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# SUBMISSION TO THE ACTING INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR RE: OFFENCES RELATING TO ENTERING AND REMAINING IN 'DECLARED AREAS' UNDER DIVISION 119 OF THE CRIMINAL CODE ACT 1995 (CTH)

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## I. Introduction

1. The Centre for Military and Security Law at the ANU College of Law greatly appreciates the opportunity to provide this short submission in response to Acting INSLM letters to Associate Professors McLaughlin and Letts, of 22 March 2017. We will focus upon s119.2(3), which sets out the 'solely for legitimate purposes' exceptions to the s119.2(1) offence of entering or remaining in a declared area.

2. To this end, our submission deals with whether the s119.2(3)(a) exception of 'providing aid of a humanitarian nature' is sufficiently robust to protect the activities of individuals working for organisations such as the ICRC (and, perhaps others of similar purposes such as Geneva Call), which – amongst their other humanitarian work – occasionally engage in providing law of armed conflict (LOAC) instruction and related assistance to armed groups with the aim of moderating the behaviour of such armed groups through encouraging compliance with LOAC.

## II. Section 119.2(3)(a) – the 'humanitarian aid' exception

*Background*

3. In his Fourth Annual Report (28 March 2014), the then INSLM, Brett Walker SC, specifically noted the importance of reforming s7(1B) *Foreign Incursions Act* to 'include an exception for activities that are humanitarian in character and are conducted by or in association with the ICRC, the UN or its agencies, and the agencies contracted or mandated to work with the UN or its agencies…'.[4] Elsewhere, INSLM recommended against the

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[4] Recommendation III/4, at p17

creation of specific lists of 'approved' humanitarian organisations,[5] thus indicating that the ICRC, UN, and associated entities effectively comprise a special category of entities that are distinguishable (in this particular context) from International Organisations and NGOs in general. Indeed, s119.2(3)(e) provides a specific exemption for the UN and its agencies.

4. The Explanatory Memorandum to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill* 2014 specifically refers to Recommendation III/4 in the INSLM's Fourth Annual Report, albeit in the context of ss119.4(7) and 119.5(4) as opposed to s119.2(3); however, as the Explanatory Memorandum continues,

> Whilst the INSLM's specific recommendation has not been implemented, the overarching rationale of the INSLM's recommendation, being that a broad humanitarian defence for terrorism offences is not appropriate, has been adopted. This amendment will appropriately limit the operation of the defence whilst ensuring that genuine humanitarian activities do not fall within the scope of the offences at new sections 119.4 and 119.5. [6]

5. INSLM's recommendation was not noted in respect of s119.2. The issue, consequently, is that neither the s119.2(3)(a) exception for 'providing aid of a humanitarian nature', nor the other humanitarian activities exceptions in Div 119, make specific reference to the work of the ICRC, or of those humanitarian organisations that pursue similar humanitarian purposes in the area of LOAC compliance, such as Geneva Call.

*The problem*

6. Two of the policy objectives behind s119.2 in general – preventing those covered by the provision from engaging in hostile activity in the declared area, and enhancing jurisdictions to act in relation to those returning from such areas with hostile intent[7] – do speak to the focus of the humanitarian exception in that genuine humanitarian purposes do not include activities that could be said to provide for or enhance the capacities of the armed groups operating in the area, in relation to their participation in hostilities.

7. The ICRC, however, is routinely involved in attempting to build the capacity of armed groups to comply with LOAC, and this activity clearly has a humanitarian purpose. Further, the ICRC routinely engages in discussions with armed groups about their conduct of hostilities. This is done with a view to better understanding the 'roots of behaviour in armed conflict', in order to better tailor training and other mechanisms aimed at encouraging LOAC compliance.[8] This is clearly activity that – on its face - relates to hostilities: it is, after all, centrally concerned with what is lawful and unlawful in war. Yet it is also clearly a form of activity that is absolutely and fundamentally humanitarian, in that it is aimed at convincing such armed groups to comply with LOAC, thus at reducing the deleterious consequences for civilians in the area, and to treat captives in accordance with accepted law of war norms and applicable human rights. Similarly, Geneva Call offers training in LOAC to (for example)

[5] At p16-17
[6] [239]
[7] [225]
[8] https://www.icrc.org/en/event/roots-behaviour-war-revisited

Syrian groups in the hope of improving compliance with LOAC and related humanitarian norms within that conflict.[9]

8. As the exception currently stands, it would – prima facie - be difficult to conclude that an Australian national (or a person within the scope of s119.2(1)(c)) could be engaged in the provision of such training under the auspices of the ICRC (or of other similarly focussed and reputable entities such as Geneva Call) secure in the knowledge that they were unambiguously covered by the s119.2(3)(a) exemption. This would seem to be the case even though such assistance is clearly aimed at encouraging armed groups to behave more humanely in their operations. To some extent, this likely unintended consequence thus subverts the generally accepted assessment that – as the then INSLM tacitly acknowledged – the role and status of the ICRC in particular perhaps warrants some special consideration in terms of the sometimes unique scope of its humanitarian operations.

*Recommendation*

9. As Mr Walker SC noted in his Fourth INSLM Annual Report, it would prove difficult and counter-productive to construct a list of 'accepted' humanitarian organisations; nor would creating a schedule of 'acceptable' humanitarian activities for the purposes of the s119.2(3)(a) exception be simple. Similarly, it may not be considered appropriate to add the ICRC (and those entities with which it has close humanitarian links, such as Geneva Call) to the s:119.2(3)(e) 'UN exception' (noting of course that other International Organisations which engage in a broad range of humanitarian and conflict reduction operations, such as the EU, are similarly not encompassed by this particular exception).

10. However, it may be appropriate to consider the prescription of a specialised s119.2(3)(h) regulation that would provide clear protection for Australians who might be engaged in the delivery of training that has a humanitarian purpose, including for example, LOAC compliance training to armed groups in declared areas or similar humanitarian training such as battlefield medical/first aid, and visits to places of detention run by a terrorist group in a declared area. Such exemption would necessarily need to be narrowly limited to situations where it is clear from both the organisation's reputation and purpose, and from the nature of the training provided, that the person ought to be given the same opportunity to access an exemption, and under the same conditions, as is provided for in respect of other forms of humanitarian aid.

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[9] http://genevacall.org/syria-top-military-commanders-eight-free-syrian-army-brigades-received-training-humanitarian-norms-geneva/