Guest Editorial

Connecting Scholarship and Practice in International Humanitarian Law: A Tribute to Professor Bruce Oswald CSC

1 Introduction

One of the enduring refrains in scholarship on international humanitarian law (IHL) is the need to draw links between academia and practice and, as an offshoot of this, to promote the relevance and importance of the work of scholars to practitioners in the field. While this is not limited to this sub-discipline of international law, it is noticeably prevalent in the literature on IHL.¹ Thus, the Yearbook of International Humanitarian Law states that it ‘bridges the gap between theory and practice’, serving as ‘a useful reference tool for scholars, practitioners, military personnel, civil servants, diplomats, human rights workers and students.’² Noam Zamir’s book review of International Law and the Classification of Conflicts (edited by Elizabeth Wilmshurst) and The Law of Non-International Armed Conflict (by Sandesh Sivakumaran), describes the two books as ‘an excellent contribution to IHL scholarship, not least because

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¹ In this introduction, the term ‘international humanitarian law’ is used interchangeably with ‘the law of armed conflict’ (LOAC). It is noted that some writers and practitioners maintain a distinction between the use of IHL and LOAC whereas others see them as encompassing the same subject matter. For a discussion on the use of terminology see: Amanda Alexander, ‘A Short History of International Humanitarian Law’ (2015) 26 European Journal of International Law 109, 122-4; Dieter Fleck (ed), Handbook on International Humanitarian Law (OUP 2021) 4.

² This statement is included on the back cover of successive volumes of the Yearbook, see for example (2013) 16 Yearbook of International Humanitarian Law.
both ... highlight the need to bridge word and deed, discourse and practice.\textsuperscript{3} The reason for this explicit and eager desire to bridge the gap between IH\textsubscript{L} scholarship and practice may be manifold, but in a field of law where force is permitted and killing is lawful, and, which has been described as at the ‘vanishing point of international law’,\textsuperscript{4} the need to promote the value of the legal principles is clear. Whether the desire is to encourage military forces and non-State armed groups to implement the legal principles\textsuperscript{5} or to ensure that writers and readers engage with the tragic realities of the victims of armed conflict,\textsuperscript{6} this refrain is heard in old and new debates on the principles of IH\textsubscript{L}.

The intersection between scholarship and practice is also apparent in the identities of those who work on IH\textsubscript{L} issues. Many practitioners of the law, including legal officers with military forces, undertake research and publish in the field. Many academics with expertise in IH\textsubscript{L} are involved in training members of the armed forces or advising governments on their legal obligations. Nowhere is this more evident than in the identities of the contributors to this symposium who have responded to my invitation to examine ‘the way in which scholars and practitioners ... and scholarship and practice have intersected and influenced each other in the field of international humanitarian law. The contributors have been involved in research and teaching, the provision of legal advice, litigation, judicial decision-making, development of the legal principles, and training, amongst many other activities. They have been selected with two aims in mind: first, to highlight various ways of practising, teaching and writing about IH\textsubscript{L} across different jurisdictions; and second, to reflect and celebrate the career of one scholar-practitioner in the field, Professor Bruce (‘Ossie’) Oswald.

2 The Contribution of Professor Bruce Oswald

This symposium is designed to consider the intersection between scholarship and practice in IH\textsubscript{L}, but it has another purpose: to honour the work of

Professor Bruce Oswald, both a scholar and a military officer, who retired from Melbourne Law School, University of Melbourne, in 2021. Ossie – it is difficult to write Bruce Oswald or Professor Oswald so ubiquitous is his moniker – established himself as an eminent scholar in IHL while progressing to his role as a Colonel in the Army Reserves of the Australian Defence Force (ADF) and Consultant to the Director of Army Legal Services. His extensive and continuing career as a practitioner of the law, working for the International Committee of the Red Cross (ICRC) as an Instructor to the Armed and Security Forces, and in the ADF as a Legal Officer, has seen him deployed in Rwanda, the Former Yugoslavia, Timor Leste, Afghanistan and Iraq. Ossie has served on numerous government delegations and expert panels on the law of armed conflict. For his operational service he has received the Conspicuous Service Cross (CSC) in 1996 (an honour bestowed by Australia for his service in Rwanda) and a US Army Commendation Medal for service in Afghanistan in 2010.

Ossie’s career as a Legal Officer preceded, and continued, while an academic at Melbourne Law School. Ossie joined the Law School in 2002 as a Lecturer and was promoted to Professor in 2016. He taught a wide range of subjects, including compulsory subjects in the Juris Doctor (JD) degree, Legal Method and Reasoning, and Criminal Law and Procedure, as well as specialised subjects in the JD and Master of Law degrees in International Humanitarian Law, Law of Peace Operations, Post-Conflict State Building, International Institutions and Global Lawyer. These last two subjects involved Ossie, together with two colleagues, teaching groups of Melbourne Law School students in Geneva, Washington DC and New York on courses designed to engage with the practice of international law. These subjects continue to have a lasting impact on students’ lives, with many former participants subsequently taking up positions in international legal practice. Significantly, Ossie was also one of the founders of the Asia Pacific Centre for Military Law, a collaborative initiative between Melbourne Law School and the Department of Defence Legal Service designed to ‘facilitate cooperation amongst military forces of the Asia Pacific region in the research, training and implementation of the laws governing military operations.’ He served as both an Associate Director and the Director of the Centre.

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7 The development of these two subjects resulted in Ossie, together with Professors Tania Voon and Andrew Mitchell, winning an Australian Teaching and Learning Council award in 2011 for excellence in curriculum design and for providing innovative and authentic learning experiences in international law.

A distinctive feature of Ossie’s scholarship is its strong roots in tackling problems he encountered through his practice of IHL. This is most clearly demonstrated by his extensive research and publications on the legal framework applicable to detention in military operations – work that draws on his practical experience managing detainees in operational environments. This includes his role in establishing the Detainee Management Unit for the International Force in East Timor (INTERFET).\(^9\) Equally, his scholarship on peace operations is based on his experience in working in complex United Nations operations.\(^10\) The second edition of his book, *Documents on the Law of UN Peace Operations*, originally co-authored with Helen Durham (a contributor to this symposium) and Adrian Bates, provides the reader with a detailed contextual analysis of treaties and other instruments relevant to UN peacekeeping. As Sir Christopher Greenwood writes in his contribution to this symposium, Ossie’s Introduction to the *Documents on the Law of UN Peace Operations* is ‘one of the most significant works on the law of peacekeeping operations.’\(^11\) A well-thumbed copy of this book was essential reading for a chapter I wrote on the law applicable to the operational activities of international organisations.\(^12\) As many of his colleagues in academia can attest, Ossie gives generously of his knowledge. While undertaking research for the chapter on operational activities, I frequently wandered the corridor separating our offices at Melbourne Law School to discuss with Ossie the various ways in which domestic and international law governed the work of UN peacekeeping forces in practice, right down to the minutiae of leasing buildings and occupational health and safety laws. Ossie is always willing to lend his expertise and work through a thorny legal problem with a fellow traveller in international law.

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Intersections between Scholarship and Practice in International Humanitarian Law

This is only a small snapshot of Ossie’s many different roles as a scholar-practitioner. With a career of this breadth and depth, it is not surprising that Ossie’s work as a student, scholar and practitioner of international law has touched the lives of many different people. The three editors of the *Journal of International Humanitarian Legal Studies* welcomed my suggestion that I approach individuals working in IHL to contribute to a symposium on the intersection between scholarship and practice to celebrate his work. Because of Ossie’s influence, despite the demanding professional lives of the individuals involved, not least during the pandemic, those I approached to write were overwhelmingly positive in their desire to contribute. They include one of Ossie’s lecturers at the London School of Economics and Political Science where Ossie studied for a Master of Law (Sir Christopher Greenwood), a former colleague from Melbourne Law School, most recently with the ICRC in Geneva (Dr Helen Durham), a fellow academic and Legal Officer in the ADF (Professor Robert McLaughlin) and Professor Sean Murphy, who first met Ossie while he was a Jennings Randolph Senior Fellow at the United States Institute of Peace. These scholar-practitioners have been joined by Dr Anne Quintin, Yuri Parkhomenko and Emma Lush (a former student from Ossie’s International Humanitarian Law class). Lush has written on one of the most complex questions that has arisen in recent years: the relationship between IHL and international human rights law.

The work of the contributors to this symposium has intersected with Ossie’s career in multiple ways and all have taken different approaches to the provocation to write on the intersection between scholarship and practice in IHL. Greenwood, in ‘The Practical Reality and Efficacy of International Humanitarian Law: Some Reflections’ examines four developments in IHL since the Second World War: the rise of debates about the scope of application (has the threshold of armed conflict been met?), the increase in the detail and complexity of the legal principles, the enhanced understanding of the relevance of human rights law in armed conflict situations, and the proliferation of enforcement mechanisms. Durham and Quintin, both working at the ICRC in Geneva at the time of writing their article, enlarge on one of the themes in Greenwood’s paper – the increase in the number of legal rules. They are not so concerned with the growth in the number and sources of legal principles, but rather the need for a renewed focus on implementation, including ‘genuine ownership of the applicable rules by the actors that are in charge of applying,'
interpreting or implementing such rules." Durham and Quintin highlight the way in which partnerships have developed between the ICRC and institutions such as the Philippine Judicial Academy to enhance IHKL training and implementation. Additionally, they emphasise the need to include a broad range of actors, as well as diverse disciplinary expertise, to ensure that the legal principles are disseminated and implemented appropriately.

The next three papers pick up on this complexity in the development, implementation and enforcement of IHKL in specific factual and legal contexts. Murphy and Parkhomenko focus on the difficulties in attributing responsibility for damage, and consequently reparations, in the conflict in the Great Lakes region of Africa, where there were multiple State and non-State actors involved. They examine the evidence provided by court-appointed experts to determine damages in the case before the International Court of Justice, Democratic Republic of the Congo v Uganda. The authors argue that ‘there are limits’ on the ability of ‘any given professor, law firm partner, or other experts’ to provide new evidence for the purposes of assessing damage and ultimately reparations for wartime damages. McLaughlin engages with the ‘dialogue between law and operational context’ by exploring the difficulty in determining the appropriate rules of engagement (ROE) – either self-defence under domestic law or the law of armed conflict – when justifying an individual’s use of force. The final contribution, from Lush, tackles an area introduced by Greenwood – the relationship between international human rights law and IHKL in armed conflict. Lush focuses on three international human rights treaties, the Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, and Convention on the Elimination of All Forms of Discrimination Against Women, to argue that ‘by importing IHKL norms into [international human rights law – IHRL], the IHRL framework can help facilitate greater respect for IHKL.’

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13 Helen Durham and Anne Quintin, ‘At the Crossroads: Multi-Stakeholder and Multi-Disciplinary Approaches in the Application of IHKL’ Case’ (2023) 14 Journal of International Humanitarian Legal Studies 31, 35.
14 Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) (Reparations) ICJ General List No 116 (9 February 2022).
This is not the first occasion when the relationship between scholarship and practice in international law or one of its sub-fields has been discussed. The ‘invisible college of international lawyers’ has long been seen to comprise government and non-government lawyers as well as scholars, with a recognition that ‘[i]ndividuals who move from one role to another are unlikely to remain uninfluenced by the ideas and considerations which impinge on them in their different capacities.’\(^{18}\) Whether there was ever a ‘clear and sharp separation of the scientific from the governmental’ tasks\(^{19}\) in the past may be a matter of debate, however, it is certainly not the case in the 21st century as is demonstrated by the diverse careers of the authors included in this symposium. Many of those who write about the connection between scholarship and practice in international law perceive a close relationship between academic work and practice-oriented work. Anne Peters, in the English summary of her work interviewing 17 international law practitioners (most of whom are also legal scholars) reflects on the importance of all participants in contributing to ‘securing the quality of the discourse on international law by clearly keeping in mind where he or she just stands: in the invisible college or the invisible bar of international lawyers.’\(^{20}\) Thus, both scholars and practitioners have important contributions to make, but there is also a need to understand their different perspectives. In the field of international criminal law, Gabriele Chlevickaite has written that the ‘the academia-practitioner dichotomy ... is not only unhelpful for the field, but also rather illusory.’\(^{21}\) Chlevickaite believes that ‘while both academia and practice certainly have their own, distinct, professional goals and practices, the two worlds are continuously intertwining, mirroring, developing, and expanding side by side.’\(^{22}\)

Others perceive a stricter divide between the work of academics and practitioners. The commentary around the war on terror has been a particular site


\(^{19}\) ibid.

\(^{20}\) Anne Peters, ‘Summary: Roles of Legal Theorists and Practitioners – From a Public International Law Perspective’ in Bardo Fassbender, Christiane Wendehorst, Erika de Wet et al, Paradigmen im internationalen Recht Implikationen der Weltfinanzkrise für das Internationale Recht (CF Miller 2011) 173.


\(^{22}\) ibid.
of debate about the value of academic versus practitioner contributions in relation to both the *jus in bello* and *the jus ad bellum*. For example, in a television interview in March 2003, Australian Prime Minister John Howard was presented with conflicting opinions on the international legality of the Iraq War pursuant to the *jus ad bellum*, and Australia’s decision to commit troops to the US-led operation. On one side was an opinion from Oxbridge law professors that the war was not legally justified. On the other side was an advice prepared by senior legal officers from the Attorney-General’s Department and the Department of Foreign Affairs and Trade that a decision by the Australian government to commit troops to the war would comply with international law.\(^\text{23}\) Preferring the view of the Australian government lawyers that the use of force was legally permissible, Prime Minister Howard distinguished between ‘the learned professors from Oxford and Cambridge’ and the those whose ‘daily job is not on the theory but of the practice of international law.’\(^\text{24}\)

Similar distinctions are seen elsewhere. For example, the authors of *The Law of Armed Conflict: An Operational Approach*, all previously legal officers in the US armed forces, with most subsequently joining the faculties of US law schools, describe the difference between scholarship and practice in IHL in the context of the war on terror, as being the difference between ‘debate and contemplation’ and ‘contribution to decisive action where lives were in the balance’.\(^\text{25}\) While they highlight that ‘the works of distinguished scholars have and will continue to significantly influence the evolution of the LOAC’, they conclude that ‘it is the ability to apply the law to the problems presented during military operations that defines success.’\(^\text{26}\) These comments leave open the question what is the purpose of scholarship in IHL, particularly by those who also practice in the discipline. Naz Modirzadeh asks ‘[s]hould scholarship about international law of war be passionate? Should it make a reader feel something?’\(^\text{27}\) In discussing the war on terror, Modirzadeh emphasises the need for ‘[c]ontextual, connected, passionate writing’ that enables authors to ‘reflect upon the responsibilities that law, legal structures, and wartime legal scholars themselves may bear in seemingly endless war.’\(^\text{28}\)

\(^\text{23}\) This interview and the differing advice are discussed in Madelaine Chiam, *International Law in Public Debate* (*CUP* 2021) 64-69.
\(^\text{24}\) Quoted ibid 67.
\(^\text{26}\) ibid.
\(^\text{27}\) Modirzadeh (n 6) 6.
\(^\text{28}\) ibid 62.
As is stated earlier, the authors in this symposium have approached the relationship between scholarship and practice in different ways, but several themes emerge. First, the authors have all recognised the complexities of current operational environments and that this complexity extends to the need for scholars and practitioners to engage with a variety of legal frameworks. Operations can involve peacekeeping forces, which may or may not be strictly bound by IHRL (see Greenwood’s reflections on the practical reality and efficacy of IHRL), or multiple military forces and non-State armed groups (see Murphy and Parkhomenko’s discussion of the difficulty in determining liability for damages in the conflict in the DRC, and Durham and Quintin’s examination of how the ICRC engages with different actors in conflict). Further complicating the issue, operations can involve intersecting international and non-international armed conflicts as Greenwood so clearly demonstrates through the situation in Bosnia and Herzegovina.29 Different international legal frameworks (most obviously the application of IHRL and international human rights law as discussed by Greenwood and Lush) sit side by side with domestic legal principles (for example, McLaughlin’s discussion of the ‘normative “choice of law” challenge’30 when interpreting ROEs). The writers have also acknowledged that this complexity is not always helpful. For example, the application of international human rights law during armed conflict and its relationship with IHRL needs to be translated into rules that can be applied by those on operations.31 Uncertainty as to the applicable legal principles is not necessarily ‘cured’ by distilling legal principles into ROEs, as McLaughlin demonstrates with his discussion of the law on self-defence in the operational context.

Second, the authors in this symposium do not write in terms of a stark divide between scholarship and practice. This is not surprising given their dual, in some cases, multiple, roles in the discipline of international law. Perhaps, as is highlighted by Anne Orford and Florian Hoffman, it is because they perceive that ‘[t]heorizing is an inherent part of the practice of international law’32 (recognising that not all IHRL scholarship explicitly engages with international legal theory). Durham and Quintin emphasise the need to involve many different actors and strategies in disseminating IHRL to those involved in conflict. In their view, applying IHRL requires a diverse range of activities, from ensuring that the law is taught in universities to presenting basic principles

29 See Greenwood (n 11) 18.
30 McLaughlin (n 16) 82.
31 Greenwood (n 11) 25–6.
to non-State armed groups. Murphy and Parkhomenko are concerned about the use of experts (both scholars and practitioners) in quantifying damages arising from breaches of IHL. It is not necessarily the academic-practitioner divide which is the cause of the problem, but rather the difficulty in ‘quantifying mass civil injury resulting from a lengthy and complex armed conflict.’

Third, the authors recognise – either explicitly or implicitly – the need for all involved with IHL to engage with the practical realities of armed conflict. This could be through removing unnecessary uncertainty in the law so that it can be easily understood and applied by those engaged in operations (Greenwood and McLaughlin), finding new ways of implementing the law (Durham and Quintin, and Lush), or acknowledging the enormity of the task of assessing damages for a devastating war (Murphy and Parkhomenko). After reading Murphy and Parkhomenko’s piece on the conflict in the Great Lakes region, the reader may be left wondering whether and how monetary reparations can ever repair loss and devastation on such a scale. By engaging with the experiences of armed conflict, the writers have also recognised the need to alleviate its many consequences.

4 Conclusion

In commenting on developments in the invisible college of international lawyers 40 years after Oscar Schachter wrote his original article, Santiago Villalpando has highlighted that international lawyers do not only move between ‘objective scientist’ and ‘government advocate’, but are also ‘international judges, members of monitoring bodies and special rapporteurs, arbitrators, counsel for non-State parties in international adjudication, independent experts in law-making bodies, advisors of non-governmental organisations, international civil servants etc.’ In particular, international humanitarian lawyers have identities as academics and practitioners, but they may also have multiple roles within those two professional characterisations – scholar, teacher, trainer, litigator, legal advisor, judge or advocate, to name a few. The contributions to this symposium demonstrate that individuals may move between their different identities fluidly, not necessarily seeing a disjuncture between their many roles as they write about some of the most pressing issues

33 Durham and Quintin (n 13) 32.
34 Murphy and Parkhomenko (n 15) 49.
in IHL. The gathering of these authors is designed as a tribute to one scholar-practitioner who has made an enormous contribution to this discipline and who embodies many of these characteristics. Professor Bruce Oswald has used his practice in IHL to illuminate his writing, and his scholarship to draw insights for his other professional roles. It is hoped that the articles in this symposium will not only stand in their own right as important contributions to current debates about the legal framework in armed conflict, but will also add to the long and important tradition, exemplified by Professor Oswald’s work, of ‘bridging the gap’ between scholarship and practice in international humanitarian law.

Alison Duxbury
Professor and Deputy Dean, Melbourne Law School, University of Melbourne, Melbourne, Victoria, Australia
a.duxbury@unimelb.edu.au