treated by the international community largely as a criminal act.[81] However, in the post 9-11 world, the acts of terrorists have been treated as acts of aggression by nation states, thereby invoking IHL.[82] A clear example of this are the recent attacks by Al-Shabaab, a Somali based terrorist organisation with links to Al-Qaeda, which has invoked a military response by the African Union with military backing by the United Nations.[83] Unfortunately, what contributes to the situation in Somalia is the lack of governance which in turn has bred organised networks that have created an illicit network around the United Nations' presence in order to fund future political ambitions in the region.[84] In essence, the goal of combating organised crime has always been to prevent their illicit networks, but unfortunately, in times of conflict, there is no way to combat organisations such as these, particularly when law and order is absent.

Of course, when applying IHL, it is also important to consider whether organised criminals could obtain 'combatant' status because they may act as agents of the state. This is dictated by how the opposing forces assess the situation. Borrowing from the logic applied in warfare, the US, it is believed, routinely takes the position that, 'a state is responsible for the actions of private actors operating on its territory even if does not exercise effective or overall control over them...'[85] In a situation such as Mali, the cooperation between terrorists and organised crime could suggest that those who were in power were indeed responsible for the actions of organised crime and therefore, the next level of analysis would be whether the criminals would be given the privileges that are given to combatants under IHL. The presumption does not favour classifying terrorists as combatants. The same logic should hold true for organised criminals. Therefore, the classification 'unlawful combatants' is more closely aligned with the activities of organised criminal groups because they are direct and indirect participants in war but do not fall within the range of characteristics that are associated with combatants in war.

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[81] Upendra Acharya, 'War on Terror or Terror Wars: The Problem in Defining Terrorism' (2009) 37(4) *Denver Journal of International Law and Policy* 666.
[82] Ibid.
[83] Colum Lynch, 'Exclusive: U.N. Uncovers "Credible" New al-Shabab Terror Plot' *Foreign Policy* (online), October 17 2013, <http://thecable.foreignpolicy.com/posts/2013/10/17/exclusive_un_uncovers_credible_new_al_shabab_terror_plot>.
[84] Rob Hanser, 'Organized Crime in Africa' in Frank Shanty and Patit Pabran Mishra (eds), *Organized Crime: From Trafficking to Terrorism Vol 1* (ABC-CLIO, 2008) 61.
[85] Theresa Reinold, 'State Weakness, Irregular Warfare, and the Right to Self Defense Post 9-11' (2011) 105 *American Journal of International Law* 244, 251.

V CONCLUSION

Transnational organised crime is not a new phenomenon in the global landscape. For centuries, from the cartels in Mexico to the mafia in Italy, these groups have benefitted from subverting laws and creating a market that exploits resources and people. While criminal law has traditionally governed this group, it is time to incorporate them under the conflict narrative so as to broaden how the international community can respond to actions of these criminal networks. Perhaps the time has come to consider them under IHL, which is considered 'prescriptive' and 'proscriptive'.[86]

Globalisation has contributed to the rise and the strengthening of transnational organised crime. The impact is seen in armed conflict, especially in Mali. Given the roles of these criminal networks during conflict, the international legal community needs to consider how best to address this problem.

IHL should be broadened to include these criminal networks. As a lack of power or rampant corruption within governments continues to exist, organised networks will use these vulnerabilities to their advantage. Organised crime has already proven that it can be flexible in how it operates and achieve financial success, with or without armed conflict, and the international community should be just as adaptable. Perhaps the time has come for nation-states to consider whether categories that strictly limit how organised crime is dealt with is broad and flexible enough to cover transnational organised crime.

[86] David P Cavaleri, *The Law of War: Can 20th Century Standards Apply to the Global War on Terrorism?* (Combat Studies Institute Press, 2005) 7.

THE DEVIL IN THE DETAIL: *TARKINE NATIONAL COALITION INC V MINISTER FOR SUSTAINABILITY, ENVIRONMENT, WATER, POPULATION AND COMMUNITIES* (2013) 214 FCR 233

AMANDA CAVANOUGH*

I INTRODUCTION

In this case, a judge of the Federal Court of Australia declared the decision of the respondent Minister to approve the development and operation of a mine in north west Tasmania invalid on the ground that the Minister had not considered the text of a document known as the Approved Conservation Advice for the Tasmanian Devil ('the ACA') as required by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'). Although the briefing information before the Minister referred to the ACA, this was held not to be sufficient to satisfy s 139(2) of the *EPBC Act* because it could not be said that genuine consideration had been given to the document. The applicant for judicial review, Tarkine National Coalition ('TNC') raised three other grounds which attacked conditions that the Minister attached to the approval to 'compensate for unavoidable impacts on Tasmanian devils and their habitat'. However, the Court rejected these other grounds, finding the conditions were authorised by s 134 of the Act, were not inconsistent with Australia's international obligations and were otherwise reasonable.

II BACKGROUND

The Tarkine is an area of north-west Tasmania that is of World Heritage significance. It contains large tracts of pristine wilderness and cool temperate rainforest and is noted for its natural beauty, plants and wildlife, including the iconic endangered Tasmanian devil. The Tarkine also has a significant mining history.

An overseas mining company ('Shree Minerals') proposed to develop and operate an iron ore mine near Nelson Bay River in north-west

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Tasmania. The proposal was controversial.[1] Those supporting it championed employment, industry and investment in the state of Tasmania. Those opposing it were concerned about the threat to the Tasmanian devil from mining, trucking and logging activity, particularly by the threat of that activity in hastening the spread of Devil Facial Tumour Disease. The Court stressed that its role was not to 'resolve that controversy' but to determine the application by TNC for judicial review of the Minister's decision.

A *The Interim Injunction*

On 21 May 2013, the Court heard an urgent application for an interim injunction pending the hearing and resolution of the case. The Court gave judgment *ex tempore* on that day, granting the injunction. The parties did not request written reasons for the decision. However, the Court gave some brief reasons on transcript. The Court was satisfied that the application raised serious questions to be tried at least concerning the correct construction of the *EPBC Act* in the context of the proposed action. The Court also considered that the balance of convenience favoured grant of the injunction and that failure to grant an injunction would frustrate the Court's processes, by allowing work on the mine to begin before the Court dealt with the validity of that action.[2]

B *The Substantive Application*

In the substantive application, TNC applied under s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') and s 39B of the *Judiciary Act 1903* (Cth) for review of the Minister's decision under s 133(1) of the *EPBC Act* to approve the taking of an 'action' by Shree Minerals, namely the development and operation of the mine.

On 18 December 2012, the Minister approved the taking of the proposed action by Shree Minerals to develop and operate the mine. The Minister's approval was subject to several conditions, including the condition that Shree Minerals donate money to a fund for the purpose of assisting with the maintenance of the Tasmanian devil insurance population, being a program to establish a population of

[1] Anne Mather, 'Tarkine protest halts iron mine', *The Hobart Mercury* (Hobart) 11 May 2013; H Kempton, 'Tarkine ban stay until July hearing', *The Hobart Mercury* (Hobart) 22 May 2013.

[2] The Court cited *Patrick Stevedores v MUA* (1998) 195 CLR 1, [35] and *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, [5] (Deane J) in support of this conclusion.

healthy devils in captivity to be released into the wild, if necessary, to support the survival of the species. Prior to the Minister's decision, the impacts of the proposed action were assessed by an Environmental Impact Statement ('EIS').[3] The draft EIS was made available to the public for comment in December 2011. In March 2012, Shree gave the Minister the finalised EIS, a submission from TNC in respect of the draft EIS and Shree's response. Shree later provided further information which had been requested by a delegate of the Minister. In November 2012, an Assistant Secretary of the Department provided the Minister with a brief and recommended that he approve the action subject to conditions. Shree Minerals was informed that the Minister intended to approve the action subject to conditions and was asked to provide further comment. The Minister was provided with a final brief in December 2012 and published his decision on 18 December 2012. On 21 January 2013, TNC requested a statement of reasons pursuant to s 13 of the *ADJR Act* which the Minister provided.

III THE DECISION

The Court identified the critical issues for determination as follows:

1. Whether in deciding to approve the taking of the action, the Minister had regard to the 'ACA for the Tasmanian Devil' and in the event of failure to do so, the consequence of such failure; and

2. Whether, in approving the taking of the action, the Minister was entitled to attach conditions which required Shree to donate money to a program known as the Save the Tasmanian Devil Appeal.

The Court considered the statutory context in which the decision was made, being the *EPBC Act*, including its objects which include the protection of the environment, particularly those aspects of the environment which are of national significance. The critical provision was s 139(2), which provides:

> If:
> (a) the Minister is considering whether to approve, for the purposes of a subsection of section 18 or section 18A, the taking of an action; and
>
> (b) the action has or will have, or is likely to have, a significant impact on a particular listed threatened species or a particular listed threated ecological community;

[3] Under Div 6 of Pt 8 of the *EPBC Act*.

> the Minister must, in deciding whether to so approve the taking of the action, have regard to any approved conservation advice for the species or community.

An ACA is required for a listed threatened species under the *EPBC Act*. It is a document approved by the Minister which sets out the grounds on which the species is eligible to be listed as a threatened species under the *EBPC Act* and information about measures to stop the decline or support the recovery of the species. Taking into account the text, context and purpose of the *EPBC Act*, the Court found that the ACA was an important document which was intended to inform the Minister's decision-making. At [46], the Court said:

> It is a document which is approved by the Minister after advice from a scientific committee. Such an advice, prepared specifically in relation to a threatened species, would ordinarily be expected to be a significant document to take into account in making a decision which has the capacity to affect that species.

The Court at [47] also observed that the text of s 139(2) 'in mandatory language requires that, in deciding whether to approve the taking of the action, the Minister *must* have regard to any approved conservation advice for the species' [emphasis in original].

As to whether the Minister in fact 'had regard to' the ACA, the Court noted that the Minister, in his statement of reasons, said that he referred to '*any* relevant conservation advice' in making the decision [emphasis added]. TNC argued that in doing so the Minister merely paid lip service to his statutory obligation. The Minister referred to 'any' advice in a generic way and the actual document was not included in the final brief to the Minister, although, as mentioned above, the brief referred to it. The Court noted, in this context, that there were other listed threatened species considered by the Minister in making his decision. Given the significance of the document in the Act, the Court held that it was not sufficient that the material provided to the Minister referred to the ACA. It could not be said that the Minister gave genuine consideration to the document. The Court concluded that the Minister's failure to have regard to the document for the purpose of making his decision was 'fatal to its validity'.[4]

Although the Minister's decision might appear to have been invalidated on a narrow point, it was not a mere matter of form. As the Full Court explained in *Minister for Immigration and Citizenship v Khadji*[5]

[4] (2013) 214 FCR 233, [48].
[5] (2010) 190 FCR 248.

the expression 'have regard to' is capable of having different meanings, depending on the statutory context. In some contexts, it means the decision-maker is to have regard to the matter as a fundamental element in the decision-making process.[6] In others, the matter will require consideration by the decision-maker not necessarily as a fundamental element.

The Court applied *Lansen v Minister for Environment and Heritage*[7] where the Full Court considered the consequences of a failure to consider matters in s 134(4) of the *EPBC Act* in deciding to attach a condition to an approval. There, the majority said:

> The question as to whether a decision made in breach of a condition regulating the exercise of a statutory power is invalid involves a question of statutory construction to determine whether the purpose of the legislation is to invalidate any act done in breach of the condition.[8]

As in *Lansen*, there was no indication from the terms of s 139(2) of the *EPBC Act* that failure to have regard to the ACA would *not* lead to invalidity. To the contrary, the plain words of the provision and the purpose and objects of the *EPBC Act* revealed a legislative intention that any decision made without proper regard to the ACA would be invalid. Given the particular statutory context, the Court rejected a submission made by counsel for the Minister that the failure to consider the ACA would not have materially affected the decision.

IV LESSON FOR THE FUTURE

The Court's decision was not challenged on appeal. It therefore stands as authority for the proposition that government decision-makers must give genuine consideration to the precise terms of any ACA for a listed threatened species under the *EPBC Act* and examine that document in considering whether to approve a proposed action that has or is likely to have a significant impact on that species.

[6] (2013) 214 FCR 233, [42].
[7] (2008) 174 FCR 14.
[8] Ibid [33].