 2 and there must be a sufficient nexus between the acts of the accused and the armed conflict.⁴⁹

As to the first element, jurisprudence from the ICTY establishes that the crime need not have taken place in the precise square inch of where military activities are occurring at the time.⁵⁰ In *Tadić*, the ICTY Appeals Chamber stated that 'the temporal and geographical scope of [an] international armed [conflict] extends beyond the exact time and place of hostilities'.⁵¹ The first of the 'general elements' is obvious here. As found by the Coroner, it was in the course of the advance of the Indonesian troops and the allied partisans into Balibo and following limited sporadic fighting with Fretilin that the soldiers came upon and killed the journalists. Clearly enough, a sufficient temporal and geographic connection existed between the alleged killing and the armed conflict in question.

⁴⁸ *Geneva Conventions Act* s 8, as repealed by the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) sch 3.

⁴⁹ See, eg, *Prosecutor v Kunarac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [402]; *Prosecutor v Naletilić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-34-T, 31 March 2003) [225].

⁵⁰ *Prosecutor v Kunarac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case Nos IT-96-23 and IT-96-23/1-A, 12 June 2002) [64].

⁵¹ *Prosecutor v Tadić (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-AR72, 2 October 1995) [67].

Turning to the second general element, the act or omission in question must have been sufficiently connected to the armed conflict. In the words of the ICTY Appeals Chamber in *Tadić*, the conduct in question must have been ‘closely related to the hostilities’.⁵² It is clear that it is not necessary that the alleged war crime be committed pursuant to an officially sanctioned practice or policy or be on orders from high authority. As was stated by the Trial Chamber in the *Tadić Trial Judgment*:⁵³

It would be sufficient to prove that the crime was committed in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties. It is not, however, necessary to show that armed conflict was occurring at the exact time and place of the proscribed acts alleged to have occurred, as the Appeals Chamber has indicated, nor is it necessary that the crime alleged takes place during combat, that it be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict; the obligations of individuals under international humanitarian law are independent and apply without prejudice to any questions of the responsibility of States under international law. The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict as a whole.⁵⁴

The focus of a war crime charge is on the suspect’s individual conduct, not the role of the state. Unlike the case of a ‘crime against humanity’ under art 7 of the *Rome Statute*, there is no need to link the crime with any policy of a state or organisation. Again there would appear to be little doubt that on the findings of the Coroner the connection between the killings and the armed conflict is made out. According to the Coroner, the journalists were killed by Indonesian troops immediately following the capture of Balibo and as part of the general advance of troops.⁵⁵ The capture of Balibo at that time was the military objective. Accordingly, the journalists were killed ‘in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties’.⁵⁶ A killing in the course of or during the takeover of a locality is a sufficient nexus with the armed conflict to make out the general element of a grave breach of *Geneva Convention IV*.⁵⁷

The Coroner stated that to be a war crime ‘the killing must have been intended by the perpetrator to advance the interests of one of the parties to the

⁵² Ibid [70].

⁵³ *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) (*‘Tadić Trial Judgment’*).

⁵⁴ Ibid [573] (citations omitted).

⁵⁵ *Coroner’s Findings*, (Unreported, New South Wales State Coroner’s Court, Magistrate Pinch, 16 November 2007) 21.

⁵⁶ Ibid. See also Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (Kluwer Law International, 2000) vol 2, 1095–6.

⁵⁷ *Prosecutor v Delalić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-21-T, 16 November 1998) [193] (*‘Čelebići Trial Judgment’*). This has the support of scholars in the field: see, eg, Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, 2005) ch 6; Werle, above n 13, 294–5.

conflict'.⁵⁸ With respect, this is not a necessary element of the offence of a war crime or grave breach of the *Geneva Conventions*. Similarly, the ultimate finding of the Coroner that the Balibo Five died

from wounds sustained when [they were] shot and/or stabbed deliberately, and not in the heat of battle, by members of the Indonesian Special Forces, including Christoforus da Silva and Captain Yunus Yosfiah on the orders of Captain Yosfiah, to prevent [them] from revealing that Indonesian Special Forces had participated in the attack on Balibo ...⁵⁹

is also not a necessary element of the charge of 'wilful killing' as a grave breach of the *Geneva Conventions*. Even if the soldiers had been acting without authority or in defiance of orders, a war crime can still be committed. Similarly, the Coroner went on to remark that:

There is strong circumstantial evidence that those orders emanated from the Head of the Indonesian Special Forces, Major-General Benny Murdani to Colonel Dading Kalbuadi, Special Forces Group Commander in Timor, and then to Captain Yosfiah.⁶⁰

That also is not a necessary element of the offence.

D *Were the Journalists Protected Persons under Geneva Convention IV?*

1 *Article 4*

Article 4 of *Geneva Convention IV* provides:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in art 13:

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention.

⁵⁸ *Coroner's Findings* (Unreported, New South Wales State Coroner's Court, Magistrate Pinch, 16 November 2007) 124.

⁵⁹ *Ibid* 129.

⁶⁰ *Ibid*.

The nationalities of the Balibo Five were as follows: reporter Malcolm Rennie, 28, and cameraman Brian Peters, 29, were British; reporter Greg Shackleton, 27, and soundman Tony Stewart, 21, were both Australian; and cameraman Gary Cunningham, 27, was a New Zealander. All were nationals of states bound by the *Convention* and were nationals of neutral states which had (or likely had) normal diplomatic representation in Indonesia. Article 13 of pt II of *Geneva Convention IV* applies to ‘the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion’. The effect of art 4 and art 13 is explained in the ICRC Commentaries as follows:

This Article is, in a sense, the key to the Convention; for it defines the people to whom it refers. The meaning does not stand out very clearly, however, and the definition contained in the Article may be easier to grasp if we set it out as follows ... [I]t will be seen that there are two main classes of protected person: (1) ‘enemy nationals’ within the national territory of each of the Parties to the conflict and (2) ‘the whole population’ of occupied territories (excluding nationals of the Occupying Power). The other distinctions and exceptions extend or restrict these limits, but not to any appreciable extent.⁶¹

Hence, the Balibo Five will be ‘protected persons’ if they were killed whilst:

- 1 ‘in the hands of a Party to the conflict or Occupying Power’; and
- 2 in ‘occupied territory’.⁶²

2 *Were the Balibo Five in the Hands of Indonesia?*

The ICRC Commentaries make it clear that being ‘in the hands of’ an Occupying Power is used in an ‘extremely general sense’ and may be ‘at a given moment and in any manner whatsoever’.⁶³ According to the ICRC Commentaries to art 4 the words ‘were intended to ensure that all situations and cases were covered’.⁶⁴ The article refers both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of circumstances: ‘travellers, tourists, people who have been shipwrecked and even, it may be, spies or saboteurs’.⁶⁵ The findings of the Coroner make it clear that this requirement is satisfied (assuming Balibo at the time was occupied territory). The journalists were not only killed in Balibo, they were killed by the agents of the Occupying Power, being soldiers of Indonesia, and after they had surrendered to those forces.

3 *Were the Balibo Five in Occupied Territory?*

The words ‘in case of a conflict or occupation’ in art 4 must be taken, according to the ICRC Commentaries, as referring to a conflict or occupation as

⁶¹ ICRC Commentaries, above n 9, 46.

⁶² *Geneva Convention IV* art 4.

⁶³ ICRC Commentaries, above n 9, 47.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

defined in art 2. As previously mentioned:

[T]erritories are considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.⁶⁶

Hence, territory is occupied when, immediately after any hostilities, one side's army has achieved control of any territory. There is no need for there to be a civilian administration or an authority dedicated to governing and actually governing the territory concerned.

The facts found by the Coroner were that when the Indonesian troops and partisan fighters came upon the journalists, the fighting had stopped and Fretilin had withdrawn from their positions. Their deaths, according to the Coroner, did not occur in cross-fire or during actual hostilities between Indonesian and Fretilin forces. Immediately prior to being killed, the Coroner found that the journalists were surrendering to the arriving troops and had been captured. At the moment of their deaths, there was no other 'authority' in Balibo other than the Indonesian forces. Balibo was, therefore, 'under the authority of the hostile army'. Hence, it would appear that, at the time of the deaths of the journalists, Balibo was occupied territory as understood in *Geneva Convention IV*.

4 *Conclusion*

At the time of their deaths, the journalists were protected persons under the *Geneva Convention IV* because they were in the hands of an Occupying Power in respect of an armed conflict or occupation to which the *Convention* applied.

E *Was the Killing of the Balibo Five 'Wilful'?*

According to the case law of the ICTY, 'wilful killing', as a grave breach of the *Geneva Conventions*, consists of the following elements:

- 1 the death of the victim as a result of the actions of the accused; and
- 2 the accused intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death.⁶⁷

The findings of the Coroner were that the Balibo Five were killed deliberately by the persons identified and, hence, these elements are satisfied.

F *Was the Wilful Killing Justified by Any Customary Rule or Defence under the Laws of War?*

The laws of war provide certain defences or rules which permit the targeting of enemies during hostilities. The main rule or defence is that during actual hostilities a member of the armed forces may target combatants, being members of an armed group involved in the conflict, or non-combatants, being 'other

⁶⁶ *Occupied Palestinian Territory* [2004] ICJ Rep 136, 167. See also *Hague Convention (IV) representing the Laws and Customs of War on Land, Annex to the Convention Regulations respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, [1910] UKTS 9, art 42 (entered into force 26 January 1910).

⁶⁷ See, eg, *Prosecutor v Delalić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No IT-96-21-A, 20 February 2001) [422] ('*Čelebići Appeal Decision*').

individuals who, despite not being members of the said armed groups, were assisting any of them in such a way as to amount to taking direct part in the hostilities'.⁶⁸ Hence, if the Indonesian forces believed the journalists were combatants and killed them in the course of hostilities, this would be a defence under the laws of war. It is a fundamental rule of humanitarian law that parties to a conflict must distinguish between civilians and combatants. The former may not be targeted for attack. On the findings of the Coroner, the journalists were not dressed as combatants and immediately prior to being killed, they were surrendering to the Indonesian forces by throwing their arms in the air and protesting their status as 'Australians' and 'journalists'. Hence, there is no room for concluding that the perpetrators believed the journalists were combatants.

As to the second category of persons who may be legitimate targets, the notion of 'taking direct part in the hostilities' is notoriously ambiguous.⁶⁹ Whilst this field of international humanitarian law will often call for a careful assessment of the facts, the facts as found by the Coroner do not allow for much debate. The Coroner was at pains to find that the journalists were not armed, were not participating in the hostilities on the side of Fretilin at the time, but were nevertheless deliberately targeted to prevent them reporting on the invasion and the involvement of the Indonesian forces. Accordingly, no defence under the laws of war or any rule of international humanitarian law can justify the journalists being deliberately killed.

G Conclusion

The Coroner's findings establish the commission of the war crime of wilful killing under *Geneva Convention IV* by the persons named, which at the time was an offence under Australian law, specifically the *Geneva Conventions Act*.

IV THE INTERNATIONAL LAW OBLIGATIONS OF AUSTRALIA AND INDONESIA

A Australia's Obligations

Under art 146, Australia, as a Party to *Geneva Convention IV*, has undertaken to search for persons suspected of committing grave breaches and to bring those persons before its own courts or extradite them to face prosecution elsewhere. It is generally accepted that this duty to 'search for' and prosecute or extradite suspects can only apply to persons who are in the territory of a High Contracting Party.⁷⁰ As the suspects are not in Australia, this suggests Australia is entitled, but is not under any duty, to pursue an extraterritorial prosecution. This, however, may not be the end of the matter. In the past, there had been a tendency to accept impunity for those who had committed international crimes. The last

⁶⁸ See, eg, *Prosecutor v Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09-3, 4 March 2009) [92].

⁶⁹ See, eg, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, 19–24.

⁷⁰ See, eg, Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005) 102; Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspective* (Oxford University Press, 2003) 55.

decade or more has seen a sea change in attitudes to such an approach. This is reflected in the establishment of the International Criminal Court, to which Australia and around 110 countries are states parties. The Preamble to the *Rome Statute* includes the following:

Affirming that the most serious crimes of international concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at a national level and by enhancing matters of international cooperation ...

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes ...

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes ...⁷¹

The war crime of deliberately killing five unarmed journalists, who were surrendering and protesting their status as journalists, in order to prevent those journalists reporting on the conflict must amount to one of the most serious crimes of concern to the international community. The extent of the duty under customary law to take steps to suppress international crimes likely varies with the circumstances. As Judges Higgins, Kooijmans and Buergenthal of the ICJ put it:

[I]nternational consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play.⁷²

Some human rights organisations, such as Amnesty International, rely upon various statements at the international level such as the Preamble to the *Rome Statute* and General Assembly *Resolution 3074*⁷³ to argue that customary international law has developed to the point where *all* States have a general duty to take steps to prosecute those who have committed serious international crimes.⁷⁴ Belgium argued for such a duty before the ICJ, at least where the victims were nationals of the forum State.⁷⁵ This was not endorsed by any of the judges and was strongly criticised by some members of the Court.⁷⁶ It is fair to conclude that there is virtually no evidence of state practice confirming universal jurisdiction over war criminals who reside outside the state's territory on the

⁷¹ *Rome Statute* Preamble.

⁷² *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 78 (Judges Higgins, Kooijmans and Buergenthal) ('*Arrest Warrant*').

⁷³ See below n 93.

⁷⁴ Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation* (Amnesty International Report, 1 September 2001) ch 13.

⁷⁵ *Arrest Warrant* [2002] ICJ Rep 3, 65–6 (Judges Higgins, Kooijmans and Buergenthal).

⁷⁶ President Guillaume said universal jurisdiction *in absentia* (as he described the assertion of universal jurisdiction without the presence of the defendant) is unknown to international conventional law: *Arrest Warrant* [2002] ICJ Rep 3, 39–40 (President Guillaume). Judges Ranjeva, Rezek and Bula-Bula appeared to agree, at least in the absence of the presence of the defendant: 56–8 (Judge Ranjeva), 92–4 (Judge Rezek) and 124–5 (Judge Bula-Bula).

basis of a duty rather than a right.⁷⁷ The impracticality of such an obligation falling on all states tells against such a duty. Brennan J in *Polyukhovich v Commonwealth*⁷⁸ considered the issue and concluded that international law evidenced the right, not the obligation, in Australia to exercise universal jurisdiction over crimes against humanity committed in Europe during the Second World War in the case of a suspect who was resident in Australia.⁷⁹

The killing of the Balibo Five in East Timor, however, was not just any war crime committed outside Australia. Australia, compared with other countries, has many strong links to the offences. Two of the five journalists were Australian citizens. At least Mr Peters was a resident in Australia at the time. All were identified as 'Australian journalists' because they were working for Australian media organisations. This is borne out by the iconic image of Mr Shackleton painting the Australian flag on a house in Balibo immediately prior to his death. On the Coroner's findings, the Balibo Five were killed *because* they were Australian journalists who might have reported Indonesia's involvement in the conflict to Australia and the world. It is only in Australia that there has been a lengthy coronial inquiry which has investigated the evidence and made findings of culpability. This means Australia, in the absence of any available international tribunal, is probably uniquely placed to prosecute the suspects as an agent of the international community and to ensure that the underlying purposes of the *Geneva Conventions* are fulfilled. In such circumstances, whilst it may be difficult to say that Australia is under an international obligation to act, it can be asserted that it would be generally incompatible with the underlying purpose behind art 146 of *Geneva Convention IV* and Australia's overarching duty to take measures to suppress grave breaches of the *Geneva Convention* for Australia simply to take no action in light of the findings of one of its own Coroners.

One further thing can be said with certainty and that is if any of the named suspects were to travel to Australia, Australia would be obliged under art 146 of *Geneva Convention IV* to take action against them. Could Indonesia successfully claim state immunity for the suspects in such a case? The issue will not arise if Indonesia extradites the suspects because extradition will act as a waiver of any state immunity. The matter may arise if the suspects are otherwise brought to, or found in, Australia.⁸⁰ It may be generally accepted that if the acts of a state official have been undertaken on behalf of a state then the state may claim immunity on behalf of its servants as if sued itself.⁸¹ The emphasis in art 146, however, on individual universal punishment, irrespective of the nationality or

⁷⁷ Cryer, above n 70, 109–10; M Cherif Bassiouni and Edward M Wise *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martin Nijhoff, 1995) 45.

⁷⁸ (1991) 172 CLR 501.

⁷⁹ *Ibid* 562–3.

⁸⁰ Immunity from a criminal prosecution is not covered by the *Foreign States Immunities Act 1985* (Cth).

⁸¹ In England, see *Jones v Ministry of Interior Al-Mamlaka Al-Arabia AS Saudiya (the Kingdom of Saudi Arabia)* [2007] 1 AC 270, 281, 300–1; in Germany, see Bundesgerichtshof [German Federal Court of Justice], VI ZR 267/76, 26 September 1978, (1978) 65 ILR 193, 198 ('*Scientology Case*'); in the United States, see *Herbage v Meese*, 747 F Supp 60, 66 (D DC, 1990); in Canada, see *Jaffe v Miller* [1993] 13 OR (3d) 745, 758–9; in Ireland, see *Schmidt v Home Secretary of the Government of the United Kingdom* (1994) 103 ILR 322, 324–5.

location of the suspect, is fundamentally incompatible with the more archaic notions of state immunity. The regime of universal jurisdiction enshrined in the *Conventions* would be rendered largely inoperable if state immunity could be invoked. State practice also supports the right of a forum State to apply its domestic war crimes laws to captured foreign nationals.⁸² In *Pinochet (No 3)*,⁸³ Lords Browne-Wilkinson, Hutton and Saville thought the *Torture Convention*⁸⁴ was decisive in denying Chile's claim to State immunity on behalf of Augusto Pinochet as such a claim was necessarily inconsistent with the express provisions of the *Convention*.⁸⁵ As Chile was a party to the *Torture Convention*, Lord Browne-Wilkinson reasoned, it must be regarded as having waived the right to claim State immunity where the charge was one of torture because torture frequently involved acts by State officials and the *Torture Convention* recognised the right, even obligation, to prosecute or extradite suspects found in the jurisdiction.⁸⁶ By parity of reasoning, the case for the existence of an implied waiver arising from the terms of the *Geneva Conventions* is compelling.⁸⁷

B *Indonesia's Obligations*

The two main suspects named by the Coroner are Mohammad Yunus Yosfiah and Christoforus da Silva. The whereabouts of da Silva is unclear, but he is believed to be in Indonesia. Yosfiah is well known in Indonesia. He is a former Minister in the Suharto government and is currently a Member of Parliament. He denies having ordered the killings.⁸⁸ The government has indicated that it regards the matter as closed.⁸⁹ Indonesia's obligation to cooperate with any Australian criminal prosecution under *Geneva Convention IV* is dealt with in art 146 as follows:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting

⁸² See Michael Akehurst, 'Jurisdiction in International Law' (1972–73) 46 *British Yearbook of International Law* 145, 157–9.

⁸³ *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 ('*Pinochet (No 3)*').

⁸⁴ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*Torture Convention*').

⁸⁵ *Pinochet (No 3)* [2000] 1 AC 147, 204–6 (Lord Browne-Wilkinson) 261–2 (Lord Hutton), 266–7 (Lord Saville).

⁸⁶ *Ibid* 204 (Lord Browne-Wilkinson).

⁸⁷ This was also the view of Saul, above n 27, 109–10.

⁸⁸ See ABC Radio National, 'Indonesia Unhappy with New Balibo Probe', *AM*, 10 September 2009 (Geoff Thompson) <<http://www.abc.net.au/news/stories/2009/09/10/2681516.htm>>.

⁸⁹ Indonesian Foreign Ministry spokesman Teuku Faizasyah told journalists that Indonesia maintains the journalists were killed in crossfire, saying that '[t]he film [on Balibo] may stir some controversy in Australia ... [b]ut for us, it's a finished problem, case closed': Adam Gartrell, 'Balibo Case Is Closed, Says Indonesia', *The Sydney Morning Herald* (Sydney) 24 July 2009.

Party concerned, provided such High Contracting Party has made out a *prima facie* case.⁹⁰

This provision makes it plain that Indonesia must search for persons alleged to have committed a war crime residing in its territory and bring them before its own courts. Some argue that being ‘another High Contracting Party *concerned*’ requires the State to have some link to, or interest in, the crime.⁹¹ Alternatively, it may be argued that the principle underlying art 146 is that *all* states parties have an interest and concern in suppressing war crimes so that any state party becomes ‘concerned’ when it makes out a *prima facie* case.⁹² In any event, Australia’s links with the victims, described above, likely makes it a ‘Party concerned’ so that Indonesia may, if it prefers, extradite the suspects to Australia. Apart from the qualification that there exists a *prima facie* case, no exception based upon any other matter, such as the time period that has elapsed, is permitted.

The duty to extradite or prosecute persons suspected of committing war crimes has also been the subject of General Assembly *Resolutions 2712, 2840 and 3074*, passed in 1970, 1971 and 1973 respectively.⁹³ *Resolution 2840* stated that refusal to cooperate in the extradition, arrest, trial and punishment of persons suspected of committing crimes against humanity and war crimes is contrary to the purposes of the *Charter of the United Nations* and international law.⁹⁴ *Resolution 3074* states that perpetrators of war crimes and crimes against humanity:

[W]herever they are committed, shall be subject to investigation and ... shall be subject to tracing, arrest, trial and, if they are found guilty, to punishment. ... Every State has the right to try its own nationals for war crimes and crimes against humanity.⁹⁵

Further, suspects of such crimes ‘shall be subject to trial ... as a general rule in the countries in which they committed these crimes’ and ‘States shall co-operate on questions of extraditing such persons’.⁹⁶

It should be noted that the duty on Indonesia is not to extradite the suspects to Australia but rather to *either* extradite to any state party concerned which has made out a *prima facie* case *or* to refer the case to its own courts. The use of the

⁹⁰ *Geneva Convention IV* art 146.

⁹¹ Reydams, above n 70, 55 (emphasis in original).

⁹² Proposals at Geneva that the requesting party should prove its interest in the prosecution was rejected: see *Final Record of the Diplomatic Conference of Geneva of 1949* (1949) vol II-B, 117. In the French version ‘concerned’ is translated as ‘intéressée à la poursuite’.

⁹³ See *Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes against Humanity*, GA Res 2712 (XXV), UN GAOR, 25th sess, 1930th plen mtg, UN Doc A/RES/2712 (XXV) (15 December 1970) (‘*Resolution 2712*’); *Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes against Humanity*, GA Res 2840 (XXVI), UN GAOR, 26th sess, 2025th plen mtg, UN Doc A/RES/2840 (XXVI) (18 December 1971) (‘*Resolution 2840*’); *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*, GA Res 3074 (XXVIII), UN GAOR, 28th sess, 2187th plen mtg, UN Doc A/RES/3074 (XXVIII) (3 December 1973) (‘*Resolution 3074*’).

⁹⁴ *Resolution 2840*, UN Doc A/RES/2840.

⁹⁵ *Resolution 3074*, UN Doc A/RES/3074.

⁹⁶ *Ibid.*

phrase '[e]very State has the right to try its own nationals for war crimes' in Resolution 3074 makes this clear.⁹⁷

V CONCLUSION

On the Coroner's findings, the killings at Balibo truly did constitute war crimes under international law and as such Australia has the right to prosecute the suspects and seek their extradition from Indonesia or to call for their prosecution abroad. At the moment, however, it appears that Australia and Indonesia are on a collision course in respect of the AFP's investigation of the case. Indonesia has said that the case is closed. That there exists different perceptions about the case of the Balibo Five and their deaths some 34 years ago is understandable. It is also common that prosecutions for war crimes often only occur many years later. At this very moment, the UN-backed Extraordinary Chambers in the Courts of Cambodia is conducting trials into the atrocities committed in that country in the period 1975 to 1979. It needs to be recalled that the prosecution of suspected war criminals is not an interstate issue because international criminal law reaches to the individual directly and the role or responsibility of the state of the nationality of the perpetrator is irrelevant. The Nuremberg Tribunal famously held:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.⁹⁸

By the *Geneva Conventions*, Australia, Indonesia and the whole of the international community have agreed upon the rules for dealing with suspected war criminals. It is by these international rules that Australia has jurisdiction in the case. Australia is not just vindicating its own interests in investigating the matter, but is also upholding universal values on behalf of the international community. An analogy could be drawn with Israel's famous prosecution of the Nazi war criminal Adolf Eichmann for crimes committed in Europe. In an oft-quoted passage, the Israeli Supreme Court in *Attorney-General of the Government of Israel v Eichmann*⁹⁹ held that because the crimes were of an international character:

The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.¹⁰⁰

The exercise of such 'universal jurisdiction' by a single state over international crimes committed by foreign nationals in a foreign country, however, is best thought of as a 'subsidiary' or 'default' jurisdiction in the absence of any other state or international tribunal taking up a prosecution.¹⁰¹ Otherwise, a single foreign state exercising universal jurisdiction over

⁹⁷ Ibid.

⁹⁸ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (1947) vol 1, 223.

⁹⁹ (1962) 36 ILR 277.

¹⁰⁰ Ibid 304.

¹⁰¹ See Henri Donnedieu de Vabres, *Les Principes Modernes du Droit Penal International* (Sirey, 1928) 135 and Reydams, above n 70.

extraterritorial crimes may be accused of overreaching in a case where it is removed from the evidence. Whilst no other state or international tribunal is interested in the case of the Balibo Five, Australia is entitled to pursue a prosecution in Australia, and Indonesia under international law is equally entitled to bring the case before its own courts. Nevertheless, stripped to its bare essentials, one fundamental principle emerges from the *Geneva Conventions* and that is if a prima facie case exists against a suspect who resides in a state party's territory, that state must either refer the case to its authorities for prosecution or extradite the suspect to face prosecution in another state. Above all else, there must never be a safe haven for war criminals in any High Contracting Party to *Geneva Convention IV*. Australia, if it wishes to obtain Indonesia's cooperation, should meticulously lay bare its case and the evidence for all to see so that the obligation on all states to act becomes compelling. The greatest obstacle to a prosecution, however, may be further delay.¹⁰² The victim's family requested in the first half of 2008 that the Attorney-General and the Director of Public Prosecutions immediately take steps to commence a prosecution based upon the mass of detailed evidence already collected by the Coroner. That it took some 18 months for the announcement of the 'launch' of an AFP 'investigation' hardly suggests that the matter is receiving any priority in Canberra.

¹⁰² Customary international law requires Australia to afford 'due process' to non-nationals being prosecuted under the *Geneva Conventions*, which includes a right to a fair and speedy trial. This may preclude a prosecution if undue delay prejudices the ability of the defendant to have a fair trial. See, eg, Bassiouni, above n 14, 604–20.