ASIA-PACIFIC PERSPECTIVES ON INTERNATIONAL HUMANITARIAN LAW

Place is inextricably linked to history by way of culture, language, philosophy, faith and the development of worldviews. The richness and depth of experience of the Asia-Pacific region has been understudied, over-simplified and under-appreciated. This book addresses that lacuna in the subject area of international humanitarian law. Drawing on authoritative perspectives and interviews with experts on this topic, including four of the region's most distinguished international judges, forty-one chapters thematically examine the development of international humanitarian law; practice and application of international humanitarian law; implementation and enforcement of international humanitarian law; and looking to the future and enhancing compliance with international humanitarian law. The expert contributors draw out unique features, providing fresh insights to scholarship. Contributions on and from the area also grapple with the regional commitments to humanitarianism generally, illuminating how and why international humanitarian law might be more readily accepted or ignored in armed conflicts in the region.

Suzannah Linton is a Thousand Talent Professor at Zhejiang Gongshang University and holds a West Lake Friendship Award. She has published widely on international criminal justice and the practice of international courts and has previously held the Chair for International Law at Bangor University.

Tim McCormack is the Special Adviser on International Humanitarian Law to the Prosecutor of the International Criminal Court in The Hague. He is also Professor and Dean of the Faculty of Law at the University of Tasmania. He has previously held positions as Charles H. Stockton Distinguished Scholar-in-Residence at the US Naval War College in Newport, Rhode Island and as James Barr Ames Visiting Professor at Harvard Law School.

Sandesh Sivakumaran is Professor of Public International Law at the School of Law, University of Nottingham. He has published widely on a variety of topics in public international law.

Asia-Pacific Perspectives on International Humanitarian Law

Edited by

SUZANNAH LINTON

Zhejiang Gongshang University

TIM MCCORMACK

University of Tasmania

SANDESH SIVAKUMARAN

University of Nottingham

CAMBRIDGE UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108497244
DOI: 10.1017/9781108667203

First published 2020

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalogue record for this publication is available from the British Library.

ISBN 978-1-108-49724-4 Hardback

Contents

Figures and Tables

FIGURES

TABLES

Contributors

Niran Anketell practises law in Sri Lanka, primarily in the superior courts. He is a co-founder of the South Asian Centre for Legal Studies which works on advancing remedies for victims of mass atrocity crimes. He holds a master's degree in international legal studies from New York University.

Mohammad Nazmuzzaman Bhuian is Professor in the Department of Law, University of Dhaka. He completed his PhD at the School of Oriental and African Studies (SOAS), University of London, under the British Commonwealth Scholarship. He is a member of the Executive Council of the Asian Society of International Law and also the current Vice-President of the Bangladesh Chapter of the Asian Society of International Law. He works as a consultant with the United Nations Development Programme, International Committee of the Red Cross and International Federation of the Red Cross and Red Crescent Societies. His areas of expertise include: international humanitarian law, international human rights law, media law, disaster law and legal systems of Asia and Africa. He has published several books and research papers in reputed journals.

Sedfrey M. Candelaria, former Dean of Ateneo de Manila University School of Law (2012–2018), teaches constitutional law, public international law and peace process. He is the author of *The Convention on the Rights of the Child and the Philippine Legal System* (Ateneo Human Rights Center 1998) and 'Testing Constitutional Waters' (*Ateneo Law Journal*, April 2018). He is co-author of *Indigenous Peoples and the Law* (CD Technologies Asia 2008). He served as a member of the Government Negotiating Panel and Chief Legal Consultant for peace talks with the Communist Party of the Philippines – New People's Army – National Democratic Front and Moro Islamic Liberation Front, respectively.

Roger S. Clark is Board of Governors Professor of Law at Rutgers Law School, Camden, New Jersey, where he has taught since 1972. Born in New Zealand, Professor Clark is an expert on global issues that include nuclear disarmament, protecting human rights, international criminal law and US foreign relations law. He graduated from the University of Wellington in New Zealand and Columbia Law School in New York. Prior to joining the Rutgers faculty in 1972, he worked for the New Zealand Justice Department and Ministry of Foreign Affairs; taught law in New Zealand; and served as an American Council of Learned Societies Fellow and Doctoral Fellow at the Columbia University School of Law. In 1995 and 1996, he represented Samoa in arguing the illegality of nuclear weapons before the International Court of Justice. Since 1995,

he has represented Samoa in negotiations to create the International Criminal Court and to get the Court running successfully. He was very active in the Court's Special Working Group on the Crime of Aggression. In 2014–2016, he was a member of the Marshall Islands legal team in its cases against the States possessing nuclear weapons for failure to disarm.

Emily Crawford is Associate Dean of Research Education, a Senior Lecturer and an associate of the Sydney Centre for International Law at Sydney University. Previously at the Law Faculty at the University of New South Wales, Emily completed her Arts and Law degrees before working as a researcher at the Australian Broadcasting Corporation. She returned to UNSW to undertake her PhD. Her doctoral thesis on the disparate treatment of participants in armed conflicts was published by Oxford University Press in 2010.

Liu Daqun – see the interview with His Excellency Judge Liu Daqun.

Treasa Dunworth is Associate Professor at the University of Auckland where she teaches public international law, international criminal law and disarmament law. Her research interests include the relationship between international law and domestic law (in particular, domestic implementation of international obligations), issues of arms control and disarmament, and questions of accountability of international organisations. She recently completed her PhD at the University of Melbourne on the humanitarian discourse in disarmament and arms control. She joined the delegation of United Nations Institute for Disarmament Research at the 2017 United Nations negotiations for a Nuclear Weapons Prohibition Treaty.

Steven Freeland is Dean of the School of Law and Professor of International Law at Western Sydney University, Australia. He is also Visiting Professor at the University of Vienna; Permanent Visiting Professor at the iCourts Centre of Excellence for International Courts, University of Copenhagen; Member of Faculty at the London Institute of Space Policy and Law; Visiting Professor at Université Toulouse 1 Capitole; Adjunct Professor at University of Adelaide; Associate Member at the Centre for Research in Air and Space Law, McGill University; Fellow of the Australian Academy of Law; and a former Marie Curie Fellow (2013–2014). He has been a Visiting Professional within the Appeals Chamber at the International Criminal Court and a Special Advisor to the Danish Foreign Ministry in matters related to the ICC. He sits on the editorial board of several international law journals and is also Co-Editor of *Annotated Leading Cases of International Criminal Tribunals*, a long-established series of casebooks annotating the jurisprudence of all of the major international criminal courts/tribunals.

Gregory S. Gordon is Professor of Law at the Chinese University of Hong Kong Faculty of Law, having previously served as Associate Dean and Director of the Research Postgraduates Programme. He is a former war crimes prosecutor with stints at the International Criminal Tribunal for Rwanda and the United States Department of Justice (Criminal Division, Office of Special Investigations). He regularly lectures for the International Committee for the Red Cross East Asia Delegation and serves as a judge for the Delegation's IHL Moot competitions. Professor Gordon's expertise also extends to international criminal law and he is considered one of the world's leading experts on the law of incitement. In 2017, Oxford University Press published his monograph *Atrocity Speech Law: Foundation, Fragmentation, Fruition*, which calls for a paradigm shift in international speech crime law. He is the recipient of the Chinese University's 2018 Research Excellence Award.

Elise Gruttner has a Bachelor of Laws and Arts degree from the University of Adelaide. She has worked for the Office of the International Judges of the Pre-Trial Chamber at the United

Nations Assistance to the Khmer Rouge Trials. Elise has studied International Law at Peking University Law School and KoGuan Law School at Shanghai Jiao Tong University. She has worked for King & Wood Mallesons (Shanghai) and the Australian Chamber of Commerce in Shanghai. Elise was Vice-Chair of the Red Cross South Australian International Humanitarian Law Collective and currently works at HWL Ebsworth Lawyers.

Satoshi Hirose is Professor and Vice Director of Public International Law, International Organizations as well as Nuclear Disarmament at the Research Center for Nuclear Weapons Abolition, Nagasaki University. Before assuming the current post, he served for the UNDP, Japanese Ministry of Foreign Affairs and several universities and colleges. He is currently Chairperson of the Editorial Committee of *Disarmament Review* issued by the Japan Association of Disarmament Studies and also an associate editor of the *Journal for Peace and Nuclear Disarmament* (published by Taylor & Francis).

Kim Hoedong is a Republic of Korea Army Lieutenant Colonel and Assistant Professor of Public International Law and Military Law. He earned an SJD degree (PhD in Law) from Emory Law School. He is also Department Head of the Department of Law and Economics at the Republic of Korea Military Academy. He is a co-author of *The Principles of Military Law* (3rd edn, Parkyoungsa Publishing Co. Seoul 2018). He is also an exam writer for public institutions recruitment. Professor Kim is one of the specialised persons on the Law of Armed Conflicts in the Korea military. He also consults or carries out legal advice for the Department of Defence and the Korean Army on an ad hoc basis.

M. Rafiqul Islam has a BA Honours, MA Economics, LLB (Rajshahi University Bangladesh), LLM, PhD (Monash University Australia) and is Professor of Law at Macquarie University Law School, Australia. He has researched extensively on various aspects of public international law and published many monographs, edited books, book chapters, journal articles and newspaper articles. His major publications include: *International Trade Law of the WTO* (Oxford University Press 2006); *International Law: Current Concepts and Future Directions* (LexisNexis Australia 2014); and *An Introduction to International Refugee Law* (Brill/Nijhoff 2013). His most recent book, *National Trials of International Crimes in Bangladesh: Transitional Justice as Reflected in Judgments*, was published by Brill/Nijhoff in March 2019. Professor Islam was awarded the Outstanding Teacher Award by Macquarie University in 2000 for his contributions to teaching and higher degree research supervision and administration.

Kenneth Keith – see the interview with His Excellency Judge Sir Kenneth Keith.

Kriangsak Kittichaisaree is a judge of the International Tribunal for the Law of the Sea. He was a member of the UN International Law Commission (2012–2016) and the Chairman of its Working Group on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*), Chairman of the UN General Assembly's Sixth Committee's Working Group on the Administration of Justice at the United Nations and President of the 25th Meeting of States parties to the 1982 UN Convention on the Law of the Sea. A career Thai diplomat until October 2017, he served as Director of the Legal Affairs Division, Director-General of the International Organizations Department, and Ambassador to Iran, Australia and the Russian Federation. He has taught courses on public international law in four continents. He authored *International Criminal Law* (Oxford University Press 2001); *Public International Law of Cyberspace* (Springer 2017); and *The Obligation to Extradite or Prosecute* (Oxford University Press 2018).

Borhan Uddin Khan is Professor in the Department of Law, University of Dhaka and an Adjunct Professor, Department of Law, Independent University, Bangladesh (IUB). Dr Khan is one of the founding members of the Asian Society of International Law. He is currently a member of its board of advisors and a former vice president (2013–2015). His areas of interest include: international human rights law, international humanitarian law, legislative drafting and codification of laws. As a consultant to the Ministry of Law Justice and Parliamentary Affairs, Bangladesh, he codified the Laws of Bangladesh (1939–2005), published in 2007 as *The Bangladesh Code* (Vols. 9 to 36). His co-edited book *Revisiting the Geneva Conventions: 1949–2019* (Brill/Nijhoff with Jahid Bhuiyan) is forthcoming in 2019. He recently received 'The LSE Outstanding Alumni Volunteer Award' (2016–2017) from the London School of Economics and Political Science, University of London.

Tek Narayan Kunwar is a high court judge, currently working at the High Court in Patan, Nepal. He has been at the forefront of efforts in the country to counter human trafficking, gender-based violence and juvenile issues while championing the rights of victims. During his previous tenure in the Lalitpur District Court, he pioneered a fast track court system to decrease the length of time survivors must wait to appear. In May 2013, he was the first judge to order restitution to be paid to a survivor by the government and has consistently handed down severe sentences for human traffickers. He has published extensively on transitional justice, human trafficking and other human rights issues. In 2013, he was named the Best Performing Judge of the year by the Judicial Council of Nepal. In 2014, US Secretary of State John Kerry honoured him as a Trafficking in Persons (TIP) Hero for being at the forefront of efforts in Nepal to counter human trafficking. Judge Kunwar studied as a Sohmen Scholar at the University of Hong Kong's Law School.

O-Gon Kwon – see the interview with His Excellency Judge O-Gon Kwon.

Isabelle Lassée is Co-Founder and former Head of Programmes of the South Asian Centre for Legal Studies based in Colombo, Sri Lanka. She has a doctorate in international law with high honours from Université Paris II Panthéon-Assas and is the author of *Les missions d'etablissement des faits des Nations Unies: sur les violations graves du droit international humanitaire ou massives des droits de l'homme*.

Suzannah Linton was born in Malaysia and studied law in the United Kingdom as a Chevening Scholar. She is now Distinguished Professor in the International Law Department of Zhejiang Gongshang University in Hangzhou, China. This position is held in conjunction with a China Thousand Talents Award. In her academic publications and teaching, Professor Linton draws extensively from many years of professional legal work across the region. Among her more significant Asia-Pacific publications are *Hong Kong's War Crimes Trials* (editor, Oxford University Press 2013) and 'Post Conflict Justice in Asia', in M. Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimisation and Post-Conflict Justice* (Intersentia NV 2010). Her database presenting the post-World War II war crimes trials in Hong Kong can be viewed at the University of Hong Kong Libraries at http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/home. Professor Linton is a member of the International Institute of Humanitarian Law in San Remo, Italy and an editor of the *Oxford Monographs in International Humanitarian and Criminal Law* (Oxford University Press).

Saori Matsuyama is Assistant Professor at the Graduate School of Law and Politics, Osaka University, Japan. She was, in 2018, a member of the international panel of evaluation for the

written round of the International Criminal Court Moot Court Competition (2018). She has written articles on international humanitarian law and international criminal law, with particular focus on non-international armed conflict, including the concept of armed conflict and war crimes. She has a PhD in law from Osaka University.

Tim McCormack is Dean of Law at the University of Tasmania Law School in Hobart, Special Adviser on International Humanitarian Law to the Prosecutor of the International Criminal Court in The Hague and Professorial Fellow at the Melbourne Law School. He specialises in international humanitarian law and international criminal law, with a particular focus on the Asia-Pacific Region. His most recent books include: Georgina Fitzpatrick, Tim McCormack and Narrelle Morris, *Australia's War Crimes Trials 1945–51* (Brill/Nijhoff 2016); Rain Liivoja and Tim McCormack (eds), *Routledge Handbook on International Humanitarian Law* (Routledge 2016); and Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victors' Justice: The Tokyo Trial Revisited* (Brill 2011) (also published in Japanese as *Sairon Tokyo Saiban: Nani o Sabaki Nani o Sabakanakattanoka* (2013)).

Rob McLaughlin is Professor of Military and Security Law and Director of the Australian Centre for the Study of Armed Conflict and Society at UNSW Canberra (Australian Defence Force Academy) and Honorary Professor at the ANU College of Law. He served for more than twenty years in the Royal Australian Navy as a Seaman officer and a Legal officer, and after leaving full-time service was the inaugural Head of the UN Office on Drugs and Crime's Maritime Crime Program.

Nakib Nasrullah is Professor of Law in the Department of Law at the University of Dhaka in Bangladesh. Professor Nasrullah obtained his LLM in International Law from the University of New South Wales, MPhil in Law and PhD from Macquarie University, Australia. His teaching assignments currently include public international law and international trade law. He also serves as coordinator for MPhil and PhD research programmes. His research interest in the main involves international trade and investment law, international humanitarian and human rights law. His major works include the co-authored book *CSR in Private Enterprises in Developing Countries: Evidences from the Ready-Made Garments Industry in Bangladesh* (Springer 2014).

Hitoshi Nasu is Professor of International Law at the University of Exeter. Prior to his current appointment, he held academic posts at the Australian National University, where he was also Co-Director of the Centre for Military and Security Law and the Australian Network for Japanese Law. He also served as a member of the International Law Association's Study Group on Cyber Terrorism and International Law (2014–2016) and is a core expert of the *Woomera Manual on the International Law of Military Space Operations*.

Megumi Ochi is Visiting Researcher at the Graduate School of International Public Policy, Osaka University, Japan. She is also Senior Fellow of the Case Matrix Network (CMN) and a member of the Young Penalist Committee of the International Association of Penal Law (AIDP). She interned at the Pre-Trial Chamber of the International Criminal Court (ICC) from April to September 2012. She has written many articles on international criminal law, including the issues of the *ne bis in idem* principle, amnesty, extradition, admissibility and reparation before the ICC.

Keiichiro Okimoto is a legal officer at the Office of the Legal Counsel, Office of Legal Affairs, United Nations. Before joining the United Nations, he was a legal adviser and a delegate of the

International Committee of the Red Cross in Iraq, Israel and the Occupied Palestinian Territory, the Philippines and Rwanda. He is the author of *The Distinction and Relationship between* Jus ad Bellum *and* Jus in Bello (Hart Publishing 2011). His qualifications are: LLM, London School of Economics and Political Science; PhD, University of Cambridge.

Raul Pangalangan – see the interview with His Excellency Judge Raul Pangalangan.

Sanoj Rajan is Professor of International Law and Human Rights and is presently appointed as Distinguished Professor of Law in the International Law Department of Zhejiang Gongshang University in Hangzhou, China. He is an affiliate expert with Harvard Humanitarian Initiative at Harvard University, Massachusetts, Life Member of the Indian Society of International Law and Visiting Professor at Al-Farabi Kazakh National University, Almaty and the International Christian University at Kinshasa, Congo. He is one of the Founding Governance Board members of Statelessness Network Asia Pacific (SNAP) and also was the co-coordinator for the core group of experts who founded SNAP. His research and teaching interest include international criminal law, international humanitarian law, human rights law, refugee law, statelessness and citizenship laws. His latest publications include: *Global Refugee Crisis, A Contemporary Reflection* (Thomson Reuters 2018); 'Ending International Surrogacy Induced Statelessness: An International Human Rights Law Perspective' *Indian Journal of International Law* (2018); and *Handbook on International Humanitarian Law in India: Legislations and Case Laws* (Thomson Reuters, Asia Pacific, forthcoming).

Kristin Rosella has over twelve years of domestic and international litigation experience and has represented victims and accused. Currently, she is a senior legal consultant on a defence team at the Extraordinary Chambers in the Courts of Cambodia and Senior Legal Counsel at Project Expedite Justice. She also lectures at Royal University for Law and Economics (RULE) and Pannasastra University of Cambodia. Prior to working in human rights and international criminal law, she was an associate in the litigation practice groups of law firms in New York and Chicago.

Soliman M. Santos Jr. is presently a Judge of the Regional Trial Court (RTC) of Naga City in the Bicol region of the Philippines. He is one of the few Filipino lawyers with an expertise in IHL and is a leading contributor to a new field here of peace lawyering and *lex pacificatoria* or 'law of the peace makers'. It is both as a peace advocate and as a legal scholar that he had developed familiarity with, including through actually engaging on a landmine ban and other IHL norms, the two main Moro liberation fronts subject of his herein chapter. As a consultant to the then Philippine National Red Cross (PNRC) IHL National Committee, he was the main drafter of Republic Act No. 9851, the 'Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity'. He is the author and editor of a number of books.

Ben Saul is Challis Chair of International Law, University of Sydney, Australia; Chair of Australian Studies at Harvard University; an associate fellow of Chatham House; and a barrister. He has published twenty books and 100 refereed articles. His books include *Defining Terrorism in International Law* (Oxford University Press 2006) and the *Oxford Commentary on the International Covenant on Economic, Social and Cultural Rights* (Oxford University Press 2014) (awarded a Certificate of Merit by the American Society of International Law). Ben has advised the United Nations, governments and NGOs; served on numerous professional bodies; and taught law and undertaken field missions in over thirty-five countries. He practises in various

international tribunals. He has a doctorate from Oxford and honours degrees in Arts and Law from Sydney.

Mandira Sharma is a practitioner of human rights and a leading voice against impunity in Nepal. She has received the Franco-German Human Rights Award (2017) and Human Rights Watch's Human Rights Defenders award (2006) for defending human rights in difficult political contexts. She has worked in Nepal and in many other countries in the Asian region documenting, monitoring cases of human rights violations and devising strategies for challenging impunity for those involved in serious human rights violations. She has represented victims of human rights violation both nationally and internationally and has published on the subject. She holds an LLM in international human rights law from the University of Essex and is pursuing her PhD at the same university, researching on transitional justice issues.

Manoj Kumar Sinha is Director and Professor of Law at the Indian Law Institute. His areas of specialisation are human rights, constitutional law, international humanitarian and refugee law, international criminal law, international law and international institutions. He has published extensively in leading national and international law journals. He is serving as the member of editorial boards of various reputed national and international journals. He regularly delivers lectures at institutions across India and abroad.

Sandesh Sivakumaran is Professor of Public International Law at the School of Law, University of Nottingham. He is the author of *The Law of Non-International Armed Conflict* (Oxford University Press 2012), which was awarded the International Committee of the Red Cross Paul Reuter Prize, the American Society of International Law Francis Lieber Prize and (jointly) the European Society of International Law Book Prize. He is co-author of *Oppenheim's International Law: United Nations* (Oxford University Press 2017) and *Cases and Materials on International Law* (8th ed, Sweet and Maxwell 2015) and co-editor of *International Human Rights Law* (3rd ed, Oxford University Press 2017).

Geoff Skillen served as a legal officer in the Australian Defence Force from 1975 to 1998. From 1995 to 1998, he occupied the position of Director-General of Defence Force Legal Services. From 1998 to 2010, he served as a legal officer in the Attorney-General's Department. From 2003 to 2010, he was the Principal Legal Officer in the Office of International Law, International Human Rights section. He is an honorary professor at the Australian National University College of Law. He is a long-standing member of the Red Cross movement and since July 2010 he has been the Chair of Australian Red Cross's national committee on international humanitarian law.

Tuiloma Neroni Slade was one of the first elected judges of the International Criminal Court in The Hague, the Netherlands, where he served as Presiding Judge of Pre-Trial Chamber II. He has served extensively and in senior capacities in his Pacific region and internationally, more recently as Secretary General of the Pacific Islands Forum Secretariat and previously as Samoa's Ambassador/Permanent Representative to the United Nations based in New York and concurrently Ambassador to the United States of America and High Commissioner to Canada. Prior to that he was Assistant Director in the Legal Division of the Commonwealth Secretariat in London. In his earlier career he held office as Attorney-General of Samoa.

Göran Sluiter is Professor in International Criminal Law at the University of Amsterdam and Professor in Criminal Law at the Open University in the Netherlands. He is a partner at Prakken d'Oliveira Human Rights Lawyers, an Amsterdam-based law firm specialising in international

law and international criminal law. He is the author and editor of many publications in the field of international criminal law, including *International Criminal Procedure – Principles and Rules* (edited by Sluiter et al, Oxford University Press 2013). From 2018 to 2023 he is leading a research project entitled 'The Outer Limits of Secondary Liability for International's Crimes and Serious Human Rights Violations'.

Dale Stephens obtained an Arts degree from Flinders University in 1984 and his Law degree (LLB (Hons.)) from Adelaide University in 1988. In 1989, following completion of his GDLP, he was admitted as a legal practitioner to the Supreme Court of South Australia. That same year he also joined the Royal Australian Navy and during his naval service has been posted to numerous military establishments and commands across Australia. His operational deployments include multiple tours of East Timor and Iraq. He has been awarded the Conspicuous Service Medal (CSM), the Bronze Star (US), the Meritorious Service Medal (US) and a UN Force Commander Commendation. He attained the rank of Captain in the Navy. In 2010 he was seconded to the Department of the Prime Minister and Cabinet where he was a Senior Advisor on Afghanistan. In 2004, Professor Stephens completed an LLM at Harvard Law School. He taught at the US Naval War College during the 2005 academic year. In 2014, he completed, and was awarded, his Doctorate (SJD) from Harvard Law School. In 2013, Professor Stephens was appointed to a full-time academic position at the University of Adelaide. He is presently Director of the Postgraduate Coursework Program at Adelaide Law School. He has published widely in Australian and foreign law journals and has been very successful in securing a number of Australian and overseas research grants for his research work. He is Director of the Adelaide Research Unit on Military Law and Ethics (RUMLAE), Head of the SA/NT Navy Legal Panel and Chair of the SA Red Cross IHL Committee. He is currently the Co-Editor in Chief of the *Woomera Manual of International Law on Military Space Operations*.

Hitomi Takemura is Associate Professor of International Law at Hitotsubashi University, Tokyo, Japan. Her research focuses on the effectiveness, efficiency and legitimacy of international criminal justice. She earned an LLM in international law from Hitotsubashi University, an LLM in public international law and international criminal law from Leiden University and a PhD in law from the Irish Centre for Human Rights at the National University of Ireland. She also worked as an intern at the Appeal Chamber of the International Criminal Tribunal for Rwanda and for the International Criminal Court in 2004–2005. Her publications in English include *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders* (Springer 2008); and 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) 2(4) *Amsterdam Law Forum* 3.

Kelisiana Thynne (LLM Sydney, LLB (Hons) Australian National University) is a legal advisor in Geneva with the International Committee of the Red Cross (ICRC)'s Advisory Services. From 2014–2018, she was in Kuala Lumpur as ICRC Regional Legal Adviser, covering Southeast Asia and Japan. Prior to that, she was with the ICRC as legal advisor in Kabul, Afghanistan and as regional legal advisor for the Pacific. Kelisiana has worked for the Australian government as the director of capability and research manager at the Australian Civil-Military Centre and as a senior legal officer in the Office of International Law of the Australian Attorney-General's Department. She has worked on international humanitarian law, international criminal law and international human rights law in various capacities in the last fourteen years.

Marc Tiernan is a graduate in Law of Trinity College Dublin (LLB, 2014) and the University of Amsterdam (LLM, cum laude, 2017) and is currently a legal consultant at the Extraordinary Chambers in the Courts of Cambodia.

Matthias Vanhullebusch (PhD, School of Oriental and African Studies, University of London; LLM (Adv.), Leiden) has been Associate Professor and Executive Director of the Asian Law Center at the KoGuan Law School of the Shanghai Jiao Tong University since 2012. He has an expertise in international law with a regional focus on the Middle East and Asia. He is Senior Managing Editor of the *Asian Journal of Law and Society* (Cambridge University Press), Series Editor of Brill's the Asian Law Series (Brill/Nijhoff) and the Routledge Studies on Asia in the World (Taylor & Francis) and Associate Editor of *The Asian Yearbook of Human Rights and Humanitarian Law* (Brill/Nijhoff). He is Rapporteur of the International Law Association's study group on Asian State practice of domestic implementation of international law. He is the author of *War and Law in the Islamic World* (Brill/Nijhoff 2015) and *Global Governance, Conflict and China* (Brill/Nijhoff 2018). He has been a visiting scholar at the Geneva Academy of International Humanitarian Law and Human Rights (Summer 2018) and the Oxford Institute for Ethics, Law and Armed Conflict (Summer 2019).

Ru Xue is Associate Professor of Public International Law at the Academy of Political Science, Xi'an, National Defense University of China. She was granted a PhD from China University of Politics and Law in 2015 and was awarded a doctoral scholarship by The Hague Academy of International Law in 2013. She is the author of *The International Criminal Court and The UN Security Council* (Chinese Language, Law Press 2016). Her article, 'Crimes against Peace in the Tokyo Trial', was published in *Historical War Crimes Trials in Asia* (Liu Daqun and Binxin Zhang (eds), Torkel Opsahl Academic EPublisher 2016).

Pichamon Yeophantong is an Australian Research Council DECRA Fellow and Senior Lecturer at UNSW Canberra at the Australian Defence Force Academy. Previously, she was a Global Leaders Fellow at University College, Oxford University and the Niehaus Center for Globalization and Governance, Princeton University, as well as an ASEAN-Canada Senior Fellow at Nanyang Technological University. Pichamon has conducted extensive fieldwork in China and Southeast Asia and served as a consultant to the Africa Progress Panel and Overseas Development Institute, among others. Her work has appeared in such publications as *Pacific Affairs*, *Asian Survey*, *Chinese Journal of International Politics* and *Water International*. She is also a recipient of the Council for the Humanities, Arts and Social Sciences' Australia Prize for a Future Leader. Pichamon completed her PhD in Politics and International Relations at the Australian National University.

Yvette Zegenhagen is National Manager of the Australian Red Cross International Humanitarian Law program. In this role, she is also the Secretariat for Australia's National IHL Committee. Prior to joining the Australian Red Cross, Yvette worked as an adjunct teaching fellow in the Bond University Law Faculty and as a commercial litigator in Melbourne. Yvette is currently the chair of the Asia-Pacific National Society Legal Advisers' Network. Yvette has also worked briefly in the ICRC's Legal Advisory Service as the ad-interim common law legal adviser in Geneva. She is published in the areas of nuclear weapons, and counter-terrorism and principled humanitarian action.

Binxin Zhang is Assistant Professor of Public International Law at Xiamen University Law School. She previously worked as Legal Officer in the International Committee of the Red Cross Regional Delegation for East Asia; and as a trial monitor of the Asia International Justice

Initiative Trial Monitoring group. She has been visiting scholar at National Taiwan University, the Australian National University and Sciences Po (Paris) Law School. She holds a PhD in international law from Renmin University of China. Her main research areas are public international law, international criminal law and international humanitarian law. Her publications include various journal articles and book chapters, as well as editing volumes. She is a core expert on the *Woomera Manual on the International Law of Military Space Operations* and an editorial board member of the *Journal of International Humanitarian Legal Studies*.

Foreword

His Excellency Judge Sang-Hyun Song
President of the Korean Committee for UNICEF and
Former President of the International Criminal Court

This book instantly brought back memories of war in my childhood. The Korean War broke out in 1950 when I was nine years old. For three months, during the battle for Seoul, my family hid in a hot and humid underground bunker. It was my daily task to emerge above ground to find food. To do this, I had to walk about ten miles every day to my home town just outside Seoul to find generous people who might share potatoes and vegetables they grew. When war planes appeared in the sky and started dropping bombs on the city, I had to run for cover, dropping all the food I had tried so hard to find. On these trips, I passed hundreds of corpses in the streets and was often overcome by the horrible stench on those hot summer days. I was only a small boy, yet old enough to realize that war inflicts immense suffering and destruction.

I often thought how lucky I was to have survived the war and to have had the opportunity to go on and live a normal life. Thankfully, the war ended in 1953, and I was able to grow up in relative peace and prosperity, a privilege for which I have always been profoundly grateful. Regrettably, there are still far too many parts of the world in which peace remains an unattainable luxury.

I chose a legal career because I believed – in my youth, and still believe to this day – that it is through the law that the worst violence and cruelty inflicted upon human beings can be prevented; it is with law that we can change the world. Fortunately, many shared that outlook, as the world saw a fundamental overhaul of international structures and the adoption of new legal instruments after World War II. First, the United Nations (UN) was established as the primary forum for international dialogue and security. Second, the Universal Declaration of Human Rights, which became the basis of the modern concept of human rights, was adopted in 1948. Third, international military tribunals were set up in Nuremberg and Tokyo to try the architects of the atrocities committed by Nazi Germany and its allies. Fourth, shortly afterwards, the Convention on the Prevention and Punishment of the Crime of Genocide and the four Geneva Conventions of 1949 were adopted.

Common to all these post-World War II developments was the notion that the protection of peace and basic human dignity is a matter of common concern for the international community and that even in a world consisting of sovereign States, certain international rules are necessary to safeguard these values of fundamental importance to humankind as a whole. First, the UN Charter prohibited aggressive warfare and charged the UN Security Council with matters of international peace and security and the International Court of Justice with the peaceful settlement of disputes between States. Second, international human rights law (IHRL) emerged as an expression of the new notion that States have a responsibility to respect and to protect the human rights of their own nationals and other individuals on their territory and subject to

their jurisdiction. Third, the law of armed conflict progressed into international humanitarian law (IHL), with an increased focus on the protection of vulnerable individuals in time of war. Fourth and finally, the seeds of international criminal law (ICL) were planted in Nuremberg with the recognition that individuals responsible for mass atrocities must be held accountable for their acts.

We have seen the recent expansion of ICL, IHL and IHRL through the International Criminal Court (ICC), the ad hoc international criminal tribunals and several other international hybrid courts. These institutions have brought us a proliferation of modern jurisprudence on genocide, crimes against humanity and war crimes. Cases before the ICC show us that international criminal justice issues are intertwined with issues of IHL and human rights abuses. While the Rome Statute represents a major advancement in the development of international criminal justice, the ICC has also proven to be a major international court to develop the interpretation and application of IHL. The ICC continues to propel these fields forward, as rights advocates all over the world have demanded accountability for violations of IHRL and IHL amounting to international crimes.

***

As significant as these developments have been, scholarship on IHL, especially as it has developed and been applied in the Asia-Pacific, has been relatively lean. This book, *Asia-Pacific Perspectives on International Humanitarian Law*, is an ambitious, invaluable contribution to the field.

There are many reasons why I am pleased with this book. One prominent reason is that the volume has been conceptualized and edited by three prominent scholars, whom I respect highly. I think that I first met Professor Suzannah Linton in Bangkok in April 2009 when she made her inspiring presentation on 'Post-Conflict Justice in Asia' at the conference on 'Fighting Impunity and Promoting International Justice', which she and Professor Cherif Bassiouni's International Institute of Higher Studies in Criminal Science organized. I have since been overwhelmed by her brilliant and prolific works of an academic and professional nature in specialized fields such as ICL, IHL, IHRL and dealing with the legacies of the past. The online Hong Kong War Crimes Trials Collection, for example, is a monumental work that led to the identification of case files at the UK National Archives in relation to Hong Kong's War Crime Trials after World War II. Professor Linton has been a visiting professor at universities in several countries, including South Korea. Her academic work has been extensively published. She has ample experience of editing many important works, books and proceedings. Further, she has wide practical experience with international courts and tribunals and international organizations, intensively covering the Balkans, Cambodia, Indonesia, East Timor and Bangladesh. As a renowned law professor in Australia and beyond, Professor Tim McCormack, the second editor of this book, is Special Advisor on International Humanitarian Law to the Prosecutor of the ICC in The Hague, and also Law of Armed Conflict Advisor to the Australian Defence Force Director of Military Prosecutions. I had the pleasure of meeting this distinguished scholar at Melbourne Law School, as well as at the ICC. Professor McCormack's successful experience of setting up and developing an IHL program domestically has to be highlighted as an example of how IHL can be disseminated and promoted. He is a symbol of Australian leadership in the promotion of IHL. The third editor, Professor Sandesh Sivakumaran of the University of Nottingham's School of Law, has written some important articles on the law of armed conflict and sexual violence against men and boys in situations of armed conflict. His textbooks on international

law and IHRL, co-authored with other scholars, are gaining popularity in some law schools in South Korea.

The editors of this book have captured the importance of documenting historical, theoretical and practical developments, practices and application, enforcement of and compliance with IHL. The chapters provide readers with first-hand insight into the successes of and the challenges to IHL and criminal justice in the Asia-Pacific region. Each contributor is an expert in this field. The authors include leading academics as well as top practitioners from various institutions, including international and domestic judges, prosecutors, military legal advisors, current and former International Committee of the Red Cross (ICRC) legal advisors, NGO leaders and diplomats. They provide interdisciplinary perspectives on substantive IHL, ICL and IHRL; on procedural issues, and policy and political dimensions; and also some important topics such as sexual and gender-based violence, the protection of victims and their redress. This volume highlights and fully discusses important issues of IHL that are currently debated worldwide. On top of the unique characteristics of known and lesser-known conflicts in the region, the expert authors ably tackle new challenges to IHL brought on by contemporary conflicts, terrorism and new technologies. They explore a wide range of challenges faced by protected persons during armed conflict, the prohibition of or restriction on the use of certain weapons, cyber warfare, methods and means of warfare, national and/or international jurisdictions over violations of IHL, and States' acceptance of IHL treaties and domestic implementing legislation. Some chapters emphasize that for IHL to effectively regulate the behaviour of warring parties, there is a need for both adequate rules and actual respect for those rules and to strengthen compliance with IHL.

The volume is therefore thorough and exhaustive in scope, in terms of countries and issues covered. In essence, this book highlights the diversity and plurality of experiences with IHL in the Asia-Pacific region. This publication presents views on critical IHL issues from a wide range of Asia-Pacific experts, as well as perspectives on wider thematic IHL issues in the region. I am delighted to see an outstanding array of representatives from across the region, hailing from China to Samoa and Korea to Sri Lanka. Further, it is a thought- provoking and vivid highlight to add interviews with international judges such as Messrs. Keith, Liu, Kwon and Pangalangan, experts and senior leaders in the fields of ICL and IHL.

***

When I had the honour of serving the ICC as its President from 2009–2015, I believed that the advent of the ICC and the broader Rome Statute system changed the way the world has come to think about and respond to grave international crimes, including violations of IHL and human rights abuses. The creation of the ICC in itself was a great achievement. The ICC was created to ensure the prosecution of those most responsible for international crimes. These international crimes tear lives apart and inflict trauma that takes generations to heal. The ICC's judicial interventions contribute to establishing lasting peace, as a key element in reconciling societies and ending cycles of violence. Moreover, the ICC's permanent existence is an essential step towards ensuring that future generations do not have to live in fear of these devastating crimes. The threat of prosecution has a powerful deterrent effect; and it can put any potential perpetrators of crimes on notice that they will be held liable for their actions.

Hopes for a permanent international criminal court came to fruition in July 1998 when delegates from 160 countries gathered in Rome to negotiate an international treaty that was both the Statute for a new, permanent international criminal court, and also a powerful statement

of intent by the international community that impunity for atrocity crimes would no longer be tolerated. With sixty ratifications, the Rome Statute entered into force on 1 July 2002. The ICC was thus born as a new, independent international organization, mandated to investigate and prosecute most heinous crimes. It is now clear that the Court is at the heart of a global movement that demands an end to impunity for these crimes. With good reason it has been said that the birth of the ICC was the most important development in international law since the creation of the UN and the adoption of the UN Charter. By helping the entrenchment of strong legal and societal norms that prohibit massive crimes and human rights abuses, the Rome Statute system can help us move towards a safer world in which people around the globe can live and prosper in peace. However, this is not a task for the justice sector alone; it is a goal that can be achieved only with the simultaneous strengthening of democracy, development and the rule of law.

My work as the ICC President was full of political sensitivity, difficult challenges and over-expectations that were hard to manage. The Court's jurisdiction is not universal. It is clearly limited to the most recognized bases of jurisdiction. The Court only has jurisdiction over nationals of States parties or crimes committed on the territory of a State party. As the first ICC President from the Asia-Pacific, I made it a priority to convince as many Asia-Pacific countries as possible to ratify or accede to the Rome Statute because the region was most under-represented. I realized through my trips that States that are still suffering from the wounds of war are rather reluctant to join the Rome Statute system for fear that their leadership might be subject to ICC prosecution for the atrocities that some leaders in power had allegedly committed. To dispel such suspicions, I emphasized that the Court's jurisdiction can be extended only to crimes committed after the entry into force of the Rome Statute on 1 July 2002 and when a State ratifies the Rome Statute, the Statute applies from the date of joining onwards. In other words, if a State ratifies the Rome Statute, it would be a safety net for the future. Many States remain strongly suspicious and sceptical of this legal reality of temporal non-retroactivity. The wide reach of the Rome Statute system can further enhance perceptions of its legitimacy, as the Court already works closely with other partners to share information and coordinate efforts towards expanding the Rome Statute. As President of the ICC, I travelled to many States whose governments were actively considering a sovereign decision to adopt the Rome Statute. The Court can provide information to ensure that policy considerations are based on facts. On these visits, the Court benefited greatly from partnerships with the European Union (EU), States parties and civil society. In each case, this coordination began before the visit and continued after it was over. It was through precisely this type of partnership that I managed to expand the reach of the Rome Statute. My persistent efforts for universality met with fourteen more ratifications.

While I represented the ICC as its President and protected its institutional independence and integrity, I was also a judge in the Appeals Chamber with cases before me. Consequently, I was constantly on guard to observe judicial ethics and safeguard my own independence and integrity. This had an impact on the way I lived. I tried very hard to avoid even the slightest impropriety.

The geographical and cultural diversity of the ICC, as well as its gender balance, are in fact reflected not only in the totality of the Court's judges but practically in every bench of the ICC.

The ICC relies especially on the legal community and States parties to speak up on behalf of the rule of law and to defend the law from interference of politics. The successful implementation of the ICC's mandate relies on continued support for the noble principles that resonated in Rome. In the early days, judges were fully engaged in legislating regulations, codes and other rules, but the ICC soon grew into a busy institution with a full docket. Whereas in the beginning the judges also spent a lot of time considering how to 'bridge the gap' between their legal

cultures, and how to address many legal issues for the first time, application of the ICC's *sui generis* legal system is now business as usual. While international justice is absolutely vital for global security and the rule of law, it is not cheap, nor fast, mainly because of the complexity of crimes and the remoteness of crime sites. There is always a need to respect the highest standards of fair trials and due process and the in-built procedural requirements under the Rome Statute and the Rules of Procedure and Evidence (RPE). With the conclusion of the *Lubanga* trial, I swiftly took the initiative to put together a committee composed of some judges and mandated it to identify and work on issues for improvement with interested parties. In essence, the committee tried to ensure judicial efficiency without sacrificing fairness. As a judicial body, the ICC is not well equipped to address politically motivated attempts to undermine its institutional legitimacy. States parties are asked to speak up strongly in defence of the Court. At the same time, States must fully respect the ICC's independence and they must refrain from exerting political pressure on the judicial proceedings. At all times, the Statute, Rules, Regulations and other legal instruments of the ICC should form a coherent whole. The balance of the legal framework should not be disturbed lightly. The force of international criminal justice has come a long way. Yet we are aware that there is much room for improvement, and the ICC is fully committed to improving and refining its functioning. The steadfast commitment of the States parties is needed to support the ICC's work, to provide full cooperation and the necessary resources for its operations, while respecting the Court's independence. The ICC is a legal institution that must be accountable to its States parties, but in its prosecutorial and judicial capacity, it must remain independent of their influence and control. At the same time, we have to acknowledge and deal with the situations where the Court operates in a political world in which States are the main actors.

The fundamental principle underpinning the ICC is complementarity, that the ICC is a court of last resort. Under this principle, the ICC does not replace national courts, nor does it have the ability to override properly functioning national courts, unlike the International Tribunals for Rwanda and the former Yugoslavia that enjoyed jurisdictional primacy. The Rome Statute requires that the ICC only step in if a State is unwilling or unable, genuinely, to carry out an investigation or a prosecution. This principle has a number of powerful implications. First, it means that every State joining the Rome Statute can be confident that they retain the primary jurisdiction to conduct proceedings for any ICC crimes. I cannot stress enough that this is both the right and the responsibility of each State. The fight against impunity can only succeed when the national justice system of each State is strong enough to stand against atrocious crimes. To strengthen national justice systems, there are domestic laws to amend, judges and attorneys to train, and penal systems to improve. Yet only about a half of States parties have adopted implementing legislation. As many partners can assist in expanding the reach and depth of ICL, IHL and human rights abuses, I raised these and other needs with the Court's many partners, and tried hard to strengthen relationships with regional organizations and NGOs. The challenge of realizing a vision of a world of accountability and peace is even more difficult if one steps back from the ICC to look at the broader system of international justice. This system comprises numerous actors with widely diverging, and sometimes conflicting, mandates. Tremendous work is already being done to provide expertise, training and material resources for enhancing national judicial capacity. More can be done to better bring together and coordinate the different activities, to raise awareness of opportunities, and to bring into the mainstream ICL, IHL and IHRL throughout rule of law programmes. In essence more must be done to ensure that national courts are willing and able to act, since the ICC will only ever be able to handle a relatively small number of cases at a time. And even if States have the capacity, they

may still lack the will to conduct fair trials. There is also increasing awareness of the need to involve development agencies in helping the strengthening of national justice systems. This shows that the real power of the ICC is not in the Court alone, but in an entire system of international criminal justice incorporating international organizations such as the UN, regional organizations such as the EU, La Francophonie, the Commonwealth and the Organization of American States, development agencies, States and civil society. With every year that goes by, the normative consensus grows stronger that justice must be done in the case of mass atrocities. The bulk of the work of developing national capacities will therefore fall to the court's partners mentioned above. I am particularly glad that the UN is increasingly taking a strong role in this area, since the UN is uniquely placed to advance the rule of law in all parts of the world where international assistance is needed.

While the ICC and the UN together may be the most visible leaders of the fight to end impunity, it is ultimately States whose action or inaction will determine the success of this quest. By adopting the Rome Statute, States established not just a Court, but an entire system of international justice. The architecture of the system splits responsibilities, whereby the ICC carries out judicial work, but enforcement is devolved to States. Therefore, the ICC will investigate, prosecute and try suspects of crimes, but for arrest warrants to be implemented, evidence to be provided, witnesses to be protected, and sentences to be enforced, States must assist the ICC. Most of the time, States extend good cooperation to the ICC, but not always, and the lack of cooperation can seriously diminish the ICC's ability to deliver justice. It is important not to lose sight of the fact that cooperation with the ICC is a treaty obligation, and it must be treated as such. Cooperation should come to be regarded as routine, not an exercise of extraordinary political will. It is now up to the States who created the Court, and its other supporters, to help identify from their perspectives the challenges in providing cooperation and assistance and to identify actions that can be taken. It is my hope that the Assembly of States Parties will consider as a matter of priority how they can best use the political and diplomatic tools at their disposal to bring about cooperation.

Under current international law, victims of armed conflict have a substantive right to reparation from the responsible parties. Various reparation mechanisms have been established in the last twenty-five years. The Trust Fund for Victims of the ICC and its practices are illustrative. I believe that one of the great achievements of the Rome Statute is the strong emphasis it places on the position of victims. It allows victims to be substantially integrated into the ICC's proceedings even when they are not called as witnesses. The Statute is mindful of the particular interests of the victims, including the need to prevent violence against women and children. In some situation countries, the ICC's outreach program communicates actively with the local population, informing the victims of their rights and helping communities generally understand the ICC's mandate and proceedings. The ICC has the power to order reparation to victims including restitution, compensation and rehabilitation. The Statute directly mentions the relationship between the ICC and the Trust Fund in the case of court-ordered reparations following guilty verdicts. The Fund also has a mandate to assist victims outside the context of the court proceedings, and it has already supported tens of thousands of them. The Fund collects voluntary donations and uses these resources to manage projects covering the major areas: (1) rebuilding communities; (2) helping victims of torture or mutilation; (3) caring for children and youth; and (4) helping victims of sexual violence. An important consequence of these efforts is the positive impact they have on the peace-building process in war-torn countries. Even though there are wounds that may never heal, this model of justice helps communities overcome a violent past and build a more stable future. Further, the ICC has continued

to breathe life into victim protection programmes, mainly enabling victims to participate in the proceedings, seek reparation and receive humanitarian assistance from the Trust Fund under the Statute. For some victims, perhaps, seeing justice done has alleviated the urge for violent retribution. More victims now have reason to hope that their tormentors will answer for their crimes. More victim communities can see that their voices are increasingly heard and that the right to justice is vigorously defended. However, in the adjudication of mass crimes with often thousands of uneducated victims and their families, to ensure meaningful participation of all these victims is an immensely difficult task, and inevitably some victims will feel left out of the process. Although most remedies are not preventive, nor sufficiently efficient, best practices have to be continuously developed in the search for effective redress for victims. As victims have told stories of anguish and suffering in the courtrooms, the Fund has been assisting individual victims and their communities in affected countries. The ICC and the Trust Fund each have roles in providing solace to those who have suffered from crimes already committed. Working always in complement, and sometimes together, the ICC and the Fund can ensure that those who have survived the worst emerge with a sense that comprehensive justice has been delivered.

I am the only ICC president who has ever visited war-torn communities in Uganda and the Democratic Republic of the Congo twice. I had many opportunities to speak personally to numerous victims with severely mutilated bodies or with no limbs. This experience saddened me greatly but also reinforced my commitment to the common goals of the ICC and the Rome Statute. My experience convinced me that a lot of work still needs to be done if we wish to end impunity and achieve universal deterrence of the most serious crimes which threaten the peace, security and well-being of the world. Having seen the incredible energy that victims have after all the suffering that they have gone through, we must surely find the strength and resources to redouble our efforts to ensure justice for them and to prevent the needless suffering of others. The stakes are high – the future of humanity is in question. I was convinced that retributive justice alone would do nothing for the rehabilitation of victims and society. My commitment to justice and my determination to make a positive impact through my work at the ICC have been reinforced after meeting with many victims in the situation countries. Some were former child soldiers, grappling to rebuild their lives. Other victims were missing arms or legs, or lips or ears, which had been intentionally cut off. The brutality which they had suffered reminded me that, unfortunately, with so many countries caught up in conflict, we are far from eradicating depravity and mass violence. I was the first judge in the ICC's history to write a sole dissenting opinion on the modality of victims' participation in the proceedings in favour of their easier, freer participation. Ten years later, after my retirement, the Court abolished the Appeals Chamber's majority opinion and my lone judicial view has been accepted as the ICC's precedent. The Rome Statute confers rights to victims that have never before been granted by any international criminal tribunal. An area that most remarkably distinguishes the work of the ICC from all the other international tribunals is the unprecedented systematic focus on victims in its work, not only to bring to justice those who wronged them, but also to help them rebuild their lives and societies. This way, we have to go beyond the traditional concept of criminal justice, i.e., retributive justice, and expand it to include restorative justice and reparative justice. This is the first experiment of its kind in human history, and therefore we cannot afford to fail.

***

In the Asia-Pacific, many practical lessons have been learned in the context of investigations and prosecutions as well as the practice and application of IHL, ICL and human rights law. Yet, many challenges still remain. Ignorance and indifference are the worst enemy. This book presents considerable jurisprudence on crimes threatening peace and security in the Asia-Pacific, from the various countries of the region. The authors of the chapters engage in domestic and regional debates on IHL, using vivid examples from conflicts in the Asia-Pacific region, regional jurisprudence as well as academic and other works from the region to the fullest extent possible.

As domestic implementing legislation and court decisions continue to grow in the region, so too will the need for continued professional work in the international community. Proper understanding of IHL is thus essential to its correct practice and application, as well as to the enhancement of and compliance with the law. This collection of essays that draws together academic and professional commentary on a wide range of IHL issues, providing a broad geographical overview that also spans the cultures of the region, serves this purpose. The book contains a good balance in terms of aspects of the law that it covers, ranging from development of the law, its practice and application, through to implementation, enforcement and compliance.

The book explores the role of Asia-Pacific States as well as of non-State actors in the development of IHL, and assesses the practices and judicial opinions of those States that are used in the formation of customary IHL. Importantly, the book analyses the ICRC Customary International Humanitarian Law Study, ICTY jurisprudence and the work of other bodies such as UN Commissions of Inquiry. It also considers the extent to which States and persons from the Asia-Pacific region are involved in the production of other IHL documents, such as the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, the Tallinn Manual on the International Law Applicable to Cyber Warfare, Tallinn 2.0 and the HPCR Manual on International Law Applicable to Air and Missile Warfare. Professor Sivakumaran provides an excellent rundown of the relevant documents and records with scholarly discussion.

Looking to the future, Professors McLaughlin and Gordon respectively anticipate two major issues in the region: those relating to operational naval warfare that might arise in the event of an armed conflict in the South China Sea and the IHL issues that may arise in a future conflict on the Korean Peninsula. A unique geopolitical relationship in the South China Sea area might lead to a possible naval warfare, and the tension in the area is high and unpredictable. Anticipating the recent tensions between the United States and North Korea over the latter's budding nuclear arsenal and missile testing, North Korea calls for attention to the fact that there is still unresolved martial enmity between north and south on the Korean Peninsula. In the nearly sixty-five years since the armistice, the Korean Peninsula is most heavily militarized and always pregnant with high tension. Despite the recent military and diplomatic thaw, the article correctly predicts and analyses the humanitarian law issues that would arise if the tensions between North Korea and the United States were to spark a fresh outbreak of armed conflict on the Korean Peninsula. It is clear that the landmines and nuclear weapons would raise core issues of IHL. But given North Korea's behaviour in recent years, any such armed conflict would raise other significant questions implicating the law of war: the impact of human rights abuses on peace efforts and the impact of the involvement of the United States and China on IHL issues. The Korean conflict would pose all kinds of challenges to IHL, as much as the Vietnam War did.

Asia-Pacific Perspectives on International Humanitarian Law, with its rich contribution from well-respected experts, deals eruditely with the crucial and very tangible issues of law, policy and practice. Indeed, the essays reflect the many, diverse and expanded dimensions of IHL. They bear testimony to a vibrant, rapidly developing area of international law. It is hoped that as time

goes by, the outstanding challenges identified by the authors will be addressed adequately and that the law will grow to its full potential. For example, there is significant interplay between IHL, IHRL and ICL in the book, and some of the reality that is revealed is not so smooth and needs to be improved. Using concrete examples, the authors of this volume provide thorough legal analysis and guidance to State authorities, human rights and humanitarian actors and others for improved application of national, as well as international, law (IHRL, IHL and ICL). This will require the concerted effort and cooperation of all actors in the field.

This collection represents a most valuable contribution to a more erudite understanding and interpretation of IHL, and is also a powerful tool to anyone seeking to better understand, interpret and apply the law in the Asia-Pacific region. The detailed analyses of the theorization and concrete operation of IHL and the critical discussions that the volume offers will lead to a better understanding of the principles of IHL and its impact on the development of international justice and IHRL. They will be a source of inspiration and provide invaluable insight for judges and practitioners, academics, researchers and policymakers alike.

The book also deals with accountability and explores the legal framework determining State and individual responsibility. It also presents victims' rights in the event of such violations. Just as the ICC does through its proceedings and jurisprudence, this book contributes many ideas and possibilities for enhancing humanity in war, and the development of a stout body of scholarship that is capable of contributing to greater protection of victims of mass atrocities and deterring future crimes. This book's comprehensive overview of the many problems confronted and the progress made in the area of IHL will be a benchmark against which to gauge future progress.

***

Just thirty years ago, who would have thought that crimes against humanity, war crimes and genocide would be prosecuted by an independent, permanent international institution? And that investigating such crimes would become the expected norm, instead of being a rare exception? The monumental achievement of the Rome Statute is that it set up an entirely new paradigm of international criminal justice, which has made accountability for atrocity crimes an integral aspect of the rule of law that simply cannot be ignored any more. Now the world knows that perpetrators of the gravest crimes need to be and can be held accountable – in the first place by national courts, and failing that, by the ICC. There are already signs of a growing deterrent effect of the ICC's permanent presence. Another big achievement of the ICC's first fifteen years is the fact that we have turned the ICC from a Court on paper into a leading actor in the area of the enforcement of international justice, IHL and human rights. Trials for the gravest crimes before a permanent international court are now a reality. So far, 123 States have ratified the Rome Statute. The ICC has active cases at all stages of proceedings. All triggering mechanisms of the ICC's jurisdiction have been activated. Some African States have referred situations to the ICC; the UN Security Council referred two situations to the Prosecutor, and two investigations were initiated by the Prosecutor, with judicial authorization. Even non-States parties have accepted the ICC's jurisdiction – in the case of Côte d'Ivoire, and most recently, Ukraine. The judicial proceedings undertaken at the ICC have not always been easy. The judges and the parties have been applying a new legal system in practice for the first time. As a result, we now have a large body of jurisprudence on many fundamental legal issues.

The creation of the ICC was a historic victory of idealism, persistence and international cooperation – led in particular by small- and middle-sized States, motivated by the lessons of history that impunity must not be tolerated, and that joint action is required to change the world

for the better. The ICC is strongly committed to continuous development. In my view, the constant quest for enhanced efficiency and performance is part of the good governance of a public institution such as the ICC.

In view of my experience at the helm of the ICC, I am quite certain that the recent development of international criminal justice will strongly influence IHL and trigger a great leap forwards with tireless education and public awareness raising, continuous improvement of practices and advancement of scholarly and professional activities.

There are many challenges – competing interests, limited resources, political opportunism, cultural differences, different visions and so forth – but at the end of the day, there are also undeniable shared values and common goals that humans everywhere hold dear. Men, women and children everywhere want to live in a world of peace, security and harmony, without fear of violence and suffering.

Once again I congratulate the three editors and the authors for this successful endeavour and I thank them for initiating and completing such an important scholarly project. It is also hoped that this distinguished publication will enhance the understanding of the importance of IHL in the pursuit of justice for international crimes and in building a culture of rule of law through accountability for these crimes. It is therefore with great pleasure that I present this volume. I wish it much success.

Foreword

Dr Helen Durham
Director of International Law and Policy, International Committee of the Red Cross (written with the assistance of Laura Green)

As a young international lawyer, I learned my trade in the beauty of the Asia-Pacific region. As Manager of International Humanitarian Law (IHL) at the Australian Red Cross, and then as a Legal Adviser for the International Committee of the Red Cross (ICRC) for this part of the world, I spent over fifteen years doing work such as teaching IHL, engaging with governments and militaries, and visiting detainees across the region in Indonesia, the Philippines, Australia, New Zealand, Myanmar, Papua New Guinea, Fiji and a whole host of other countries that are distinct but deeply connected through their geography and culture. From military exercises in far North Darwin, to running a course on IHL at the law school in Port Vila, the distances I had to travel and the different landscapes I navigated often amazed my counterparts when I returned for briefings at the ICRC headquarters in Geneva.

Yet the long travel and deep diversity of the Asia-Pacific region taught me a great deal. As someone devoted to the ideals found in IHL – including the need for a space for humanity in war and the importance of impartial assistance – the idea of a 'common humanity' runs deep in our region. Just as IHL is essentially about the real human connections we must show each other if the human race is to survive in the horror of armed conflict, the focus on 'getting to know the person' was a profound experience for me in the Asia-Pacific region. Whether it was singing karaoke with government officials in different Asian countries, or really getting to know my students (their families, cultural alliances and answering lots of questions about myself) before teaching in small Pacific Island States – the human agency was always present. In my early professional experience, I learnt that a written agreement meant less than an understanding of the person you are working with, and the building of genuine trust. Today, as a director in the ICRC, my methods of engagement with authorities are very different (sadly less karaoke), but the lesson of 'understanding another human' remains with me constantly.

The Asia-Pacific region also challenged many of the ideas I had based on cultural relativity and the universal nature of IHL. Arriving with a copy of the Geneva Conventions in hand and the story of Henri Dunant from a far-flung cold country in Europe had little traction in countries such as Tonga. I quickly needed to find methods to bring out the key principles of IHL in a way that was meaningful for those living in a very different environment. Indeed, it was Dr Langi Kavaliku, former Deputy Prime Minister of Tonga, who asked me to present IHL in a way that incorporated history and culture of relevance to those living in the Pacific. From this request, the Regional Delegation of the ICRC in the Pacific developed *Under the Protection of*

the Palm: Wars of dignity in the Pacific.[1] It captured examples of ancient or traditional Pacific cultural practices (such as Samoan warriors wearing white hats, or in the Solomon Islands wearing combs and ferns to distinguish warriors from the community) and correlated these with principles found in IHL.[2] I found the process fascinating and understanding the range of examples that showed the use of restraint in conflict, despite most history books talking about the opposite, made me question how regions can be simplistically viewed and easily classified. The Asia-Pacific region has a rich history of practices that relate to providing humanity during times of armed conflict, as well as numerous examples of the opposite. Finding methods to best pass messages about IHL, through law but also history, cultural practices, religion and relevant narratives, is important and once again has been a significant part of my work with the ICRC.[3]

One area that always impressed me during travels and professional activities, was the strong and inspirational women I met in the region. Despite the many struggles and inequalities experienced by women in many Asia-Pacific countries,[4] I came across politicians such as Dame Carol Kidu in Papua New Guinea and amazing civil society leaders in the Philippines profiling the plight of 'comfort women'. Small in numbers, but often powerful in action, these women were motivating and left a lasting impression. Having a professional focus on not only protecting women during times of armed conflict but also exploring a better understanding of what gender means to IHL,[5] I believe there is much still to be examined in relation to gender, IHL and the Asia-Pacific region. In the area of development and human rights there is a wealth of analysis of the way gender impacts upon the region,[6] but other areas of international law are more silent on this topic.

Indeed, international law is still struggling overall with concepts and definitions of gender as it applies in universal treaties and norms. A range of definitions for the term 'gender' exist in international law, but attempts over the years to better capture what is meant by the term have had limited success. Article 7(3) of the Rome Statute of the International Criminal Court (ICC Statute) remains one of the few legal definitions of 'gender',[7] yet there is growing concern that this is a narrow and inadequate construction. The difficult negotiations that led to this very limited definition are aptly summarized by Judge Raul Pangalangan's comment in his interview for this book. When referring to the compromises that were in the end reached to bring different perspectives on board, he cites his favourite example as being the outcome that the statute uses 'gender' to mean simply 'male or female'.

Looking at developments across the wider international legal landscape, a number of Security Council Resolutions have addressed broader gender issues in relation to armed conflict.

1 ICRC Regional Delegation in the Pacific, *Under the Protection of the Palm: Wars of Dignity in the Pacific* (ICRC 2009).
2 Helen Durham, 'The Laws of War and Traditional Cultures' (2008) 34(4) *CLB* 836.
3 Fiona Terry and Brian McQuinn, *The Roots of Restraint in War* (ICRC 2018).
4 HRW, 'Bashed Up: Family Violence in Papua New Guinea' (HRW 2015); HRW, '"Only Men Need Apply": Gender Discrimination in Job Advertisements in China' (HRW 2018).
5 Helen Durham and Katie O'Byrne, 'The Dialogue of Difference: Gender Perspectives on International Humanitarian Law' (2010) 92(877) *IRRC* 31; Helen Durham, 'International Humanitarian Law and the Protection of Women' in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (Martinus Nijhoff Publishers 2005) 97.
6 See further Anne-Marie Hilsdon and others (eds), *Human Rights and Gender Politics: Asia-Pacific Perspectives* (Routledge 2000).
7 Rome Statute of the International Criminal Court, art 7(3): 'For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the one above.'

Security Council Resolution 1820 (2007),[8] for example, locates sexual violence within the discourse of threats to international peace and security, rather than deeming it an unavoidable consequence of armed conflict and violence. Moreover, Security Council Resolution 1325 (2000)[9] represented a landmark resolution, recognizing the importance of women's involvement in peace and security issues to achieve long-lasting stability.

However, in October 2018, nearly two decades since the adoption of Resolution 1325, Phumzil Mlambo-Ngcuka, Executive Director of UN-Women, exposed the 'systemic failure' to integrate women into these critical processes of peacekeeping, mediation and peace negotiations.[10] Presenting figures on the implementation of the resolution to the Security Council, she highlighted that women constituted only 2 per cent of mediators, 8 per cent of negotiators and 5 per cent of witnesses and signatories to major peace processes between 1990 and 2017,[11] demonstrating a significant gap between what is being said in the Council, and what is being done outside. Gender is a complex subject that is both highly personal and strongly public, and it is clear that the international community continues to grapple with defining it and addressing gender-related issues more broadly.

Separately, as is well acknowledged, progress has been achieved over the years in identifying rape as a war crime and in the definition of the crime itself. In a case before the Australian War Crime Trials held from 1945 to 1951, rape was previously defined as 'unlawful carnage knowledge of women without her consent by force, fear or fraud',[12] a definition based on the then-current Australian domestic law. The *ad hoc* Tribunals subsequently moved from conceptual definitions (International Criminal Tribunal for Rwanda, *Akayesu*[13]) to a more mechanical focus upon the crime (International Criminal Tribunal for the former Yugoslavia, *Furundzija*[14]).[15] Later, the International Criminal Court (ICC)'s process of codification of the elements of the crime of rape demonstrated the difficulties still experienced today when dealing with such crimes in international law.[16] But the result can nevertheless be seen as an achievement, in particular for its wider codification of the prohibitions on sexual violence, neither using value-laden terms such as 'honour', nor focusing exclusively on women. Current international criminal law continues to develop its articulation of the crime. For example, in its 2017 ruling in *Ntaganda*,[17] the ICC Appeals Chamber affirmed the Court's jurisdiction over the war crimes of rape and sexual slavery when committed against members of the perpetrator's own armed forces, progress that reflects the interpretation of the ICRC's Commentary on Common Article 3 (CA 3) of the Geneva Conventions.[18]

[8] UNSC Res 1820 (2008) [on acts of sexual violence against civilians in armed conflicts] (19 June 2008) UN Doc S/RES/1820.
[9] UNSC Res 1325 (2000) [on women and peace and security] (31 October 2000) UN Doc S/RES/1325.
[10] UNSC 8382nd Meeting (25 October 2018) UN Doc SC/13554.
[11] UNSC 'Report of the Secretary-General on Women and Peace and Security' (9 October 2018) UN Doc S/2018/900.
[12] Australian Military Courts, Rabaul R1 Trial Report, Summing up, as quoted from John Frederick Archbold, *Archbold's Pleading, Evidence and Practice in Criminal Cases* (31st edn, 1943).
[13] *Akayesu* Trial Judgment [688].
[14] *Furundžija* Trial Judgment [185].
[15] For further analysis, see Gloria Gaggioli, 'Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law' (2014) 96(894) *IRRC* 503.
[16] The codification can be seen to be simply a combination of previous deliberations; see further Mark Ellis, 'Breaking the Silence: Rape as an International Crime' (2006/7) 38(2) *Case West Reserve J Int Law* 225.
[17] *Ntaganda* Appeal Decision on the Jurisdiction of the Court in Respect of Counts 6 and 9.
[18] *Commentary on GC I (updated)* para 547.

GENDER IN IHL

As a normative legal framework, IHL continually reiterates the need for protection to be accorded 'without any adverse distinction founded on sex',[19] and gender humiliation of either men or women is prohibited by the general and specific wording of the Conventions and their Protocols.[20] Moreover, throughout the Geneva Conventions and Additional Protocol I, the 'special protection' or 'special respect' to be granted to women is repeated, as well as the need for treatment to be accorded 'with due regard to their sex' or 'with all consideration due to their sex'.[21]

Much has already been written on the use of outdated language within the body of IHL, and in updating the ICRC Commentary to the First Geneva Convention a gender perspective has been applied.[22] Indeed, the reference in the original Commentary to women as 'weaker than oneself and whose honour and modesty call for respect'[23] would no longer be considered appropriate. The original Commentaries were a product of the social and historical context of the time, and the update reflects the many developments that have since taken place, acknowledging that developing neat categories of 'men' and 'women' (as 'violators' and 'victims') can detract from a deeper examination of needs during times of armed conflict. The updated Commentary describes, where relevant, how the application in practice of a provision may affect women, men, girls and boys differently, with today's understanding of their specific needs and capacities and the different ways they can be affected by conflict.[24]

GENDER IN THE ASIA-PACIFIC REGION

Military Manuals

Numerous military manuals across the Asia-Pacific refer to the obligation to respect the specific needs of women affected by armed conflict.[25] Moreover, violation of this obligation is an offence under the legislation of some States, including Bangladesh.[26] The specific protections accorded under IHL to women, in particular those detained as prisoners of war, have thus been incorporated into domestic law and military doctrine across the region.

[19] GC I, art 12; GC II, art 12; GC III, art 16; GC IV, art 27; AP I, art 75; AP II, art 4.

[20] For example, art 14 of GC III clearly states 'Prisoners of War are entitled in all circumstances to respect for their person and their honour'.

[21] See GC I, art 12(4); GC II, art 12(4); GC III, art 14(2); GC IV, art 27(2); AP I, art 76(1). For example, under IHL, women are required to be provided with separate dormitories and conveniences from men (see GC III, art 25(4) and art 29(2)), even when undergoing disciplinary or penal punishment (see GC III, art 97(4) and art 108(2)).

[22] Writers have also acknowledged the use of outdated language within the body of IHL itself, but many argue that like any text, the GC must be read with a temporal understanding of views in the 1940s and within the range of cultural constructs. See for example Charlotte Lindsey, 'The Impact of Armed Conflict on Women' in Durham and Gurd (eds) (n 5) 33.

[23] *Commentary on GC I*, 140. See further Lindsey Cameron and others, 'The Updated Commentary on the First Geneva Convention – a new tool for generating respect for international humanitarian law' (2015) 97(900) IRRC 1209.

[24] In addition to the updated commentary to art 12(4) of GC I, dealing specifically with the treatment of women, further examples of the inclusion of a gender perspective in the *Commentary on the Additional Protocols* (updated) can be found in discussions of concepts such as humane treatment, non-adverse distinction and the obligation to care for the wounded and sick in CA 3 and art 12, and in the commentaries on arts 6, 11, 23 and 31 of GC I.

[25] See for example Indonesia, *Field Manual concerning the Treatment of Prisoners of War* (Department of Defence 1979) 7, 18; Philippines, *Rules for Combatants, in Handbook on Discipline*, Annex C (II) (General Headquarters, Armed Forces of the Philippines 1989) Rule 1; New Zealand, *Interim Law of Armed Conflict Manual* (DM 112, New Zealand Defence Force 1992) paras 916, 1004(2).

[26] The International Crimes Tribunal Act (1973) as amended, s 3(2)(e).

As to non-international armed conflicts, while CA 3 and Additional Protocol II do not contain a general rule stating that the specific needs of women must be respected, they do refer to specific aspects of this rule, such as prohibiting outrages upon personal dignity, including humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, and requiring the separation of women and men in detention. Indeed, these considerations can also be found in the Codes of Conduct of many non-State armed groups. For example, in Chapter 16 of this book, Emily Crawford notes that the Code of the Chin National Front of Myanmar contains a number of provisions on the humane treatment of detainees, including provision of special protection for female detainees.

Women as Combatants

Despite criticism of the Geneva Conventions and their Additional Protocols for taking an archaic view of the roles and value of women as exclusively 'vulnerable', there are a number of provisions within these treaties dealing with protections afforded to women as combatants. In this sense, the drafters even in the late 1940s comprehended that women may not always find themselves solely in civilian roles.

Across the Asia-Pacific region, the number of women engaged in combat has dramatically increased, in both regular forces and irregular armed groups. Whilst many States previously had a policy of excluding women from active participation in combat roles, this is now changing. In Australia, all employment categories were opened up to women between 2011 and 2016. In the case of China, the People's Liberation Army trained its first sixteen female fighter jet pilots in 2009, and in Japan, a number of women are entering formerly male-dominated fields, with one recently becoming the country's first-ever female fighter pilot. Japan's Air Self-Defence Force lifted the gender restriction on women operating fighter jets as well as reconnaissance aircraft in November 2015. In addition, in the context of civil rebellions, including in Sri Lanka, women have comprised significant proportions of fighters in guerrilla forces.[27]

Sexual Violence in Armed Conflict

The Asia-Pacific region has some interesting history addressing sexual violence in armed conflict. Unlike the Nuremberg trials, the International Military Tribunal for the Far East (IMTFE), in the aftermath of World War II, did include a number of cases of sexual violence and rape, in which senior Japanese military personnel and the Foreign Minister were found guilty, although rape was not dealt with as a specifically prohibited act, rather they were charged under a classification of 'inhumane treatment', 'ill-treatment' and 'failure to respect family honour and rights'.[28]

There is however evidence of domestic war crimes trials in Australia in which rape was prosecuted as a war crime under the Australian War Crimes Act 1945.[29] Unlike the IMTFE trials, these cases dealing with sexual crimes allowed direct evidence to be submitted, ensuring that the voices of victims were heard. Difficulties remained, however, with issues of corroboration of

[27] For further analysis, Suzannah Linton, 'Women Accused of International Crimes: A Trans-Disciplinary Inquiry and Methodology' (2016) 27 *CLF* 159.

[28] Kelly Dawn Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21(288) *Berkeley J Int'l L* 302.

[29] Two prosecutions were held for rape, Rabaul R1 and Rabaul R58, both of which resulted in the death penalty. Helen Durham and Narelle Morris, 'Women's Bodies and International Criminal Law: From Tokyo to Rabaul' in Yuki Tanaka and others (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trials Revisited* (Brill 2011) 285.

evidence for crimes of a sexual nature, an area that recent international criminal law continues to engage with.

At the same time, as addressed by Suzannah Linton in Chapter 18 of this book, instances such as the horrendous treatment of women called 'Comfort Women' during World War II went without any prosecution and, until relatively recently, any acknowledgement. Though patchy, inconsistent, and at times without focus, a history of prosecutions against those who committed sexual violence during conflict, particularly with the Australian cases of this early era, allowed for a nascent beginning on acknowledgement of this critical issue. Unfortunately, deeper issues, such as sexual violence against men from a gender perspective, appear not to have surfaced significantly in the reflection regionally; this also requires more examination in the future.

CHALLENGES WITH GENDER IN IHL IN THE ASIA-PACIFIC REGION

Putting Progress Into Practice

Whilst progress has undoubtedly been made, further challenges can arise when putting it into practice at the domestic level across the region. The impact of jurisprudence of international courts and tribunals in prosecuting rape as a war crime has been significant, but domestic systems are critical for accountability, and States must ensure that it is possible to investigate, prosecute and punish wartime sexual violence under their own domestic law. In some cases, better domestic implementation of existing international legal obligations is needed. Often, more measures should be taken to ease (to the extent possible) the burden of judicial procedures for victims. Appropriate sensitization and training of legal personnel, specific technical arrangements regarding time, place and mode of hearings, as well as adequate legal assistance, can help.

Practical considerations must be taken into account to ensure the effective implementation of other areas of progress in law and policy. Whilst many States in the Asia-Pacific are opening up the employment categories of their armed forces to women, ensuring appropriate facilities and lodging as well as, for example, providing child daycare centres on garrisons and bases, will be needed if the policy change is to lead to recruitment of more women into these positions.

Finally, further attention is needed across the region on a wider range of gender-related issues. Forcible recruitment by armed groups, including of minors, and conscription of men by armed forces has long been a problem,[30] and there are other consequences of armed conflict with a gender-impact that often lie under the surface, such as the high levels of domestic violence in military families. While domestic gender-based violence poses a significant challenge for communities everywhere, studies have shown that variations in its prevalence suggest that socio-political conditions influence its occurrence. Armed conflict is one such condition during which gender-based violence escalates, but research has demonstrated the unique psychological, social and environmental factors of combat service can also contribute to an elevated level of domestic violence among duty service members and Veterans, when those fighting in conflict return

[30] In November 2018, the Supreme Court of South Korea overturned the conviction of a conscientious objector, ruling that moral and religious beliefs are valid reasons to refuse the country's mandatory military service (Sup Ct., No 2016 do 10912). This came just a few months after a landmark constitutional court ruling that authorities had to provide an alternative to military service (Const. Ct., No. 2011 Hun-Ba 379 (28 June 2018)). Cited in Global Legal Monitor, 'South Korea: Supreme Court Finds Conscientious Objection to Military Service Justifiable', The Law Library of Congress, <www.loc.gov/law/foreign-news/article/south-korea-supreme-court-finds-conscientious-objection-to-military-service-justifiable/>, accessed 23 January 2019.

home.[31] Greater research on the impact of this in the Asia-Pacific region, and translation of the findings into policies and practical recommendations are needed.

CONCLUSION

I will never forget my experience, during a field mission in the Asia-Pacific with the ICRC, of explaining some of the legal developments to women who had been survivors of sexual violence. Their sense of relief ('what happened to me is unacceptable and a court has spoken on this!!') and their dignity in hope that this will make a difference to other women, was immensely moving. The region has made progress in many areas, but much remains to be done.

The creation of this book, dedicated to a large region and allowing the global voices of IHL experts to engage in debate, is exciting. I was honoured to be asked to contribute this Foreword and also honoured to write with a younger colleague. Over the years I continue to meet young professionals from Asia-Pacific countries that I have had the pleasure of working with or having had an educational journey together. The passing of knowledge (in all directions, as one always learns more than one teaches) in a region as big and diverse as ours is essential. More knowledge and implementation of IHL is essential. I know this publication will be a significant contribution to both these aims.

[31] Australian Government Department of Defence, *Defence Family and Domestic Violence: Strategy 2017–2022* (*Commonwealth of Australia*, 2017) <www.defence.gov.au/Publications/Docs/DefenceFamilyDomesticViolenceStrategy2017.pdf>, accessed 14 January 2019.

Acknowledgements

While the chapters included here are not exhaustive of regional perspectives on IHL, there is a unique richness and depth to the multi-faceted approaches that vindicate the decision to undertake this project. We are grateful to all our contributors for their splendid work. Inevitably in a group of contributors as sizeable as this, there are some who were unable to complete their work. Sandesh and Tim are particularly grateful to Suzannah for stepping into the breach to fill some of those gaps.

We also acknowledge the generous assistance of Hitomi Takemura, Prem Chandra Rai, Rubina Uprety, Ei Ei Khaing, Laura Green, Indri Saptaniningrum and Richard Mackenzie-Gray Scott. There were also a number of colleagues who provided assistance but asked to remain anonymous; we deeply appreciate their support. We are truly grateful to the student editors at the University of Tasmania Law School, led by the outstanding Taylor Bachand, who helped with the final editing checks: Bryanna Workman, Meghan Scolyer, Laura Harle, Siobhain Galea, Adam Day and Connie Beswick. Very few things warm the heart of a Law School Dean as much as seeing students shine. Tim readily basks in the reflected glory of this wonderful and talented group. And finally, we are also very grateful for all the efforts of the professional editing teams from Cambridge University Press and Newgen Publishing UK (especially Tom Randall, Emily Morgan and Laura Blake).

Suzannah Linton, Tim McCormack and
Sandesh Sivakumaran

Editors' Note

We have prepared a detailed index in order to facilitate access to the wealth of material and insights contained in this book. We have also provided seven tables at the back of the book that not only show where to find the materials that the authors have used, but also explain the abbreviations used in the chapters:

1. Glossary of Publications
2. Alphabetical Glossary of Cases and Decisions
3. Chronological Glossary of Cases and Decisions
4. Treaties and Other International Instruments, Resolutions and National Documents with an International Dimension
5. Chronological Glossary of National Legislation and Secondary Instruments
6. Peace Agreements and Communiques
7. List of Abbreviations and Translations

This means that we have been able to streamline our footnoting practice. Most readers from a legal background will be familiar with this style, but we would like to explain how this works to those for whom it is new.

A source of law such as the Geneva Conventions 1949 will appear in every chapter. Rather than repeating the same information about the four Geneva Conventions of 1949 in every single chapter, readers will find that the footnotes will only refer to the abbreviated form, for example 'GC IV'. As to what 'GC IV' means, it can be found in the Table of Treaties and Other International Instruments, Resolutions and National Documents with an International Dimension. There, 'GC IV' is listed as 'Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1951) 75 UNTS 287'.

Another example that appears many times in the footnotes is 'CA 3'. 'CA 3' can be found in the List of General Abbreviations and Definitions: the entry states 'Article 3 common to the four Geneva Conventions of 1949'.

'GC III, art 2' in a footnote refers to Article 2 of Geneva Convention III, the full details of which are listed in the Table of Treaties and Other International Instruments, Resolutions and National Documents with an International Dimension.

The *'Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction' is another item that is cited multiple times across the book. It can be found in the Table of Cases and Decisions in the section on the International Criminal Tribunal for the former Yugoslavia.

There, the full citation is provided, namely '*Prosecutor v Duško Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995)'.

For an example of a publication, readers will find the footnotes make many references to the '*ICRC Customary IHL Study*'. In the Table of Publications, the full details of the '*ICRC Customary IHL Study*' are shown as 'Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press 2005)'.

Finally, many of our authors have been able to rely on materials that are not in English. Where we can, we have referred readers to existing English language translations.

Contributors