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Human Rights Review

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IN SEARCH OF A PRACTICAL APPROACH TO 'CULTURAL' PRACTICES: APPLYING THE LESSONS LEARNT FROM PITCAIRN

DENISE LUM

ABSTRACT

The tension between recognising cultural difference and protecting universal human rights has characterised the universalist/relativist debate and hampered the efforts of those who seek to eradicate controversial 'cultural' practices that arguably violate fundamental human rights.

Before the 1990s, Pitcairn Island was inhabited by a community of 50 and little-known to the outside world due to its geographical isolation. The discovery of widespread sexual abuse of Pitcairn girls by men on the island suddenly threw the island into the spotlight of global scrutiny and the perpetrators were subsequently convicted for offences of rape and indecent sexual assault. I believe that Pitcairn's political and cultural isolation make it similar to communities where the tragic practices of female genital mutilation and honour killing are still being perpetuated today. Thus, despite the conclusion of the Pitcairn prosecutions, the arguments arising from it are instructive in devising an approach to these controversial 'cultural' practices. Using the Pitcairn arguments as a springboard, this article attempts to navigate the delicate balance between the protection of universal human rights and cultural sensitivity to generate a practical approach that can better determine the role of external intervention in these 'cultural' practices.

INTRODUCTION

Female genital mutilation (FGM) and the even graver acts of honour killing still persist today. It is estimated that about 5000 females a year fall victim to honour killings, in flagrant breach of their fundamental rights to life.¹ Some 100-140 million women and girls worldwide have been subjected to FGM, suffering its painful physical and psychological effects for the rest of their lives.² These figures are probably an underestimation of the number of females adversely affected by these practices as they remain private, family matters with many incidents thus unreported.

Despite the multiple resolutions and declarations by the global community condemning these practices, there remains an air of hesitancy which has stagnated international efforts to eradicate these practices. I would attribute this to the lack of resolution of the universalist/relativist debate, with States struggling to balance the upholding of universal human rights with cultural sensitivity. My placing of the term 'cultural' in quotation marks when I refer to the practices underscores the controversy over the extent to which culture can legitimately justify them. This article hence seeks to develop a practical approach to controversial 'cultural' practices and answer two central questions: (i) Is external intervention in practising communities appropriate? (ii) If so, what form and extent should intervention take such that it remains wholly legitimate? Both legal intervention (in the form of criminal punishment) and non-legal intervention will be considered.

The development of a *practical* approach is a primary consideration as I wish to move beyond the universalist/relativist debate and the abstract nature of other theories that have since developed in attempts to bridge the gulf between the two conflicting positions. Therefore, throughout this article, I will evaluate potential approaches based on their

¹ United Nations Population Fund (UNFPA), The State of World Population (2000) 29.

² World Health Organization, Eliminating Female Genital Mutilation: An interagency statement (2008) 1.

pragmatism and instructiveness. My approach cannot be classified as either entirely jurisprudential or entirely prescriptive. Instead, I seek to advance an approach that is based on a sound theoretical framework and provides general prescriptive guidelines. It is not the purpose of this article to enumerate exact steps to eradicate each harmful practice. To do so within the limits of this article would inevitably result in a constrained response. Instead, I aim to identify elements which legitimate external intervention should be focused on, hence laying the groundwork for effective eradication of FGM and honour killing.

Though communities currently practising honour killing and FGM might not share the extreme geographical seclusion of Pitcairn Island, there are certainly similar degrees of political and cultural isolation. The arguments arising from the Pitcairn prosecutions thus serve as my main source of inspiration. In 1790, nine British mutineers from the famous *Bounty* kidnapped nineteen Tahitian men and women and settled on the previously uninhabited Pitcairn Island - an island in the South Pacific, 'some 3,000 miles from, respectively, New Zealand and South America'.³ For more than two centuries, the Pitcairn Islanders lived in cultural and political isolation - few outside of the island knew of its existence. Though the British government has claimed that it is a British colony,⁴ 'there has - until recently - been no permanent or resident Crown presence on the island'.⁵

The international community's attention dramatically shifted to Pitcairn only in the 1990s. It started in 1996 when two Kent police officers visited the island to investigate a rape allegation. This triggered a more extensive police investigation that revealed widespread sexual abuse of Pitcairn girls (as young as three) by older men on the island. The accused were convicted by the Pitcairn Supreme Court, appealed to the Pitcairn Court of Appeal and finally appeared before the Judicial Committee of the Privy Council in England.⁶ Six of the seven defendants prosecuted were convicted under the English Sexual Offences Act 1956, for offences of rape and indecent assault (S1 and 14 respectively). Although 'Pitcairn's social and political history has been anything but a simple, straightforward desert island scenario',⁷ the fact that it is a 'concluded' case nevertheless provides illuminating retrospective insight into what the most practical approach to other 'cultural' practices might be.

The Pitcairn arguments are representative of various human rights approaches. This article examines the conventional relativist and universalist positions and in light of their flaws in practical application, moves on to consider alternatives proposed by George Letsas and Stephen Guest. I believe that their approaches draw a crucial distinction between moral and legal wrongness, which is necessary for the advancement of any practical approach to eradicate controversial 'cultural' practices. It must be emphasized that I firmly believe in the universality of human rights, and will also demonstrate, in this article, how my rejection of the *practical application* of the universalist approach in favour of alternatives is entirely consistent with this position. With the distinction between moral and legal wrongness as a theoretical foundation, I have developed a three-stage approach addressing (i) the moral wrongness of the practice itself (ii) our personal attitudes to perpetrators of the practice and (iii) the legitimacy of external intervention in the practice.

³ Dawn Oliver, 'Problems on Pitcairn' in Dawn Oliver(ed), *Justice, Legality and The Rule of Law: Lessons from the Pitcairn Prosecutions* (OUP 2009) 2.

⁴ *ibid* 3.

⁵ *ibid* 3.

⁶ *Steven Raymond Christian and Others v The Queen* [2006] UKPC 47.

⁷ George Letsas, 'Rights and Duties on Pitcairn Island' in Dawn Oliver (ed), *Justice, Legality and The Rule of Law: Lessons from the Pitcairn Prosecutions* (OUP 2009) 158.

ARGUMENTS ARISING FROM THE PITCAIRN SAGA

I. CULTURAL RELATIVISM

Cultural relativists argue that since different cultures have different views about what is right and what is wrong, it follows that rightness and wrongness are relative to each culture.⁸ States should thus not impose their culture on one another. Applied to the Pitcairn context, cultural relativists argue that the prosecutions were therefore illegitimate. This was indeed the line pursued by the defence at trial, and taken further by some commentators who argued that the prosecutions were merely 'a vehicle for exercising colonial control over Pitcairn'⁹ and that 'what might qualify as the abuse of underage children in European societies was in the context of Pitcairn an innocent result of customary Polynesian cultural practice and the tendency of young adults in such isolated island societies to reach precocious sexual maturity'.¹⁰ They further argued that Pitcairn's cultural specificity was disregarded throughout the trial process.

However, there are some fundamental flaws in the cultural relativist position both in general and in application to Pitcairn that should be highlighted. At the most basic level, it is difficult to define culture itself. It is erroneous to assume that cultures are clearly delineable wholes as it 'risks overemphasizing the internal homogeneity of cultures in terms that potentially legitimize repressive demands for communal conformity'.¹¹ Furthermore, how does one distinguish between acts that are genuinely culturally dictated and those that cannot be otherwise justified and hence seek to use culture as a 'cloak'? Making this distinction is tricky because it is unclear what exactly constitutes a cultural practice. Unni Wikan explains that culture is not static and is simply an 'idea, a word that can be filled with various kinds of content depending on one's vantage point'.¹² It is thus difficult to identify distinct cultural values, which would require them to be shared by the entire culture. Perhaps a useful, but by no means conclusive, indicator of culture is the extent of consent in the community to the practice in question. Surely a practice that is not truly accepted by the community at large cannot be considered cultural. This appears to be the case in Pitcairn where some victims testified that their attackers held them down to rape them, and even told them to keep silent about their experiences - strong indication that the Pitcairn practices of rape and sexual assault were not cultural, and that the perpetrators clearly knew that their actions were wrong.

Yet other commentators counter that the sexual practices were generally accepted, advancing support for the cultural relativist position. However, scrutiny of statements of acceptance and consent from the islanders hints at the lack of 'true' consent. There is a sense that any consent by Pitcairn women to these practices was the result of communal pressure - if the defendants (leading male figures in the community) were all convicted and jailed, stability and continued survival of the community would arguably be threatened. First instance findings of fact revealed that the non-consensual acts were perceived by victims as violent, aggressive and 'wrong'. Journalist Kathy Marks' interviews with islanders reveal a strong sense of individual preferences being conditioned by the community:

⁸ Henry J. Steiner and Philip Alston, *International Human Rights in Context*, (2nd ed., OUP 2000) 367.

⁹ Sue Farran, 'The Case of Pitcairn: A Small Island, Many Questions' (2007) JSPL 124, 125.

¹⁰ Ibid.

¹¹ Seyla Benhabib, *The Claims of Culture*, (PUP 2002) 4.

¹² Unni Wikan, 'Debate: culture in the nation and public opinion: a Norwegian case' (1999) *Social Anthropology* 7, 57-64.

‘Asked why the six guilty men did what they did, one source replies, “Because they could. Because that’s the way it was. There was a power base of influential men, and no-one was going to go against them.” At the centre of that power base was Steve Christian, head of a so-called “inner circle” of men who ... have run the island between them. Nothing happens without the say-so of the boys.’¹³

This supports Susan Okin’s argument that there needs to be an awareness of the existence of power imbalances within cultural communities in responding to demands apparently emanating from such communities to be ‘left alone’. Exercise of individual autonomy is fundamental to ensuring the legitimacy of collective cultural practices.¹⁴ One cannot assume that remaining in the community signifies acceptance of all community practices - ‘it is risking, wrenching, and disorienting to have to tear oneself from one’s religion or culture; *the fact that it is possible to do so does not suffice to show that those who do not manage to achieve the task have stayed voluntarily*’.¹⁵ Indeed, John Stuart Mill gives the example of Mormon polygamy that is tolerated provided those who are dissatisfied with their ways are allowed perfect freedom of departure.¹⁶ Such a ‘perfect’ freedom of dissociation does not always exist, and certainly did not exist in the politically and geographically isolated Pitcairn Island. The general lack of acceptance and consent to the practices on Pitcairn casts doubt on whether they can be truly considered as part of the island’s culture.

Even if the Pitcairn practices were somehow ‘cultural’, the existence of cultural difference should not compel us to automatically approve other ways of life. It is fallacious to jump from ‘is’ to ‘ought’. There are limits to the valuing of cultural difference that cultural relativists fail to recognise - ‘law should respect tradition in so far as it gives orientation to people’s lives, but not so as...to allow affective relations to become oppressive’.¹⁷ Their position is also logically flawed in that one cannot both morally oppose interference in other cultures, and believe that the whole of morality is relative to each culture. Since we do not interfere with other cultures, we expect other cultures not to intervene in ours either. However, this expectation assumes a shared sense of the moral wrongness of interference across cultures and communities, which is inconsistent with the basic relativist position of culturally-specific morality. Seyla Benhabib echoes a similar argument in her criticisms of framework relativism.¹⁸

George Letsas distinguishes between the vulgar and sophisticated relativist. The vulgar relativist, who argues that rightness and wrongness is absolutely relative to each culture, is perhaps most vulnerable to the criticisms highlighted above. On the other hand, the sophisticated relativist appears to present a more convincing argument by distinguishing between things that are wrong no matter how much societies value them and things on which societal approval can confer value. However the problem, as Letsas rightly identifies, lies in distinguishing the two. He explains that any attempt to distinguish practices is circular as it involves ‘categorising practices that have value because societies accept them by using as

¹³ Kathy Marks, ‘Guilty: the Verdicts that Shamed Pitcairn Island’, *The Independent* (UK, October 26 2004)..

¹⁴ Benhabib (n 11) 114.

¹⁵ Leslie Green, ‘Internal Minorities and their Rights’ in Judith Baker (ed), *Group Rights* (UTP 1994) 266.

¹⁶ *ibid.*

¹⁷ Roger Cotterrell, ‘Law in Culture’ (2004) 17 *Ratio Juris* 1, 12.

¹⁸ Benhabib (n 11) 28.

a criterion what societies themselves think'.¹⁹ It is hard to agree on what constitutes absolute moral wrongs or is part of Hart's 'minimum content of natural law'. The greater the 'minimum content', the more compromised the position of the sophisticated relativist becomes as it appears increasingly universalist. Thus, even the sophisticated relativist might find it difficult to advance a tenable argument in the context of the Pitcairn prosecutions. Other positions that will hopefully be more illuminating in shaping the ideal *practical* approach to 'cultural' practices should be examined.

II. UNIVERSALISM: RESPECT FOR BASIC HUMAN RIGHTS NORMS OVERRIDING CULTURAL EXCEPTIONALISM

Colm O'Cinneide's evaluation of the Pitcairn prosecutions²⁰ more elegantly articulates the distinction attempted above by the sophisticated relativist. O'Cinneide's main contention is that the protection of basic human rights norms overrides any cultural claims. While I fully condone the basic premises of the universalist position which O'Cinneide's argument reflects, I am sceptical about the practical application of universalism in shaping our attitudes to other cultural practices.

O'Cinneide argues that factually, Pitcairn is not the vulnerable culture it has been made out by some commentators to be.²¹ Even if it were, basic rights protection should still override cultural exceptionalism:

'Prosecution represented a legitimate intervention in the life of the Pitcairn community, on the basis that it served to protect and vindicate the basic human rights of the women on the island, whose rights to bodily integrity had been violated by the sexual abuse to which they had been subjected. The *protection of such basic rights must take priority over the desire to insulate unique cultures* such as that existing on Pitcairn against the shock of change'.²²

The fundamental nature of these individual human rights also takes precedence over minority group rights. This is a widely-supported proposition regardless of one's view of the status of 'group rights'. Even the strongest advocates of minority group rights recognise the need for limits on what can be justified in the name of cultural integrity. There is a sense that respect for individual autonomy underlies minority group rights theories. Will Kymlicka argues that minority group rights should be recognised as they are compatible with the liberalism tradition. They are derived from the need to recognise individual human flourishing across the full range of human activities and ways of life; we recognise group interests because we respect an individual's exercise of autonomy in choosing to be part of a particular cultural community, and 'each person within the community [should] be free to choose what they see to be most valuable from the options provided'.²³ Since 'cultural rights protect autonomy',²⁴ any cultural practice that violates basic human rights must clearly be

¹⁹ Letsas (n 7) 165.

²⁰ Colm O'Cinneide, 'A Million Mutinies Now: Why Claims of Cultural Uniqueness Cannot be Used to Justify Violations of Basic Human Rights' in Dawn Oliver (ed), *Justice, Legality and The Rule of Law: Lessons from the Pitcairn Prosecutions* (OUP 2009).

²¹ 'it is necessary to avoid being sucked into assumptions that may be founded on myths of tropical isolation, remoteness and innocence'. (ibid 142).

²² ibid 132.

²³ Will Kymlicka, *Liberalism, Community, and Culture*, (OUP 1991) 198.

²⁴ Chandran Kutkathas, 'Are There Any Cultural Rights?' (1992) 20 Political Theory 241.

overridden. Basic individual autonomy is in fact lacking in many communities where the individual is pressured into conforming to community interests and practices.²⁵ As such, there is a pressing need for protection of individual rights to be elevated over minority group rights, lest 'the opportunity of minorities within the group to reshape the cultural community, whether directly or through its interaction with those outside the group'²⁶ is further restricted.

O'Cinneide's argument is hence bolstered - cultural rights claims must be overridden when individual autonomy is not respected and basic human rights are violated, as in the case of Pitcairn. I wholeheartedly agree, but it is at the next stage (where moral views are translated to the prescription of practical approaches to 'cultural' practices) that O'Cinneide and I part ways. O'Cinneide relies on the universal moral wrongness of the Pitcairn practices to legitimise prosecution of the perpetrators. However, I would argue that moral wrongness does not necessarily translate to legal wrongness - the two concepts should be considered separately. The legitimacy of the Pitcairn prosecutions should be determined based on criteria independent of moral judgment of the defendants' acts of rape and indecent sexual assault.

Several criticisms can be levelled at the practical application of universalism. Universalism, when practically applied, seems to defeat its goal of ensuring the effective protection of universal human rights. Firstly, it compromises the protection of one set of human rights for the advancement of another. As clearly illustrated in the Pitcairn prosecutions, the focus on vindicating the victims' rights, while completely legitimate, resulted in the court neglecting the defendants' due process rights. Secondly, it erroneously assumes that universal human rights and cultural sensitivity are mutually exclusive concepts, implying that an approach that upholds basic human rights is unavoidably less culturally sensitive. This perpetuates situations where practical application of the universalist approach to communities with controversial 'cultural' practices generates hostile reactions - in a show of resistance, members of these communities dismiss the rights imposed on them as ethnocentric and 'Western'. This creates a vicious cycle of deficient human rights protection in these communities.

Distinguishing moral and legal wrongness in no way compromises the upholding of universal human rights. I will next argue that such a distinction is crucial - the objective moral wrongness of an act (e.g. Pitcairn practices) can be declared, thus vindicating victims' rights, while simultaneously safeguarding cultural sensitivity through separate determination of the act's legality. It is imperative to now shift from the classic universalist/relativist debate and explore theories that separate moral and legal wrongness to inform our attitudes to other 'cultural' practices.

III. MORAL WRONGNESS AND MORAL BLAMEWORTHINESS

George Letsas' approach,²⁷ which distinguishes between the concepts of moral wrongness and moral blameworthiness, strikes a fresh balance between the need to uphold universal human rights yet remain culturally sensitive.

His distinction is in many ways valid. Letsas stresses that the idea of blameless wrongdoing is not an oxymoron and gives the example of slavery, where our belief in the moral wrongness of slavery is compatible with a hesitation to cast absolute blame on slave-

²⁵ *ibid* 243.

²⁶ *ibid* 236.

²⁷ Letsas (n 7) 157-182.

owners in Aristotelian times. His distinction also circumvents the problem that plagued the sophisticated relativist - separating practices that are absolutely wrong from practices on which societal approval confers value. It also reflects our personal unease about blaming people in alien cultures for their practices which we might condemn - Letsas' distinction allows us to label their acts as morally wrong, but the perpetrators not morally blameworthy (or less so). Since the objective moral truth of a practice is distinguished from our consequent attitudes towards it in terms of enforcement and punishment, the moral wrongness of an act does not necessarily lead to the finding of legal wrongness. In fact, this was Letsas' opinion of the Pitcairn practices - 'no doubt that rape and indecent assault are violations of fundamental rights and that the wrongdoing character of them does not depend on cultural acceptance or knowledge',²⁸ however, he found the defendants necessarily less morally blameworthy. Blameworthiness, as Letsas explained, was determined by biological, cultural and social factors, including awareness of moral wrongness of the acts committed and promulgation of law within the community. The defendants were less morally blameworthy due to the inadequate promulgation of the relevant law on Pitcairn Island, and the lack of education and public culture that would mould the appropriate sexual morality.²⁹ Letsas hence argued that the criminal sanctions imposed on them were disproportionate to their level of blameworthiness - it is possible to distinguish between moral and criminal responsibility, the Pitcairn prosecutions failed to do so and were thus illegitimate.

Letsas' approach is a breath of fresh air amidst the barrage of theories that have sought to bridge the gulf between universalism and relativism. These often take the form of highly abstract arguments with little practical significance. One example is Charles Taylor's imagination of a dialogue between people from different traditions. He argues that consensus can be reached based on abstractions of varying cultural norms and 'we would agree on the norms while disagreeing on why they were the right norms, and we would be content to live in this consensus, undisturbed by the differences of profound underlying belief'.³⁰ Theories like Taylor's seem like excessive attempts to reconcile universalism and relativism, and fail to understand that our moral attitudes towards any cultural practice exist on two levels: (i) our views on the objective moral content of the practice itself and (ii) attitudes to and treatment of its perpetrators. One does not necessarily correlate to the other.

Letsas' distinction allows us to uphold fundamental human rights (by labelling certain practices as morally wrong without running into problems faced by strict universalists or relativists), yet remains sensitive to contextual and cultural differences when actually dealing with these communities. This includes understanding that cultural factors can influence the prioritization and justification of rights. In communities where notions of duty and community prevail over any rights language, perpetrators of a particular 'cultural' practice could perhaps be deemed less morally blameworthy, without affecting our judgment of these acts as morally wrong. There are fears that the separation of morality and legality will result in injustice for victims of these acts. However, it should be clarified that Letsas' approach, while distinguishing between moral and legal wrongness, does not imply that the two cannot co-exist. Letsas would probably have adopted a different attitude to the Pitcairn prosecutions if the relevant law had in fact been well promulgated on the island and the community was less isolated.

²⁸ *ibid* 167.

²⁹ Neville Tosen's study revealed that most women had their first child between ages 12-15. The islanders were also influenced by their Tahitian historical background - Tahitian sexual mores were 'freer'.

³⁰ Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights', in J. R. Bauer and D. Bell (eds.), *The East Asian Challenge for Human Rights*, (CUP 1999) 124.

However, a potential criticism of Letsas' theory is the difficulty in objectively determining degrees of moral blameworthiness, which would render his approach impractical for the determination of legality. Yet it should be noted that Letsas' distinction purports to explain our personal moral attitudes only. It is less prescriptive in nature and not intended to be used as a standard for determination of legal wrongness. This is not to say that it lacks the potential to develop into an approach that can do so. Letsas' theory can be supplemented in a number of ways and William I. Torry's analysis of the cultural defence offers one such possibility. I believe that determining the extent to which a perpetrator is culturally isolated is subjective. The mere fact of cultural difference does not immediately make one less morally blameworthy - it would be erroneous to assume that cultural difference induces cultural compulsion. This is where Torry's framework could be useful in according more certainty to determinations of moral blameworthiness. Torry argues for a cultural defence based on cultural dictation, which can be successfully invoked when three premises are satisfied: (i) The action at issue has originated from a subcultural dictate (ii) This dictate has triggered the offending action and (iii) given the extent of its control over the perpetrator's thoughts and actions, thus forecloses punishment required by law.³¹ It thus follows that a mental profile can be built for each perpetrator to determine 'whether the circumstances sufficed to release the triggering mechanisms for subconsciously compelled action'.³² This provides an objective criterion to judge both the reliability of claims of cultural compulsion as well as degrees of moral blameworthiness.

Yet, I still have reservations about associating Letsas' approach with a cultural defence. The concept of a cultural defence is fundamentally flawed as it mistakenly assumes that cultures are clearly delineable wholes,³³ whose elements we can isolate to explain a perpetrator's actions, and once successfully invoked, completely allows a particular community to retain its right to the controversial 'cultural' practice. This ignores the reality that cultures are in fact multi-faceted, as illustrated earlier through the difficulty in determining what exactly constitutes a 'cultural' practice. The static nature of a cultural defence threatens to undermine both the protection of universal human rights and the cultural sensitivity which Letsas' approach is so valued for.

Abandoning any links with cultural defence to further develop Letsas' theory, I will now examine Stephen Guest's analysis of the Pitcairn prosecutions, especially his addressing of the question of criminal punishment, which seems to bear much potential.

IV. QUESTION OF CRIMINAL PUNISHMENT

Guest also believes that the Pitcairn prosecutions were illegitimate but his approach goes one step further than Letsas' in directly addressing the constituents of a legal wrong and hence provides a clear framework for ascertaining the suitability of criminal punishment in different circumstances. We can thus adopt a more practical approach when confronted with other controversial 'cultural' practices.

Letsas' and Guest's approaches stem from similar basic premises, hence I have no problem accepting Guest's theoretical foundation, having strongly endorsed Letsas' one. Both start off by clearly distinguishing between moral and legal wrongness - the moral

³¹ William I. Torry, 'Multicultural Jurisprudence and the Culture Defense' (1999) JLP 127, 151.

³² Ibid.

³³ Benhabib rejects universalist and relativist descriptions of cultures as 'unified, holistic and self-consistent wholes'. This has resulted in a situation where 'cultural processes of resignification and reinterpretation, which women in minority ethnic communities engaged in, are ignored.' (Benhabib (n 11) 86).

wrongness of an act does not sanction criminal punishment. Guest's assertion that 'a sensitive and sympathetic appreciation of personal responsibility in morally bad cultures should encourage the shifting of the burden of correction away from the processes of the criminal law'³⁴ also implicitly supports Letsas' concept of moral blameworthiness.

Guest then goes on to distinguish the objective moral truth of practices from law itself, taking it one step further than the distinction between moral wrongness and blameworthiness does. He provides a more easily ascertainable criterion for determining legality - the existence of a community of expectation and sufficient promulgation of law. Criminal punishment without the above elements would be unjustified, regardless of the moral wrongness of the act in question. This conception of legality is distinguished from formal legality (based on a positivist conception of law like Hart's rules of recognition).³⁵ Guest argues that the presence of a criminal statute is a necessary but insufficient condition for legality. A further moral background to legality is essential.

Both Lon Fuller and Ronald Dworkin explain the community of expectation and the need for it. It is taken to mean the presence of 'reciprocity of expectation'³⁶ between ruler and the ruled or the uniting of a community's past with its present³⁷ and 'is part of the very idea of a functioning legal order'.³⁸ Establishment of such a community as the background to legality shows equal concern for all members of the community and upholds moral principles like dignity, equality and freedom. It is also consistent with Benhabib's deliberative democracy model which guides discourse through norms of universal respect and egalitarian reciprocity. The requirement for sufficient promulgation of law then naturally follows from the need to advance these principles. If members of the community are to be treated with equal concern and respect, they must surely be given fair warning of the criminal law to which they are subject. Guest argues that this involves promulgation of both the content and penalties of the relevant statute that criminalizes the act in question - promulgation should be such that a member of the community would be reasonably aware of the 'precise nature of the offence'.³⁹

It is on this conception of legality that Guest found the Pitcairn prosecutions to be illegitimate. The defendants were convicted under S1 and 14 of the English Sexual Offences Act 1956, but apart from the existence of this criminal statute, the other elements of legality were notably absent. A community of expectation was significantly lacking:

'Pitcairn was even more isolated 20 years ago than it is now, with only recent Internet connection, and available well after any of the alleged offences occurred...The islanders were, significantly, not conversant with law other than "Island law", and they had little knowledge of how law was generally viewed, administered, policed, enforced and discussed in Britain'.⁴⁰

It is evident that they did not expect legislation to be passed and enforced by the UK. Furthermore, the rapid rate at which it was passed in the period between 1996 (when the first complaint was lodged) and 2003 (when trials began), and the way it was passed

³⁴ Stephen Guest, 'Legality, Reciprocity and the Criminal Law on Pitcairn' in Dawn Oliver (ed), *Justice, Legality and The Rule of Law: Lessons from the Pitcairn Prosecutions* (OUP 2009) 199.

³⁵ HLA Hart, *The Concept of Law* (OUP 1997).

³⁶ Lon L. Fuller, *The Morality of Law*, (YUP 1969).

³⁷ Ronald Dworkin, *Law's Empire* (Fontana 1986) 213-214.

³⁸ Fuller (n 36).

³⁹ Guest (n 34) 211.

⁴⁰ Guest (n 34) 201.

(through the exercise of the UK's royal prerogative powers under Orders in Council and Ordinances) arguably violated the principles of equal concern and respect for the islanders.

Posting local ordinances on a public notice board and conducting one public meeting on unlawful sexual conduct in 1970 could not possibly amount to adequate promulgation of law. The law then in force in Pitcairn - the Pitcairn Constitution (as revised in 1940) and the Judicature Ordinance 1961 (Pitcairn Islands) contained no direct reference to rape or other serious sexual offences. The English Sexual Offences Act was not explicitly mentioned in these ordinances, and 'there is no evidence that anyone on Pitcairn was aware of sections 1 and 14 ... prior to the commencement of the police investigation in 1996'.⁴¹ Furthermore, it was not until 2004, long after the commission of the offences, that the Supreme Court ruled that the Act was of general application. It seems illegitimate to then prosecute perpetrators under a criminal statute where the content and penalties contained within were barely known to the islanders. There was arguably also a breach of the defendants' rights to a fair trial because of the undue delay in their trial and questions about the independence and impartiality of the tribunal. The defendants' due process rights were further violated due to their prosecution under retroactive laws. However urgent the need for judicial reform on Pitcairn was, it was also unfair for the UK to take advantage of this need and subject the accused to a bespoke system 'without consideration of whether it [was] in fact the best method of resolution in [those] very unique circumstances'.⁴² The 'paper trail' line of reasoning and formal legality applied to prosecute the accused was unjustified as it thoroughly ignored the absence of reciprocity of expectation and insufficient promulgation of the relevant criminal statute on Pitcairn.

I therefore endorse Guest's finding of the illegitimacy of the prosecutions, but in ensuring that his approach can be practically applied, it is necessary to clarify its distinction from both the universalist and relativist approaches. First, it would be fatal to future practical applications of Guest's approach if it were misinterpreted as a cultural defence. Accepting that the defendants' rights to fair trial have been violated by no means condones the acts that they have been prosecuted for. Neither does Guest's advocating of a moral background to legality translate to determining law based on moral judgments of acts. Guest's approach maintains the necessary distinction between moral and legal wrongness. It is accepted that the more enculturated the defendants are, the more detailed and personal promulgation of the relevant law should be. However, this should never be seen as amounting to a cultural defence.

It is easy for cultural differences to be confusingly brought into the equation in a case like Pitcairn (where cultural and political isolation are so acute) because these differences affect the degree of promulgation of the relevant law on the island. This confusion is illustrated in Farran's argument, where she argues that the defendants' due process rights were violated (and I concur), however then jumps to moral conclusions that I cannot agree with. She argues that the prosecutions amounted to legal imperialism and used imagery of colonialists intruding in a 'vulnerable community' which resulted in incalculable destruction to the island.⁴³ Her concerns that the convicted men represent 1/4 of the island's adult male population and there would thus be significantly less people to handle the long boats that are necessary for the island's survival⁴⁴ are valid. However, they do not have a

⁴¹ *Steven Raymond Christian and Others v The Queen* [2006] UKPC 47 [68] (Lord Hope).

⁴² Anthony Trenwith, 'The empire strikes back: Human rights and the Pitcairn proceedings' (2003), Vol 7 Issue 2 JSPL, <<http://www.pacii.org/journals/fJSPL/vol07no2/3.shtml>> accessed February 4 2011.

⁴³ Farran (n 9) 144.

⁴⁴ Trenwith (n 42).

place in the determination of questions of legal wrongness at all. Moral judgments are to remain distinct from the question of legality and it should again be emphasised that it was ultimately the lack of community of expectation and promulgation of law on the island and not cultural differences that explains Guest's objection to the prosecutions.

Next, I must reiterate that Guest's objection to the prosecutions does not in any way amount to a rejection of universal human rights. In fact, Guest's and Letsas' approaches enable us to uphold fundamental human rights by first establishing the objective moral truth of 'cultural' practices. Guest's criteria for legality, which exists independently of moral judgments,⁴⁵ then allows us to effectively move away from the universalist/relativist debate and offers practical determinations of whether perpetrators should be subject to criminal punishment.

Guest's theory completes my three-stage approach to 'cultural' practices. This approach involves: (i) establishing the objective moral content of the practice (ii) ascertaining moral blameworthiness of perpetrators of the practice and finally, (iii) determining the appropriateness of criminal punishment based on the existence of a community of expectation and degree of promulgation of the relevant criminal statute. This approach will now be tested in its application to the controversial 'cultural' practices of female genital mutilation and honour killing.

APPLICATION TO FEMALE GENITAL MUTILATION

Female genital mutilation refers to procedures 'involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons'.⁴⁶ FGM is largely practiced in Africa, Western Asia and some Arab states like Yemen and Egypt (where prevalence is at a high of 96%).⁴⁷ It is mostly conducted on girls aged 0-15 by elders in the community who have been specially appointed for the task. FGM is considered a cultural rather than religious practice - there is no evidence that it is sanctioned by any religion as its existence predates the rise of Islam and Christianity.

Infibulation, the most drastic and severe form of FGM, involves removal of the clitoris, labia minora and, depending on the ethnic groups involved, either a thin ribbon of flesh from either side of the labia majora or the cutting of the labia majora to create an open wound. Wounds are then adhered together by various means like stitching or with thorns. A reed or thin stick is inserted such that when the wound forms a tough scar tissue, there will be a small opening for urine and menstrual flow. It adversely affects a woman's physical and reproductive health, causing menstrual difficulties, obstetric complications, urinary tract infections, cysts and abscesses. Unsurprisingly, psychological trauma is also a common result.

Not only are the health detriments of this practice a huge cause for concern, I strongly believe that FGM is also a violation of women's rights to bodily integrity, to be free from torture and inhumane or degrading treatment and their right to life if complications in the procedure results in death. Since it is carried out principally on minors, it also represents violation of rights of the child. 'The basis for a rights approach is the affirmation that human well-being and health are influenced by the way a person is valued, respected and given the choice to decide on the direction of her/his life without discrimination, coercion or

⁴⁵ 'A legal claim is different from the announcement that the defendants acted wrongly'. (Guest (n 34) 188).

⁴⁶ WHO (n 2) 4.

⁴⁷ UNFPA, A Holistic Approach to the Abandonment of FGM/C (2007), 1-2.

neglect'.⁴⁸ However, FGM is so deeply entrenched in many communities as a 'cultural' practice that a culturally sensitive approach to it is paramount. The nuances of the situation bear many similarities to Pitcairn, and it is appropriate to apply the practical three-stage approach that has been distilled from the various arguments arising from the Pitcairn prosecutions.

I. IS IT MORALLY WRONG?

I personally believe that FGM is morally wrong as it severely violates basic human rights. However, this is not to say that the strict universalist approach will ultimately result in the most effective protection of these rights in practicing communities. As illustrated in my critique of O'Cinneide's approach above, application of universalism proves problematic. First, there is a danger that advocacy of these rights will be seen as forcing a 'Western' articulation of rights on these communities, where rights language is not as prevalent. Indeed in some African communities, FGM eradication is seen as a 'project of white people' and an attempt to destroy African culture.⁴⁹ Second, the unwavering focus on upholding women's rights to be free from violence might cause another set of human rights to be neglected. There is a sense that the community's right to self-determination and dignity (which they gain from the preservation of this tradition) might be threatened. Semra Asefa's research reveals that it is often the older women in the community (who were once subject to FGM) who are the greatest champions of the practice.⁵⁰ This should not be interpreted as my condoning of any reliance on a cultural defence. Instead, I believe that a practical approach to FGM should be based on a multi-faceted appreciation of the various attitudes to FGM within practising communities. The universalist approach, while pursuing a wholly legitimate end of protecting women's rights to be free from such degrading treatment, lacks the means conducive to do so.

Rejection of the universalist approach does not mean that the relativist approach then becomes relevant. While the former was rejected for practical difficulties, the latter is objectionable on basic theoretical grounds (as explained earlier in the section on cultural relativism). Such an approach could never adequately guarantee the protection of basic human rights norms. As similarly argued in relation to the Pitcairn practices, claims of consent to FGM do not make the tradition defensible. While FGM appears to be accepted as a social convention in some practicing communities, other narratives cast doubt on whether this consent constitutes true consent.⁵¹ UN reports reveal that many women who are opposed to it ultimately relent under social pressure, as they fear being ostracised or deemed unmarriageable otherwise.

II. ARE THOSE WHO CARRY OUT FGM MORALLY BLAMEWORTHY?

⁴⁸ UNFPA (n 47)1.

⁴⁹ The UNFPA Global Consultation on FGM/C contains Dr Kembal Mustafa's findings from the Mombasa Muslim Clerics and Scholars Symposium 2007. A key one was participants' suspicions that the symposium and other efforts to eradicate FGM had a hidden agenda of 'forcing them to renounce their culture and propagating the western ideology of feminism'.

⁵⁰ The Hosken Report also gives the example of a professional woman in Mali who was unwilling to excise her daughters, but when their grandmother found out, she brought them to be excised without the mother's knowledge.

⁵¹ Consent seems to only be given because 'women have culturally accepted violence as normal, 'natural' and a woman's fate. Women bear the violence and suffer silently'. (Dr Bogaletch Gebre, Founder, KMG Ethiopia).

Letsas' distinction is appropriate for making sense of 'cultural' practices that we have some degree of ambivalence towards. On one hand, FGM undoubtedly violates a woman's basic rights to bodily integrity and to be free from inhumane treatment. It is objectively morally wrong. However, most would hesitate to then castigate the perpetrators of this practice - the medical staff and midwives who directly perform excisions, or even the families and community at large who indirectly instigate and support these procedures. This stems from an appreciation that FGM, however morally wrong, is often a core tradition in practicing communities. FGM is commonly seen as an initiation rite through which guidance and knowledge are passed on from one generation to another. Certain narratives reveal that those who carry out FGM (whether directly or indirectly) genuinely believe in its value.⁵²

Families have a variety of reasons for subjecting their young daughters to these practices - Some see excision as an important part of the initiation ritual that marks a girl's transition into adulthood,⁵³ hence are well-meaning in their desire to have their daughters excised. This ritual is thus seen as necessary for girls to become marriageable, ensuring their economic and social security. Others ironically believe that FGM ensures fertility and survival of offspring. There are others who erroneously advance that excision facilitates sexual intercourse and childbirth. Some communities also view the clitoris as an object of shame that has to be cleansed and purified.⁵⁴ What is noticeably absent from the plethora of justifications for FGM listed above is the presence of any malicious intent. FGM is not conducted for the primary purpose of punishment or violence.

Hence applying Letsas' distinction, I would argue that FGM is morally wrong, but those who conduct it are less morally blameworthy. The degree of moral blameworthiness is mitigated by an appreciation of the different cultural context, as well as well-meaning values and tradition underlying the practice. This determination creates an ideal balance between the need for cultural sensitivity to inform our attitude towards FGM and the advancement of basic human rights norms. It should however be emphasised that in some communities where FGM is in fact a means of patriarchal control and cultural justifications are merely exploited to perpetuate gender violence, those who knowingly conduct it will still be deemed morally blameworthy.

III. SHOULD WE INTERVENE? HOW?

Guest's approach will now be employed to ascertain legal wrongness and definitively answer the question of whether criminal punishment is appropriate in the context of FGM. I will suggest that a broad interpretation of his approach must be taken to ensure effective and long-term protection of basic human rights.

FGM is prohibited in most affected countries, where the relevant legislation explicitly identifies the act of FGM as an offence and states penalties for its commission. However, recalling Guest's argument that the presence of a criminal statute is a necessary but insufficient condition for legality, the existence of a community of expectation and sufficient promulgation of law must be ascertained before those who conduct FGM can be

⁵² 'Another striking feature of FGM, which is of utmost importance, is that it is not recognised as an act of violence. After all, the reasoning goes, how can what parents do out of concern for their daughters be a crime? It is shrouded in the mystifying guise of 'the loving act''. Semra Asefa, 'Female Genital Mutilation: Violence in the Name of Tradition, Religion, and Social Imperative' in Stanley G. French, Wanda Teays, and Laura M. Purdy (eds.), *Violence Against Women-Philosophical Perspectives* (Cornell University Press 1998) 100.

⁵³ UNFPA-UNICEF Joint Programme, FGM/C: Accelerating Change (2008) 9.

⁵⁴ Asefa (n 52).

legitimately prosecuted. Some argue that community of expectation between the State government and members of practising communities has been established by the liability of members of these communities to prosecution under State-made criminal law. However, this is not the case in rural communities where community of expectation only exists between its members and those they perceive to be their direct rulers (elder tribesmen and other individuals in positions of power within the community). In these communities, it is uncertain whether those who conduct FGM would reasonably expect to be prosecuted under legislation passed by the central government at all.

Determining the extent of promulgation of law required to satisfy this requirement of legality is problematic. Despite the authoritative Hosken Report⁵⁵ and increasing UN surveys, it is nonetheless difficult to gather reliable data on whether the relevant law has been successfully promulgated - FGM operations are conducted in private and are largely intimate family matters. The question is whether mere understanding and intelligibility of the prohibitive statute is sufficient or whether something more is required. I support the latter view as it ensures a more practical and culturally sensitive approach. For this broader conception of promulgation to be satisfied, members of the community 'should be able to see how the rule fits intelligibly into some possible pattern of their life ... it will need to have a certain *fit* with some existing forms of life, habits of conduct, settled expectations and shared moral sentiments between members of the community'.⁵⁶ The mere announcement in advance of a set of stable rules is inadequate as rules must also reasonably accommodate the community's social values.⁵⁷

Applying this conception, it is evident that the relevant law prohibiting FGM has been inadequately promulgated. FGM remains very much entrenched as a social convention in most practising communities. The public declarations of commitment to FGM eradication cannot be considered evidence of sufficient promulgation - although 2657 villages in Guinea, Senegal and Burkina Faso have made such declarations, there are troubling signs of the continued prevalence of FGM there.

A broad approach to establishing the moral background of legality is favoured for various reasons. While determination of questions of legal wrongness was central to the Pitcairn saga, the legitimacy of prosecutions is not the sole emphasis when prescribing an approach to FGM eradication. Unlike the 'closed case' of Pitcairn, FGM is a persisting phenomenon and it would thus be myopic to focus on criminal punishment alone. The approach advanced should be preventative as well, and a broad conception of promulgation, which dictates sustainable change from within, is thus essential. FGM elimination has to be a collective, coordinated choice by the practising community, 'so that each family has confidence that others are also abandoning the practice'.⁵⁸ A broad approach is also consistent with Guest's endorsement of the principles of equality, dignity and freedom, and in fact furthers it through appreciating the need for alignment between a community's values and the law it is subject to.

Most importantly, such a conception is instructive in determining the role of external intervention, ensuring that a most practical approach to FGM is developed. Firstly, the international community is in no position to directly subject those who conduct FGM to criminal punishment. Even though States that house practising communities have ratified the relevant international instruments (like the Maputo Protocol and General

⁵⁵ Franziska Hosken, *The Hosken Report: Genital and Sexual Mutilation of Females* (1993).

⁵⁶ Roxanne Yanofsky, 'Pitcairn island: in pursuit of a morally charged rule of law' (2007) UCLJR 113, 6.

⁵⁷ Andrew Ashworth, 'Interpreting Criminal Statute: a Crisis of Legality' (1991) LQR 419.

⁵⁸ WHO (n 2) 19.

Recommendation 14 of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW)) which uphold basic human rights to bodily integrity and to be free from inhumane or degrading treatment, these declarations are not substitutes for the relevant criminal statutes that should be in place as a prerequisite for finding legal wrongness. A community of expectation between the international community and those who conduct FGM is clearly absent, rendering any prosecutions illegitimate. It can therefore be established that the role of external intervention in criminal punishment should be limited to supporting legal and judicial reform in these communities. However, there is a danger of falling into the Pitcairn trap of rapidly reforming judicial systems such that those who conduct FGM could be 'fairly' prosecuted under it. This is where a broad conception of promulgation again proves useful in reinforcing that there is no fast-track approach to satisfying the promulgation requirement - it takes time for members of practicing communities to 'grasp the values or objectives that the law serves'.⁵⁹ A culturally sensitive approach is hence also ensured.

Next, since a broad approach to legality focuses on change from within, external intervention should facilitate and support such change. Efforts should focus on knowledge dissemination to ensure that erroneous beliefs about FGM are corrected. The UNFPA and UNICEF's Joint Programme for Accelerated Abandonment of Female Genital Mutilation/Cutting (FGM/C) can be condoned only insofar as it supports activism and change from within. Its coordination of media campaigns (for example, the lobbying of Guinean, Kenyan and Djiboutian media houses to put the FGM/C debate on their media agenda) and cooperation with religious leaders to clarify the misconception that FGM is religiously sanctioned will help shift communal attitudes and accelerate promulgation of law.

The broad conception also encourages consideration of the positive social value underlying FGM. Though the practice of FGM has been perverted in some communities, in other practicing communities it still represents the continuity of tradition and hence preservation of a community's dignity. External intervention could then potentially take the form of promoting alternative rites of passage ceremonies, thus preserving this dignity while eradicating FGM. For example, the Tsaru Ntomonik Initiative in Kenya encourages new ways for Maasai girls to be initiated into adulthood without actual cutting.

The three-stage approach thus creates a 'framework that respects the unique features of [FGM], while still rendering it a violation of human rights standards'.⁶⁰ My advancement of a broad approach to promulgation ensures that FGM eradication efforts are sustainable, and legitimises external intervention insofar as it is limited to a supportive role consistent with furthering promulgation of the relevant law and creating an international context of concern.

APPLICATION TO HONOUR KILLING

An even more controversial 'cultural practice' is that of honour killing, where women are murdered by their male family members as punishment for a perceived violation of a social norm of sexuality or behaviour. Honour killing is then viewed as the means of restoring honour to the family. This tragic practice occurs worldwide, though it is most prevalent in Middle Eastern and African countries like Pakistan, Turkey, Afghanistan, India and Jordan. Like FGM, honour killing is not a religious practice. It predates modern religions and there is nothing in the Koran that explicitly permits it. However, Sharia law has

⁵⁹ Yanofsky (n 56) 6.

⁶⁰ Hope Lewis, 'Between *Irua* and 'Female Genital Mutilation': Feminist Human Rights Discourse and the Cultural Divide (1995) 8 HHRJ 15.

been exploited to enable perpetrators of such acts to escape liability. It has been interpreted to create a parallel justice system giving family members of the victim the option of *qisas* - pardoning the perpetrator, usually through the receipt of compensation from him. This effectively allows the perpetrator to walk away scot-free.

I will again apply the three-stage approach to this practice, to make sense of both our personal moral attitudes to honour killings and the form external intervention should take. While honour killing seems similar to FGM in terms of how culturally entrenched both practices are, crucial distinctions can be drawn.

I. IS IT MORALLY WRONG?

Honour killing violates victims' rights to life and is believed to be a fundamental moral wrong. There have been numerous universal declarations to this effect, notably the UN General Assembly Resolution on 'The Elimination of All Forms of Violence Against Women including Crimes Identified in the Outcome of Beijing +5' which calls on all States to oppose honour killing and implement measures necessary for its eradication. The universal moral wrongness of this act is also emphasized in the UN General Assembly's Declaration of the Elimination of Violence against Women (1993) which provides that States must not 'invoke custom, tradition or religious consideration to avoid their obligation to eliminate discriminatory treatment of women'. Honour killing also violates women's rights to non-discrimination. Women are reduced to vessels of honour for the male members of their family and are not thought to possess honour of their own.⁶¹

Yet questions of moral and legal wrongness should still remain distinct. While I advance the objective moral wrongness of honour killing, this does not translate to support for legitimising the criminal punishment of perpetrators. Some would however rely on *mala in se*⁶² to argue that there are some acts so wicked and gravely morally wrong that they must certainly be unlawful. In these cases, it is the nature of the crime itself that 'gives it the quality of legality'.⁶³ The classic example of *mala in se* is genocide as highlighted in the Nuremberg Trials. However, I believe that *mala in se* is not a helpful concept to apply to controversial 'cultural' practices. While honour killing is indeed a severe violation of the fundamental right to life, justifying its legal wrongness by the very nature of the act itself will unfortunately draw us back into the universalist/relativist debate. Surely this cannot inform a *practical* approach that ensures eradication of the practice, especially since a significant hindrance to such efforts is the very lack of State commitment. *Mala in se* is typically used to justify punitive action by the State and is thus inappropriate for use in communities where legislators and law enforcers do not absolutely believe in the moral wrongness of honour killing.

Nevertheless, the grave nature of honour killing does have an indirect impact on the finding of its legal wrongness. I would adopt Fuller's view that the more serious the offence, the less the need for detailed promulgation⁶⁴ and thus conclude that less promulgation is required to satisfy the requirements of legality here, making legitimate prosecutions relatively easier.

⁶¹ John Alan Cohan, 'Honour Killings and the Cultural Defense', (2010) 40 CWILJ 178, 187.

⁶² An act that is 'inherently and essentially evil; that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state'. Black's Law Dictionary (1979).

⁶³ Guest (n 34) 198.

⁶⁴ Fuller (n 36).

II. ARE THOSE WHO CARRY OUT HONOUR KILLING MORALLY BLAMEWORTHY?

The situation in communities where honour killing is prevalent is *prima facie* similar to that in communities where FGM is practised - community pressures to act are significant. However I find that perpetrators of honour killing are nevertheless still morally blameworthy, owing to a key difference in the practices that will be explained later. Perpetrators are subject to strong social pressure to avenge perceived 'dishonourable acts', even if they are reluctant to do so. Killing the woman is often seen as the only way to restore honour, with no other alternatives contemplated. The perpetrator's social prestige and reputation are also at stake - 'the ideal of masculinity is underpinned by a notion of "honour"...and is fundamentally connected to policing female behaviour and sexuality'.⁶⁵ There is significant communal collusion as perpetrators are usually aided and abetted by multiple family members in the killings.

Yet, there is a crucial difference between honour killing on one hand, and FGM and Pitcairn practices on the other. It is this distinction that has shaped my personal moral attitude to the perpetrators and I would not hesitate to consider them morally blameworthy. What unites the different justifications for honour killing is that they all serve the purpose of punishing the victim. This could be for her commission of perceived 'dishonourable acts', which could include anything from her adultery, homosexuality, seeing men from other tribes and exercising of free will in choosing a husband or seeking a divorce, to her refusal to follow the Islamic dress code or adoption of other Western habits. She could even be punished without any such act as perpetrators might have acted on false allegations made against the victim. She could also be punished for an offence committed by a male member of her family or even for being a victim of rape. The common thread running through all honour killings is *punishment* - a purpose that is noticeably lacking in FGM (where those who conduct FGM generally have good but misplaced intentions of benefiting the one subjected to it) and the Pitcairn practices (where regardless of the defendants' motivations for committing rape and indecent assault, their primary purpose was surely not to punish the victims through their acts).

Having made sense of our personal moral attitudes towards the perpetrators of honour killing, the more pertinent question of subjecting them to criminal punishment and relatedly, the role of external intervention will now be addressed.

III. SHOULD WE INTERVENE? HOW?

Guest's criteria will be applied to determine the legal wrongness of honour killing. Therefore, besides ascertaining the presence of the relevant criminal statute, the existence of a community of expectation and sufficient promulgation of law must also be established. A broad interpretation of his approach (as advanced in the section on FGM) should also be recalled.

Different States criminalize honour killing in varying degrees. In states like Pakistan and Turkey, honour killings are unlawful. Yet in other States like Jordan, the law justifies and perpetuates honour killing. Not only is prohibitive legislation absent, criminal statutes also ensure either a complete defence to honour killing⁶⁶ or reduced sentences for perpetrators.⁶⁷ For the latter group of States, the first step would then be to correct legislative deficiencies. I believe that only change from within the community can provide the impetus for prohibitive

⁶⁵ Cohan (n 61) 185.

⁶⁶ Art 340 Jordan Penal Code.

⁶⁷ Art 98 Jordan Penal Code, Art 548 Syria Penal Code, Art 418 Morocco Penal Code.

legislation that goes far enough and gives no impunity to perpetrators.

Even in States where the relevant criminal statute exists, community of expectation is sometimes absent. Like FGM, this is especially so in rural communities. In rural Pakistan, tribal courts (*jirgas*) uphold tribal rules and customs that sanction honour killing over any national law. 'The people of Pakistan have always remained distant from the political system and they have been unable to understand a Constitutional theory or relate to the idea of a consensual plurality or national identity. On the contrary, the citizens have continued to follow the local tribal leaders whom they trust'.⁶⁸ Community of expectation appears to only exist between community members and their local tribal leaders, such a relationship is not extended to national governments that have implemented legislation criminalising honour killing.

Despite establishing that less promulgation of the relevant law is required given the gravity of honour killing, I still believe that the current level of promulgation is grossly inadequate. In countries where prohibitive legislation is absent, promulgation is obviously stagnant. Yet even in countries where honour killing has been criminalised, deficiencies in law enforcement have also contributed to the lack of promulgation. For example, the corrupt Pakistani police will accept bribes to release perpetrators. Perpetrators are also often released as long as they claim that the killings were for the restoration of their honour. The Pakistani enforcement system is also inherently flawed as individuals (and not the State) are given power to initiate prosecutions. Prosecutions of perpetrators are hence rare since the perpetrator is usually a family member of the victim and has committed the killing with the family's approval and collusion.

Given the current situation, a broad interpretation of Guest's approach is again necessary. Promoting an understanding of the 'values or objectives that the law serves'⁶⁹ is not only culturally sensitive, but also ensures that there is sufficient change from within for more robust enforcement of the law. Since honour killing is sanctioned by communities themselves, it is necessary to first understand the source and significance of community pressures in order to dispel them. Applying the broad approach, external intervention can take a few forms: First, the international community should support institutional and legal reform so that national governments will enact and actively enforce the relevant prohibitive legislation. CEDAW's General Recommendation 19 (1992) can be relied on - 'States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence'. The international community should also support institutional reform aimed at creating a community of expectation between national governments and members of rural communities - a pre-requisite for the finding of legal wrongness. Next, external intervention should support and facilitate change from within (a role similar to that assumed in FGM eradication efforts). Indeed, 'there is not only a need to bring about a change to fill in the lacunae existing in the law. There also needs to be a change in the attitude of society to bring effective implementation of any law'.⁷⁰ Like FGM, women in the community perpetuate the practice through their actions.⁷¹ There is therefore an urgent need to raise awareness and empower women to rouse a change from within. UN efforts should focus on education and media campaigns, ensuring that local media report more extensively and accurately about honour killing and do not project

⁶⁸ Cohan (n 61) 211.

⁶⁹ Yanofsky (n 56) 6.

⁷⁰ Anushree Tripathi and Supriya Yadav, 'For the Sake of Honour: But Whose Honour?' (2004) 5 Asia-Pac JHR&L 65, 78.

⁷¹ 'mothers in a family abet the father and brother to kill the daughter or sister if the family feels their honour has been soiled'. (ibid).

women as mere vessels of honour. Religious leaders should also be rallied to spread awareness that honour killing is not sanctioned by religion.

Using the arguments arising from the Pitcairn prosecutions as a springboard, I have applied my three-stage approach to the controversial 'cultural' practices of FGM and honour killing. I have endeavoured to prove that basic human rights protection and cultural sensitivity are compatible concepts. Far from detracting from the universality of human rights, I believe that my approach further reinforces it. The broad approach to promulgation focusing on communal change from within ensures that practices can be more effectively eradicated, thus guaranteeing the long-term protection of universal human rights.

I believe a *practical* approach has been developed to adequately address the appropriateness and extent of external intervention in each practice. I found that external intervention focused on supporting non-legal reform and change within the practising communities is necessary for the establishment of a moral background to legality, before determinations of legal wrongness can even be considered. As echoed in Benhabib's discourse ethics, the principles of equality and respect for all mean that sweeping generalisations prescribing 'fix-all' solutions cannot be made. Instead, the existence of a community of expectation and degree of promulgation of law in each practising community has to be individually ascertained.

All this implies that it will be a long-drawn process before perpetrators can even be legitimately prosecuted. While it is tempting to thus circumvent the promulgation requirement, I would caution against this. Some may argue that the symbolic, deterrent effect of law justifies prosecuting even if conditions for finding legal wrongness have not been fully satisfied because the signalling effect will instigate change within the community. However, the need to convey a message to the community alone should never justify prosecutions that would otherwise be illegitimate. 'Symbolic law' will not bring about sustainable or effective change - on this approach, even if FGM or honour killing become less prevalent, it is only because of fear of penalties imposed, and not genuine re-alignment of community values. The importance of positive community change as the driving force for eradication of these practices cannot be emphasized enough, and it is this that should focus and limit external intervention.

The Pitcairn saga may have been concluded, but the question of external intervention in the other 'Pitcairns' of our world today remains unanswered. It is hoped that my deconstruction of the arguments arising from this saga to create a practical three-stage approach has provided a useful starting point. If the question of external intervention's appropriateness and form can thus be answered with less hesitation, we are one step closer to the end of human rights violations in practising communities.

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PROSECUTING NAZI WAR CRIMINALS IN THE UK AND LESSONS FOR TODAY: WILL HISTORY REPEAT ITSELF?

MICHAEL J BAZYLER AND CARLA FERSTMAN*

I. INTRODUCTION

The morning of February 8, 1999 was overcast, dreary and cold, like any other winter day in London. Individuals navigating through the snow that fell overnight past the busy Central Criminal Courthouse in London and fondly known as “the Old Bailey” would hardly know that history was being made inside: the only criminal trial of the Holocaust to have occurred in Britain was about to begin.¹

The defendant on trial in Court 12 was being charged for multiple murders that had taken place fifty-seven years before, not in England but in Nazi-occupied Europe.² And the end-result was that the defendant attained the dubious distinction of being the sole Nazi war criminal to be convicted by an English jury. The man, Anthony Sawoniuk, and his two-month trial in the Old Bailey – from February 8 to April 1, 1999 – is the focus of this article.

This sole conviction of a Nazi or Nazi collaborator in Britain – in the words of sociologist David Hirsh, “perhaps the country in Europe least touched by the [Holocaust]”³ – raises an important question: since ending their prosecutions in occupied Germany in 1948, why have the British held only one trial of a Nazi war criminal over the last sixty years, despite credible information that hundreds, if not thousands, Nazi perpetrators came to British shores after the war? This is in contrast to the American scenario, where over one-hundred individuals have been deported from the United States for hiding their Nazi past. And further, what has been the legacy of the Sawoniuk trial? And last, how has Britain responded to the presence of many modern-era suspects of genocide, crimes against humanity, war crimes and torture?

II. ANTHONY SAWONIUK, THE NAZI-ERA POLICEMAN

Anthony Sawoniuk was born on March 7, 1921 in Domachevo, a small town on the border between today’s Belarus and Poland.⁴ The town lies about twenty miles south of Brest, the largest city in the area. In the interwar period, Domachevo, like Brest, was part of Poland. Following Poland’s partition in September 1939 between Stalin’s Soviet Union and Hitler’s Germany it was incorporated into Belorussia (White Russia), where it became part of the Belarusian Soviet Socialist Republic. Today, it is part of the independent Republic of Belarus.

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¹ David Cesarani, *Justice Delayed: How Britain Became A Refuge For Nazi War Criminals* (Phoenix Press, 2001) 277.

² Ibid.

³ David Hirsh, *Law Against Genocide: Cosmopolitan Trials* (The GlassHouse Press, 2003), 94.

⁴ David Hirsh, ‘The Trial of Andrei Sawoniuk: Holocaust Testimony Under Cross-Examination’, (2001) 10 Social & Legal Studies 531. See also ‘Life for Nazi ‘lord’ who murdered Jews and then escaped to Britain’ *The Guardian* (London, 1 April 1999).

Domachevo's pre-war population of approximately 5,000 included Poles, Belarusians, ethnic Germans and Jews. Like Brest, Domachevo had a substantial Jewish population, with two Jewish prayer houses. Because it was encircled by lush large pine forests with beautiful scenery and healthy air, Domachevo became known as a spa resort, with Jews from throughout Poland coming there during the summer.⁵

Andrusha (Anthony Sawoniuk), as he was known (even as an adult), experienced a difficult childhood. At the time of Andrusha's birth, his mother Pelagia was a widow with one son, Nikolai. With Andrusha's birth, Nikolai gained a younger half-brother – and this relationship, as we shall see, had a significant role in Sawoniuk's arrest years later in Britain. Nikolai, also unwittingly, played a role in the London jury's finding of guilt of his half-brother.

Sawoniuk dropped out of school at the age of fourteen. His plight worsened when his mother lost her battle with cancer prior to the war.⁶ Between 1939 and 1941, when the region became part of Stalin's U.S.S.R, the brothers supported themselves by raising pigeons and doing odd jobs around town, often for the town's Jewish residents.⁷ In June 1941, within days of Germany's surprise attack on the Soviet Union, German troops entered Domachevo. Sawoniuk, now 20 years old, very quickly experienced a rise in status by joining the *Schutzmannschaft*, the local auxiliary police force set up by the German occupiers. Consisting of about thirty recruits, their task, in the words of the English Court of Appeal in 2000, was to "combat local crime, to provide protection against partisans (many of them Russian communists who fled to the forests upon the German invasion) and to lend effect to the occupation policy of the German state."⁸ Lending effect to the occupation policy meant, of course, killing Jews.

Andrusha's brother Nikolai also joined the *Schutzmannschaft* but, unlike Sawoniuk, left after a few weeks when he realized what was expected of him. Sawoniuk did not seem to mind hunting and killing those in his community, even if he grew up with them.

A local census carried in February 1942 by the German civil administration recorded 3,316 Jews living in Domachevo. By that time, the local Jews had been segregated into a ghetto, fenced in with barbed wire, which the Germans set up three weeks after the invasion. The police station was set up at the entrance to the ghetto, and one of the functions of this newly-established force was to prevent Jews from escaping the ghetto or for food or provisions to be smuggled in.⁹

The end of the Jews of Domachevo took place six months later in the fall of 1942, on the eve of Jewish holiday of Yom Kippur, Judaism's holiest day of the year. In the words of Israel Silber, one Jewish survivor:

It was in the year 1942, on a Sunday before Yom Kippur, the Germans surrounded the ghetto, and took all the men, women and children – a total of 2,700 souls to the Ossover hall opposite the German Church. Then began the most ghastly and terrible event. Everyone was forced to strip naked, taken aside in groups and shot dead.¹⁰

⁵ Hirsh (n 4) 531. See also Samuel Chain, *A Summer Incident* available at <<http://www.jewishgen.org/Belarus/newsletter/pogroms.htm>> accessed 1 October 2011.

⁶ Hirsh (n 4) 531.

⁷ Ibid.

⁸ R. v Sawoniuk, (2000) 2 Cr. App. R. 220; Crim. L.R. 506.

⁹ R. v Sawoniuk (2000) Case No: 1999/02465/X4; 2000 WL 473 (See Background).

¹⁰ Israel Silber, 'The End of the Jews in Domachevo', JewishGen <<http://www.jewishgen.org/yizkor/Brest/bre087.html>> accessed 20 October 2011.

The German account of the September 1942 massacre, coming from a monthly report of the Gendarmerie County leader in Brest, records the success of this mass murder operation.

On September 19-20, 1942, an anti-Jewish *Aktion* was carried out in Domachevo and Tomashovka by a special commando of the SD together with the cavalry squadron of the Gendarmerie and the local police stationed in Domachevo, and in total some 2,900 Jews were shot. The action took place without any disturbance.¹¹

In the aftermath of the *Aktion*, local police were sent on their own “search and kill” operations for those Jews who may have escaped the initial eradication. The theory was that local police officers were more familiar with the forests of Domachevo, as well as other potential hiding places, which would allow them to hunt and kill any Jew in hiding who may have survived the initial massacre.¹² The young Sawoniuk apparently conducted the “search and kill” operations and his other police tasks admirably. In November 1943, when the commander was killed by partisans, Sawoniuk took his position. That same month, his first wife Anna also was killed by cross-fire during a partisan attack. A short while later Sawoniuk married a second time to a local woman named Nina.

Sawoniuk served as a *Schutzmann* for about three years. As the Red Army began recapturing Soviet territory, Sawoniuk in July 1944 fled with the Germans by joining the Waffen-SS. He achieved the rank of corporal. The prosecution introduced at trial Exhibit 7, a German SS document showing Sawoniuk’s name, his correct date and place of birth, and even listing the correct name of his second wife “Nina S” (presumably “S” for Sawoniuk), who fled with him in 1944. It also noted his transfer from Warsaw to France, and his service in the Waffen-SS from July to November 1944.¹³

Sawoniuk, however, was not a Nazi loyalist but an opportunist. When Germany’s military successes began to falter, Sawoniuk defected. The Same Exhibit 7 refers to Sawoniuk going missing sometime in late November 1944. Using his Polish birth certificate, Sawoniuk enlisted in the Polish Free Army, which fought alongside the British and against the Germans. He served briefly in Egypt and Italy before sailing with his regiment to Glasgow, arriving on British soil on June 27, 1946.¹⁴

Earlier that year the British government created the Polish Resettlement Corps [*Polski Korpus Przysposobienia i Rozmieszczenia*] (PRC), a holding unit for members of the Polish armed forces who had served with the British forces and did not wish to return to a Communist Poland after the war. Run mainly by the British Army, the PRC was disbanded in 1949 after fulfilling its purpose of resettling the Polish soldiers who fought on the side of the Allies. It was reasonable to assume that anyone who fought for the Polish Army was not a supporter of the Nazi regime, and so Sawoniuk accordingly was allowed to stay in Britain.¹⁵ Sawoniuk moved around Britain before finally taking up residence in London. He earlier abandoned Nina in France after she followed him from Domachevo, and so not long after arrival he married briefly a third time. In 1958, Sawoniuk married a fourth time and this marriage in

¹¹ Ray Brandon & Wendy Lower (ed), *The Shoah in Ukraine: History, Testimony, Memory* (Indiana University Press, 2008) 258–59.

¹² R. v Sawoniuk (2000) Case No: 1999/02465/X4; 2000 WL 473 (Judgment). See also R. v Sawoniuk, (2000) 2 Cr. App. R. 220; Crim. L.R. 506 (Evidence Admissibility and Background).

¹³ David Hirsh (n 3) 125–27.

¹⁴ Ibid, 125.

¹⁵ Ibid, 103–07.

1961 produced a child, a son also named Anthony. The marriage dissolved when the son was only a few months old and the infant remained with his mother. Following his fourth marriage, Sawoniuk in 1958 became a naturalized British citizen. In 1961, he began working as a British Rail ticket inspector and continued at this job for twenty-five years until retirement in 1986.¹⁶

III. PRELUDE TO PROSECUTION: THE WAR CRIMES ACT 1991

Retirement, however, did not bring on the good years for Sawoniuk. In 1986, the same year that Sawoniuk retired, the Los Angeles-based Simon Wiesenthal Center (SWC) submitted to Downing Street a list of 17 suspected Nazi war criminals alleged to be living in the United Kingdom. The list was compiled by the SWC's Jerusalem-based Nazi hunter Efraim Zuroff. At this point, the dragnet around Sawoniuk had not yet closed in, since he was not on Zuroff's list.¹⁷

Claims that Britain became a haven for Nazis led Home Secretary Douglas Hurd in February 1988 to establish an official War Crimes Inquiry, to be headed by Sir Thomas Hetherington, a former Director of Public Prosecutions, and William Chalmers, former head of the prosecutorial Crown Office in Scotland. The sixteen month investigation studied more than three-hundred potential suspects, and the ensuing Hetherington-Chalmers Report, issued in 1989, recommended that British law be broadened to allow prosecution of those who currently reside in Britain and committed murder, manslaughter, or genocide in German-occupied territories during the Second World War.¹⁸ According to the report:

The crimes committed are so monstrous that they cannot be condoned: their prosecution could act as a deterrent to others in future wars. To take no action would taint the UK with the slur of being a haven for war criminals.... War criminals were not given an assurance that they would not be prosecuted here, and we see nothing in the policy or practice of successive British Governments that would prevent the present Government taking whatever action it considers suitable.¹⁹

There remained only one obstacle to prosecution: English law. At the time, English courts could not exercise jurisdiction even against the common law crime of individual murder committed abroad if the accused, found on British soil, was not a British citizen or resident at the time of the commission of the crime. Holocaust perpetrators living in Britain fell within this gap in the law, and so new legislation was necessary.²⁰

It took two years after the issuance of the Hetherington-Chalmers Report for Parliament to pass the necessary legislation. And doing so was not an easy task. Lord

¹⁶ Ibid, 97.

¹⁷ Jon Silverman, 'War Crimes Inquiries' (2000) 50 *History Today* 26.

¹⁸ Hirsh (n 13) 95.

¹⁹ *Report of the War Crimes Inquiry*, (Cm 744, 1989), quoted in 188 Parl. Deb., H.C. (6th ser.) (1991) 23–92, <<http://www.publications.parliament.uk/pa/cm199091/cmhansrd/1991-03-18/Debate6.html>> accessed 20 October 2010.

²⁰ The suspects, of course, could be extradited. However, the suspected Holocaust perpetrators were all collaborators hailing from territories then controlled either by the Soviet Union or one of its Eastern European client states. Even if an extradition request was received from these states, the British were reluctant to send suspects behind the Iron Curtain. The Americans, on the other hand, had no qualms in extraditing former Nazi collaborators to the U.S.S.R. to stand trial.

Shawcross, Britain's lead prosecutor at Nuremberg, surprisingly led the opposition, and he was joined by Lord Hailsham, a former Lord Chancellor. Hailsham accused the Thatcher government of “giving in to a special interest community” – plainly referring to Jews. After the House of Lords twice refused to accede to the legislation, the House of Commons, in a rarely-used parliamentary procedure, overrode the will of the upper chamber and enacted the bill into law.²¹

The War Crimes Act 1991 was “an Act to confer jurisdiction on United Kingdom courts in respect of certain grave violations of the laws and customs of war committed in German-held territory during the Second World War; and for connected purposes.”²² Section 1 of the War Crimes Act 1991 provides:

- (1) ... proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence –
 - (a) was committed during the period beginning 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and
 - (b) constituted a violation of the laws and customs of war.
- (2) No such proceedings shall ... be brought against any person unless he was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom, the Isle of Man or any of the Channel Islands.²³

The War Crimes Act 1991 was a remarkable piece of legislation in that it allowed proceedings for murder or another culpable homicide (i.e. not in self-defense) to be brought against a person irrespective of the nationality of the person. Moreover, it was the first time that Parliament allowed British courts to have jurisdiction for crimes committed outside its territory. The nexus to Britain was the suspect's tie to Britain either through citizenship or residency. Last, Parliament in the Act directed British courts to look to international treaties dealing with laws and customs of war, specifically the Geneva and Hague Conventions in force during the Second World War, as the basis for determining whether the acts committed by the accused were in fact war crimes. In other words, the acts charged must not only constitute “murder, manslaughter or culpable homicide” under British domestic law; they must also be international war crimes.²⁴

To facilitate investigations, a War Crimes Unit was set up both within the police force, in the Metropolitan Police (New Scotland Yard), and the government-run criminal prosecution office, the Crown Prosecution Service. War Crimes Unit detectives, who began searching for evidence in Eastern Europe, Israel, Canada, the US, South Africa and New Zealand, were skeptical at first but then came around to the importance of these prosecutions. Professor Anthony Glees, who served as academic adviser to the original Home Office War Crimes Inquiry, recalls: “At the beginning the police thought Mrs. Thatcher had just got a bee in her bonnet, but within a few months there was nobody who

²¹ Cesarani (n 1) 190–224; 225–46; 247–67.

²² War Crimes Act, 1991, s 13 (U.K.).

²³ War Crimes Act, 1991, s 1 (U.K.).

²⁴ Cesarani (n 1) 190–224; 225–46; 247–67.

was not committed to prosecution. When you saw the files you realised these were people who had committed thousands of murders.”²⁵

Sawoniuk though was still safe, since he was not on the Hetherington-Chalmer list or the list submitted by the SWC to the British government in 1986. He eventually came to the attention of the War Crimes Unit through fortuitous circumstances.

The Soviets began looking for Sawoniuk and other local collaborators soon after the end of the war when villagers identified Sawoniuk as a collaborator. As a result, the KGB opened a file on him, designated as “All Union Search File no 1065.” Over the years, the Soviets made repeated attempts to determine whatever happened to the man serving as chief of the collaborator police force who left with the Germans on the heels of Soviet liberation of Domachevo.²⁶

In 1951, the KGB received a break. Sawoniuk, already residing in the United Kingdom, wrote a letter to Nikolai, still living in Domachevo. At the time, it was common for all mail arriving from the West to be opened by the authorities. The Soviet security service now learned of Sawoniuk’s whereabouts. However, because this was during the height of the Cold War, the KGB did not share their information with the British authorities. In the 1980’s, as Mrs. Thatcher announced that the West could do business with Mikhail Gorbachev, relations between the two nations improved. As a result, the Soviets delivered for the first time to the British a list of Second World War criminals whom they suspected of having fled to the U.K. Sawoniuk, however, still went undetected because the transliteration the Soviets made into English had his name spelled as “Savanyuk.” As a result, the computer search conducted by the War Crimes Unit of National Health Service and pensioner records did not pick up Sawoniuk’s name. He was finally identified and located in 1996, living in the south London district of Bermondsey, when a historian working for the unit pointed out the alternative English-language spelling of his name.²⁷

IV. CLOSING IN AND INDICTMENT

It took nine years from the time the Soviets turned over their list of Nazi collaborators living in Britain for British officials to arrest Sawoniuk. On March 21, 1996 at 10:10 a.m. his past caught up with him when Scotland Yard detectives came knocking on his door. On April 1 and 3, 1996, detectives formally interviewed Sawoniuk at the police station in the presence of counsel. The interviews focused not on his army service under the Germans but on his activities in Domachevo during the German occupation.²⁸

Sawoniuk initially denied everything. He was never a policeman in Domachevo but rather was working as a forced laborer in Germany, alongside other locals who had been forcibly shipped there after German occupation. Moreover, according to his account, Domachevo did not even have a local police force comprised of indigenous non-Germans. The only security function, he claimed, that the non-German locals performed was to keep watch for Russian partisans. These locals were unarmed and did not even wear uniforms. His claims became less credible when he stated that the Jewish population was not restricted

²⁵ Anthony Glees, quoted in Tim Luckhurst, ‘Why Won’t Britain Jail This War Criminal’ *The Guardian*, (London, 2 September 2001).

²⁶ ‘Sawoniuk guilty of war crimes’, *BBC News UK* (London, 1 April 1999). See also Cesarani (n 1) 276–83 and Nick Hopkins, ‘How the net closed around Sawoniuk’, *The Guardian* (London, 1 April 1999).

²⁷ Cesarani (n) 276–283. See also Hopkins (n 26).

²⁸ Hopkins (n 26).

in any way after the Nazi occupation and that there had not been a ghetto at Domachevo. Eventually, Sawoniuk admitted that he had served on the local police force and that at one point he was its senior officer. These admissions came after his indictment, but prior to his trial.²⁹

At this point, we note that Sawoniuk was not the first person prosecuted under the War Crimes Act. The Hetherington-Chalmers Report initially identified 400 potential suspects, and the War Crimes Unit, after their investigation, whittled that list down to 100 individuals. In 1996, five years after the act's passage, the War Crimes Unit prosecutors finally charged a suspect from that list: Syzmon Serafinowicz, another elderly Eastern European who served as a collaborationist police chief in another town in Belorussia. Coincidentally, Serafinowicz and Sawoniuk both served in the same Waffen-SS unit, though apparently they had not known each other. In another coincidence, alternative spellings of Serafinowicz's name also tripped up the investigators, even though Serafinowicz was listed in the telephone book and had lived in the same house in Banstead in Surrey since 1956.³⁰

The Serafinowicz case collapsed, however, on the eve of trial. In January 1997, the judge before whom Serafinowicz was to be tried issued a permanent stay of prosecution after a jury, hearing from medical experts, decided that the accused was unfit to stand trial because of dementia. The 85-year old Serafinowicz died eight months later. By this time, the War Crimes Unit had spent £2 million on the case.³¹

British Holocaust historian David Cesarani blames the result on the conduct of the police investigators of the War Crimes Unit: "The Met unit squandered 18 months attempting to trace Szymon Serafinowicz...even though the correct version was in the phone book. They repeated the same mistake with Anton Sawoniuk...."³² Since Serafinowicz died later that year, Sawoniuk's conviction in 1999 consequently became the first – and to date – the sole successful prosecution of a Nazi war criminal in Britain.

In March 1997, the War Crimes Unit of the Crown Prosecution Service formally charged Sawoniuk, who was a decade younger than Serafinowicz and in better health, with five counts of murder. On May 29, 1998, magistrate Graham Parkinson of Bow Street Magistrates' Court committed Sawoniuk for trial but released him on bail pending his trial. Judge Parkinson, after hearing the proffered evidence from witnesses who came from Belarus and Israel, allowed four of the five charges to go forward. He dismissed the fifth charge because the necessary witness was unable to travel to London to testify at the pre-trial hearings.³³

The charges against Sawoniuk were quite specific and concerned events covering a three month period: between the September 19 - 20, 1942 German-organized murder *Aktion* against the Domachevo Jews, and the end of that year. Each count charged Sawoniuk with the murder of one specific individual: two unidentified Jewish women and two identified Jewish men, all residents of Domachevo. All the murders were alleged to have been committed in the aftermath of the *Aktion*.³⁴

²⁹ R. v Sawoniuk (Anthony), Case No: 1999/02465/X4, 2000 WL 473 (Court of Appeal Criminal Division 2000).

³⁰ Silverman (n 17) 26–28. See also Cesarani (n 1) 276.

³¹ Ibid.

³² David Cesarani, 'Getting Away with Murder', *The Guardian* (London, 25 April 2001).

³³ See <http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0020_0_20618.html> accessed 20 October 2010. See also Silverman (n 17) 26–28.

³⁴ Ray Brandon and Wendy Lower (ed) *The Shoah in Ukraine: history, testimony, memorialization*, (Indiana University Press, 2008) 259.

The witnesses the War Crimes Unit investigators located related to them events in which Sawoniuk killed approximately 20 individuals during his time on the police force. However, since English law requires only one allegation of murder for each count, the prosecution chose to charge Sawoniuk with just four murders, even in those instances where the witnesses could testify that Sawoniuk killed others at the same time.³⁵

Each of the four murder counts was supported by eyewitness testimony. Guilt or innocence would depend, therefore, on the credibility of the four eyewitnesses for each of the murders, as well as corroborating testimony of other witnesses from Domachevo and its environs who would testify about Sawoniuk's activities after German occupation. If Sawoniuk chose to take the stand to contradict the witnesses' testimony, which he did but which the War Crimes Unit prosecutors could not know at the time of preparing its case, Sawoniuk's credibility would likewise be central to the case.

Unlike at Nuremberg and the Eichmann trial, documentary evidence played a minor role in the Sawoniuk trial. No documents could be found showing that Sawoniuk was a policeman in the German-created local police force, or his involvement in the killing of anyone. The Waffen-SS AWOL document located in the German archives, showing a Corporal Sawoniuk as gone missing from his unit in November 1944 and introduced at trial (as noted above as Exhibit 7) ultimately was ruled as being inadmissible by the judge since it could not be properly authenticated according to English criminal procedure evidentiary rules.³⁶

Count 1 accused Sawoniuk of murdering an unknown Jewish woman sometime between September 19-27, 1942. The formal charge stated that Sawoniuk, "a person resident in the United Kingdom on March 8, 1990, in Domachevo, Belorussia, a town under German occupation, murdered a Jewess in circumstances constituting a violation of the laws and customs of war."³⁷ The allegation was based entirely on eyewitness testimony of a local resident, Alexander Baglay, thirteen years old at the time.

According to the 69 year-old Baglay, he and a 16 year-old companion who both resided in Boris, a hamlet of about thirty houses on the outskirts of Domachevo, went into the Domachevo ghetto seeking clothing that they might find in the now-abandoned ghetto. The boys heard shootings coming from the ghetto in the days before. They were confronted by Sawoniuk and fellow officers, who took them back to the police station, located directly opposite the ghetto. They were given shovels, and taken back inside the ghetto. Baglay knew Sawoniuk, since Sawoniuk hired Baglay's father months earlier to disassemble and move the house from the ghetto that Sawoniuk was now living in.³⁸

In the ghetto, the group approached two other police men who were guarding two older Jewish men and a younger Jewish woman, all standing next to a freshly dug hole. Sawoniuk ordered the three individuals to undress. The older men complied with Sawoniuk but the Jewish woman refused. It was not until Sawoniuk threatened her with a truncheon that she did so. The three undressed Jews were then lined up on their knees. Sawoniuk then drew his pistol and shot each in the back of the head at point blank range. Their lifeless bodies were then pushed into the hole that awaited their arrival. At that point, Sawoniuk ordered Baglay and his friend to grab the shovels and cover up the grave. Once the boys

³⁵ R. v. Anthony Sawoniuk, 2 Cr. App. R. 220.

³⁶ R. v. Anthony Sawoniuk, 2 Cr. App. R. 220. See also R. v Sawoniuk (Anthony), Case No: 1999/02465/X4, 2000 WL 473 (Court of Appeal Criminal Division 2000).

³⁷ *Sawoniuk*, 2 Crim. App. at 222.

³⁸ *Ibid*, 222-47.

finished filling the hole with dirt, Sawoniuk offered the boys the victims' clothing, which both boys declined.³⁹

Baglay first told this story to the War Crimes Unit investigators in 1991. He had never previously related this incident to anyone. The friend died in 1986 and so could not corroborate Baglay's account. As noted above, even though Baglay claimed he witnessed Sawoniuk kill three people, two men and one woman, the prosecutors charged Sawoniuk only with the single count of murdering the woman.⁴⁰

Count 2 charged Sawoniuk with another single murder: a Domachevo Jewish man named Shlemko sometime between September 19 and October 4, 1942. This count was also based entirely on an account given by another local witness, Ivan Stepaniuk, also a resident of Borisy. Stepaniuk claimed he witnessed Sawoniuk, along with two other policemen, beat and drag Schlemko into woods a few days after the *Aktion*. When he lost sight of Sawoniuk and Schlemko, Stepaniuk heard the sound of gunfire echoing through the woods. Sawoniuk and the other policemen then returned with their carbines and shovels, with Schlemko being noticeably absent. Stepaniuk never actually saw Sawoniuk shoot Shlemko. Stepaniuk also did not know Sawoniuk's identify at the time of the shooting, and stated that he only learned Sawoniuk's name a few days later from Sawoniuk's brother.

Count 3 charged Sawoniuk with the murder of another unknown "Jewess in circumstances constituting a violation of the laws and customs of war."⁴¹ This act was also said to have taken place between September 19 and October 4, 1942. The key witness for this count was Fedor Zan, another local from Borisy. Zan worked in Brest, and would take a train there from the Domachevo station. On his way home from work in September 1942, Zan got off the train early at the nearby village of Kobelka to visit his sister. From his sister's residence, he decided to cut across the woods to get home to Borisy. While walking home through the woods, he heard shouts and cries. He went towards the noise until he saw and heard Sawoniuk order a group of approximately 15 Jewish women to undress. Not wanting to reveal his presence, Zan hid behind a tree about 127 to 128 paces away. He heard Sawoniuk, who was the only policeman on the scene, instruct the women to place their clothing in a pile and then turn and face the pit. After they did so, Sawoniuk raised a machine gun and killed the women.⁴²

Count 4 charged Sawoniuk with the murder of another Domachevo Jewish man named Mir Barlas sometime between September 4 and December 31, 1942. This count was based on an account given by a former Jewish playmate of Sawoniuk, Ben Zion Blustein, who at age 76 years came from Israel to testify against his former friend. According to Blustein:

I had known [Sawoniuk] since I was nine or 10. He bred pigeons and as children we used to play....[I]n the summer we used to wash in the stream near his house. I therefore used to meet him almost daily...But [h]e became a man of power, a master, a lord, and I was a JewHe used to behave cruelly whenever he wanted and with whomsoever he wanted.⁴³

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ben Zion Blustein, quoted in Jill Serjeant, 'Elderly Jew tells war crimes trial of ghetto horror', *Reuters* (23 February 1999).

Barlas, the victim in Count 4, was also a friend of Blustein. Blustein remembered how the Germans had detained and interrogated Barlas before handing him over to Sawoniuk and other police officers. A few days later, Sawoniuk told Blustein that “Barlas was very courageous”⁴⁴ and that they would soon meet again “in the next world.”⁴⁵ Blustein never saw Barlas again. Blustein did not actually see Barlas being killed or see Sawoniuk do the killing.

V. THE DEFENSE MOVES TO STAY THE PROCEEDINGS

Hearing the case was Mr. Justice Francis Humphrey Potts. On the High Court since 1986, Potts was 67 years old, and held a reputation for being strict. Sawoniuk’s defense team was headed by barrister William Clegg, QC. Clegg, then in his late forties, is a highly sought-out criminal defense barrister. Clegg was likely chosen by Sawoniuk because of his success in getting a stay of prosecution for Serafinowicz. Though his demeanor is unassuming and modest outside of a courtroom, inside he is, as described by one profile “[r]igorously forensic and quietly authoritative.”⁴⁶

The prosecution team was headed by Sir John Nutting, QC, whose clients include the Queen, and who was ranked Number 27 in the 2007 *The Times* (London) list of “UK’s most high profile lawyers.” Nutting and Clegg had faced each other before as prosecution and defense barristers in the Serafinowicz case. In the words of one court observer, Nutting speaks “with an antiquated upper class accent, and is slow and methodical.”⁴⁷

Clegg’s first act on behalf of his client was to file a motion to stay the proceedings, akin to result achieved for Serafinowicz. In this case, however, unlike in *Regina v. Serafinowicz*, Clegg did not argue that Sawoniuk was not competent to stand trial. Rather, he contended that because the events in question took place so long ago it was impossible for Sawoniuk to get a fair trial under standards of English justice. Specifically, Clegg argued that Sawoniuk would be unable to find witnesses that could exculpate him, either because they had died since the events in question, or could not be located more than fifty years later. Lapse of time, Clegg also contended, likewise prevented Sawoniuk from obtaining documents that could exculpate him. In effect, Clegg was arguing that Nazi war criminals discovered today could not be prosecuted in England because such prosecution presents insurmountable challenges to the defense case, making it impossible for a defendant accused of Nazi-era crimes to receive a fair trial.

Mr. Justice Potts rejected Clegg’s motion. As to unavailability of witnesses, he held that whether their absence was detriment or a bonus to the defense was entirely speculative. As to the witnesses presented by the prosecution, their reliability could be tested by the defense through a vigorous cross-examination. With regard to documentary evidence, he also held that the reliability of the documents could be tested within the trial process. The judge also noted that prosecution of Nazi war criminals for events taking place during the Second World War would invariably pose special challenges, and yet, he was required by English law to conduct such a trial. Or to put it another way, as the appellate court later pointed out, it “must have been obvious to Parliament when passing the legislation that these types of evidentiary difficulties would arise.”⁴⁸

⁴⁴ Hirsh (n 3) 108.

⁴⁵ Blustein’s trial testimony, quoted in Hirsh (n 3) 108.

⁴⁶ Roger Hermiston, ‘The Master Defender’, *Suffolk Magazine* (May 2009, profile of William Clegg, QC).

⁴⁷ Hirsh (n 3) 99.

⁴⁸ *R. v Sawoniuk*, Crim. L.R. 2000, June, 506–09.

VI. THE TRIAL

When his trial began, Sawoniuk was “deaf in one ear and nearly blind in one eye. He [was] diabetic. He suffer[ed] from heart disease and high blood pressure. Some years ago...he underwent electro-convulsive therapy for a mental condition.”⁴⁹ His appearance in court and demeanor, however, belied this description given by the Court of Appeal. Sociologist David Hirsh, who sat through the entire trial, describes Sawoniuk this way:

[Sawoniuk] was, in many senses, an ordinary man. Physically, he was not tall. Aged 78 at the time of his trial, he had white hair, which was carefully barbered, and a round baby face with blue-grey eyes peering through his up-to-date glasses. He was always dressed smartly, in a blazer, creased trousers, and shiny shoes, like the old Polish soldier and British Rail ticket collector that he was. He limped, and used a stick, but did not seem particularly fragile. He seemed to be a man who knew how to look after himself. He sat in court next to his solicitors, not in the dock, since he was on bail. He followed the transcript of the proceedings as it appeared on the laptop computer in front of him. He occasionally whispered, rather loudly, perhaps because of his partial deafness, to his solicitors. They seemed friendly and called him Tony. Not once in the whole trial did Sawoniuk look to his right towards the press gallery, or to the public above it.⁵⁰

The first step was to empanel a jury. Unlike in an American trial, attorneys in England do not have the right to conduct the process known as *voir dire*, whereby they question potential jurors regarding their background and have the right to exclude a certain number of jurors for no cause at all, and others for cause by convincing the judge that keeping a certain juror would be detrimental to their case. Considering the nature of the case, however, Mr. Justice Potts did announce to the jurors that if they or their family had suffered from "German actions against Jewish or other races or religions" they should inform the court and would be excused. None of the eight men and four women responded, and so the trial went forward. As far as we are aware, none of the jurors were Jewish.

In his opening statement, Nutting made it clear to the jury that Sawoniuk was eager to join the local police force in Domachevo. He also informed the jury that Sawoniuk originally denied being a member of the police force, but later conceded this point prior to the start of trial. Nutting declared that the prosecution's case would be based on eyewitness testimony, and that the witnesses would testify as to crimes that had taken place more than a half-century ago. And though Nutting conceded it was entirely possible for witnesses in an ordinary criminal trial to have faulty memories after such an enormous time-lapse, he argued that the lapse of time may work here in the prosecution's favor. Here, instead of time creating faulty memories, Nutting proposed that the witnesses could still remember actions committed by Sawoniuk because “they describe events which are literally unforgettable...which once witnessed would remain fixed in a man's memory for his life[.]”⁵¹

⁴⁹ *Sawoniuk*, 2 Crim. App. at 224.

⁵⁰ Hirsh (n 3) 96–97.

⁵¹ Sir John Nutting, QC, quoted in Andrew Buncombe, ‘Enthusiastic Nazi Who Took Pleasure in Slaughter of Jews’, *The Independent* (London, 10 February 1999).

In his defense opening address, Clegg proposed a far different scenario. Clegg first rhetorically asked the jurors: "If an orphaned teenager was asked to join the local police, you may describe him as a willing volunteer, but can we just think what other employment the teenager may have open to him as a career under German occupation?"⁵² The defense portrayed Sawoniuk as being painted into a corner; it was either work for the local police force and guard against partisans or run the risk of being deported himself into forced labor or living life on the run.

VII. THE CASE FOR THE PROSECUTION

The prosecution's first witness was the renowned American Holocaust scholar Christopher Browning. With Browning's help, Nutting set forth before the jurors the Nazi ideology which fueled the Holocaust and the Second World War. Nutting's approach and strategy was well organized. He would have Professor Browning, as his expert witness, set out a roadmap of the Nazis' Final Solution, and in particular the murder operations conducted by the Germans and local collaborators against the Jews in German-occupied Soviet Union. He would then follow with eyewitness accounts of how these murder measures were conducted in Domachevo and identify Sawoniuk as one these local murderers.

Fedor Zan, the next witness, would provide the first part of his testimony not in the London courtroom but in Belarus. To inspect the crime scene, the proceedings were moved to Domachevo, 1100 miles away, where for four days the court entourage and reporters toured the various places where the alleged killings took place. The trip to Domachevo was a first in the history of English criminal procedure; the only other time that a British court convened outside the country was for the inquest in the death of Princess Diana in Paris. Sawoniuk, on the other hand, stayed in London, even though the trip to Domachevo was made at the request of the defense. Clegg argued that the extensive sets of maps and photos the prosecution would be introducing at trial would still not be sufficient to give jurors a feel for the place.⁵³

The group arrived to subzero temperatures which reached -14F. One of the first stops was the site of the old police station and the former ghetto. There, Nutting pointed out the area where Baglay stated he stood 57 years ago, at age 13, and reportedly saw Sawoniuk shoot two Jewish men and one Jewish woman, Count 1 of the indictment.⁵⁴

In another stop, Nutting pointed out to the jurors where Count 2 of the indictment had allegedly occurred: the woods where, according to witness Ivan Stepaniuk, Sawoniuk reportedly struck Schlemko with a shovel before marching him off into the forest and killing him.

The group also traveled to where Ben Zion Blustein would claim he witnessed the Germans hand over Mir Barlas, a local Jew, to Sawoniuk, relevant to Count 4. Other stops included interviewing on video witnesses who were too old and feeble to travel to England. The video testimony would be shown to the jurors back in court. Clegg recalls this trip as being a "surreal experience. [I can] remember quite literally walking through knee-high snow to a cottage in pitch dark, hammering on the door and going in with cameras and taking

⁵² William Clegg, QC, quoted in Matt Wells, 'Nazis' Offer to Accused 'Could Not be Refused', *The Scotsman* (Edinburgh 13 February 1999).

⁵³ Cesarani (n 1) 277. See also *Sawoniuk*, 2 Crim. App. at 232–33.

⁵⁴ *Ibid.*

evidence from this old woman who was sitting in front of a fire with a cat on her lap, about things that had happened 60 years before.”⁵⁵

The trip concluded with viewing the crime scene for Count 3, with witness Zan leading the jury through the forest from his sister’s place to where he saw Sawoniuk force fifteen Jewish women to undress before mowing them down with a machine gun into a pit. Mr. Justice Potts and the jury followed in single file line “trudging briskly through the thick layer of snow.”⁵⁶

Along the way Zan stopped on three separate occasions. The first stop was to show the jury where he was when he first heard the cries of women. The second was to demonstrate where he hid once he realized what was going on. The final stop was to show where Sawoniuk stood while this was going on. The critical issue was whether Zan was able to make an accurate identification of Sawoniuk from his place of hiding. From this demonstration, the prosecution and defense stipulated that Zan stood about 127-128 paces from the spot he supposedly saw Sawoniuk shooting the women, quite a distance.⁵⁷

Upon returning to the Old Bailey, the next witness was Ben-Zion Blustein, the only Jewish witness to testify at trial. Blustein, 76 years-old, was a year younger than Sawoniuk, his former childhood friend. At age 19, he was one of the few Jews to survive from Domachevo by hiding during the Yom Kippur massacre and then surreptitiously joining a group of surviving Jews spared by the Germans to serve as forced laborers in the aftermath of the massacre. After the war, Blustein immigrated to Israel and became a building contractor. He was now retired and living in Jerusalem.⁵⁸

Blustein was a difficult witness. Rather than just answering Nutting’s questions on direct examination, he had a story to tell and insisted on telling it. Accordingly the court had to repeatedly remind Blustein, who testified in Hebrew through an interpreter, to only answer questions that were asked of him and not go into narratives when there was not a question of legal significance pending. Hirsh observed that Blustein, “claimed too much...he did not trust the court to assess his evidence...”⁵⁹

Blustein’s testimony demonstrates the perils of having actual survivors of a genocide or another mass atrocity testify about the event, and especially many years after the events in question. Hirsh, in the chapter on the Sawoniuk trial in his *Cosmopolitan Trials* book, ably dissects the difficulties of transforming Holocaust memory into admissible testimony in courts of common law jurisdictions. Using Blustein’s testimony as a typical example of such difficulties, he points out:

Many Holocaust survivors have published memoirs of their experiences during the genocide. There have also been projects to record the experiences of large numbers of survivors in archives. That which can be accepted as evidence in a criminal trial, however, is different from these memoirs. At least, it may start as memoir, but the memoir is acted upon by the rules and norms of the legal processes, particularly by the process of cross-examination and by that of the sifting out of evidence which is deemed to be inadmissible; the trial process is always striving to transform memoir into evidence.

⁵⁵ Hermiston (n 46) 24.

⁵⁶ Ibid.

⁵⁷ Hirsh (n 4) 541–45.

⁵⁸ Ibid, 537–45.

⁵⁹ Hirsh (n 3), 110.

Giving evidence in any criminal trial, especially for victims of the crime, must always be difficult. Holocaust survivors are accustomed to being in control of the presentation of their memoir and to being listened to by a supportive audience. For a survivor, the demand that the court makes, that it be allowed to take control of the presentation of memoir, to challenge it and to transform it into what it considers to be evidence, must be particularly difficult. [In this case,] Blustein resisted the court's mechanisms and tried to retain control over his own testimony.⁶⁰

At the IMT in Nuremberg, the prosecution's case was almost entirely bereft of survivor testimony; the prosecutors for the most part chose to present their case through cooperating German perpetrators or through documentary evidence, "conceived either as filmic, material or written artifact."⁶¹ In the American trial of the *Einsatzgruppen* the prosecution chose to base their case entirely on German documents.⁶²

More than one hundred survivors testified at the Eichmann trial, but few actually saw Eichmann at the scenes of the massacres, or had even heard of him at the time. Rather, their testimony was presented for didactic purposes, to educate post-Holocaust Israelis and the world-at-large about the Holocaust, but was of little use in making the criminal case against Eichmann. Chief prosecutor Gideon Hausner, in his personal history of the trial, conceded that witness testimony was superfluous: "[I]t was obviously enough to let the [German] archives speak; a fraction of them would have sufficed to get Eichmann sentenced ten times over."⁶³

Following the Sawoniuk case, another Holocaust trial was held in London: the civil libel suit brought by David Irving against American historian Deborah Lipstadt for calling Irving a "Holocaust denier." As a result of the grilling during Blustein's cross-examination a year earlier, Lipstadt's defense counsel chose not to put survivors on the stand during the trial in 2000 to prove the existence of gas chambers and other instruments of the Holocaust's mass murder.

Another negative court experience with the use of Holocaust survivor testimony took place in the Canadian criminal trial of Ernst Zündel in 1985 for Holocaust denial. Zündel's defense counsel took particular glee in trying to discredit the testimony of survivors. Lipstadt quotes Christopher Browning, who testified in all three trials (Zündel, Sawoniuk and Irving), about the Zündel trial: "[Browning] recalled that Zündel's lawyer questioned the survivors on topics with which they were least familiar. 'He had let them twist in the wind as long as the judge allowed it. He seemed not be searching for truth, but for humiliation. It was a horrible ordeal for both the survivors and for the spectators'".⁶⁴

In the Sawoniuk trial, however, the prosecution had no choice. If they were going to convict Sawoniuk of Count 4 – the murder of Mir Barlas – Blustein had to testify about what he saw and heard with regard to the murder.

Blustein testified about how Sawoniuk joined the German-organized police force and the police's role in the persecution and eventual murder of the Domachevo Jews. But the

⁶⁰ Hirsh (n 4) 530.

⁶¹ Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001) 104.

⁶² Hillary Earl, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity Law and History* (Cambridge University Press, 2009).

⁶³ Gideon Hausner, *Justice in Jerusalem* (Thomas Nelson and Sons Ltd., 1967) 292.

⁶⁴ Deborah Lipstadt, *History on Trial: My Day in Court with David Irving* (Harper Collins, 2005) 44.

bulk of his testimony was personal, focusing on his fate as well as the fate of his family and other Jews. Sawoniuk was at most a minor character in Blustein's account, and his name was not mentioned until Blustein had already been on the stand for hours, and even then only in passing. That, of course, was not what Nutting wanted: his aim was to convict Sawoniuk and not to provide the jury the horrid details of the fate of the Domachevo Jews, or what happened to Blustein's family. It was only towards the end of Blustein's direct examination, after many hours of testimony, that Nutting was able to get Blustein specifically to focus on the facts surrounding the allegations in Count 4: the murder of Mir Barlas.

Next came Clegg's cross-examination. For Blustein, the process of being grilled by an experienced criminal defense barrister aiming to discredit him must have seemed at times unbearable. Hirsh refers to Primo Levi's recollection in *If This Is a Man*,⁶⁵ that one of the major motivations that kept Levi alive in Auschwitz was his desire to tell the world of what he observed and experienced. Levi never imagined, however, that his account of Auschwitz would be subjected to a brutal cross-examination by a skilled questioner aiming to pierce holes in the story. As Hirsh observes: "Cross-examination is Primo Levi's nightmare come to life."⁶⁶ And Blustein in Court 12 was now living that nightmare.

Clegg first focused on the inconsistencies of Blustein's statements from testimony given in court as well as previous statements which dated back to 1944. He next focused on the fact that Blustein never mentioned Mir Barlas' death to British police when first questioned in 1995 in Israel. There is also no mention of Mir Barlas in Blustein's published memoir. Blustein also never mentioned the murder of Barlas during his 1944 interrogation by the Soviets. Most critical, Blustein conceded that he never actually saw Sawoniuk kill Mir Barlas.

The next critical witness was Alexander Baglay, whose testimony formed the basis for Count 1: the murder of an unknown Jewish woman and her compatriots that Baglay witnessed when he and his friend came to the now-abandoned ghetto after the massacre to scavenge for clothing. As Hirsh points out: "[O]f the four counts, [Count 1] was by far the strongest. [Alexander] Baglay had witnessed Sawoniuk kill three people; he had known Sawoniuk, and he had been close to him as the murder was committed."⁶⁷

Baglay: ...Andrusha ordered them to undress. The men were about 40. They undressed. The woman, about 28, was reluctant to take her pants off. Andrusha insisted. Andrusha threatened her with a beating. The Jews were emaciated and unshaven. Andrusha shot the Jews in the back of the head. [*Alexander Baglay explains that he and his friend were told to bury the bodies, and told that they could take the clothes.*]

Nutting: Who shot the Jews?

Baglay: Andrusha.

Nutting: With what?

Baglay: With the pistol, in the back of the head.

Nutting: Did they fall into the pit?

Baglay: Yes. One after the other.⁶⁸

⁶⁵ Primo Levi, *If This Is A Man* (Abacus, 1988) 47.

⁶⁶ Hirsh (n 3) 103.

⁶⁷ Ibid, 119.

⁶⁸ Direct-examination of Alexander Baglay, quoted in Hirsh (n 3) 120.

With Alexander Baglay standing only feet away, there were no identification issues. Rather, the sole issue the jury faced with Alexander Baglay's account was whether or not they found him to be a credible witness.

The next significant witness, Ivan Stepaniuk, gave testimony to prove Count 2, the murder of Shlemko a few days after the main massacre. As noted earlier, Stepaniuk recounted seeing Sawoniuk with other policemen leading Schlemko away towards the woods, with Sawoniuk beating him all the while and Schlemko constantly falling to the ground. After Stepaniuk lost sight of the group, he heard a gunshot. Sawoniuk and the other officers then emerged from the woods with rifles and shovels; Schlemko was noticeably absent. On cross-examination, Clegg was able to show that Stepaniuk did not in fact know who Sawoniuk was when he witnessed Schlemko being dragged away.

The next witness was the 75 year-old Fedor Zan, the sole witness for Count 3. As noted earlier, Zan had been walking in the woods when he heard faint cries and screams in the distance. When he came closer, about 127-28 paces away from the scene and hiding behind a tree, he testified that he saw Sawoniuk with a machine gun shouting orders at a group of fifteen women and then shooting all of them. During the court's trip to Domachevo, Zan took the jurors to the spot in the forest where he stated he witnessed the murders.⁶⁹

Clegg sought to discredit Zan's testimony by showing his bias against Sawoniuk. Zan conceded that his uncle and cousin had been partisans, and had been killed by the local police. Zan believed that Sawoniuk was one of the killers, but this murder allegation was not part of the criminal case against Sawoniuk.⁷⁰

During the prosecution's case, other locals testified about Sawoniuk's role as policeman and the brutal way that he conducted himself. One witness testified about an incident when Sawoniuk discovered a young Jewish woman trying to smuggle potatoes into the ghetto, and beat her savagely. Since assault was not a prosecutable offense under the War Crimes Act, Sawoniuk could not be charged for this incident.

VIII. THE DEFENSE CASE

At the end of the case for the prosecution, Clegg motioned to dismiss Count 2 (murder of Barlas, as testified to by Blustein) and Count 4 (murder of Shlemko, as testified by Stepaniuk). Since the only evidence presented for these murders was the testimony of one witness for each murder, and since neither witness actually saw the killings, Mr. Justice Potts dismissed both counts.⁷¹

At this point, odds appeared to favor Clegg being able to obtain a complete acquittal of his client. Both of the other two alleged murders dealt with victims whose names were unknown, and each was based entirely, like the dismissed counts, on testimony of just one witness, Alexander Baglay for Count 1 and Fedor Zan for Count 3 (The person who supposedly could corroborate Alexander Baglay's version of the murders of Count 1 was no longer alive). Each witness had testified about events that occurred over a half-century earlier and, just as critical, neither witness ever related these events prior to Sawoniuk's prosecution.

⁶⁹ Hirsh (n 3) 122.

⁷⁰ Ibid.

⁷¹ *Sawoniuk*, 2 Crim. App. at 227–28.

Everything pointed, therefore, to Sawoniuk not taking the stand by exercising his right to silence. It appears, however, that Sawoniuk insisted on taking the stand to rebut the charges against him. This proved to be a grave error.

On the stand, Sawoniuk admitted that he joined the local police force voluntarily and rose to a senior rank. This, however, was the extent of his admission. He denied that Jews were confined to the ghetto; he denied being present for the Yom Kippur massacre; he denied committing any acts of brutality or murder against the Jews; he even denied knowing the eyewitnesses who testified they had known him. In his own words:

I have done no crime whatsoever. My conscience is clear. I killed no-one. I would not dream of doing it. I am not a monster...Everyone is telling lies. They have been told by the Russian KGB to say there was a ghetto. These devils came here with their lies against me... I have nothing to hide. My conscience is clear and when I am dead, I am going to heaven.⁷²

After Clegg's brief direct examination of Sawoniuk, Nutting proceeded to take apart his statements. It was not hard, since Sawoniuk continued to deny even historical facts such as the existence of the Domachevo ghetto. He also denied being a German soldier.⁷³ When asked about the Waffen-SS document discovered in the German archives and providing detailed information about him, including his former wife's name, Sawoniuk claimed that it was a forgery, created either by the KGB or Scotland Yard. As the cross-examination progressed, Sawoniuk's apparent lack of credibility must have become apparent to the jurors. When Nutting pressed the issue of whether or not an officer could leave the police force without fear of retaliation, he used Sawoniuk's brother as proof that there was indeed a choice. When pressed as to why his brother had left, Sawoniuk responded, "[Nikolai] didn't want to do things like hitting people or killing people." Sawoniuk then tried to mitigate the damage of his statement by testifying that his brother never told him why he left the police force but that his brother "didn't like the idea that the Jews didn't have their freedom."⁷⁴

After the close of the defense case came closing arguments. Sawoniuk's testimony on the stand made Clegg's job more difficult. In his closing statement, Clegg relied on a conspiracy theory to cast doubt on the prosecution witnesses. Clegg reminded the jurors that none of the incidents which led to the four counts were initially reported to the British War Crimes Unit. Instead, they slowly evolved after the witnesses knew who the suspect was; and as Clegg pointed out, all of the eyewitnesses, with the exception of Blustein, were from Borisy. Despite the witnesses from Borisy not being Jewish, at the time of German occupation, residents of Borisy were considered to be aligned with the partisans rather than with the German occupiers. Here before them was Sawoniuk, a self-proclaimed partisan hunter from the town where all but one of the eyewitnesses had lived. This was not mere coincidence, argued Clegg, but rather carefully planned revenge. Sawoniuk's trial in London finally gave the elderly former partisans from Borisy and their sympathizers an opportunity to hold someone accountable for the pain and tragedy they endured during the German occupation.

In his summing up, Mr. Justice Potts explained to the jury the heart of their upcoming deliberations: the stark issue in this case is one of fact. "The Crown's case is that the

⁷² Sawoniuk, quoted in Alun Thorne, 'The Monster Who Almost Got Away', *The Birmingham Post* (Birmingham, 8 November 2005).

⁷³ Cross-examination of Sawoniuk, quoted in 'Sawoniuk Threatens to Storm Out', *BBC News* (London, 23 March 1999).

⁷⁴ Hirsh (n 3) 124.

defendant was a willing executioner of Nazi policy, that he shot the Jewish women referred to in count one and count [three]. The defendant's case is one of complete denial of either of these charges. He admits to being a policeman, but he says: 'At all times I was a friend of the Jews.' The witnesses, he says, who gave evidence against him are liars in league with the KGB and Scotland Yard. There is the issue, and it is for you to resolve it."⁷⁵

IX. THE VERDICT

During the prosecution's case, one of the female jurors fell ill and it was determined she would be out for at least a week. Ultimately, Mr. Justice Potts decided to proceed with eleven jurors considering they were already weeks into trial.

On April 1, 1999, exactly three years after Sawoniuk was first interviewed by the War Crimes Unit of Scotland Yard, the eleven person jury returned to the wood-paneled courtroom with a verdict. After deliberating for fourteen hours over a period three of days, it found Sawoniuk guilty of both of the remaining counts.

To Count 1, the murder of two Jewish men and one Jewish woman, though the charge only made reference to a Jewish woman, the verdict was unanimous. To Count 3, the verdict was guilty by a majority of 10-1. The lack of unanimity was of no legal consequence; English law since 1967 has allowed criminal juries to return verdicts by a margin as low as 10 to 2, so long as the jury deliberates at least two hours.

One thing appears clear: Sawoniuk was convicted on the slimmest of evidence, consisting of uncorroborated testimony of just one witness for each of the murder counts. And though the acts occurred 56 years ago, neither witness had told their story prior to being interviewed by British investigators a half-century later. With the evidence they had, it would not have been surprising if the jury had acquitted Sawoniuk.

Why did the jury convict? We can only speculate, but it appears that when it finally came down to it, the jury believed Alexander Baglay and Fedor Zan and did not believe Anton Sawoniuk. One can only wonder whether this Rashomon-type clash of factual accounts would have been resolved differently by the jurors if Sawoniuk had not taken the stand or, upon doing so, had not denied all, including historical facts. Perhaps if Sawoniuk had been more forthcoming during his time on the stand, admitting additional facts beyond his admission on the eve of trial that he in fact served as a policeman, the jury might have found him more believable.

Former BBC correspondent Jon Silverman, who covered the trial, recalls a point during the cross-examination when Nutting asked Sawoniuk about his army service with the SS. Sawoniuk not only denied doing so, but also lost his temper. Rage filled his face. To Silverman, the rage that Sawoniuk suddenly exhibited brought into the courtroom Andrusha the policeman who could have committed the mass killings testified to by Baglay and Zan, as well as the other killings and assaults that other witnesses had recounted before the jury.⁷⁶

X. SENTENCING

On April 1, 1999, Mr. Justice Potts sentenced Sawoniuk to life imprisonment. At age 79, Sawoniuk was one of the oldest persons to have been convicted of murder in Britain. At the hearing, the judge spoke directly to Sawoniuk:

⁷⁵ Mr. Justice Potts, quoted in *Sawoniuk*, 2 Crim. App. at 223.

⁷⁶ Interview with Jon Silverman, 15 September 2010.

No word of mine can add anything of value to those already written and spoken about the events in which you played a part. I only say this, that though you held a lowly rank in the hierarchy of those involved in liquidating Jews in Eastern Europe, to the Jews of Domachevo it must have seemed otherwise. [One witness] said of you that when you became a policeman you became a man of power, a master and a lord. I am sure from the evidence that we have heard in this trial that he was right when he said that. You have been convicted of charges properly brought, you have had a fair trial, no jury could have given closer attention to the issues raised by this case than the one that has tried you. You have been convicted of 2 charges of murder on clear evidence in my judgment. I pass upon you the sentence fixed by law on each count which is one of life imprisonment.⁷⁷

The sentencing phase of *Regina v. Sawoniuk* did not pass without additional drama. In England, a life sentence for murder must be confirmed by the Home Secretary, who takes into account the requirements of retribution and general deterrence. Before doing so, however, the Home Secretary receives recommendations from the trial judge and the Lord Chief Justice. The Home Secretary then sets a so-called “tariff” – the minimum amount of time a life-term defendant must spend in jail before being considered for parole. In this case, Mr. Justice Potts recommended that Sawoniuk should die in jail. In his report, he wrote: “Given the defendant's age and the nature of the offences, to release him before his death would, in my opinion, defeat the purpose of the War Crimes Act.”⁷⁸ The Lord Chief Justice, Lord Bingham, disagreed. He wrote:

The judge's view is plainly a tenable, and perhaps preferable, approach to this unique case, and he has had the experience of living with these harrowing facts for weeks. An alternative approach, to which I myself incline, is that general deterrence has little part in this sentence and retribution must be moderated when delayed for nearly 60 years and visited on a man approaching the age of 80.⁷⁹

Lord Bingham in turn recommended a tariff of five years. After the below-discussed appeals were exhausted, Jack Straw, the Home Secretary, ultimately agreed with Mr. Justice Potts and rejected Lord Bingham’s recommendation. He decided that Sawoniuk should die in prison.

XI. APPEALS

Sawoniuk appealed to the Court of Appeal. In 2000, a three-judge appellate panel, headed by Lord Bingham, unanimously affirmed the conviction.⁸⁰ In its decision, the Court of Appeal did not grant leave for Sawoniuk to appeal to the Law Committee of the House of Lords, the predecessor body to the current Supreme Court of the United Kingdom. Consequently, Sawoniuk made his last challenge by going outside Britain and appealing to the European Court of Human Rights (ECtHR). Because the U.K. is a member of the Council of Europe

⁷⁷ Ian Bryan and Peter Rowe, ‘The Role of Evidence in War Crimes Trials: The Common Land and the Yugoslav Tribunal’ (1999) 2 YBHIL 317.

⁷⁸ Mr. Justice Potts, quoted in Francis Gibb, ‘Hope of Release For War Criminal’ *The Times* (London, 25 June 1999).

⁷⁹ Ibid. (Lord Bingham, quoted in Gibb).

⁸⁰ *R. v. Sawoniuk*, [2000] 2 Crim. App. 220.

and a party to the Council's European Convention of Human Rights (ECHR), a criminal defendant from a state party who has exhausted his domestic remedies can appeal to the ECtHR by arguing that the state party violated a provision of the ECHR in its domestic proceedings in the course of prosecuting the defendant.

Before the ECtHR, Clegg argued that his client's right to a fair trial, guaranteed by Article 6 of the ECHR, was violated by British authorities. He also argued that Britain's imposition of a mandatory life sentence upon his elderly and frail client also violated Articles 3 and 5 of the Convention as being arbitrary and disproportional. In May 2001, a seven-judge panel of the ECtHR unanimously rejected these contentions.⁸¹ The ECtHR found that the large gap of time between the crime and its prosecution does not necessarily make the trial unfair, especially since under international law no statute of limitations exists for war crimes. It concluded:

This Court finds that no issue can arise under Article 6 insofar as the jury was left to decide for itself whether the evidence dating back to events in 1943 was credible and reliable. As the Court of Appeal pointed out, the key evidence in the case did not concern the purported identification, years after the event, of a suspected perpetrator of war crimes but the recollection by witnesses of shocking events, likely to have made a deep impact, which involved a person whom they already knew.... In conclusion, the Court finds, on examination of the complaints individually and taken together, that the applicant was not deprived of a fair trial within the meaning of Article 6 § 1. These complaints must therefore be rejected as being manifestly ill-founded...⁸²

On the morning of November 6, 2005, at age 84, Anthony Sawoniuk died in Norwich prison of heart failure due to natural causes. He had been jailed for over 6 ½ years.

XII. THE AFTERMATH

As noted earlier, the War Crimes Act was a highly controversial piece of legislation, becoming law only by the House of Commons having to overrule the majority of the House of Lords. As a result, the law always seemed to be under strict scrutiny.

In the month following Sawoniuk's conviction, the Commissioner of the Metropolitan Police announced that the War Crimes Unit was being disbanded for "operational" reasons. He added that the Unit had become redundant because the police had "no more leads for the police to investigate."⁸³ Other units of the police could still investigate war crimes arising out of the Second World War, but only if information was brought to the police's attention. The latter statement was a mere formality. The death-knell for further prosecutions appeared clear when the Met concurrently announced that it would begin to limit the War Crimes Act in its application. As noted by Cesarani in 2001:

⁸¹ *Sawoniuk v. United Kingdom*, 63716/00 ECHR (29 May 2001) 1–10.

⁸² *Ibid.*

⁸³ Reasons for the disbanding of the Metropolitan Police War Crimes Unit, FOI 2867, March 10, 2006, (Release in March 2006 of documents explaining why the War Crimes Unit was disbanded in 1999).

Although the War Crimes Act was intended to apply to anyone suspected of "grave violations of the laws and customs of war committed in German held territory during the second world war," in practice it was modified to restrict its scope dramatically. At a press conference in March 1999, following the conviction of Sawoniuk, a spokesman for the Met explained the criteria for the prosecution. In addition to safe identification and solid eye-witnesses, "proof that the defendant was in a position of command, responsibility [was] also an important factor in deciding on the defendant's culpability." Sawoniuk met this standard, but others who were equally as guilty of mass murder did not. The exclusion of those who were not officers indicates that a decision was quietly made by law officers, presumably in concert with the Home Office, to ignore so-called "small fry" no matter how bloody their hands.⁸⁴

Cost appears also to have been a major consideration. During its existence, it cost at least £1.5 million per year to run the unit. The total cost of trying Sawoniuk was £6.5 million. Though the War Crimes Act 1991 remains technically on the books, the noble enterprise of prosecuting Nazi collaborators who "committed [war crimes] during the period beginning 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation" is over. Even if an aging Nazi war criminal was discovered today living in Britain, that person would be 85 or older. Unlike Germany – which is still willing to prosecute such geriatric Nazis or collaborators – or the United States – which is willing to denaturalize and deport them – the British appear uninterested in taking either course of action. The usual reason given is that these individuals are too feeble to assist in their defense and to undertake the rigors of a trial. It is an especially strange answer coming from Britain, where, as of 2010, 51 peers over 85 years old serve on the House of Lords, helping to run the United Kingdom.⁸⁵

The alternative of deportation has always offered more promise than actual prosecution. In the Sawoniuk case, for example, it would have been easy to prove that Sawoniuk had entered Britain under false pretenses. An "Aliens Report" discovered in the Home Office archives recounts Sawoniuk's lies in his entry papers that he was a forced laborer for the Germans working on their railways until 1941 and then sent to work on a German farm until he was liberated in autumn 1944. No government has sought, however, to modify the War Crimes Act by seeking deportation rather than actual criminal prosecution. Cesarani laments: "[B]y requiring prosecutions for murder, rather than denaturalization and deportation, the War Crimes Act set an almost impossibly high threshold of evidence."⁸⁶

The "small fry" exclusion from prosecution that Cesarani criticized in 2001 continues a decade later. According to Cesarani, writing in 2010, "The collaborators in the U.K. who were identified in previous investigations are 'small fry' and the Government has not departed from its policy of only prosecuting those in command responsibility. Age and infirmity will always be an obstacle, more so if the alleged perpetrator was 'merely' taking orders."⁸⁷

⁸⁴ Cesarani (n 32).

⁸⁵ See <<http://www.publications.parliament.uk/pa/ld201011/ldselect/ldleader/48/4803.htm>> accessed 1 October 2011.

⁸⁶ Cesarani (n 32).

⁸⁷ Email from David Cesarani to Michael Bazyler, 8 October 2010.

Former BBC correspondent Jon Silverman, who is also critical of the “small fry” exclusion, conducted his own investigation of the extent of the Nazi refugee problem in Britain. Silverman likewise laments the lost opportunity, allowing those who came to Britain with blood on their hands to live out peacefully their years in Britain. Going back to the original list of 400 suspects identified by the Hetherington-Chalmers Report, Silverman notes:

In 259 of the 400 cases investigated, there was either insufficient evidence to prosecute or the subject’s health precluded a prosecution. Even if only 20 per cent were guilty, that’s more than fifty people who lived out their lives in tranquility, having taken part in the greatest act of mass murder of the twentieth century. Was Britain a haven for war criminals? The answer is self-evident.⁸⁸

Cesarani places some of the fault on the English judiciary. “Sections of the judiciary objected to the act. These people are very influential.”⁸⁹ In a 2001 piece for *The Guardian* subtitled “The War Crimes Act Has Produced a Pathetic Single Conviction,” he expounded:

Despite overwhelming evidence that Britain harbors Nazi collaborators, a significant section of political and legal opinion has stubbornly opposed bringing them to justice. In June 1992 and again in November 1994, peers led by Lord Campbell of Alloway passed legislation designed to nullify the [War Crimes Act], even though it had been passed by substantial majorities. This legislation perished in the Commons, but it sent a message to law officers that their influential senior colleagues reviled war crimes prosecutions.⁹⁰

We recall the words from the Hetherington-Chalmers Report which led to the passage of the War Crimes Act: “The crimes committed are so monstrous that they cannot be condoned: their prosecution could act as a deterrent to others in future wars. To take no action would taint the UK with the slur of being a haven for war criminals”.⁹¹ Britain’s decision to prosecute only two individuals under the Act – Sawoniuk and Serafanowicz – sadly turns that slur into a fact.

The legacy of the Sawoniuk trial: Britain’s response to the presence of modern-era suspects of genocide, crimes against humanity, war crimes and torture

The remaining part of this article examines what happened in the aftermath of the failed effort of the English criminal justice system to prosecute English nationals for Nazi-era crimes. It analyzes the implications of this failed effort upon the current attempts to bring to justice perpetrators of modern-day genocides and other mass atrocities who, like the refugee

⁸⁸ Jon Silverman, ‘War Crimes Inquiries’, (2000) *Today’s History* 26.

⁸⁹ Tim Luckhurst, “Why Won’t Britain jail this war criminal,” *The Observer*, (London 1 Sept. 2001)(quoting David Cesarani).

⁹⁰ *Ibid.*

⁹¹ See note 19.

perpetrators in the immediate post-World War II period, are currently residing as asylum seekers or refugees in the UK. The United Kingdom's stated policy is that the country should not be a refuge for war criminals or those who have committed crimes against humanity, or genocide.⁹² Sadly, this policy does not appear to align with practice. While it is not fully clear how many suspects of post-Holocaust atrocities currently reside in the UK, there is some data, specifically kept by the UK Border Agency War Crimes Team. The War Crimes Team determines whether applicants for entry into the UK, including asylum seekers, may have committed war crimes and related offences. Between August 2005 and June 2010, it recommended that immigration action be taken against 495 suspected war criminals.⁹³ However, the number of suspects present in the UK could be much higher, given the scale of migration into Britain at the end of conflicts and taking into account that until recently, only limited vetting processes and background checks were carried out.

As is evidenced by the Serafinowicz case, time is always to the advantage of a suspected war criminal. This, of course, was the factor which ultimately saved Augusto Pinochet from being extradited to Spain on charges of mass torture. Whilst the decisions of the UK's highest court were lauded for recognizing that the former President was not immune for acts of torture,⁹⁴ in the end, the executive did not follow through with the judicial decision to allow the extradition because of Pinochet's advanced age and ill-health.⁹⁵

The one successful prosecution: the Zardad case

As of this writing in 2011, there has only been one successful modern atrocity prosecution. Faryadi Zardad Sarwar, an Afghani mujahadeen military commander, was arrested and accused of overseeing a system whereby travelers and traders were stopped at a strategic checkpoint that he controlled in Sarobi (between Peshawar and Kabul) and tortured in order to obtain ransoms from family members. Zardad's trial took place at the Old Bailey in London in 2005 and he was convicted for acts of torture and hostage-taking that had taken place in Afghanistan in the 1990s. He was sentenced to twenty years imprisonment. Interestingly, revelations of Zardad's presence in the UK came to light during a 1999 BBC interview with the Taliban's Foreign Minister who accused Britain of sheltering the criminal. Zardad had applied for asylum in the UK in September 1998. BBC investigative journalists then prompted the police investigation leading to Zardad's arrest and eventual trial. In his first trial in October 2004, jurors heard most of the witness testimony by a special video-link that was set up in the UK Embassy in Kabul. Part of the reason to rely on video-link

⁹² See Hansard Commons Debates, Daily Hansard – Written Answers 28 Feb 2011: Column 100W (war crimes).

⁹³ Ibid.

⁹⁴ House of Lords, *R. v. Bartle and the Commissioner of Police for the Metropolis and others* (Appellants), ex parte Pinochet (Respondent); *R. v. Evans and Another and the Commissioner of Police for the Metropolis and others* (Appellants), ex Parte Pinochet (Respondent), Judgment of 25 November 1998, 37 ILM [1998] 1302; House of Lords, *R. v. Bartle and the Commissioner of Police for the Metropolis and others* (Appellants), ex parte Pinochet (Respondent); *R. v. Evans and Another and the Commissioner of Police for the Metropolis and others* (Appellants), ex Parte Pinochet (Respondent), Judgment of 24 March 1999, [1999] 2 All E.R. 97.

⁹⁵ Decision of British Home Secretary Jack Straw of 2 March 2000 to end extradition proceedings on humanitarian grounds linked to Pinochet's ill-health.

testimony pertained to the reluctance to grant visas to the witnesses.⁹⁶ Unfortunately, this first Zardad prosecution resulted in a hung jury.⁹⁷ One of the reasons cited was the difficulty for British jurors to appreciate the context of the evidence and the distance of the 40 witnesses who gave testimony by video-link. Technically, the cumulative time gap between questions being posed at the Old Bailey in London and being heard in Kabul, translated into local language, the time for the witnesses to reply and the translation of the reply into English contributed to what has been described as a “flat, unemotional and unemotive effect of the witnesses’ evidence.”⁹⁸ The trial was re-launched in 2005 with a much greater emphasis on in-person testimony, and it was this second try that resulted in Zardad’s conviction and 20 year sentence in July 2005.⁹⁹

One important precedent set by the case was the dismissal of the defence submission that Zardad was not a public official or a person acting in an official capacity as required by Section 134(1) of the Criminal Justice Act which incorporates the UN Convention against Torture into domestic law and formed the basis of the torture charge against Zardad.¹⁰⁰ It was found that although Zardad was not a *de jure* public official, he was to be treated as a public official on a *de facto* basis, which was sufficient to fall within the Act.

XIII. RWANDAN GENOCIDE SUSPECTS: A WINDOW OF THE CHALLENGES TO MOUNT SUCCESSFUL PROSECUTIONS IN THE UK

The example of Rwandan genocide suspects in the United Kingdom provides some useful insights into the array of barriers impeding war crimes prosecutions in the UK. As part of a broader policy of the Rwandan Government to seek the return of genocide suspects located abroad, on 24 August 2006, it issued warrants for the arrest of four named genocide suspects who were living in the UK. The men were arrested in the UK on 29 December 2006 and held in custody pending the outcome of the Rwandan Government’s request for their extradition to face trial in Rwanda on allegations of genocide, conspiracy to commit genocide, complicity in genocide, crimes against humanity and other crimes relating to their alleged involvement in the 1994 genocide.

The extradition request was considered in the City of Westminster Magistrates Court by District Judge Anthony Evans and on 6 June 2008 he referred the cases to the Secretary of State for her consideration and decision, after rejecting all the arguments raised by the defence in the hearing. These had included the argument that the men’s extradition was incompatible with the European Convention on Human Rights, particularly article 6, in that they would not receive a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.¹⁰¹ In the course of his ruling Judge

⁹⁶ Mari Reid, ‘Video-link witness evidence’, in REDRESS and FIDH, ‘Universal Jurisdiction Trial Strategies: Focus on victims and witnesses, A report on the Conference held in Brussels, 9–11 November 2009’ (November 2010) 41–42.

⁹⁷ See <http://news.bbc.co.uk/2/hi/uk_news/3733198.stm> accessed 1 October 2011.

⁹⁸ See Paul Taylor, ‘The Prosecution of Serious International Crimes’, in REDRESS and FIDH, ‘Fostering A European Approach To Accountability For Genocide, Crimes Against Humanity, War Crimes And Torture: Extraterritorial Jurisdiction And The European Union’ (April 2007) 78–80.

⁹⁹ See <http://news.bbc.co.uk/2/hi/uk_news/4693239.stm> accessed 1 October 2011.

¹⁰⁰ *R. v. Zardad*, judgment of 7 April 2004.

¹⁰¹ See *Government of the Republic of Rwanda v Vincent Bajinya and three others*, City of Westminster Magistrates’ Court, judgment of District Judge Anthony Evans, 6 June 2008.

Evans also said that it was “the correct course of action for the trials to take place in Rwanda”.¹⁰² The Home Secretary ordered their extradition on 1 August 2008. The four men appealed to the High Court against the decisions of Judge Evans and the Home Secretary, and on 8 April 2009 the High Court upheld the appeal.¹⁰³

Under UK law, for an extradition to proceed, unless special arrangements are in place, the country seeking extradition must usually show that there is sufficient evidence to bring a court case against the individual to be extradited. The High Court, same as Judge Evans of the District Court, concluded that the suspects had ‘a case to answer’, and thus that the evidentiary test was satisfied.¹⁰⁴ Despite this, the High Court in London ordered the release of the suspects after rejecting the extradition request because of fair trial concerns.¹⁰⁵ The High Court judges held that there was a real risk the four men would suffer a flagrant denial of justice, noting that defence witnesses in Rwanda were afraid to give evidence in their favor and that there was a real risk of executive (government) interference with the judiciary in Rwanda. As a result, the four men were released from custody without conditions or risk of prosecution because of a then-gap in UK law; there was no jurisdiction under UK law to bring a prosecution for genocide occurring in 1994. The patchwork of universal jurisdiction legislation in Britain gives courts criminal jurisdiction over grave breaches of the Fourth Geneva Convention committed in an international armed conflict and under occupation¹⁰⁶ and torture.¹⁰⁷ Additionally, when the UK ratified the International Criminal Court statute, its domestic law implementing the Statute provided for a limited universal jurisdiction against persons residing in the UK. However, the 2001 International Criminal Court Act is not retrospective and thus does not apply to events predating the entry into force of the Act, and thus, not to the 1994 Rwandan genocide. The result is that the suspects could get on with their lives even though it was judicially determined that there is sufficient evidence to warrant their trial.

The outrage sparked by this anomaly led to a reform of the law, which provided for a degree of retrospective jurisdiction for most crimes under the ICC Act. The change was brought about through an amendment to section 70 of the Coroners and Justice Act 2009.¹⁰⁸ The effect of this amendment, which came into force on 6 April 2010, is to give UK courts jurisdiction over genocide, war crimes and crimes against humanity, committed abroad after 1 January 1991 when the suspect is resident in the UK.

Once the amendment came into force, it was thought that the Crown Prosecution Service, the prosecution service that had taken on the extradition for the Rwandan government and thus had an important role, together with the Metropolitan police, in marshalling and collective the evidence, would have proceeded with a criminal trial. However, quite the opposite has happened. The Government has stated that it prefers to wait for the Rwandans to make a second extradition request, presumably after ‘fixing’ all the fair trial flaws identified by the courts, in lieu of a UK prosecution. This is an interesting take on prosecute or extradite obligations, whereby there is an obligation to prosecute in the absence of an extradition request. How long will it be acceptable to wait for a new

¹⁰² Ibid, para 551.

¹⁰³ *Vincent Brown (aka Vincent Bajinya) v Government of Rwanda and the Secretary of State*, [2009] EWHC 770 (Admin), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2009/770.html> > accessed 1 October 2011.

¹⁰⁴ Ibid, paragraphs 124–136. Section 84 (3) of the *Extradition Act 2003*.

¹⁰⁵ Ibid.

¹⁰⁶ Geneva Conventions Act of 1957.

¹⁰⁷ Criminal Justice Act 1988 s 134.

¹⁰⁸ Coroners and Justice Act 2009.

extradition request to be made by the Rwandan Government? – Another year? Two years? Five years? With the passage of each day, justice becomes a more remote possibility.

Of course, the passage of time is not only an issue for the suspects. Age is also a factor that can impact upon witnesses who will suffer the same frailties. Their ability to recall with precision traumatic events may lessen with time. Age can also negatively impact the availability of documentary and other secondary forms of evidence. But advanced age and poor health are not the only factors impeding prosecutions.

XIV. LIMITED INVESTIGATIONS AND PROSECUTIONS CAPACITY

Although allegations have been raised against numerous individuals who are, or have been, physically present in the UK, the number of investigations and arrests has been distinctly low.¹⁰⁹ As already indicated, only one modern atrocity case has led to a conviction. The absence of a dedicated specialized investigation and prosecution unit has naturally resulted in poor resourcing of police and prosecution services tasked with following up on atrocity cases. Insufficient time has been devoted to tracking down suspects and the collection of evidence.

In the UK as well as many other European countries, both victims and suspects of atrocity crimes tend to enter the country as asylum or visa applicants. The asylum process thus is an important tracking tool to identify potential suspects. The Council of the European Union has identified this problem in its decision on ‘the investigation and prosecution of genocide, crimes against humanity and war crimes’, urging Member States to “take the necessary measures to ensure that the relevant national law enforcement and immigration authorities are able to exchange the information, which they require in order to carry out their tasks effectively.”¹¹⁰ A specialized war crimes team was established within the Immigration and Naturalization Department (IND) of the UK Border Agency in 2004.¹¹¹ The team may take one of several actions in respect of people who may have committed or been complicit in serious international crimes. These include refusing leave to enter, excluding from refugee status and depriving citizenship as well as revoking refugee status

¹⁰⁹ Not all cases are known or in the public domain. Ongoing investigation are typically not publicised in order to avoid alerting suspects who may flee the jurisdiction if they have a veritable fear of prosecution. However, a few examples may shed some light. In September 1997, a Sudanese doctor, Mohammed Ahmed Mahgoub, was charged in Scotland in connection with the alleged torture of detainees at a secret detention centre in Sudan. The case was dropped shortly before the scheduled trial date, with little explanation from authorities. The allegations were first raised by Sudanese refugees in the UK. In addition, there were several attempts to bring a criminal prosecution against Pinochet before and during his detention pending the determination of the Spanish extradition request. Several requests were brought against Israeli officials for war crimes allegations, described in more detail later in the article. Recently a Peruvian and a Zimbabwean suspect were arrested on international crimes charges, though to date the cases have not significantly progressed due to a lack of evidence.

¹¹⁰ Council Framework Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal 118/12, 14 May 2003, Art. 2.

¹¹¹ Report of the Home Office, ‘Secure Borders, Safe Haven- Integration with Diversity in Modern Britain’, (February 2002) 103. The team is now called “Research and Information Team” (RAIT) at 27.

where applicable.¹¹² The team may also refer cases to the Metropolitan Police, but does not automatically do so.

As has been indicated, the War Crimes Unit which was set up specifically to investigate and prosecute Holocaust-era crimes disbanded after Sawoniuk's conviction. On 10 March 2006, the Home Office released documents¹¹³ which suggest that 'the decision to disband the Unit was an operational decision' made by the Metropolitan Police who stated in a 'Policing of London Debate 1999' briefing that 'there were no more leads for the police to investigate' and that 'if new evidence were to come up this would be investigated by the police, but not through a specific War Crimes Unit.'¹¹⁴ Whilst it continued to be possible for suspects to be prosecuted under the War Crimes Act, no further cases proceeded to trial. Arguably the absence of a specific focus of a specialized unit dedicated to the investigation and prosecution of war crimes – both Holocaust-era crimes and modern era atrocities and beyond, and competing national priorities, has inhibited further cases. Despite renewed calls in recent years to establish a new specialized unit, with a mandate over modern era atrocities, to date this has not been acted upon. The existing specialized unit in the Immigration and Nationality Directorate is an important tool for tracking suspects, however what is needed is a dedicated investigations and prosecutions unit capable of following up on the leads coming from the IND.

Currently, the Metropolitan Police is charged with the investigation of international crimes cases, including allegations of genocide, war crimes, crimes against humanity and torture. Investigations are taken up by the Serious Crime Group of the Metropolitan Police (SO15). There are a number of investigators working on an ad-hoc basis on war crimes and other modern atrocity cases, alongside cases related to terrorism. In May 2007, the Counter Terrorism Division of the Crown Prosecution Service (CTD) entered into a protocol with the Crimes against Humanity Unit of SO15.¹¹⁵ This was a welcome sign, though there are a number of gaps, including the failure to include in the arrangements cooperation on torture investigations and prosecutions, despite the clear jurisdictional basis for extraterritorial torture prosecutions.¹¹⁶ The Counter-Terrorism Department of the Crown Prosecution Service has also set up a "Community Involvement Panel for War Crimes" which includes civil society representatives working on anti-impunity issues. The Panel twice a year and provides a platform for prosecutors, police investigators and civil society to discuss and share information on specific issues in relation to serious international crimes cases.¹¹⁷

XV. LIMITED POLITICAL WILL

¹¹² UK Border Agency, 'Identifying, handling and considering asylum claims made by suspected war criminals and perpetrators of crimes against humanity, including genocide', (undated) available at <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/suspectedwarcriminals.pdf?view=Binary>> accessed 1 October 2011.

¹¹³ Reasons for the disbanding of the Metropolitan Police War Crimes Unit, FOI 2867, 10 March 2006, available at: <<http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information/foi-archive-crime/2867-war-crime-unit?version=1>> accessed 1 October 2011.

¹¹⁴ Ibid, 4.

¹¹⁵ Crown Prosecution Service, War Crimes/Crimes Against Humanity Referral Guidelines, 8 July 2011.

¹¹⁶ Criminal Justice Act 1988 s 134.

¹¹⁷ For the Terms of Reference see <www.cps.gov.uk/your_cps/our_organisation/ctd.html> accessed 1 October 2011.

Despite the stated governmental policy that the United Kingdom should not be a safe haven for war criminals,¹¹⁸ an examination of the practice reveals that there is only limited political will to make good on this commitment, particularly when faced with the sensitivities associated with prosecuting suspects coming from allied countries which have never themselves recognized the existence of the crimes, let alone investigate or prosecute them. The limited political will is also evidenced by way of the failure to set up a specialized unit and to afford an appropriate level of dedicated resources to the cause of investigating and prosecuting such cases, as already referred to above. The failure to institute criminal proceedings against the four Rwandan genocide suspects, after Rwanda's failed bid to have them extradited, is also a sign of the limited political will to proceed with extraterritorial atrocities prosecutions.

XVI. THE ROLE OF THE EXECUTIVE

In the United Kingdom, it is usually the police that decide whether to investigate a case and the prosecution authorities, whether to prosecute. In contrast, for war crimes and other international crimes cases, before any prosecution can proceed, the consent of the Attorney General, a political appointee, is required.¹¹⁹ Prosecutorial discretion can operate to prevent the filing of frivolous complaints, though the exercise of the discretion by a political appointee raises questions about the potential for abuse. The Attorney General enjoys absolute discretion over the prosecution of such offences,¹²⁰ though there are criteria that must be followed in the exercise of the discretion. In addition to questions about the sufficiency of evidence and the prospects of a conviction, part of the test applied by the Attorney General in considering whether to provide consent relates to whether it can be said that the circumstances are such that it would be in the public interest for there to be a prosecution.¹²¹

It was not clear at what stage in the process consent must be sought or granted, but typically the Crown Prosecution Service will involve the Attorney General at an early stage. Following an application by private parties, a magistrates court in London in the case against Doron Almog held that the Attorney-General's consent was not needed to issue an arrest warrant, but that consent was required for the issuance of a summons.

Almog, a former Israeli General, flew into Heathrow Airport in September 2005. Shortly before, an application was made and a warrant was subsequently issued for his arrest in relation with allegations relating to the violation of the Geneva Conventions in connection with the bulldozing of more than 50 houses in the Rafah refugee camp in the Gaza Strip, when Almog was head of Israel's Southern Command. Upon arriving at Heathrow airport on 11 September 2005 the police were waiting to execute the arrest warrant. Almog, however, did not disembark the plane. Apparently, he was advised by the military attaché of

¹¹⁸ See Hansard Commons Debates, Daily Hansard – Written Answers 28 Feb 2011 : Column 100W (war crimes).

¹¹⁹ Criminal Justice Act 1988, s 135; Geneva Conventions Act 1957, s 1A (3) (a); International Criminal Court Act 2001, s 53 (3).

¹²⁰ Criminal Justice Act, s 135; Geneva Conventions Act, s 1 A; International Criminal Court Act, s 53 (3); War Crimes Act, s 1 (3).

¹²¹ Written answer by the Attorney General to Mr Boateng, Parliamentary question 19/07/93 published in Hansard.

the Israeli embassy not to leave the plane and to return directly to Israel and he heeded this advice.¹²²

Following the Almog incident, Israeli officials have met with Home Office representatives to discuss possible changes to the Prosecution of Offences Act, ostensibly to take away the power of district judges to issue arrest warrants in such cases. The changes were strongly opposed by civil society groups given the crucial role such warrants play: they enable a judicial authority to respond swiftly to the presence or expected impending arrival of a suspect. Also of concern was the role of a foreign government in pressing for such legal reforms. The calls for reforms from this corner became more insistent following the apparent issuance of an arrest warrant for former Israeli Foreign Minister Tzipi Livni, for her role in 'Operation Cast Lead'.¹²³ Livni cancelled her scheduled visit.

Whilst proposals to reform the law initially sought to do away with the ability of individuals to make a private application for an arrest warrant by a magistrate in international crimes cases, the legislation which was eventually passed requires the Director of Public Prosecutions (DPP) to give consent to any such private requests.¹²⁴ According to the Explanatory Notes accompanying the new provision, "requiring the DPP's consent is intended to ensure that an arrest warrant is issued only where there is a prospect of successful prosecution."¹²⁵

On 5 October 2011, a fresh application for an arrest warrant was made against Livni. Two days later, the Crown Prosecution Service indicated that it had been served with a certificate by the Foreign Secretary, William Hague, declaring that the Foreign Office "has consented to the visit to the UK of Ms Livni as a special mission".¹²⁶ The status of special mission would afford the former minister with diplomatic immunity for the period of the mission, making her immune from arrest.¹²⁷ Lawyers for the applicants called the retrospective granting of special mission status an abuse of law, tying the hands of the DPP.¹²⁸

XVI. CONCLUSION

What lessons can be learned? The Serafinowicz imbroglio illustrates that speedy prosecutions are essential for Holocaust-era war crime prosecutions, since any still-living culprits will be of advanced age. It also illustrates another important point: time is always to

¹²² 'Israel general avoids UK arrest', *BBC News* (London, 12 September 2005).

¹²³ Ian Black and Ian Cobain, 'British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni', *The Guardian* (London, 14 December 2009).

¹²⁴ Police Reform and Social Responsibility Act 2011 (c.13) which received Royal Assent on 15 September 2011.

¹²⁵ Police Reform and Social Responsibility Act 2011 (c.13) Explanatory Notes, Para. 19.

¹²⁶ Owen Bowcott, 'Tzipi Livni spared war crime arrest threat', *The Guardian* (London, 6 October 2011).

¹²⁷ See Crown Prosecution Service, CPS statement in relation to Ms Livni's visit, 6 October 2011, available at:

<http://www.cps.gov.uk/news/press_statements/_cps_statement_in_relation_to_ms_livni_s_visit/> accessed 1 October 2011.

¹²⁸ Hickman and Rose, solicitors and the Palestinian Centre for Human Rights, 'New Legislation Fails to Give Tzipi Livni Protection From Arrest', 6 October 2011, available online at: <http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=7768:new-legislation-fails-to-give-tzipi-livni-protection-from-arrest-&catid=36:pchrpressreleases&Itemid=194> accessed 1 October 2011.

the advantage of a suspected war criminal. As example, such notorious post-Holocaust atrocities as the Rwandan genocide of 1994 and the mass murders and rapes in Bosnia in the early 1990's after the disintegration of Yugoslavia were committed two decades ago. This means that the perpetrators are now middle-aged and beyond, especially the elder leaders who instigated their younger compatriots to commit such crimes. If such perpetrators follow the route taken by the Nazi war criminals and find haven in Britain – as already has been done by perpetrators of the 1994 Rwandan genocide¹²⁹ – without being promptly prosecuted or deported, these modern-era perpetrators will also be able to rely on claims of ill health as a means of obtaining impunity. We may, therefore, find history repeating itself. Just like the hundreds of Nazi war criminals (save one – Sawoniuk) that found refuge in Britain without justice being meted out to them, perpetrators of modern-era atrocities likewise will be able to escape justice.

¹²⁹ See e.g. Jon Swain, 'Britain is now a haven for Rwandan genocide suspects', *The Times* (London, 12 April 2009).

**RESPONSIBILITY DETERMINED:
ASSESSING THE RELATIONSHIP BETWEEN THE DOCTRINE OF THE RESPONSIBILITY
TO PROTECT AND THE RIGHT OF SELF-DETERMINATION**

RYAN LISS *

ABSTRACT: Despite consistent affirmations of the right of self-determination by states, international organizations and international courts, practical invocations of the right have often been met with apprehension outside of the colonial context. This paper suggests that this unease may be the result of the uncertainty surrounding the margins of the right, particularly with regard to claims of external self-determination. This paper seeks to locate possible boundaries of the right of self-determination through a functional account of the right grounded in a symbiotic relationship with the emerging doctrine of the Responsibility to Protect. While not suggesting that the right should be confined to its role in the R2P framework, this paper, nonetheless, proposes that the right's minimum guarantee may be consistent with the minimum guarantee of R2P itself: the responsibility lies with the state to ensure, at minimum, sufficient political, cultural, social and economic freedom to facilitate the creation of a state where all citizens are protected from genocide, war crimes, crimes against humanity and ethnic cleansing. Ultimately, the Responsibility to Protect doctrine and the right of self-determination outside of the colonial context have a symbiotic relationship: the invocation of self-determination provides the R2P doctrine with a broadly affirmed right in which to ground its rhetoric and work; and R2P provides the right of self-determination with a possible framework and context through which to circumscribe its uncertain boundaries and define the content of its minimum entitlement.

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*"The obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them. For the right men have by nature to protect themselves, when none else can protect them, can by no covenant be relinquished."*¹

—Thomas Hobbes, *The Leviathan*

I. INTRODUCTION

The post-World War II human rights framework was intended to remedy the pathologies inherent in the statist global system. These pathologies, demonstrated starkly over the course of the War, brought to the forefront the harm to the individual that was possible in an international system based upon an absolutist conception of sovereignty. When individuals were solely citizens of a state, and not conceived of as citizens of the world, they were at the mercy of their state regimes, good or bad. The United Nations (UN) system, anchored by the principles of 'self-determination' and equality of peoples, sought to remedy these harms.² At the time of drafting the UN *Charter*, the precise content of the anchoring principle of self-determination was not entirely clear to UN member states.³ However, self-determination grew to be among the most actively invoked and significant rights of the UN system. Quickly becoming intertwined with the decolonization movement already nascent at the birth of the United Nations,⁴ self-determination was adopted as the rhetorical and the legal basis for the independence of colonial territories.⁵ To a large extent, the application of the right in the context of decolonization has been fairly clear, and would now be viewed as rather uncontroversial.⁶

The terrain of the right beyond decolonization, however, has been anything but clear or uncontroversial. Despite repeated affirmations that the right of self-determination (even

¹ Thomas Hobbes, *Leviathan* (Edwin Curley ed, Indianapolis: Hackett Publishing Company, 1994) at 144.

² *UN Charter of the United Nations*, 26 June 1945, 1 U.N.T.S. XVI at art. 1(2) [*UN Charter*]; also anchored by responsibility to maintain peace and security at Article 1(1) and protection of human rights Article 1(3).

³ Diane F. Orentlicher, 'Separation Anxiety: International Responses to Ethno-Separatist Claims' (1998) 23 *Yale J. Int'l L.* 1 at 40.

⁴ Orentlicher, *ibid.* at 39-41.

⁵ See, e.g., *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514(XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/RES/1514(XV) UNGA (1960) [*Declaration on Colonial Peoples*]; *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res. 2525(XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/RES/2625(XXV) (1970) [*Declaration on Friendly Relations*]; *Western Sahara*, Advisory Opinion, [1975] ICJ Rep. 12 [*Western Sahara*].

⁶ However, there do remain some controversies, including: the Falkland Islands; Gibraltar; ironically, Western Sahara and the Sahrawi people; and indigenous peoples in all states.

the right to *external* self-determination) may be invoked by peoples outside the colonial context,⁷ states and courts alike have demonstrated reluctance (or least uncertainty) with regard to practical invocations of the right. Among the possible reasons for this reluctance may be the lack of clarity concerning the definition of the right and its enforceability outside of decolonization. As will be discussed, while the parameters of the right were, arguably, neatly circumscribed in the case of decolonization, the boundaries are less certain beyond this context.

This paper optimistically suggests that some guidance regarding the application of the right outside decolonization—and a possible framework for its application—may be found in the emerging doctrine of the Responsibility to Protect (R2P). The doctrine seeks to shift the central ‘essence’ of sovereignty ‘from control to responsibility’.⁸ Specifically, it provides that states possess a primary responsibility to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity; and the international community has a secondary responsibility to protect where a state is unable or unwilling to act.⁹ This paper argues that the significant connection between the denial of self-determination and the perpetuation of these aforementioned acts of atrocity accentuates the need to incorporate the right of self-determination as a foundational element of the Responsibility to Protect. Notably, the tenets of self-determination are inherent in the idea of R2P generally, and while the connection between the right and the doctrine is not made explicitly it is latent in the initial report setting out the doctrine.

In this way, the Responsibility to Protect doctrine and the right of self-determination outside of the colonial context have a symbiotic relationship: the invocation of self-determination provides the R2P doctrine with a broadly affirmed right in which to ground its rhetoric and work; and R2P provides the right of self-determination with a possible framework and context through which to circumscribe its uncertain boundaries and define the content of its minimum entitlement. This argument will proceed in three parts. First, it will survey the uncertainty around non-colonial self-determination, and provide an overview of the development of the Responsibility to Protect. Second, it will discuss the relation between the denial of self-determination and mass atrocities, suggest where the nexus between self-determination and R2P can be found, and draw a possible proposal for the minimum guarantee of the right. Finally, it will proceed by briefly examining three case studies—the post-election violence in Kenya, the dissolution of the former Soviet states, and the independence of Kosovo—in order to assess the application of the proposed model and boundaries of self-determination.

⁷ See, e.g. *Declaration on Friendly Relations*, *supra* note 5; see also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ General List No. 141 at para. 79 [*Kosovo*]; *Reference Re Secession of Quebec*, [1988] 2 SCR 217 at para. 133 and elsewhere (SCC) [*Quebec Secession Reference*].

⁸ Gareth Evans and Mohamed Sahnoun, ‘The Responsibility to Protect’ (2002) 81:6 Foreign Affairs 99 at 101.

⁹ 2005 *World Summit Outcome*, GA Res. 60/1, UN GAOR, 60th Sess., 49th Supp., UN Doc. A/RES/60/1 (2005) at paras. 138-139 [*World Summit Document*].

II. BACKGROUND: THE RIGHT OF SELF-DETERMINATION AND THE RESPONSIBILITY TO PROTECT

To provide the proper context for the discussion that follows this section surveys judicial responses to the right of self-determination with a focus on the uncertainty surrounding the right outside the colonial context. As well, this section outlines, in brief, the doctrine of the Responsibility to Protect and the support R2P has elicited since its development in 2001. It should be noted that the overview of self-determination is cursory in nature, and does not explore all the nuances of the uncertainty surrounding this complex right.¹⁰

2.1 The Uncertain Boundaries of the Right of Self-Determination

Put most simply, the right to self-determination provides ‘peoples’ with the right to ‘freely determine their political status and freely pursue their economic, social and cultural development’.¹¹ Despite repeated affirmations and endorsements of the right by treaty,¹² declaration¹³ and jurisprudence,¹⁴ states and international courts remain reluctant to recognize invocations of the right in practice outside of the colonial context.

Among the possible reasons for this reluctance may be the lack of clarity surrounding the boundaries of the right. As Diane Orentlicher has noted, this uncertainty is not new. From its humble beginnings on the international stage as President Woodrow Wilson’s pet project at the Versailles peace talks, there have been ‘misgivings’ about the precise content and margins of the right of self-determination.¹⁵ The introduction of the principle/right of self-determination into the United Nations system was not accompanied by any initial clarity:

¹⁰ Others have provided thorough examinations of development and consequent uncertainty surrounding the right; *see, e.g.,* Orentlicher, *supra* note 3.

¹¹ *E.g., International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 at art. 1 [ICCPR]; *International Covenant on Economic Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3 at art. 1 [ICESCR].

¹² ICCPR, *ibid.* and ICESCR, *ibid.*

¹³ *Declaration on Friendly Relations*, *supra* note 5; *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, GA Res. 50/6, UN GAOR, 50th Sess., 49th Supp., UN Doc. A/RES/50/6 [Declaration on the Fiftieth Anniversary of the UN]; also *see United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., UN Doc. A/RES/61/295 (13 September 2007) [“UNDRIP”].

¹⁴ *E.g., Western Sahara*, *supra* note 5; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep. 16. [Namibia]; *East Timor (Portugal v. Australia)*, Judgment [1995] ICJ Rep. 90 [East Timor]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep. 136 [The Wall]; *Kosovo*, *supra* note 7; *Quebec Secession Reference*, *supra* note 7.

¹⁵ Orentlicher, *supra* note 3 at 34-35

The Charter of the United Nations gave a prominent place to the ‘principle of self-determination,’ yet the sponsoring countries could not agree on the meaning of this conveniently ambiguous phrase.... Different views about the meaning of this provision emerged when it was first proposed by the Soviet Union at the San Francisco Conference, and states approved the language without resolving their differences.¹⁶

While, as mentioned above, the right gathered some clarity in its application in the decolonization process, a great deal of ambiguity remained and continues to remain beyond this context. Fundamentally unclear, outside the colonial context, is the relationship between the right, territorial integrity and sovereignty of existing states.¹⁷ Similarly, the relationship between the right and claims to secession remains uncertain.¹⁸ As well, while a right of ‘internal self-determination’ short of secession has been affirmed for all peoples,¹⁹ it is not evident what such a right involves,²⁰ who can enforce it,²¹ or how it relates to ‘external self-determination’ or independence.²² Finally, and crucially, how to determine who belongs to the ‘people’ entitled to exercise the right in a particular instance also remains without any clear guidelines.²³ While the answers to these questions were more obvious—or at least interpreted to be—in the case of decolonization,²⁴ the answers have not been forthcoming beyond this context.

The uncertain nature of the right, it seems, has often lead states, courts, tribunals, and the international community more broadly to avoid directly engaging with practical invocations of the right outside of the colonial context. To demonstrate this phenomenon this paper, briefly, examines the decisions of one these actors—courts—looking to the

¹⁶ UNCIO VI, 296, Doc. 343, I/1/16 (1945) as cited in Orentlicher, *ibid.* at 40.

¹⁷ Lea Brilmayer, ‘Secession and Self-Determination: A Territorial Interpretation’ (1991) 16 Yale J. Int’l L. at 177; *see also* Martin Griffiths, ‘Self-Determination, International Society and World Order’ (2003) 3 Macquarie L. J. 29 at 46.

¹⁸ “But while responding in a piecemeal fashion, the international community has failed to develop a principled response to secessionist movements”: Orentlicher, *supra* note 3 at 2.

¹⁹ *See, e.g., Quebec Secession Reference*, *supra* note 7 at paras. 126-130; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1999) at 53.

²⁰ *See the discussion below regarding the unprincipled assessment of the exercise of the right in Quebec Secession Reference*, *ibid.* at paras. 135-136.

²¹ *Lubicon Lake Band v. Canada*, Communication No. 167/1984, [1990] (HRC) at para. 13.3.

²² *Quebec Secession Reference*, *supra* note 7 at paras. 134-135.

²³ Griffiths, *supra* note 17 at 33; *Quebec Secession Reference*, *ibid.* at para. 123.

²⁴ E.g. issues of territorial integrity were avoided by the statement in the *Declaration on Friendly Relations*, *supra* note 5 that Non-Self-Governing Territories have a separate and distinct legal status from the metropolitan states. The default options for context and content of the right were set out in the *Declaration on Colonial Peoples*, *supra* note 5 and in the *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter*, GA Res. 1541(XV), UN GAOR, 15th Sess., 16th Supp., UN Doc. A/RES/1541(XV) (1960). Enforcement of the right was undertaken by UN General Assembly on recommendation of the Special Committee, *see, e.g.,* Question of Mauritius, GA Res. 2066(XX), UN GAOR, 20th Sess., 14th Supp, UN Doc. A/RES/2066(XX) (1965). The ‘people’, with a few exceptions, was generally accepted to be the population of the area comprising a specific colonial territory, *see, e.g., Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, [1986] ICJ Rep. 554 at paras. 20-22.

prominent jurisprudence on the right as indication of the international legal stance on these issues. The earliest cases to consider the right as enshrined in the UN *Charter*²⁵ did so in the context of decolonization. The International Court of Justice (ICJ) in both the *Namibia Case* and *Western Sahara Case* made surprisingly clear affirmations of the right of self-determination possessed by the whole of the colonized people in question; moreover, the Court was fairly direct in its statement that this right should lead to independence for the people of the territory if they so choose.²⁶ Since this time, however, as the jurisprudence has considered the right beyond decolonization, courts have consistently affirmed the existence of the right while at the same time either: attesting to the lack of clarity around the right; glossing over the analysis of its content; or finding overly legalistic grounds upon which to avoid substantive engagement with the right.

This trend began with the Badinter Commission's 1991 *Opinion No.2*, in which it considered the right of self-determination as it applied to the new states emerging from the break-up of Yugoslavia. The Commission's discussion was brief. Ultimately, it did little to distinguish self-determination from minority rights, noting in short that 'the Commission considers that international law as it currently stands does not spell out all the implications of the right to self-determination'.²⁷

Similarly, the ICJ's *East Timor Case* demonstrated the emerging judicial opacity around the right. The *East Timor Case* was on the fringe of the decolonization cases. While dealing with the status of a non-self-governing territory, the decision was released in 1995 after most of the decolonization process had been completed. As well, the decision came in the wake of a dramatic demonstration of the possible development of the right beyond decolonization through the dissolution of Yugoslavia and the USSR. In addition, the case was not confined in scope purely to independence, but raised complex questions regarding the interaction between the right of self-determination and a peoples' right to territorial resources. The Court avoided substantive discussion of the right on the basis of jurisdictional constraints—finding that issues raised ultimately concerned the acts of Indonesia, who had invaded East Timor, and who had not accepted the Court's jurisdiction.²⁸ They reached this conclusion despite acknowledging the *erga omnes* character of the right²⁹ and despite the case being brought by the territory's administering state alleging acts by which Australia effectively endorsed Indonesia's invasion.

The Supreme Court of Canada's (SCC) 1998 *Quebec Secession Reference* is widely cited as an authoritative statement on the right of self-determination. However, this decision too attests to the reluctance of courts to engage with the right. Throughout its decision, the Court acknowledged that international law had yet to define many aspects of the right. The SCC noted, for example, that the right has developed 'with little formal elaboration of the

²⁵ Jurisprudence predating the *Charter* will not be considered here.

²⁶ *Namibia*, supra note 14 at paras. 53-54 and 59; *Western Sahara*, supra note 5 at paras. 54-60, 70 and 162.

²⁷ *Conference on Yugoslavia, Arbitration Commission Opinion No. 2*, (1992) 31 ILM 1497 at para. 1 [*Badinter Commission Opinion No. 2*].

²⁸ *East Timor*, supra note 14 at para. 29.

²⁹ *East Timor*, *ibid.* at para. 29.

definition of “peoples” and thus any precise delineation of who possess the right ‘remains somewhat uncertain’.³⁰ They circularly avoided answering this question—a complex one in light of Quebec’s Anglophone and Aboriginal population—on the basis of an assertion that it was ultimately unnecessary to answer in the context. Regardless of who the ‘people’ were, the Court found, their right had not been infringed.³¹ Likewise, the Court glossed over the question of whether there exists a basis for a right to external self-determination—outside of the traditionally recognized contexts of colonization and alien subjugation—where internal self-determination has been denied. The Court concluded that it was unnecessary to make this determination, as the threshold for such an entitlement—if it existed—had not been reached.³² They based this conclusion upon a loose inventory of the participation of various prominent Quebecers in federal and international politics and civil service.³³ In so doing they sidestepped the question of what a right of *internal* self-determination actually requires. Particularly, the Court failed to explain how the success of the few individuals listed amounted to self-determination for the ‘people’ of Quebec as a whole. In many ways, the decision represents an impressive analysis of international law—particularly for a domestic court—and a much deeper engagement with the right of than other jurisprudence. Nevertheless, the residual reluctance of the Court to engage with the challenging questions at issue in the *Quebec Secession Reference* demonstrates the deeply uncertain nature of the right to either internal or external self-determination.

The ICJ’s 2004 Advisory Opinion, *The Wall Case*, concerning the construction of a wall by Israel on the Occupied Territories, included a surprisingly strong invocation of the right of self-determination. The Court held quite clearly that the construction of the wall represented an impediment to the Palestinian people’s right to self-determination and called for the construction ‘to be brought to an end’.³⁴ This conclusion is all the more notable when considering that the Request for an Advisory Opinion from the UN General Assembly did not specifically refer to the right of self-determination in the questioned posed.³⁵ It is worth accentuating that *The Wall Case* tracks the less controversial application of self-determination of subjugation or decolonization: there exists issues at play regarding the existences of a conflict between two distinct international entities (if not an explicitly interstate conflict); the ‘people’ were predetermined—the Court invoked Israeli’s previous recognition of the specific rights of the ‘Palestinian people’;³⁶ and the outcome of the right was easily defined—cessation of construction of the wall. Beyond this, however, there may be something to be said for the connection implicit in *The Wall Case* between the invocation of the right of self-determination and the Court’s recognition of the need to remedy particular breaches of humanitarian law.³⁷ This connection is directly relevant to the interaction between Responsibility to Protection and self-determination discussed below.

Two recent cases at the ICJ, however, emphasize the Court’s reluctant approach to the right, and the uncertainty that persists in the international community. In July of 2010, the Court released its highly anticipated decision concerning the independence of Kosovo.

³⁰ *Quebec Secession Reference*, supra note 7 at para. 123.

³¹ *Quebec Secession Reference*, ibid. at para 125.

³² *Quebec Secession Reference*, ibid. at para 135.

³³ *Quebec Secession Reference*, ibid. at paras. 135-136.

³⁴ *The Wall*, supra note 14 at para. 159-160.

³⁵ *The Wall*, ibid. at para. 1: although the right of self-determination was among many rights referenced in the preamble to the question.

³⁶ *The Wall*, ibid. at para. 118.

³⁷ *The Wall*, ibid. at para. 159.

The Advisory Opinion request regarding the legality of the unilateral declaration of independence by Kosovo provided an apt opportunity to explore the post-colonial right of self-determination. Instead, the ICJ opted for an exceedingly narrow interpretation of the Advisory Opinion request, and chose to focus exclusively on the legality of the unilateral declaration of independence, itself. As a result, the Court evaded the more complex issues with respect to self-determination underlying Kosovo's claim of independence.³⁸ In the course of its decision, however, the Court acknowledged the diverse and competing views presented in state submissions on both the question of whether a remedial right of self-determination exists and whether Kosovo, in the circumstances, possessed such a right.³⁹ Some states, such as Serbia, sought to engaged directly with apprehensions pertaining to the uncertain boundaries of the right by invoking a 'slippery slope' argument to dissuade the Court from acknowledging Kosovo's right to external self-determination.⁴⁰ The decision, in which the ICJ strongly affirmed the existence of the right of self-determination in general, but avoided any discussion of its content or specific application, epitomizes the reluctant and uncertain treatment of the right outside of the colonial context.

The Court's reluctance may have been the basis for the legal advocacy choices of Georgia and Russia in the ongoing ICJ case between the two states. In its decision on provisional measures in the case, the Court noted that while Georgia initiated the case—concerning the 2008 interventions in South Ossetia and Abkhazia—on the basis of alleged violations of the *Convention on the Elimination of all forms of Racial Discrimination* (CERD), Russia in reply had insisted that what was actually at issue were the principles of non-intervention and self-determination.⁴¹ An allegation regarding violations of the right to self-determination was, in fact, included in Georgia's claim; however, it was buried at the very end of Georgia's list of seven violations, and framed, itself, as a violation of the CERD rather than as a violation of a self-standing right.⁴² While requiring a much more nuanced discussion, it seems *prima facie* that Georgia's choice to invoke the CERD as the basis for its claim, and its choice to bury allegations regarding self-determination at the end of a laundry list of alleged violations, could be seen as an acknowledgement of the uncertain nature of the right and the reluctance of the Court and the international community to pursue its enforcement.⁴³

Although a cursory overview of the right, it is nonetheless apparent from this survey of judicial decisions that, under international law, the boundaries of the right of self-

³⁸ *Kosovo*, supra note 7 at paras. 82-83.

³⁹ *Kosovo*, ibid. at para. 82.

⁴⁰ See, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, "Written Comments of the Government of the Republic of Serbia" (14 July 2009) at paras 127-132 [*Serbia's Written Submissions*].

⁴¹ *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, [2008] ICJ Rep.353 at para. 110 [*Georgia*].

⁴² *Georgia*, ibid. at para. 21.

⁴³ Admittedly, however, it may be simply be Georgia's desire to find a 'jurisdictional hook' to bring Russian before the Court which lead to the reliance on the CERD.

determination of peoples outside of the colonial context remains vague and seemingly unenforceable.

2.2 The Emergence of the Responsibility to Protect

In contrast, the Responsibility to Protect seems to engage the pathologies of the international order in a prescribed and arguably practical way. While not without its own critics,⁴⁴ R2P as a principle has received a surprisingly broad and rapid endorsement by the international community. After the initial proposal of the principle in a 2001 report by the International Commission on Intervention and State Sovereignty (ICISS),⁴⁵ the concept has since received the unanimous support of all heads of state and government in 2005 through the World Summit Outcome Document.⁴⁶ As well, it was the subject of a 2009 report issued by UN Secretary-General Ban Ki-moon on ‘Implementing the Responsibility to Protect’.⁴⁷

The crux of the ICISS report is a shift in the perception of sovereignty from ‘control to responsibility’.⁴⁸ As the report describes, this responsibility pertains to a state’s internal duty to protect the safety and lives of its own citizens (both in general and through specific protection from war crimes, crimes against humanity, genocide and ethnic cleansing), as well as an external responsibility to citizens of the international community writ large:

Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission.⁴⁹

The intention of ICISS, according to the report, was to protect individuals by ‘strengthen[ing], not weaken[ing], the sovereignty of states’,⁵⁰ and by ‘improv[ing] the capacity of the international community to react decisively when states are either unable or unwilling to protect their own people’.⁵¹ To actualize the latter, the report proposes a framework upon which to legitimately and consistently authorize international intervention, and a standard upon which to determine if it is required.⁵² However, it is the report’s

⁴⁴ See for instance Noam Chomsky “Professor Noam Chomsky’s Statement” (to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect United Nations, New York, 23 July 2009).

⁴⁵ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001) [ICISS Report].

⁴⁶ *World Summit Document*, supra note 9 at paras. 138-139.

⁴⁷ UN General Assembly, *Implementing the responsibility to protect: report of the Secretary-General*, 12 January 2009, UN Doc. A/63/677 (2009)

⁴⁸ Evans and Sahnoun, supra note 8 at 101; ICISS Report, supra note 45 at para. 2.14.

⁴⁹ ICISS Report, *ibid.* at para 2.15.

⁵⁰ ICISS Report, *ibid.* at para. 8.31.

⁵¹ ICISS Report, *ibid.*

⁵² ICISS Report, *ibid.* at paras. 4.1-4.43; Evans and Sahnoun, supra note 8 at 101; see also *World Summit Document*, supra note 9 at para. 139.

contribution to the former—the ‘strengthening of sovereignty’—that is arguably the more novel aspect of the principle of R2P and potentially of greater relevance for the discussion at hand.

Responsibility to Protect is what Gareth Evans describes as ‘an umbrella concept’ encompassing not only the ‘responsibility to react’—an analog to traditional humanitarian intervention—but also the ‘responsibility to prevent’ and the ‘responsibility to rebuild’.⁵³ Of central importance in the R2P model is the underlying commitment of the international community to build capacity to protect, as stated by the world’s heads of state and government in the 2005 Summit document:

We also intend to commit ourselves, as necessary and appropriate, to *helping States build capacity to protect* their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.⁵⁴

As will be discussed further below, the ICISS report recognizes that central to the responsibility to prevent, rebuild and even react is, *inter alia*, the facilitation of the free political, cultural and economic will of all citizens.

III. A SYMBIOTIC MODEL: CONNECTING SELF-DETERMINATION AND THE RESPONSIBILITY TO PROTECT

Despite the conceptual interconnectedness, the explicit connection between the Responsibility to Protect and the right of self-determination has not been examined to date. This section considers the nature of this connection, and explores the possibility that the context of the Responsibility to Protect may guide a functional account for the right of self-determination, indicating where the minimum guarantee ensured by the right may be located.

3.1 A Basis for Connection

The need to secure a central role for the right of self-determination in an effective implementation of the Responsibility to Protect is evidenced through the recent conflicts that have given rise to the pathologies that R2P is intended to remedy. While R2P atrocities are not confined to instances where self-determination has been denied, the failure of states to live up to their responsibilities under R2P occurs with increased frequency where self-determination is at issue.

As observed by Martin Griffiths, while reciprocal recognition of territorial sovereignty between states under the UN system has reduced inter-state conflict, by increasing the inviolability of borders it has led to increased competition over the distribution of sovereignty and power within existing states.⁵⁵ As a consequence, the occurrence of conflict

⁵³ Evans and Sahnoun, *ibid.* at 101; *see ICISS Report*, *ibid.* at Section 3 and Section 5.

⁵⁴ *World Summit Document*, *supra* note 9 at para. 139 (emphasis added).

⁵⁵ Griffiths, *supra* note 17 at 35.

and atrocities in recent decades has been closely tied both to the denial of self-determination within states by the ruling regimes and to unilateral efforts to secure self-determination by marginalized groups. The International Crisis Group has noted the prevalence of civil conflicts since the end of the Cold War (19 of 20 conflicts, by their count), and the distressing frequency of internal ‘one-sided violence’ by ruling parties and militias against civilians seeking to undermine free political expression and competition for power.⁵⁶ Moreover, as Griffiths observes,

[Admittedly not] all contemporary civil wars involve protagonists invoking the principle of self-determination to justify a struggle for independent statehood. However, Wallensteen and Sollenberg have found that at least half the wars waged at the end of the 20th century feature claims by aggrieved groups that their right to self-determination has been breached by the states from which they seek to separate. A glance at the most devastating of these conflicts, such as Indonesia (Aceh, West Papua), India (Kashmir), Russia (Chechnya), Yugoslavia (Kosovo), and the Israeli-Palestinian dispute, highlights how difficult such conflicts are to resolve. Many other tense situations, such as those which were once violent (Bosnia) or which could become more violent (Taiwan), feature a clash of the competing principles of territorial sovereignty and national self-determination.⁵⁷

In addition, other atrocities, such as the Rwandan genocide, where ‘self-determination’ was not the rallying cry of the conflict per se, have demonstrated that issues of self-determination may be at play even when not explicit in rhetoric of the parties. As Orentlicher has noted, an increased focus on global democratic entitlements—ordinarily perceived to be a constituent element of realizing self-determination—has seemingly been the ‘best inoculation against’ destabilizing forces.⁵⁸

Admittedly, one must be careful not to oversimplify the remedial power of such measures as democratic entitlements, as Orentlicher indicates. Particularly in the context of multiethnic tension, rapid democratization can lead to ‘heightened levels of ethnic conflict’.⁵⁹ Nevertheless, as she observes, ‘appropriate institutional arrangements can go a long way toward averting conflict and promoting accommodation in a framework of democratic governance’.⁶⁰

The connection between preventing atrocities and ensuring the ability of all peoples to exercise their political, cultural and economic free will is inherent in the doctrine of the Responsibility to Protect as proposed. However, the connection with the existing right of self-determination is underexplored both in the report formulating the R2P, and in the academic analysis of the doctrine which has followed.

⁵⁶ Mark Schneider, “Implementing the Responsibility to Protect in Kenya and Beyond” (International Crisis Group Address to the World Affairs Council of Oregon, Portland State University, 5 March 2010) online: <<http://www.crisisgroup.org/en/publication-type/speeches/2010/implementing-the-responsibility-to-protect-in-kenya-and-beyond.aspx>> (last accessed 18 December 2010).

⁵⁷ Griffiths, *supra* note 17 at 35.

⁵⁸ Orentlicher, *supra* note 3 at 61.

⁵⁹ Orentlicher, *ibid.* at 62.

⁶⁰ Orentlicher, *ibid.* at 62

3.2 The Nexus of Connection: the three pillars of R2P

As noted earlier, there is a role for the right of self-determination to play in all three pillars of the R2P doctrine: the responsibility to prevent, the responsibility to react, and the responsibility rebuild. Significantly, while the 120 page ICISS report only references the right of self-determination twice, much of language either implicitly acknowledges the right or is, nevertheless, apt to interpretation on the basis of the right. The following discussion suggests some examples of this phenomenon. Notably, the doctrine of R2P implicitly shifts the international community's concern away from its traditional focus solely on the facilitation of 'external self-determination' and implies that it should be the guarantor of internal self-determination, as well.

Responsibility to Prevent

Optimistically, the most substantial role for the right of self-determination should, in fact, be at the stage of the responsibility to prevent. The ICISS report, in advocating a 'root cause prevention' framework, acknowledges that among the various root causes of atrocities are 'political needs and deficiencies', 'economic deprivation and the lack of economic opportunities' and the need to 'strengthen legal protections and institutions'.⁶¹ All of these are closely tied with guaranteeing the right of self-determination of the peoples concerned, as made clear by the report's various suggestions for remedial measures. With regard to fulfilling political needs, the report suggests such steps as 'democratic institution and capacity building; constitutional power sharing, power-alternating and redistribution arrangements; confidence building measures between different communities or groups'.⁶² Regarding the economic deprivation, the report considers such solutions as 'development assistance and cooperation to address inequities in the distribution of resources or opportunities; promotion of economic growth and opportunity'.⁶³ Finally, in discussing the development of legal institutions, the report suggests such efforts as 'strengthen the rule of law; protecting the integrity and independence of the judiciary; promoting honesty and accountability in law enforcement; enhancing protections for vulnerable groups, especially minorities'.⁶⁴

While implicit in these measures, it suggested that R2P should explicitly embrace the discourse of the right of self-determination as the underlying entitlement behind these measures. Such a focus would provide a normative grounding for the concept of the responsibility to prevent and its execution; for example, where multiple avenues of implementation are available, those means which best facilitate the self-determination of the peoples concerned should be pursued. Conversely, recognizing and fostering a connection between R2P and self-determination could provide a functional lens through which to delineate the content and margins of the right of self-determination, as will be discussed in the next section. Moreover, entrenchment of such a relationship would attend, at least in

⁶¹ *ICISS Report*, supra note 45 at paras. 3.21-3.23.

⁶² *ICISS Report*, ibid. at para. 3.21.

⁶³ *ICISS Report*, ibid. at para. 3.22.

⁶⁴ *ICISS Report*, ibid. at para. 3.23.

part, to the lack of an enforcement mechanism surrounding the right of self-determination. Notably, it would place the responsibility on the international community—specifically the UN and regional bodies⁶⁵—to provide capacity building support, and oversight for states seeking to actualize the right to self-determination as an element of the Responsibility to Protect. As noted by Griffiths, ‘the development of interlocking networks of democratically accountable sub-national and supra-national political institutions’ help to ‘improve the effectiveness and legitimacy of state institutions’ seeking implementation of self-determination, where such efforts might otherwise face entrenched national challenges.⁶⁶

Responsibility to React

The right of self-determination also informs the implementation of the responsibility to react to an R2P atrocity. The report indicates, for example, that all actions undertaken in the course of intervention should be pursued with a view to ensuring fertile ground for post-conflict rebuilding on the basis of principles consistent with self-determination. Options which emphasize compromise and cross-factional representation—such as power sharing in the wake of atrocities caused by political upheaval—should be pursued, but as temporary measures. The ICISS report aptly suggests that responses to ethnic minority conflict or secessionist pressures should include devolutionist compromises brokered in good faith that guarantee autonomy while preserving the integrity of the state in question.⁶⁷ It will be considered in the next section what actions should be taken when such efforts fail.

It is worth noting that, in one of only two explicit references to the right of self-determination, the report emphasizes that the advancement of a claim of self-determination cannot, from the outset, be a justification for intervention.⁶⁸ Nevertheless, while a group’s claim of self-determination cannot provide, in itself, a justification for action under R2P, self-determination may provide the basis for selecting the proper remedial measures when the responsibility to react is otherwise engaged.⁶⁹

Responsibility to Rebuild

Finally, the right of self-determination is also pertinent at the stage of the responsibility to rebuild in the wake of a breach of R2P norms. Once again, the importance of the right is manifest in the language and standards for rebuilding contained in the ICISS Report, itself. The right of self-determination is engaged in its discussion of efforts seeking to ensure cooperation among and to ensure cultural and political freedom for all groups in the wake of conflict; specifically, the ICISS Report discusses the responsibility of the international community to

...take steps to set up a political process between the conflicting parties and ethnic groups in a post-conflict society that develops local competence within a framework that encourages cooperation between former antagonists.⁷⁰

⁶⁵ See *i.e. ICISS Report*, *ibid.* at paras. 3.15-3.17.

⁶⁶ Griffiths, *supra* note 17 at 48.

⁶⁷ *ICISS Report*, *supra* note 45 at para. 4.38.

⁶⁸ *ICISS Report*, *ibid.* at para. 4.33.

⁶⁹ *ICISS Report*, *ibid.* at para. 4.33.

⁷⁰ *ICISS Report*, *ibid.* at paras. 5.30-5.31.

As well, the significance of self-determination is manifest in the need to ensure ‘balance between the responsibilities of international and local actors’ in the rebuilding process.⁷¹ Once again, it must be emphasized that among the strengths of the R2P model is the underlying guarantee of international oversight and sustained capacity building. These factors represent a crucial element of successful implementation—providing support structures to help overcome nationally entrenched challenges.

3.3 Consequences of the Connection: Proposing boundaries for the right of self-determination

The significance of R2P’s engagement with the tenets of self-determination may provide more than a mechanism to enforce the right and a normative foundation for R2P. This engagement may, in fact, provide some indication of where the boundaries of the right could be drawn. This paper suggests locating the minimum guarantee of the right in its role in the Responsibility to Protect. While such an analysis does not prescribe the scope of the right of self-determination writ large, it could provide the elusive certainty for the boundaries of the right beyond the colonial context.

Internal Self-Determination

Engagement with the right of self-determination as a constituent element of the Responsibility to Protect brings internal self-determination within the purview of the international community. Specifically, it suggests a functional account for the minimum guarantee to be provided by the right: that is, to take such measures to implement guarantees of political, economic and cultural freedom of all peoples as necessary to prevent the perpetration of atrocities. While such an approach may ultimately do little to provide concrete content for the right of internal self-determination, it may provide some indication of where the conversation should be taking place. It is worth noting that this narrow functional approach should not define the entire scope of the right—rather it should, as stated, indicate the minimum guarantee that is required by the right of self-determination.

External Self-Determination

The more interesting and substantive discussion to emerge from the interaction between R2P and self-determination seems to come in the context of external self-determination. It was noted earlier that the existence of a remedial right to external self-determination beyond colonization or a right to external self-determination based on a denial of internal self-determination has been contemplated by the international community and international courts.⁷² However, what such an entitlement actually guarantees is, as of yet, unclear. The interaction between R2P and self-determination may indicate a possible standard by which to assess claims of independence based on external self-determination in

⁷¹ *ICISS Report*, *ibid.* at paras. 5.30-5.31.

⁷² This is sourced in such places as the *Declaration on Friendly Relations*, *supra* note 5 and *Declaration on the Fiftieth Anniversary of the UN*, *supra* note 13 at art. 1.

such a context. If the minimum guarantee of internal self-determination is the progressive implementation of measures which prevent peoples from suffering from genocide, war crimes, crimes against humanity or ethnic cleansing, it would seem that this right is denied, at the very least, when the state is ultimately unable to protect a people or peoples from these atrocities. That is, where a people suffers from R2P atrocities in a manner tied to the fundamental denial of mechanisms of political participation, and social, economic and cultural freedom, this could provide the basis for a legitimate claim of autonomy.

This suggestion is consistent with the underlying principle of the Responsibility to Protect: the traditional inviolability of sovereignty is reconceived of as a responsibility and privilege contingent on the provision of basic minimum protections to all citizens. Thus, a state's sovereignty is no longer inviolable, and its redistribution can be considered when these minimums are not met.⁷³

Notably, a right to external self-determination is often sourced in a similarly contingent conception of sovereignty described in the *Declaration on Friendly Relations*. Significantly, the framework suggested here provides a legal threshold to respond to observations such as those by Avishai Margalit and Joseph Raz that

...given the absence of effective enforcement machinery in the international arena, the interest in group prosperity justifies entrusting the decision concerning self-government to the hands of an encompassing group that constitutes the vast majority of the population in the relevant territory, provided other vital interests are protected.⁷⁴

And, likewise, the suggested standard also provides content for oft cited statement by the Commission of Rapporteurs considering the status of the Aaland Islands early in the development of self-determination. The Commission noted, years before self-determination was incorporated into the *UN Charter*, that independence may be available as a 'last resort when the State lacks either the will or the power to enact and apply just and effective guarantees [to protect minorities]'.⁷⁵

However, while a denial of self-determination leading to R2P violations perpetuated by the state may be the basis for a re-distribution of sovereignty, it does not necessarily require an automatic right of secession. For instance, if both the conflict and distribution of affected 'peoples' is country-wide, secession may be neither practicable nor desirable. In such cases, what is required is the mobilization of international or regional actors to ensure the state as a whole is representative of all peoples; this may require such measures as efforts to facilitate negotiations between adverse factions, temporary power sharing arrangement, and robust political capacity building on a national scale. Even if a people is based in a

⁷³ This notion is similar to Henry Shue's discussion of "conditional sovereignty": Henry Shue, *Basic rights: subsistence, affluence, and U.S. foreign policy*, 2ed (Princeton: Princeton University Press, 1996) at 174-175; see also the discussion in Patrick Macklem, 'Humanitarian Intervention and the Distribution of Sovereignty in International Law' (2008) 22:4 *Ethics & Int'l Affairs* 369 at 387.

⁷⁴ Avishai Margalit and Joseph Raz, 'National Self-Determination' (1990) 87:9 *J. Philosophy* 439 at 461.

⁷⁵ *The Aalands Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B7.21/68/106 at 28(1921); see also Orentlicher, *supra* note 3 at 49-50 proposing a similar claim on the basis of democratic entitlement generally.

particular region of the state, re-distribution of sovereignty may first involve the aforementioned measures advocated by the ICISS report, including ‘devolutionist compromises’ brokered in good faith that guarantee autonomy while preserving the integrity of the state in question.⁷⁶ As Patrick Macklem has recognized in the context of indigenous autonomy, ‘sovereignty can refer to political and legal authority within nation states. In this internal sense, sovereignty need not be vested in one single authority.’⁷⁷ It is only when efforts seeking to preserve the integrity of existing states fail to either resolve the ongoing violations and or protect self-determination of all peoples that wholesale redistribution of sovereignty leading to secession is required under the R2P-guided standard. Moreover, it is important to emphasize that such re-distribution of sovereignty is mediated by the principles governing the responsibility to rebuild. Consequently, the international community has a responsibility to ensure such re-distribution proceeds in a manner that guarantees cooperation among, as well as cultural and political freedom for, all groups that may be included in the new entity.

While it is admittedly a crucial element of defining the right of self-determination, the present paper will not endeavour to provide a conclusive definition for the ‘peoples’ possessing a right to external self-determination. However, in light of the remedial nature of the right suggested by the proposed affiliation with the R2P framework, a starting point for a possible definition of a ‘people’ may be grounded in the subjective-objective group definition applied in recent international criminal law jurisprudence on genocide.⁷⁸ At the risk of oversimplifying, it is suggested that a distinct people could be defined on the basis of a contextual assessment focusing particularly on factors such as whether: they self-identify as a group; they feel they have been denied political participation and cultural freedom as group; and whether those in a position to facilitate or deny participation in society view the people as a ‘group’ distinct from those in power (the ‘group’ could potentially include the great majority of the citizenry in autocratic or dictatorial state).

IV. APPLYING THE MODEL: CASE STUDIES

In order to test the proposed model, the following briefly considers three case studies—the emergence of the former Soviet states in the early 1990s, the recent political violence in Kenya, and the independence of Kosovo—as a demonstration of how the interplay of self-determination and the responsibility to protect may occur in practice. As well, a brief discussion on the interaction between the model and indigenous self-determination will follow.

4.1 Soviet Dissolution: Testing the Threshold

The dissolution of the former Soviet states in the early 1990s is a complex case study requiring far more attention than this short section affords. As such, the present

⁷⁶ *ICISS Report*, supra note 45 at para. 4.38.

⁷⁷ Patrick Macklem, ‘Distributing Sovereignty: Indian Nations and Equality of Peoples’ (1992-1993) 45 *Stan. L. Rev.* 1311 at 1346-7.

⁷⁸ See William A. Schabas, *Genocide in International Law: The Crime of Crimes*, (2nd ed., Cambridge: Cambridge University Press, 2009) at 127-129.

analysis will focus on a brief assessment of the critique Will Kymlicka poses regarding the securitization of the European community's concerns in the region. In examining the European community's seemingly failed effort to internationalize minority rights in post-Communist states, Kymlicka notes that these efforts were undermined, to an extent, by the creation of a dual track approach, which triaged promoting (i) security concerns over (ii) compliance with minority rights.⁷⁹ He references the suggestion by critics that efforts to define a 'coherent minority rights standard' fell by the wayside as the EU 'demonstrated [its] preparedness to follow virtually any policy measure to create stability'.⁸⁰

This concern is a necessary one for the present model to respond to considering that under the model self-determination is, in some ways, made contingent on its association with security concerns. Admittedly, the Responsibility to Protect doctrine possesses the danger of replicating the dual track divide in its own distinction between situations rising to the level of the responsibility to prevent—involving potentially more principled, less urgent engagement—and those reaching the level of the responsibility to react—involving more dramatic immediate action aimed at stability. Nevertheless, at least in the ideal, a Responsibility to Protect model based, fundamentally, on seeking implementation of the right of self-determination blurs this divide.

Under the proposed R2P model, security crises are viewed as rising *out of* a failure to provide broad based guarantees of self-determination. In contrast, the EU's willingness to abandon 'minority rights' in order to ensure stability demonstrates that the latter was not conceived of as contingent on the former. Whereas there was no per se requirement for consistency between the security track and minority rights track advocated by the European communities, maintaining a non-negotiable mandate throughout the Responsibility to Protect doctrine—at least theoretically—requires coherence between the actions of states taken under the responsibility to prevent and the responsibility react. In addition, the responsibility to prevent which, places a duty on the international community to provide capacity building, oversight, and early warning mechanisms requires much more active engagement than mere standard setting undertaken by the European community in the 1990s.

Ultimately, however, a more challenging critique may be grounded in Kymlicka's discussion of the reasons underlying the European community's sudden concern with minority rights protection. He notes, 'humanitarian concern is rarely enough, on its own, to mobilize Western governments'⁸¹—an observation unlikely restricted in application to Western governments—and goes on to list a number of self-interested and ideological justifications that likely contributed to Europe's interest. It remains to be seen whether R2P's pre-existing model of implementation (as opposed to the ad hoc, and consequently fluid approaches developed in the 1990s by the European community), and the involvement of international oversight (as opposed to exclusively regional efforts) will be sufficient to neutralize self-interest among states and allow for a focus on humanitarian concerns. The failure of the international community to implement R2P in any significant manner in Darfur, Sri Lanka and elsewhere in recent years indicates that, ultimately, something more than humanitarian concern may be required.

⁷⁹ Will Kymlicka, *Multicultural Odysseys* (Oxford: Oxford University Press, 2007) at 233.

⁸⁰ See Kymlicka, *ibid.* at 232.

⁸¹ Kymlicka, *ibid.* at 174.

4.1 Kenya: Country-wide Self-determination

The international reaction to the 2007 and 2008 election violence in Kenya has been described as a paradigmatic example of the Responsibility to Protect in action.⁸² While reliance on the doctrine was unstated until after the conflict had passed, the International Crisis Group and others have articulated a belief that R2P was ‘definitely a factor in international decisionmaking’ at the time.⁸³

Following a ‘flagrantly flawed presidential election’ and the political crisis that followed in December 2007, ethnic violence broke out leading to over 1000 murders and internally displaced as many as 500,000 people.⁸⁴ The violence which targeted individuals on ‘the basis of their ethnicity and corresponding perceived support for a particular presidential candidate’⁸⁵ was the consequence of, *inter alia*, an institutionalized lack of accountability and longstanding failures to facilitate comprehensive political, economic and social self-determination for various factions.⁸⁶

The international community, through an African Union delegation led by Koffi Annan and others and supported by the UN, was quick to respond. Their short-term efforts sought to mediate an interim power-sharing agreement. However, the delegation also sought to initiate long-term reform aimed at strengthening country-wide mechanisms, of political self-determination and representative governance. Such measures included support for the development of legal and constitutional reforms—adopted by referendum—as well as an overhaul of the elections framework developed in tandem with local actors.⁸⁷ Most measures continue to be reinforced by international oversight. Nevertheless, the emphasis placed throughout upon ensuring that reform processes were built on collaboration between international and local actors is indicative of the ethic of self-determination that underscores the responsibility to rebuild. Generally, the measures implemented vividly demonstrate the approach suggested earlier for situations in which the denial of country-wide, cross-group self-determination leads to the perpetration of R2P atrocities. Solutions cannot be grounded

⁸² Desmond Tutu, “Taking the responsibility to protect” *The New York Times* (9 November 2008), online: NYTimes <<http://www.nytimes.com/2008/02/19/opinion/19iht-edtutu.1.10186157.html>> (last accessed 18 December 2010); *see also* Human Rights Watch, “Ballots to Bullets: Organized Political Violence and Kenya’s Crisis of Governance” (2008) 20:1(A) Human Rights Watch Report 67-68.

⁸³ Schneider, *supra* note 56.

⁸⁴ Schneider, *ibid.*; Global Centre for the Responsibility to Protect (GCRtoP), Police Brief, “The Responsibility to Protect and Kenya: Past Successes and Current Challenges” (13 August 2010) online: ICRtoP <[http://responsibilitytoprotect.org/The_Responsibility_to_Protect_and_Kenya_Past_Successes_and_Current_Challenges\(1\).pdf](http://responsibilitytoprotect.org/The_Responsibility_to_Protect_and_Kenya_Past_Successes_and_Current_Challenges(1).pdf)> (last accessed 18 December 2010); Human Rights Watch, *supra* note 82 at 2.

⁸⁵ GCRtoP, *ibid.*

⁸⁶ Human Rights Watch, *supra* note 82 at 2-4; *see also* United Nations High Commissioner for Human Rights, *Report from OHCHR Fact-finding Mission to Kenya* (6-28 February 2008) at 6.

⁸⁷ Schneider, *supra* note 56; GCRtoP, *supra* note 84.

in, for example, a scheme of regional autonomy in such cases,⁸⁸ rather what is required is state-wide measures to strengthen the mechanisms of inclusive or cooperative political self-determination and representative governance.

Contrasting with traditional modes of humanitarian intervention, international efforts in Kenya in the name (or at least spirit) of R2P emphasized international support for sustainable guarantees of self-determination both as means of responding to and preventing further mass atrocities.

4.3 Kosovo: From *sui generis* to a principled approach

Among the strengths of the model proposed in the present paper is its ability to recognize the right to independence possessed by Kosovo, and distinguish the claim from other assertions of self-determination. A surprising number of states' written submission provided for the ICJ's *Kosovo* Advisory Opinion, sought to portray Kosovo as an explicitly *sui generis* claim.⁸⁹ Serbia—as mentioned earlier—accentuated the lack of merit inherent in this argument, particularly because reliance on a *sui generis* classification seeks to resolve the international adjudication of Kosovo's claim by insisting it is beyond the norms of international law.⁹⁰ Cyprus, likewise, wrote that '[s]pecial cases' do not 'merely dilute the quality of legality of a system: they replace it with a political element, in which the power and commitment of individual actors becomes more significant than the legal rights that they enjoy'.⁹¹ Intuitively, Kosovo seems to be the paradigmatic claim for post-colonial external self-determination; consequently, a proposed framework for the boundaries of the right should at the very least be able to recognize the merit in Kosovo's claim.

To provide a simplified overview of the history of the territory and its peoples: the history of Kosovo involves a situation where the population of a discrete regional area was denied the right to political freedom and participation, leading to the perpetration of R2P atrocities against its population by the state. Moreover, its status as an autonomous region within Serbia in the past decades failed to protect its population from the denial self-determination, and subsequently failed to protect against the perpetration of atrocities.⁹² The experience of the Kosovars as a people accords with the framework proposed within this paper providing an entitlement to seek self-determination through independence as a last resort. As detailed earlier, such an entitlement exists where the state has failed to fulfill its duty to protect its population under R2P, where the population is located mainly in a discernible region, and finally where attempted solutions such as devolutionist autonomy within the state failed to result in sufficient protection.

It is true—as states, such as the UK, contend—that Kosovo's claim to independence should not necessarily provide a precedent for claims of self-determination by, for example,

⁸⁸ As well, some argue that the breaches involved did not rise to the level of R2P violations, and what was really at issue was a heightened responsibility to prevent.

⁸⁹ Including: Albania, Denmark, Estonia, France, Germany, Ireland, Japan, Latvia, Luxembourg, Maldives, Poland, Slovenia, and the United Kingdom as noted in *Serbia's Written Submission*, supra note 40 at fn. 158.

⁹⁰ *Serbia's Written Submissions*, ibid. at para 124.

⁹¹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, "Written Statement Submitted by the Republic of Cyprus" (17 April 2009) para. 77.

⁹² See for example the overview of Kosovo's history provided in: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, "UK Written Statement of the United Kingdom" (17 April 2009) at paras. 0.22-0.23 [*UK's Written Submissions*].

the Quebecois or the Basque.⁹³ However, this distinction should not be made on the basis of classifying Kosovo as a *sui generis* claim but through the articulation of the boundaries the right of self-determination as this paper has attempted.

4.4 Indigenous Self-determination

Finally, insofar as it has been the platform for the most active invocation of the right of self-determination in recent years, it is necessary to provide a preliminary thought on the relationship between indigenous self-determination and an R2P-based model. Despite the discomfort with classifying claims as *sui generis* articulated above, it may be that indigenous self-determination, in fact, represents a *sui generis* claim. Or alternatively, it may be that an indigenous right of self-determination is more closely affiliated with invocations of the right of self-determination in the decolonization context than the non-colonial application of the right. Nevertheless, an initial suggestion for the characterization of the right under an R2P model is attempted here.

In some ways the robust right to autonomy affirmed under the *UN Declaration on the Rights of Indigenous Peoples* could be analogized to delayed redistribution of sovereignty in light of the failure by states and the international community to prevent historic breaches of the Responsibility to Protect. That is, the recognition that colonization led to the denial of self-determination of indigenous peoples resulting in acts of genocide, crimes against humanity, war crimes and ethnic cleansing may justify a claim of redistribution. As with any denial of self-determination leading to breaches of R2P where a people is located in a discernible area (e.g. indigenous peoples living on reserve lands in Canada), remedial redistribution first seeks to redistribute sovereignty or autonomy within an existing state. If this internal redistribution fails to protect against ongoing breaches, then a right to independence may be justified. Having experienced an initial breach, the right to internal autonomy of indigenous peoples has been recognized through the *Declaration*; a subsequent breach—as it would for any other people—may ground a right to independence.

V. CONCLUSION

Despite consistent affirmations of the right of self-determination by states, international organizations and international courts over the years, practical invocations of the right have often been met with apprehension outside of the colonial context. This paper has suggested that such unease may be the result of the uncertainty surrounding the margins of the right, particularly with regard to claims of external self-determination. Such a phenomenon is apparent in the choice made by numerous states during the *Kosovo* case to emphasize the *sui generis* nature of Kosovo's claim; likewise, it can be seen in Serbia's attempt to exploit international anxiety by stressing the 'slippery slope' that would result if international law were to affirm the legitimacy of Kosovo's claim.

This paper has sought to locate possible boundaries of the right of self-determination through a functional account of the right grounded in a symbiotic relationship with the

⁹³ *UK's Written Submissions*, *ibid.* at para. 0.19.

emerging doctrine of the Responsibility to Protect. While not suggesting that the right should be confined to its role in the R2P framework, this paper has, nonetheless, proposed that the right's minimum guarantee may be consistent with the minimum guarantee of R2P itself: the responsibility lies with the state to ensure, at minimum, sufficient political, cultural, social and economic freedom to facilitate the creation of a state where all citizens are protected from genocide, war crimes, crimes against humanity and ethnic cleansing. In this way R2P may be conceived of as a modern incarnation of the social covenant referenced by Thomas Hobbes in the quote that began this paper.⁹⁴ The state's promise of protection is met by a reciprocal promise by the people to seek to the 'determine their political status' in accordance with the state's continued integrity. Once the state fails to protect a people, the promise has been breached and self-determination can be sought in the manner which best protects the people at risk.

⁹⁴ Hobbes, *supra* note 1 at 144.

A Critical Examination of Rawls's Political Conception of Human Rights in The Law of Peoples

GEORGINA CHURCHHOUSE

ABSTRACT

This essay will critically evaluate Rawls's political conception of human rights outlined in The Law of Peoples as a philosophical theory seeking to elucidate the concept of human rights in international law. This essay will consider whether criticism of the Rawlsian account of the concept of human rights in international law is justified by exploring how and for what reasons Rawls arrives at his de minimus list of human rights and whether the reasoning process by which Rawls arrives at his list of human rights can be defended. A case is made that Rawls's minimal and somewhat random list of human rights stems from the peculiar combination of Rawls conceiving of human rights as being the necessary conditions for social cooperation, the idea that human rights are the necessary conditions of social cooperation being the subject of an overlapping consensus between liberal and decent peoples, and on account of Rawls's understanding of what it means to be non parochial. This essay argues that the Rawlsian conception of human rights is ultimately indefensible as a philosophical theory seeking to elucidate the concept of human rights in international law. It is indefensible on account of the shaky conceptual framework - namely the flawed idea of an overlapping consensus and Rawls's understanding of what it means to be non parochial - that Rawls uses to reason for his list of human rights. This essay concludes that Rawls's reluctance to engage with, and scepticism concerning, the Kantian possibility of objective synthetic a priori moral truths derived via pure reason alone is ultimately fatal to the Rawlsian conception of human rights and any other theory seeking to avoid parochialism. In examining Rawls's work this essay will address the following questions: What are human rights? Are liberal democratic rights necessarily human rights? Where do human rights come from? Why should we value human rights? What function do human rights perform? In what sense are human rights universal?

INTRODUCTION

This essay will critically evaluate Rawls's political conception of human rights outlined in *The Law of Peoples*¹ as a philosophical theory seeking to elucidate the concept of human rights in international law. Rawls's minimalist account of human rights has attracted much criticism in the philosophical community. Rawls specifically excludes from the list of human rights many of the liberal democratic rights advocated for in *A Theory of Justice*,² and certain liberal democratic rights respected in the Universal Declaration of Human Rights and other international human rights treaties, "reducing the list of human rights found in the six major human rights conventions by more than 50%."³ Rawls's account is thus said to sharply contradict his earlier work and the discourse on human rights in international law. This essay will consider whether criticism of the Rawlsian scheme is justified by exploring how and for what reasons Rawls arrives at his minimal list of human rights, and whether the reasoning process by which Rawls arrives at his list of human rights can be defended. A case is made that Rawls's minimal and somewhat random list of human rights stems from the peculiar combination of Rawls conceiving of human rights as being the necessary conditions for social cooperation, the idea that human rights are the necessary conditions of social cooperation being the subject of an

¹ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001).

² J Rawls, *A Theory of Justice*, (Harvard University Press, 1999).

³ A Buchanan, 'Taking the Human Out of Human Rights,' in R Martin and D Reidy, *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 150.

overlapping consensus between liberal and decent peoples, and on account of Rawls's understanding of what it means to be non parochial. This essay argues that the Rawlsian conception of human rights is ultimately indefensible as a philosophical theory seeking to elucidate the concept of human rights in international law. It is indefensible on account of the shaky conceptual framework; namely the flawed idea of an overlapping consensus and Rawls's understanding of what it means to be non parochial - that Rawls uses to reason for his list of human rights. This essay concludes that Rawls's reluctance to engage with and scepticism concerning the Kantian possibility of objective synthetic *a priori* moral truths derived via pure reason alone is ultimately fatal to the Rawlsian conception of human rights and any other theory seeking to avoid parochialism.

This thesis is developed in five main parts. In part 1 of this essay I introduce the debate surrounding the concept of human rights in international law and the need to develop a philosophical theory of human rights. I set out Tasioulas's⁴ three *desiderata* as a reference point by which to analyse any proposed philosophical theory seeking to elucidate the concept of human rights in international law, adding one or two of my own observations to the *desiderata*. In part two of this essay following Hinsch and Stephanians⁵ I set out in detail Rawls's scattered comments regarding human rights in *The Law of Peoples*, as a reference point for the analysis throughout this essay. This is of particular importance given the alternative reading of Rawls that I offer. In part 3 of this essay I briefly outline and rebut Tasioulas's⁶ interpretation of Rawls's conception of human rights as being *pro tanto* triggers for intervention, and his argument that this explains the Rawlsian minimal list of human rights. In part 4 I outline what I believe Rawls's conception of human rights to be - namely that human rights are necessary conditions of social cooperation, derived via an overlapping consensus between liberal and decent peoples - and outline how Rawls derives his list of human rights and the reasoning process behind his list of human rights. In part 5 of this essay I critically assess Rawls's concept of human rights against Tasioulas's three *desiderata* outlined in part 1.

At this point it is worth expressing a few words of caution. Firstly Rawls's theory of human rights as set out in *The Law of Peoples* is arguably not the clearest of philosophical expositions. As Beitz notes, "the monograph makes large demands on its reader - we are asked to accept a good deal without extended argument, as if the coherence of the whole, and its consistency with political liberalism, should be persuasive in itself."⁷ Rawls's remarks regarding the concept of human rights are laconic and there is a general consensus that an "argumentative lacuna"⁸ exists in Rawls's account of human rights. What is confusing about the Rawlsian account is that in many places Rawls does not explain what he means by certain concepts and for what reasons he is articulating certain propositions. Such an exegetical problem arises with the concept of social cooperation, a concept central to the Rawlsian conception of human

⁴ J Tasioulas, 'Are Human Rights Essentially Triggers for Intervention,' (2009) 4 *Philosophy Compass* 938.

⁵ W Hinsch and M. Stephanians, 'Human Rights as Moral Claim Rights,' in R Martin and D Reidy, *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 177.

⁶ J Tasioulas, 'Are Human Rights Essentially Triggers for Intervention,' (2009) 4 *Philosophy Compass* 938. J Tasioulas, 'Taking Rights out of Human Rights,' 2009 *UCL Colloquium in Legal and Social Philosophy* available at http://www.ucl.ac.uk/laws/jurisprudence/docs/2009/09_coll_tasioulas.pdf. J Tasioulas, 'From Utopia to Kazanistan John Rawls and the Law of Peoples,' 2002 22:2 *Oxford Journal of Legal Studies* 367.

⁷ C Beitz, 'Rawls Law of Peoples' 2000 110:4 *Ethics* 669, 670.

⁸ J Tasioulas, 'Are Human Rights Essentially Triggers for Intervention,' (2009) 4 *Philosophy Compass* 938.

rights. One is left trawling through previous works to find definitions of concepts and building conjectures as to why Rawls puts forward certain propositions. In sum the Rawlsian account is thus in many ways “ambiguous.”⁹ The ambiguity surrounding Rawls’s conception of human rights poses huge challenges for any reader trying to make sense of and critically engage with Rawls’s account. The challenge in understanding Rawls’s account, does not however mean that the brief and largely unarticulated offerings and justifications Rawls does provide should be turned away and left immune from critical appreciation on account of their ambiguity. On the contrary, this is precisely why Rawls’s account calls for critical examination, to examine the reasons for this ambiguity. Secondly, on account of the ambiguity inherent in Rawls’s account a certain amount of interpretative work is required to clarify what exactly it is Rawls is expounding in his theory and why. As a result of this it is argued that Rawls’s conception of human rights in *The Law of Peoples*¹⁰ is intimately related to, and to a large extent explained by reference to Rawls’s earlier works such as, *Lectures in the History of Moral Philosophy*,¹¹ *A Theory of Justice*,¹² *Political Liberalism*,¹³ and *The Idea of Public Reason Revisited*,¹⁴ and cannot and should not be seen as conceptually separate to it. Thirdly we should note interpreting Rawls as expounding a certain set of propositions in his theory of human rights does not necessarily require that this theory, which Rawls is purported to have expounded, is entirely analytically coherent. The question of what it is that Rawls expounds as the concept of a human right and the question of whether the theory underlying the concept of a human right is analytically coherent and justifiable are two different and separate questions. These three points make the study of Rawls challenging and any critique of Rawls controversial. What follows in light of these observations is an attempt to give a detailed exposition of Rawls’s conception of human rights and a critique of it.

I. THE NEED FOR HUMAN RIGHTS THEORY

The term ‘human rights’ is exploited in international law. It is exploited in two main senses. Firstly the term is so frequently enunciated in legal and political rhetoric as a grounding reason for or against pursuing certain actions, or in evoking criticism of such actions, standards by which to judge conduct, that it has become something of an “ethical *lingua franca*.”¹⁵ Secondly the scope of human rights appears to have been stretched *ad infinitum* as international treaties and declarations increasingly add to the list of what may be termed a human right. It is said that the concept of human rights has come under “strong inflationary pressures,”¹⁶ that is “the tendency to label everything that justice requires, or worse still, everything that is merely desirable as a human right,”¹⁷

⁹ A Buchanan, ‘Taking the Human Out of Human Rights,’ in R. Martin and D. Reidy, *Rawls’s Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 150, at 151.

¹⁰ J. Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001).

¹¹ J. Rawls, *Lectures on the History of Moral Philosophy*, (Harvard University Press, 2003).

¹² J. Rawls, *A Theory of Justice*, (Harvard University Press, 1999).

¹³ J. Rawls, *Political Liberalism*, (Columbia University Press, 2005).

¹⁴ J. Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001).

¹⁵ J. Tasioulas, *The Moral Reality of Human Rights in Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* 75 (Thomas Poore ed., Oxford University Press, 2007).

¹⁶ J. Griffin, *On Human Rights*, (Oxford University Press, 2008).

¹⁷ A. Buchanan, ‘Taking the Human Out of Human Rights,’ in R. Martin and D. Reidy, *Rawls’s Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 150, at 116.

or that there has been an “apparently criterion less proliferation in human rights claims,”¹⁸ that the term “human rights is nearly criterionless.”¹⁹ As Raz rather cynically notes, “an ever growing number of rights are claimed to be human rights.”²⁰ What is clear in light of these two developments is that a consensus has developed that human rights should be respected, that human rights have force. What is unclear following these developments is firstly the question of why human rights should be respected at all, and secondly related to this question the question of what human rights are, the question of which rights are properly termed human rights and where these rights come from. There exists in short an “intellectual skepticism”²¹ surrounding the concept of human rights. As Sen puts it, at present the concept of human rights is seen as “foundationally dubious and lacking in cogency.”²² In order to throw light on such important questions it is clear that a philosophical account of the concept of human rights is necessary. As Raz notes, “the ethical doctrine of human rights should articulate standards by which the practice of human rights can be judged, standards which will indicate what human rights we have. In doing so it will elucidate what is at issue, what is the significance of a right’s being a human right.”²³ John Rawls’s political conception of human rights as set out in *The Law of Peoples*²⁴ presents one such attempt to provide a philosophical account of the concept of a human right. Having shown that human rights theory is necessary I shall now outline the three *desiderata* which must be taken in to account in assessing any such theory seeking to elucidate the concept of a human right.

THE THREE *DESIDERATA*

In assessing any proposed theory seeking to elucidate the concept of a human right Tasioulas²⁵ argues that three *desiderata* should be borne in mind. I shall outline and explain all three *desiderata*, as it is by reference to these three *desiderata* that I shall assess Rawls’s political conception of human rights, on my alternative reading of it, in part 5 of this essay.

THE *DESIDERATUM* OF THE DISTINCTIVE IMPORTANCE OF HUMAN RIGHTS

¹⁸ J Tasioulas, ‘From Utopia to Kazanistan John Rawls and the Law of Peoples,’ 2002 22:2 *Oxford Journal of Legal Studies* 367, at 381.

¹⁹ J Griffin, *On Human Rights*, (Oxford University Press, 2008), at 14.

²⁰ J Raz, ‘Human Rights Without Foundations,’ 2008 *UCL Colloquium in Legal and Social Philosophy* available at http://www.ucl.ac.uk/laws/jurisprudence/docs/2008/08_coll_raz.pdf, at 3.

²¹ A Sen, ‘Elements of a Theory of Human Rights,’ 2004 32:4 *Philosophy and Public Affairs* 315, at 316.

²² A Sen, ‘Elements of a Theory of Human Rights,’ 2004 32:4 *Philosophy and Public Affairs* 315, at 315.

²³ J Raz, ‘Human Rights Without Foundations,’ 2008 *UCL Colloquium in Legal and Social Philosophy* available at http://www.ucl.ac.uk/laws/jurisprudence/docs/2008/08_coll_raz.pdf, at 3.

²⁴ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001).

²⁵ J Tasioulas, ‘Are Human Rights Essentially Triggers for Intervention,’ (2009) 4 *Philosophy Compass* 938, at 939.

For Tasioulas, human rights theory must capture the “distinctive importance of this class of norms.”²⁶ Firstly Tasioulas argues that “not every moral consideration is important.”²⁷ Secondly Tasioulas argues that “nor is every morally important consideration a matter of human rights.”²⁸ Tasioulas notes that “on the political conception...reference must (also) be made to the distinctive political nature of such rights when picking them out within the class of all rights.”²⁹

THE *DESIDERATUM* OF FIDELITY TO HUMAN RIGHTS CULTURE

For Tasioulas human rights theory must also display an “appropriate level of fidelity”³⁰ to human rights culture in international law especially as it is exhibited in international human rights treaties such as The Universal Declaration on Human Rights (UNDHR) 1948, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976, and the International Covenant on Civil and Political Rights (ICCPR) 1976. However Tasioulas is keen to stress that given the very question of what it means to be a human right, and which rights are justified as human rights proper, are at the centre of controversy in human rights theory, any theory seeking to elucidate the concept of a human right must engage critically with the human rights discourse and culture as exhibited in such international treaties. Thus for Tasioulas “it is not the case that an adequate theory must rubber stamp all the ‘human rights’ that can be gleaned from the key human rights declarations and conventions.”³¹ For Tasioulas there may be good reasons for not recognising certain human rights in human rights discourse and culture as human rights proper. Indeed as Sen notes, “it is critically important to see the relationship between the force and appeal of human rights on the one hand, and their reasoned justification and scrutinized use, on the other.”³² But equally, as Raz helpfully points out, human rights theory must not be so divorced, so remote from human rights culture as to be irrelevant to it.³³ Thus human rights theory “must illuminate or criticise existing human rights practice.”³⁴

THE *DESIDERATUM* OF NON PAROCHIALISM OF HUMAN RIGHTS

Finally for Tasioulas human rights theory crucially must not amount to the “ethnocentric imposition of ‘western; or ‘liberal’ values,”³⁵ over what is described as “no less valid

²⁶ J Tasioulas, ‘Are Human Rights Essentially Triggers for Intervention,’ (2009) 4 *Philosophy Compass* 938, at 939.

²⁷ J Tasioulas, *Ibid.*

²⁸ J Tasioulas, *Ibid.*

²⁹ J Tasioulas, *Ibid.*

³⁰ J Raz, ‘Human Rights Without Foundations,’ 2008 *UCL Colloquium in Legal and Social Philosophy* available at http://www.ucl.ac.uk/laws/jurisprudence/docs/2008/08_coll_raz.pdf.

³¹ J Tasioulas, ‘Are Human Rights Essentially Triggers for Intervention,’ (2009) 4 *Philosophy Compass* 938, at 939.

³² A Sen, ‘Elements of a Theory of Human Rights,’ 2004 32:4 *Philosophy and Public Affairs* 315, at 317.

³³ J Raz, ‘Human Rights Without Foundations,’ 2008 *UCL Colloquium in Legal and Social Philosophy* available at http://www.ucl.ac.uk/laws/jurisprudence/docs/2008/08_coll_raz.pdf, 3.

³⁴ J Raz, ‘Human Rights Without Foundations,’ 2008 *UCL Colloquium in Legal and Social Philosophy* available at http://www.ucl.ac.uk/laws/jurisprudence/docs/2008/08_coll_raz.pdf 4.

³⁵ J Tasioulas, ‘Are Human Rights Essentially Triggers for Intervention,’ (2009) 4 *Philosophy Compass* 938, at 939.

claims of non western and non liberal traditions.”³⁶ By non ethnocentric Tasioulas means that “the principles of international justice are not limited in their range of acceptability to western societies reflecting their political values.”³⁷ Surprisingly Tasioulas offers a very brief description of this *desideratum*, but it is necessary to articulate further exactly what it means to say that human rights theory must not be parochial. I note that this *desideratum* points to the need to ground the concept in some form of universal moral objectivity. Universal moral objectivity defined as a commitment to the belief that there are universal moral propositions that are objectively true.

II. RAWL'S CONCEPTION OF HUMAN RIGHTS IN *THE LAW OF PEOPLES*

There is much controversy surrounding Rawls's account of human rights in *The Law of Peoples*.³⁸ Given this fact and the added complication that Rawls's account is scattered throughout the *Law of Peoples*³⁹ in text and footnotes, it will be useful to outline Rawls's account of human rights and the list of rights Rawls regards as human rights. Following Hinch and Stephanians⁴⁰ I will set out Rawls's comments regarding human rights in *The Law of Peoples*,⁴¹ as a point of reference throughout this essay. I shall focus on Rawls's arguments for his conception of human rights, not his hypothetical example of a non liberal hierarchical decent society, Kazanistan. I do so because as Buchanan notes, “Rawls give us no reason to believe that a society whose respect for human rights was limited to his truncated list of rights would be as tolerant as Kazanistan.”⁴² Indeed as Buchanan further notes, “our understanding of Rawls's conception of human rights must be based on his arguments, not on his very sketchy and misleading example of a non liberal but decent society.”⁴³

The following account of human rights emerges in *The Law of Peoples*,⁴⁴ as identified by Hinch and Stephanians.⁴⁵

1. That the “Basic Charter of the Law of Peoples” requires that peoples honour human rights.⁴⁶

³⁶ J Tasioulas, *Ibid*.

³⁷ J Tasioulas, ‘From Utopia to Kazanistan John Rawls and the Law of Peoples,’ 2002 22:2 *Oxford Journal of Legal Studies* 367, 391.

³⁸ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001).

³⁹ J Rawls, *Ibid*.

⁴⁰ W Hinch and M. Stephanians, ‘Human Rights as Moral Claim Rights,’ in R. Martin and D. Reidy, *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 177.

⁴¹ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001).

⁴² A Buchanan, ‘Rawls's Law of Peoples; Rules for a Vanished Westphalian World,’ 2000 110:4 *Ethics* 697.

⁴³ A Buchanan, *Ibid*.

⁴⁴ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001).

⁴⁵ W Hinch and M. Stephanians, ‘Human Rights as Moral Claim Rights,’ in R Martin and D Reidy, *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 177.

⁴⁶ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 37.

2. That human rights set a limit to a regime's internal autonomy.⁴⁷
3. That according to Rawls violation of human rights is a reason capable of justifying not only economic and diplomatic sanctions but as a last resort military intervention. Human rights can claim a right to war in self defence.⁴⁸
4. That only societies that honour the human rights of their members (and who are non aggressive) may consider themselves safe from the threat of external political sanctions and international intervention. They and only they can claim a right to war in self defence.⁴⁹
5. That human rights are neither constitutional rights nor rights "that belong to certain kinds of political institutions." Rather they set a necessary though not sufficient standard for the decency of domestic political and social institutions.⁵⁰
6. That human rights are "universal rights" in that "they are binding on all peoples and societies, including outlaw states."⁵¹
7. That human rights are necessary conditions of social cooperation that are recognised by all decent regimes.⁵²
8. That human rights are not supposed to be justified in terms of any particular comprehensive religious, philosophical or moral doctrine, because doing so would be divisive in a pluralistic world.⁵³
9. That human rights are a proper subset of the basic rights and liberties protected by liberal societies.⁵⁴
10. That human rights are particularly urgent rights.⁵⁵
11. That human rights are essential to any "common good idea of justice" and therefore not "peculiarly liberal or special to the western tradition"⁵⁶
12. That human rights must not be expounded in terms of controversial comprehensive philosophical or religious doctrines.⁵⁷
13. Human rights in *The Law of Peoples* are a subset of rights identified in the first principle of justice.⁵⁸

⁴⁷ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 27, 42 79f.

⁴⁸ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 37f, 81, 93f

⁴⁹ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 92.

⁵⁰ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 79f.

⁵¹ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at p 80f.

⁵² J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at p 65 and 68.

⁵³ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 68 and 71.

⁵⁴ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 68, 78f and 81.

⁵⁵ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001) at 79.

⁵⁶ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 65.

⁵⁷ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 68 and 81.

14. Human rights violation is "equally condemned by both reasonable liberal peoples and decent hierarchical peoples."⁵⁹
15. The political (moral) force of human rights extends to all societies and they are binding on all peoples and societies including outlaw states."⁶⁰
16. Well-ordered societies are supposed to establish "new institutions and practices in order to protect human rights beyond their own borders."⁶¹
17. Rawls lists the following rights as human rights, "the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom and forced cooperation (or occupation) , and to a sufficient measure of liberty of conscience (to ensure freedom of religion and thought); to property (personal property) and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly)."⁶² Further Rawls, takes all the rights specified in articles 3 to 18 of the Universal Declaration on Human Rights to be "human rights proper."⁶³ Rawls's reference to the Universal Declaration on Human Rights adds to the list outlined above freedom of movement and the right to immigration (Article 13),⁶⁴ the right to asylum (Article 4), the right to a nationality (Article 15), and equal rights to marry without being subject to ethnic or religious discrimination for men and women (Article 16). Articles 6 to 12 give us a more fine grained account of the right to formal equality (before the law) and the protection of habeus corpus and due process.

Rawls's account of human rights is minimalist, it excludes from the list of human rights many of the liberal democratic rights argued for in *A Theory of Justice*⁶⁵ and many of the rights classified as human rights in international law. Although Reidy⁶⁶ has attempted to argue that Rawls's account of human rights is not as minimalist as is normally assumed by the academic literature on the subject, even Reidy acknowledges that Rawls's account of human rights has notable exceptions to international human rights practice. Rights which have been identified as missing from the Rawlsian conception of human rights are; rights to democratic public participation (Article 21 of the UNDHR),⁶⁷ rights to non

⁵⁸ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 68, 78f and 81.

⁵⁹ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 79.

⁶⁰ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 80-81.

⁶¹ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 48, 93.

⁶² J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 65 see section 8.2.2.a

⁶³ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 80.

⁶⁴ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 74.

⁶⁵ J Rawls, *A Theory of Justice*, (Harvard University Press, 1999).

⁶⁶ D A Reidy, 'Political Authority and Human Rights,' in R Martin and D Reidy, *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 169, at 170-174.

⁶⁷ D A Reidy, 'Political Authority and Human Rights,' in R Martin and D Reidy, *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 169. C Beitz, 'Rawls Law of Peoples' 2000 110:4 *Ethics* 669.

discrimination (Article 23 of the UNDHR)⁶⁸ including systematic, institutionalised, public discrimination on any grounds including religion,⁶⁹ race, gender ethnicity, nationality, or sexual orientation, rights of assembly,⁷⁰ rights of freedom of expression and association (Arts. 19-20 of the UNDHR)⁷¹, second and third generation rights,⁷² welfare rights, articles 24-77 and 22 of the UNDHR,⁷³ rights to full liberty of religion and conscience,⁷⁴ rights to equality for women.⁷⁵ As Reidy notes, “he clearly rejects the view that all or nearly all of the rights contained within the UNDHR are basic human rights, or human rights proper as he puts it.”⁷⁶ To Rawls these rights do not constitute urgent rights but rather “typical liberal aspirations” that non liberal decent people do not share. Rawls observes in a footnote that “in contrast to human rights proper these and certain other rights of the declaration seem more aptly described as stating liberal aspirations or appear to presuppose specific kinds of institutions.”⁷⁷ This minimalism generates the need for a sceptical critique of Rawls in order to ask whether such a minimal conception of human rights is justified. In order to achieve this we need to examine the reasoning process by which Rawls arrives at his list of human rights, and examine whether it is justified.

III. A REBUTTAL OF TASIIOULAS’S INTERPRETATION OF RAWLS’S CONCEPTION OF HUMAN RIGHTS.

Having outlined Rawls’s comments regarding human rights in *The Law of Peoples* in part 2 of this essay, I shall now briefly outline and rebut Tasioulas’s interpretation of Rawls’s work. In short Tasioulas’s interpretation of Rawls’s conception of human rights is that for Rawls “a human right is a moral right a) possessed by all human beings and b)

⁶⁸ D A Reidy, ‘Political Authority and Human Rights,’ in R Martin and D Reidy, *Rawls’s Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 169.

⁶⁹ Although Rawls seems to protect a right against religious persecution, defined as to freedom of religious thought and to practice one’s religion without fear.

⁷⁰ D A Reidy, ‘Political Authority and Human Rights,’ in R Martin and D Reidy, *Rawls’s Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 169.

⁷¹ D A Reidy, ‘Political Authority and Human Rights,’ in R Martin and D Reidy, *Rawls’s Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 169. C Beitz, ‘Rawls Law of Peoples’ 2000 110:4 *Ethics* 669.

⁷² G Letsas, *A Theory of Interpretation of the ECHR*, (Oxford University Press, 2007), at 27.

⁷³ D A Reidy, ‘Political Authority and Human Rights,’ in R Martin and D Reidy, *Rawls’s Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), p 169. C Beitz, ‘Rawls Law of Peoples’ 2000 110:4 *Ethics* 669.

⁷⁴ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001) at 64 and 65. G Letsas, *A Theory of Interpretation of the ECHR*, (Oxford University Press, 2007). Rawls “prohibits adherents to certain religions from holding certain positions or using certain form of expression, both of which are allowed to adherents to the dominant religion... while it is undeniably a violation of liberal constitutional rights.”

⁷⁵ W Hinch and M Stephanians, ‘Human Rights as Moral Claim Rights,’ in R Martin and D Reidy, *Rawls’s Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 177. Hinch and Stephanians note however that under Rawls’s scheme decent societies must make special efforts to strengthen the representation of women in their consultation hierarchies, (LoP p 75) and also elements of equal justice for women are required by a well ordered society.

⁷⁶ D A Reidy, ‘Political Authority and Human Rights,’ in R Martin and D Reidy, *Rawls’s Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 169, at 170.

⁷⁷ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 80 n23.

capable of creating a defeasible or *pro tanto* justification for forceful intervention by well ordered societies against the society responsible for severe and widespread violations of that right.”⁷⁸ Although Tasioulas acknowledges that Rawls specifically defines forceful intervention as including not just military intervention but also diplomatic and economic sanctions, Rawls, on Tasioulas’s interpretation affords critical status to military intervention. Tasioulas clarifies that he is claiming that “what distinguishes human rights from within the broader category of rights is that their severe violation is capable of generating a *pro tanto* case for military intervention.”⁷⁹ Tasioulas makes the further claim that his interpretation of Rawls fits “Rawls’s text better at crucial points.”⁸⁰ Tasioulas cites the following passage in support of his claim that his interpretation of Rawls fits the text better, “is there ever a time when forceful intervention might be called for [against a non aggressive society that upholds slavery and ritual human sacrifice?] If the offences against human rights are egregious and the society does not respond to the imposition of sanctions, such intervention in the defence of human rights would be acceptable and called for.”⁸¹ Tasioulas argues that here, forceful intervention is contrasted with economic sanctions.⁸² Further, Tasioulas argues that his interpretation “offers a plausible explanation for the notoriously truncated list of human rights he endorses.”⁸³ He argues that “had Rawls adopted a wide reading of ‘intervention’ in his characterisation of human rights, a rather more generous schedule of human rights would have been the natural outcome.”⁸⁴

I object to Tasioulas’s claim that his interpretation of Rawls fits the text better at certain points and further explains Rawlsian human rights minimalism. On the first ground it is debatable whether Tasioulas’s interpretation fits the text better. Following Hinsch and Stephanians⁸⁵ I also find that Rawls has a more expansive interpretation of forceful intervention in mind. Firstly as Tasioulas concedes, Rawls specifically defines forceful intervention as including diplomatic and economic sanctions as well as military intervention. Secondly the example that Tasioulas cites in support of his claim that Rawls affords specific attention to military intervention as opposed to diplomatic or economic sanctions, is weak. This passage does not support the claim that human rights are determined by being *pro tanto* triggers for intervention, rather it serves to highlight that a range of different forms of intervention can be used to intervene in a state where human rights abuses are being carried out, from diplomatic to economic to military intervention. In regards to Tasioulas’s second claim, that Tasioulas’s interpretation explains Rawlsian minimalism, otherwise put that his interpretation explains why certain liberal democratic rights are left off the list, it is argued that it does not. As Tasioulas himself concedes, “assuming we believe that military intervention can ever be *pro tanto* justified in response to rights violations, it will often be hard to tell when this is the case. How clear is it, for

⁷⁸ J Tasioulas, ‘Are Human Rights Essentially Triggers for Intervention,’ (2009) 4 *Philosophy Compass* 938, at 940.

⁷⁹ J Tasioulas, *Ibid.*

⁸⁰ J Tasioulas, *Ibid.*

⁸¹ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 94 n6.

⁸² J Tasioulas, ‘Are Human Rights Essentially Triggers for Intervention,’ (2009) 4 *Philosophy Compass* 938, at 949 n 4.

⁸³ J Tasioulas, ‘Are Human Rights Essentially Triggers for Intervention,’ (2009) 4 *Philosophy Compass* 938, at 940.

⁸⁴ J Tasioulas, ‘Are Human Rights Essentially Triggers for Intervention,’ (2009) 4 *Philosophy Compass* 938, at 941.

⁸⁵ W Hinsch and M Stephanians, ‘Human Rights as Moral Claim Rights,’ in R Martin and D Reidy, *Rawls’s Law of Peoples: A Realistic Utopia?* (Blackwell, 2006), 177, at 127.

example, that rights against discrimination on the grounds of sex, race and religion, which are absent from Rawls's list, could never generate a *pro tanto* case for military intervention?"⁸⁶ Tasioulas puts this lack of determinism down to the "argumentative lacuna"⁸⁷ in Rawls's account. Although I can sympathise with Tasioulas on the grounds that Rawls's account is confusing and is not philosophically unjustified, it is argued that a different interpretation of Rawls's work can explain the Rawlsian minimalism and crucially fit the text better in many ways. It is to this alternative interpretation of Rawls's conception of human rights that I now turn.

IV. AN ALTERNATIVE READING OF RAWLS'S CONCEPTION OF HUMAN RIGHTS.

Having rebutted Tasioulas's interpretation of Rawls's conception of human rights in part 3 of this essay, I now turn to my alternative interpretation of Rawls's conception of human rights. It is argued that this interpretation of Rawls's work both fits the text better and helps us to understand why Rawls omits certain liberal democratic rights from his list of human rights. For the sake of clarity I set out my interpretation of Rawls's conception of human rights and the method in which he derives human rights in stages, although it should be noted that Rawls does not provide such a stage by stage analysis.

A case is made that Rawls's minimal and somewhat random list of human rights stems from the peculiar combination of Rawls conceiving of human rights as being the necessary conditions for social cooperation, the idea that human rights are the necessary conditions of social cooperation being the subject of an overlapping consensus between liberal and decent peoples, and on account of Rawls's understanding of what it means to be non parochial.

KANTIAN CONSTRUCTIVISM IN *A THEORY OF JUSTICE*

In *A Theory of Justice*⁸⁸ Rawls is regarded as having adapted the Kantian transcendental argument in *The Groundwork*, and later works in arguing for a liberal conception of justice derived via the original position argument. It is a matter of great debate whether in *Political Liberalism*⁸⁹ Rawls in a sceptical move sought to abandon the Kantian origins of his argument for liberalism. Looking through Rawls's other work, namely *Lectures on the History of Moral Philosophy*⁹⁰ there is certainly evidence to suggest that Rawls was sceptical as to the ability of Kantian logic to derive objective synthetic *a priori* truths from pure reason alone. In Chapter VII⁹¹ on Kant in *Lectures on the History of Moral Philosophy*,⁹² Rawls discusses Kant's attempt to derive the moral law. Rawls concludes that Kant by the time of the second critique, *The Critique of Practical Reason*, has abandoned his "hitherto vain search for a so called deduction of the moral law,"⁹³ instead developing the "doctrine of the fact of reason."⁹⁴ Although there is not scope to go in to Rawls's arguments here, what can be taken from these brief remarks is the Rawlsian scepticism

⁸⁶ J Tasioulas, 'Are Human Rights Essentially Triggers for Intervention,' (2009) 4 *Philosophy Compass* 938, at 941.

⁸⁷ J Tasioulas, 'Are Human Rights Essentially Triggers for Intervention,' (2009) 4 *Philosophy Compass* 938.

⁸⁸ J Rawls, *A Theory of Justice*, (Harvard University Press, 1999).

⁸⁹ J Rawls, *Political Liberalism*, (Columbia University Press, 2005).

⁹⁰ J Rawls, *Lectures on the History of Moral Philosophy*, (Harvard University Press, 2003).

⁹¹ J Rawls, *Lectures on the History of Moral Philosophy*, (Harvard University Press, 2003), 253 – 263.

⁹² J Rawls, *Lectures on the History of Moral Philosophy*, (Harvard University Press, 2003).

⁹³ J Rawls, *Lectures on the History of Moral Philosophy*, (Harvard University Press, 2003), at 268.

⁹⁴ *Ibid.*

concerning the ability of reason to derive pure objective synthetic *a priori* moral truths. I think this scepticism followed Rawls in to *Political Liberalism*⁹⁵ and his attempts to ground objectivity in reasonableness as opposed to rationality.

THE IDEA OF AN OVERLAPPING CONSENSUS

In *Political Liberalism*⁹⁶ Rawls introduces the idea of an overlapping consensus. For Rawls the idea of an overlapping consensus allows a liberal society to define the limits of “reasonable toleration” in that society, without imposing a liberal comprehensive philosophical view point upon those who hold other “comprehensive” religious, moral or philosophical view points. As such, it can be thought of as delineating a “political conception of justice.” Rawls thinks this “political conception of justice” can establish an objective conception of justice, as he argues not being based upon a “comprehensive” view point and subject to an overlapping consensus it can rightly be termed objective.

THE APPLICATION OF THE CONCEPT OF AN OVERLAPPING CONSENSUS TO *THE LAW OF PEOPLES*

In the *Law of Peoples*⁹⁷ Rawls appears to need to utilise this concept of an overlapping consensus on an international level. Just as *Political Liberalism*⁹⁸ was concerned with the reasonable limits for toleration in a domestic society where not all individuals in that society were liberal, *The Law of Peoples*⁹⁹ is concerned with the reasonable limits for toleration in a global order where not all peoples are liberal.

THE OVERLAPPING CONSENSUS AND INTERNATIONAL HUMAN RIGHTS

Now Rawls's account of human rights seeks to establish human rights as “universal rights” as “binding on all peoples and societies, including outlaw states,”¹⁰⁰ yet Rawls emphasises they cannot be justified in terms of any particular comprehensive religious, philosophical or moral doctrine, because doing so would be divisive in a pluralistic world.¹⁰¹ It is argued that with this in mind Rawls appeals to the idea of an overlapping consensus to establish a concept of a human right. In Rawls's mind this concept of a human right cannot be disputed as is the product of a global political conception of justice, not derived by any comprehensive viewpoint but rather via an overlapping consensus. For Rawls this, it is argued, allows human rights to properly claim to be universal. Since they are objective – being the product of a global political conception of justice, derived via an overlapping consensus between peoples.

Now Rawls as I interpret him offers a theory of human rights grounded in the concept of social cooperation. As Rawls states, human rights are the “necessary conditions of any system of social cooperation. When they are regularly violated we have

⁹⁵ J Rawls, *Political Liberalism*, (Columbia University Press, 2005).

⁹⁶ J Rawls, *Political Liberalism*, (Columbia University Press, 2005).

⁹⁷ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001).

⁹⁸ J Rawls, *Political Liberalism*, (Columbia University Press, 2005).

⁹⁹ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001).

¹⁰⁰ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 80f.

¹⁰¹ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), at 68 and 71.

command by force, a slave system, and no cooperation of any kind”¹⁰² Rather unhelpfully, Rawls doesn’t define what he means by social cooperation but Raz¹⁰³ refers to definitions of the concept that Rawls provides in his earlier work. Raz argues that the idea refers to his earlier explanation of social cooperation holding between ‘free and equal moral persons’ according to which “social cooperation[is] not simply...a productive and socially coordinated activity, but...[one] fulfilling a notion of fair terms of cooperation and of mutual advantage.”¹⁰⁴ Social cooperation “is always for mutual benefit...[it] involves ...a shared notion of the fair terms of cooperation, which each participant may reasonably be expected to accept, provided that everyone else likewise accepts them...all who cooperate must benefit or share in common burdens.”¹⁰⁵ It is argued that for Rawls social cooperation is the product of an overlapping consensus between liberal and decent non liberal peoples.

THE CONCEPTUAL SHAKINESS OF THE IDEA OF AN OVERLAPPING CONSENSUS

Now it is argued that this conception of social cooperation, the idea of it holding between free and equal moral persons, has a distinctively liberal flavour to it. I argue that this is a product of the conceptual shakiness of the idea of an overlapping consensus. In *Political Liberalism* Rawls outlines at length his conception of an overlapping consensus in *Lecture IV The Idea of an Overlapping Consensus*¹⁰⁶ and in sections detailing a reply to Habermas.¹⁰⁷ One of the questions Habermas raises is what makes a certain viewpoint part of the overlapping consensus. Now Rawls replies by saying that what makes a certain viewpoint part of an overlapping consensus is that it is reasonable. Reasonable appears to be defined by Rawls as meaning that advocated by the reasonable person. But as Scanlon¹⁰⁸ notes, Rawls provides no definition of what makes a reasonable person reasonable. What seems to emerge from this for Rawls is that a reasonable view is one which coheres with liberal ends, although these ends are subscribed to on the basis of other comprehensive moral, philosophical or religious view points. Moreover, what ends up grounding the reasonableness of liberalism, appears to be none other than the Kantian constructivist arguments Rawls uses in *A Theory of Justice*¹⁰⁹ to argue for liberalism, but which he is sceptical as to the objectivity of. Rawls of course does not acknowledge either of these points, though it is difficult to see how he could not see that this was essentially what his concept of an overlapping consensus, coupled with the absence of content grounding reasonableness, led him to.

THE IMPACT OF THE CONCEPTUAL SHAKINESS OF THE CONCEPT OF AN OVERLAPPING CONSENSUS ON RAWLS’S LIST OF HUMAN RIGHTS

¹⁰² J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001), 68.

¹⁰³ J Raz, ‘Human Rights Without Foundations,’ 2008 *UCL Colloquium in Legal and Social Philosophy* available at http://www.ucl.ac.uk/laws/jurisprudence/docs/2008/08_coll_raz.pdf, at p 13.

¹⁰⁴ John Rawls ‘Kantian constructivism in moral theory,’ 1980 77 *Journal of Philosophy* 515.

¹⁰⁵ J Rawls, *Political Liberalism*, (Columbia University Press, 1995), at 300.

¹⁰⁶ J Rawls, *Political Liberalism*, (Columbia University Press, 1995), at 135- 172.

¹⁰⁷ J Rawls, *Political Liberalism*, (Columbia University Press, 1995), at 385 – 434.

¹⁰⁸ Scanlon in S. Freeman, *The Cambridge Companion to Rawls*, (Cambridge University Press, 2003), at 163 to 166.

¹⁰⁹ J Rawls, *A Theory of Justice*, (Harvard University Press, 1999).

I think Rawls was by the time he wrote *The Law of Peoples*¹¹⁰ aware of the shaky conceptual foundations of his concept of an overlapping consensus in deriving a political conception of justice and hence one which claimed to consequently be objective. It is difficult to see how he could not have been. Imperative for Rawls is the idea that human rights should be non parochial. On my interpretation, Rawls, recognising that the political conception of justice derived via an overlapping consensus essentially relies on accepting the Kantian constructivist arguments that Rawls puts forward in *A Theory of Justice*,¹¹¹ as a ground to reasonableness,¹¹² and hence objectivity, shaves off from the largely liberal conception of social cooperation, many liberal rights entailed by the concept, such as the notion of equality for all, in an effort to appear non parochial. Non parochial for Rawls meaning a view point not only acceptable to liberal peoples.

V. AN EXAMINATION OF RAWLS'S POLITICAL CONCEPTION OF HUMAN RIGHTS BY REFERENCE TASIIOULAS'S THREE *DESIDERATA*.

Having developed my interpretation of Rawls's conception of a human right and having examined the reasoning processes which led Rawls to develop his minimal list of rights, I now turn to assess Rawls's doctrine of human rights by reference to Tasioulas's three *desiderata*.

It is argued that on account of the shaky conceptual foundations grounding Rawls's conception of human rights and determining his list of rights, namely the idea of social cooperation as being the product of an overlapping consensus between liberal and decent peoples coupled with the non parochialism requirement - that Rawls's theory fails to satisfy Tasioulas's *desiderata* in any meaningful way. Although it could be argued that Rawls satisfies both the *desideratum* of the distinctive importance of human rights and the *desideratum* of fidelity to human rights culture, simply on account of the minimalism of Rawls's list of rights, this is not persuasive. In essence both *desiderata* are parasitic upon the *desideratum* of the non parochialism of human rights. It is argued that Rawls fails to satisfy the *desideratum* of non parochialism. Any philosophical theory seeking to satisfy the *desideratum* of non parochialism must, I argue, be able to offer a theory purporting to claim objectivity and hence universality. Since Rawls is sceptical as to the Kantian possibility of deriving objective synthetic *a priori* moral truths by pure reason alone and since his argument for an overlapping consensus of reasonable views is parasitic upon accepting his Kantian constructivist argument in *A Theory of Justice*,¹¹³ the objectivity of which Rawls is sceptical of, Rawls is unable to offer a concept of human rights which can purport to be objective and hence universal. In failing to establish universal human rights Rawls, on my interpretation, fails to show why human rights are important and why they should be respected.

VI. CONCLUSION

This essay has argued from a critical perspective that Rawls's political conception of human rights outlined in the *Law of Peoples*¹¹⁴ is philosophically unsound and the minimal list of human rights that Rawls delineates as human rights is unjustified. Rawls's theory fails to satisfy Tasioulas's three *desiderata*. A case has been made that Rawls's conception

¹¹⁰ J Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001).

¹¹¹ J Rawls, *A Theory of Justice*, (Harvard University Press, 1999).

¹¹² That is, as something to ground the reasonableness of liberalism.

¹¹³ J Rawls, *A Theory of Justice*, (Harvard University Press, 1999).

¹¹⁴ J. Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001).

of human rights in the *Law of Peoples*¹¹⁵ and the human rights he derives stems not from his purported conception of human rights as *pro tanto* triggers for intervention as is traditionally conceived by Tasioulas, (part 3 of this essay). Rather that Rawls's minimal and somewhat random list of human rights stems from the peculiar combination of Rawls conceiving of human rights as being the necessary conditions for social cooperation, the idea that human rights are the necessary conditions of social cooperation being the subject of an overlapping consensus between liberal and decent peoples, and on account of Rawls's understanding of what it means to be non parochial (part 4 of this essay). This essay has argued that the Rawlsian conception of human rights is ultimately indefensible as a philosophical theory seeking to elucidate the concept of human rights in international law. It is indefensible on account of the shaky conceptual framework - namely the flawed idea of an overlapping consensus and Rawls's understanding of what it means to be non parochial - that Rawls uses to reason for his list of human rights. It has been argued that Rawls's reluctance to engage with and scepticism concerning the Kantian possibility of objective synthetic *a priori* moral truths derived via pure reason alone is ultimately fatal to the Rawlsian conception of human rights and any other theory seeking to avoid parochialism, in human rights theory (part 5 of this essay)

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¹¹⁵ J. Rawls, *The Law of Peoples: with the Idea of Public Reason Revisited* (Harvard University Press, 2001).

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THE DEFICIENCIES OF THE INTERNATIONAL LEGAL FRAMEWORK IN THE PROTECTION OF CHILDREN FROM RECRUITMENT AND USE IN HOSTILITIES

STELLA MARGARITI*

I. INTRODUCTION

...more and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values; a space in which children are slaughtered, raped and maimed; a space in which children are exploited as soldiers; a space in which children are starved and exposed to extreme brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink.¹

Since the last decade of the 20th century, a century during which human rights conventions were drafted, signed and ratified one after the other, over two million children have been killed in armed conflicts, while even more have been injured and maimed.² The practice of child soldiering is still in existence despite repeated efforts to outlaw it. According to The Child Soldiers Global Report of 2008, it is impossible to estimate the exact number of child soldiers around the globe today. However 'it is clear that there are many tens of thousands of child soldiers'.³ The same report states that in at least 86 countries and territories, under -18s are recruited and used in hostilities, either by forcible or unlawful recruitment or by legal recruitment into peacetime armies.⁴ It also states that child soldiers have been used by national armies in nine situations within the four-year period 2004-2007, compared to ten situations within the previous four-year period (2001-2004), with Myanmar being the worst offender.⁵ Finally, it concludes that the reduction of the total number of child soldiers today, compared with an earlier review in 2004, is not due to the legal or any other action taken by the States concerned, but to the decrease of the total number of armed conflicts around the globe.⁶

Recruitment of child soldiers has a deleterious impact on their development, health and future prospects. The duties that are performed by child soldiers vary from 'participation in combat; laying mines and explosives; scouting, spying, acting as decoys, couriers or guards; training, drill or other preparations; logistics and support functions, portering, cooking and domestic labour' to 'sexual slavery or other forms of sexual abuse'.⁷ After the end of the conflict, these children are treated with suspicion by their communities and find it hard to reintegrate and continue their disrupted childhood. In cases where they leave the military life as adults, they have to face poverty. As a result, they are more prone to lead a marginalised life since they have missed education and do not have any economically-useful skills.⁸

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¹ Note by the Expert of the Secretary-General, 'Promotion and Protection of the Rights of Children, Impact of Armed Conflict on Children' (1996) UN Doc A/51/306, 5 para.3.

² *ibid* 5 para.2.

³ Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report Summary* (2008) 10.

⁴ *ibid* 3.

⁵ *ibid* 5.

⁶ *ibid* 10.

⁷ *ibid* 9.

⁸ Rachel Brett and Margaret McCallin, *Children the Invisible Soldiers* (Radda Barnen Save the Children 1998) 26.

For these reasons, there is an imperative need to strengthen the relevant provisions of international humanitarian and human rights law. The question that this article will attempt to answer is the following: to what extent does the international legal framework which protects children from being recruited and used in armed conflicts fail to fulfill its mission, and what can be done in order to enhance its effectiveness? So far, the legal regimes which govern international and national conflicts differ regarding child protection. Similarly, international humanitarian and human rights instruments offer different standards of protection with respect to direct and indirect participation of children in armed conflicts, and their voluntary or compulsory recruitment. Therefore, Chapter I will discuss to what extent the relevant articles of instruments of international humanitarian law, namely the two Additional Protocols⁹ to the Geneva Convention IV,¹⁰ have proved inefficient in addressing the issue of child recruitment. Chapter II will examine the weaknesses of the relevant provisions of the Rome Statute,¹¹ being the first international instrument to criminalise child recruitment. Chapter III will analyse the deficiencies of the relevant international human rights law instruments, namely the Convention on the Rights of the Child (CRC)¹² and its Optional Protocol on the Involvement of Children in Armed Conflict (Optional Protocol).¹³ Finally, Chapter IV will focus on ways to improve the effectiveness of the aforementioned instruments in two particular areas, namely in (i) altering the minimum age requirement for child recruitment and participation in hostilities, and in (ii) making international human rights law applicable in internal conflicts. The establishment of 18 as the minimum age requirement and the applicability of international human rights law in internal conflicts will contribute to the furtherance of child protection by both international humanitarian and human rights law instruments, and will lead to a more consistent implementation of international law as it stands so far.

II. ASSESSING INTERNATIONAL HUMANITARIAN LAW

(a) *The 1977 Additional Protocol I*

Additional Protocol I to the Geneva Conventions¹⁴ was generally heralded as a step forward regarding the protection of civilians in international conflicts. It was the first international humanitarian law instrument to regulate the issue of child recruitment. It has been characterised as an instrument which ‘represents a certain democratisation of

⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978) (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978) (Protocol II).

¹⁰ Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (entered into force 21 October 1950) (Convention (IV)).

¹¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) (Rome Statute).

¹² Convention on the Rights of the Child (adopted 20 November 1989 UNGA Res 44/25, entered into force 2 September 1990) (CRC).

¹³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000 UNGA Res A/RES/54/263, entered into force 12 February 2002) (Optional Protocol).

¹⁴ Protocol I (n 9).

protection¹⁵ since it covers the civilian population at large, in contrast with Convention (IV) which provides protection only to ‘the most vulnerable’.¹⁶ It is the first instrument of international humanitarian law to clearly state that children are entitled to special treatment and to address the specific issue of child recruitment in the context of international armed conflicts.¹⁷ Specifically, article 77(1) establishes the ‘special respect’ and protection that children should enjoy, obliging the Parties to it to provide them with ‘the care and aid they require’.¹⁸ Article 77(2) addresses directly the issue of participation of children in hostilities, compelling the Parties to ‘take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities’ and particularly not to recruit them in their national armed forces.¹⁹ While this article undoubtedly furthers the protection of children by comparison to the Convention (IV), it has been criticised for the controversial scope of its application and the weak formulations of its first two paragraphs.

Regarding the scope of its application, there is a lack of consensus on whether it applies only to children who are not nationals of a party to the conflict, or to all children in general. Section III of Protocol I regulates the ‘treatment of persons in the power of a party to the conflict’. The ICRC Commentary clearly states that the article applies to all children, whether or not affected by the conflict.²⁰ However, article 72 of Protocol I, which regulates its field of application, states that the provisions of Section III are additional ‘particularly’ to the provisions of Parts I and III of the Convention (IV),²¹ which do not apply to the general population (as does Part II). Whether the addition of the word ‘particularly’ means that the said provisions apply to other Parts of the Convention as well is not clear, since only Parts I and III of the Convention (IV) are explicitly mentioned.

Furthermore, article 77(1) does not specify who are defined as children. The ICRC Commentary notes that this omission is intentional, but the age of 15, which is given in the Convention and in paragraphs (2) and (3) of this article, ‘seems to provide a reasonable basis for a definition’.²² This basis does not prevent those over 15 from being considered as children since the Parties are free to set lower or higher age thresholds.²³ However, the constant repetition of 15 as an age limit for special protection signifies that, under the scope of the Convention (IV) and the Protocol, ‘all human beings under fifteen should...be considered and treated as children.’²⁴ This tends to suggest that, regardless of national age thresholds of childhood, 15 years is the minimum age of protection under international humanitarian law.

Nevertheless, it should be taken into account that the concept of ‘protection’ as formulated in this article differs in context from that formulated in instruments of

¹⁵ Carolyn Hamilton and Tabatha Abu El-Haj, ‘Armed Conflict: The Protection of Children under International Law’ (1997) 5 *International Journal of Children’s Rights* 18.

¹⁶ *ibid* ‘(...) “extreme vulnerability” is the key to qualifying for protection [under the Convention (IV)]’.

¹⁷ Jenny Kuper, *International Law Concerning Child Civilians in Armed Conflict* (Clarendon Press 1997) 78.

¹⁸ Protocol I (n 9) art 77(1).

¹⁹ *ibid* art 77(2).

²⁰ ICRC Commentary on Protocol I Additional to the Geneva Convention IV, 12 August 1949 (ICRC Commentary on Protocol I) 898 para.3177.

²¹ Protocol I (n 9) art 72.

²² ICRC Commentary on Protocol I (n 20) 898 paras.3178-79. Since the term ‘persons’ is used in other parts of Protocol I and in the Convention (IV) for the age group of 15 to 18, it seems that art. 77(1) is bound to apply only to those under 15. See Hamilton (n 15) 25-26.

²³ *ibid* para.3179.

²⁴ *ibid*

international human rights law.²⁵ International human rights law provides for protection of any kind of human rights violations, including of course violations of fundamental human rights. However, international humanitarian law always constitutes a compromise between military necessity and human rights principles, thus leaving *lacunae* of protection when priority has to be given to military necessity rather than fundamental human rights. Therefore, the extent to which this provision actually protects children from the violation of their fundamental rights, such as the right to life or the right to survival, remains questionable.²⁶

With respect to article 77(2), States Parties are only obliged to take every 'feasible' measure in order that 'children who have not attained the age of fifteen years do not take a direct part in hostilities' and in particular, are not being recruited by the national forces.²⁷ The word 'feasible' was preferred to the stronger term 'necessary',²⁸ something that reduces significantly the effectiveness of this provision. It is axiomatic that, in wartime, States may easily claim that it was not 'feasible' to take specific measures for the prevention of child recruitment, or that it was not feasible to control it. Moreover, there is no suggestion about what acts are entailed in the term 'direct part'.²⁹ The ICRC Commentary on Protocol I suggests that since 'the intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict' they should consequently not be required to perform acts that may fall into the scope of indirect participation, such as the 'gathering and transmission of military information, transportation of arms and munitions, [and] provision of supplies etc.'³⁰ However, even if eventually the article covers indirect acts of participation in hostilities, it remains doubtful that, at the time Protocol I was drafted, this provision covered participation of a voluntary nature as well. The ICRC Commentary on Protocol I suggests that it is unrealistic to totally prohibit voluntary participation of children under 15 because 'it is difficult to moderate their enthusiasm and their will to fight.'³¹ Apart from the fact that this is not a legal argument supporting voluntary participation of children under 15 in hostilities, it is irrational to believe that a child of that age has the required maturity to fully understand the dangers of war and still have the will to participate in it.³²

In conclusion, it is clear that Protocol I offers minimum standards of protection for children in international armed conflicts, and uses weak language to prevent their recruitment. A further effort for a firmer establishment of protection was made with Additional Protocol II, regulating children's protection in internal armed conflicts.

(b) *The 1977 Additional Protocol II*

Additional Protocol II (Protocol II) expands the scope of Protocol I to cover internal armed conflicts, as is regulated by article 1(1).³³ The relevant child protection provisions

²⁵ See Declaration of the Rights of the Child, UNGA Res 1386 (XIV) (10 Dec 1959) and CRC (n 12).

²⁶ Hamilton (n 15) 22.

²⁷ Protocol I (n 9) art 77(2).

²⁸ ICRC Commentary on Protocol I (n 20) 900 para.3184.

²⁹ For the definition of 'taking direct part in hostilities' see *Prosecutor v Rutaganda* (Judgment) ICTR-96-3-T, T Ch (6 December 1999) para.100: ' (...) a direct part in the hostilities means acts of war which by their nature or purpose are likely to cause harm to the personnel and equipment of the enemy armed forces.'

³⁰ *ibid* 901 para.3187.

³¹ *ibid* 900, 901 paras.3184-85.

³² See Alison Smith 'Child Recruitment and the Special Court of Sierra Leone', (2004) 2(4) *Journal of International Criminal Justice* 1141, 1148, '[w]hen it comes to children -- especially children under 15 -- so-called "voluntary recruitment" is always a misnomer.'

³³ Protocol II (n 9) art 1(1).

are to be found in article 4(3)(c), which specifically states that ‘children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.’³⁴ Notwithstanding the lack of detail given in this provision compared to its equivalent in Protocol I,³⁵ the language used here is much stronger and affirmative, rendering the prohibition on recruitment total and unequivocal. However, as it will be examined below, the great disadvantage of this provision is related to the main general weakness of Protocol II, namely the restrictions in its applicability.

In contrast with the ‘feasible measures’ that States are required to take under Protocol I, article 4(3)(c) of Protocol II provides for an absolute prohibition on both recruitment and participation in hostilities. The formulation of the article therefore attributes equal significance to the prohibition on recruitment and participation in hostilities, contrary to article 77(2) of Protocol I, which lays more emphasis on the prohibition on taking a direct part. Moreover, the prohibition includes both direct and indirect participation, as well as forcible and voluntary recruitment.³⁶ Finally, since Protocol II regulates internal armed conflicts, the provision does not omit to provide the same prohibitions for any opposing armed groups.

Despite the aforementioned merits of this provision, the limits of the applicability of Protocol II prevent it from being invoked by the States Parties in case of a civil conflict. The conditions set in article 1(1) require that the opposing armed groups should ‘exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations’³⁷, namely, the internal conflict must be of high intensity. As is suggested by Hamilton and Tabatha, this provision limits significantly the effectiveness of Protocol II,³⁸ since ‘the non-State armed force must have progressed quite far (...) to satisfy such a stringent requirement of territorial control.’³⁹ Additionally, since Protocol II can only be formally ratified by States and not by any armed forces or groups, it is even harder to enforce compliance on the part of the latter.⁴⁰ Non-State armed forces are able to make unilateral declarations, however there is no formal provision in Protocol II to regulate their adherence to it.⁴¹

Another hindrance to the applicability of Protocol II is that even Parties to it may not be willing to admit that a situation in their territory amounts to an armed conflict as defined in article 1(1),⁴² or that a situation falls into the scope of article 1(2).⁴³ In these cases, international human rights law should apply, with the obvious possibility that a State may have used derogation techniques in case of emergency situations, such as the situations outlined in article 1(2).⁴⁴

³⁴ *ibid* art 4(3)(c).

³⁵ Protocol I (n 9) art 77(2).

³⁶ ICRC Commentary on Protocol II Additional to the Geneva Convention IV, 12 August 1949, 1379, para.4557.

³⁷ Protocol II (n 9) art 1(1).

³⁸ See Guy Goodwin-Gill and Ilene Cohn, *Child Soldiers, The Role of Children in Armed Conflicts* (Clarendon Press 1994) 65. The situation in the Philippines did not fall clearly into the Article 1(1) requirement despite the fact that the Philippines is a Party to the Protocol.

³⁹ Hamilton (n 15) 28, 29.

⁴⁰ However, in this case the norms of international customary law and Common Article 3 should apply. See Leslie C Green, *The Contemporary Law of Armed Conflict* (Manchester University Press 2000) 67.

⁴¹ Goodwin-Gill (n 38) 65 ft 27.

⁴² Hamilton (n 15) 28, 29.

⁴³ Protocol II (n 9) art 1(2): ‘This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts’.

⁴⁴ Hamilton (n 15) 32.

As a final point, it can be said that despite the strong formulation of article 4(3)(c), the protection of children from military recruitment is much weaker in internal armed conflicts than in international ones, for reasons related to difficulties in invoking the applicability of Protocol II in case of low-intensity internal conflicts. The Rome Statute of the International Criminal Court attempted to harmonise the conflicting standards that the two Protocols created in this respect, by providing for the criminalisation of child recruitment under the age of 15 both in international and internal conflicts. It is to this that attention now turns.

III. ASSESSING THE ICC STATUTE

The Rome Statute

Before the establishment of the International Criminal Court (the Court), international humanitarian law did not actually criminalise the practice of child recruitment, either forcible or voluntary, in international or non-international armed conflicts. As noted above, the two Protocols provide minimum standards of protection, mostly giving priority to military necessity instead of humanitarian considerations. Therefore, the contribution of the ICC Statute is significant, making clear that child recruitment falls into the category of war crimes, both in international and internal conflicts. The significance of the inclusion of the crime of conscripting or enlisting children under fifteen years into armed forces or groups or using them to participate actively in hostilities in article 8(2)(b)(xxvi) and (e)(vii) for international and internal conflicts respectively,⁴⁵ is twofold. Firstly, universal jurisdiction is now established with respect to instances of child recruitment that have a nexus with armed conflicts. Secondly, individual offenders are now brought to trial for the commission of international crimes, as in the case of *Lubanga Dyilo*.⁴⁶

Despite these steps forward, there are several points in the wording of the relevant articles of the ICC Statute that have occasioned criticism due to the confusion they create. The war crimes under the jurisdiction of the Court are defined in article 8(2) for both international and non-international armed conflicts. Apart from the grave breaches of the Geneva Conventions that fall into the scope of war crimes under the ICC Statute,⁴⁷ war crimes also include '[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law'.⁴⁸ The problem with this formulation is that it is nowhere clarified in the ICC Statute what is meant by the 'perplexing' phrase 'within the established framework of international law'.⁴⁹ According to Cassese, the established framework cannot but refer to customary international law, giving the provision another dimension which is lacking in article 8(2)(a) with respect to the grave breaches⁵⁰ - the conduct prescribed by the article 8(2)(b) and (e) amounts to a war crime only if customary law

⁴⁵ Rome Statute (n 11) art 8(2)(b)(xxvi) for international conflicts and art 8(2)(e)(vii) for conflicts of non-international character.

⁴⁶ *Prosecutor v Lubanga Dyilo* ICC-01/04-01/06.

⁴⁷ Rome Statute (n 11) art 8(2)(a).

⁴⁸ *ibid* art 8(2)(b). The wording is the same in art 8(2)(e) for internal armed conflicts. (' (...) in armed conflicts not of an international character').

⁴⁹ See Antonio Cassese, *International Criminal Law* (Oxford University Press 2008) 94.

⁵⁰ *ibid*. Another suggestion is that the 'established framework of international law' is equivalent to 'the laws of war, such as those relating to proportionality and military necessity', in Ilias Bantekas and Susan Nash, *International Criminal Law* (2nd edn, Cavendish Publishing Limited 2003) 387.

regards it as such.⁵¹ In other words, the Court shall examine on a case-by-case basis whether the status of customary law conceives a specific conduct as a war crime. Consequently, it is not self-evident that the Court automatically views all the crimes listed under those articles as war crimes.⁵² Secondly, article 8(2)(b)(xxvi) and (e)(vii) provide for the criminalisation of conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.⁵³ The age threshold of 15 years, while compatible with the age limit prescribed in the two Protocols, does not reflect the current tendency of setting 18 years as the age limit for recruitment.⁵⁴ The practice of regarding 18 as the appropriate minimum age for recruitment can be attributed to several explanations. Firstly, the age of 18 is the official age of acquirement of voting rights in many States.⁵⁵ This signifies that at the age of 18, a person has reached a degree of maturity which enables him to participate in the political process.⁵⁶ Consequently, as Goodwin-Gill suggests, since armed conflicts have ‘an essentially political dimension...it would seem wrong to condemn the unenfranchised to die as a consequence of political decisions on which they can exercise no influence.’⁵⁷ Secondly, the fact that 18 is the age limit for admission to employment⁵⁸ and is also the minimum age for the imposition of the death penalty, either in time of peace or war and in both international and non-international conflicts,⁵⁹ shows that it is generally acknowledged that people under 18 have reduced capacities to appreciate the nature of their actions.⁶⁰

In addition, another argument supporting the adoption of 18 as the minimum age requirement for recruitment is the contradiction created within the ICC Statute by

⁵¹ In this respect, it is relevant to examine if the crime of conscripting, enlisting and using children under 15 in hostilities is a war crime under international customary law. The Special Court of Sierra Leone was the first to adjudicate on the matter in the *Hinga Norman* case, [Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), *Hinga Norman* SCSL-2004-14-AR72(E), 31 May 2004]. The Appeals Chamber held, although not unanimously (dissenting opinion of Judge Robertson), that the aforementioned crime was a crime under international customary law, since the Geneva Conventions established the protection of children under 15 and ‘the ICC Statute codified existing customary international law’ [See *Hinga Norman* SCSL-2004-14-AR72(E), Prosecution Response 4].

⁵² Cassese (n 49) 95. ‘The Court will first have to establish whether: (i) under general international law they are considered as breaches of the international humanitarian law of armed conflict; and, in addition, (ii) whether under customary international law their commission amounts to a war crime’.

⁵³ Rome Statute (n 11) art 8(2)(b)(xxvi) for international armed conflicts and (e)(vii) for internal armed conflicts.

⁵⁴ ‘(...) a survey of more than 100 systems of municipal law indicated that more than two-thirds accepted 18 as the minimum age for compulsory recruitment.’ Julia Maxted, ‘The International Criminal Court and the prohibition of the use of children in armed conflict’ in Ramesh Thakur and Peter Malcontent (eds), *From Sovereign Impunity to International Accountability, The Search for Justice in a World of States* (United Nations University Press 2004) 260.

⁵⁵ Goodwin-Gill (n 38) 7.

⁵⁶ *ibid*

⁵⁷ Goodwin-Gill (n 38) 8.

⁵⁸ ILO Convention No. 138: Minimum Age for Admission to Employment (adopted 26 June 1973, entered into force 19 June 1976) found in Brett (n 8) 167. Even if military recruitment is beyond the scope of the Convention, it is suggested that it ‘may be applied in corollary to the involvement in armed conflicts’.

⁵⁹ Convention (IV) (n 10) art 68, Protocol I (n 9) art 77(5), Protocol II (n 9) art 6(4). See also International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) art 6(5), CRC (n 12) art 37.

⁶⁰ Goodwin-Gill (n 38) 9.

article 8(2)(b)(xxvi) and (e)(vii) and article 26 - persons over 15 are allowed to participate actively in hostilities, but the ICC does not have jurisdiction over them in case they commit war crimes.⁶¹ In other words, under the current legal framework of the ICC Statute, young people of 15 to 18 years of age can participate in hostilities, and can potentially commit war crimes, without being accountable to the Court since its jurisdiction is limited only to those over 18. This contradiction may lead to the targeting of young soldiers, who may run the risk to be exploited by military leaders and be ordered to commit the most heinous crimes in order that they avoid accountability before the Court.⁶²

In brief, the establishment of individual criminal liability for the recruitment of children has undoubtedly increased the level of protection that is afforded to them by the instruments of international humanitarian law examined in the previous Chapter and despite the age limit of 15 years set by the ICC Statute. It remains to be examined to what extent international human rights law has made its contribution towards this end.

IV. ASSESSING INTERNATIONAL HUMAN RIGHTS LAW

(a) *The 1989 Convention on the Rights of the Child*

The 1989 Convention on the Rights of the Child (CRC) was the first international human rights instrument to explicitly incorporate international humanitarian law into its text. Article 38 regulates the issue of child protection during armed conflicts generally and the issue of child recruitment specifically.⁶³ It is the most publicised article of the CRC,⁶⁴ and has given rise to many controversies. Given the fact that it is an almost universally ratified Convention,⁶⁵ one may expect few contentious points to have arisen during its drafting. However, article 38 has been regarded as a lost chance for the promotion of the protection of children from recruitment, causing many of the participants in the Working Group to express concerns about several inadequacies in its wording.⁶⁶ These inadequacies are to be found in the first three subsections of the article, each of which requires individual analysis.

(i) Article 38(1)

Article 38(1): States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.⁶⁷

The wording of this provision presents two interpretative challenges: what is meant by 'respect and to ensure respect for', and what is meant by the 'rules of international humanitarian law applicable' to the States Parties. The dual obligation to 'respect and to

⁶¹ Rome Statute (n 11) art 26: 'The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.'

⁶² Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) 62.

⁶³ CRC (n 12) art 38.

⁶⁴ Kuper (n 17) 99.

⁶⁵ The Parties to the CRC are 193 according to the United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> accessed 18/07/2010. Only the USA and Somalia are not Parties to it.

⁶⁶ See Kuper (n 17) 105. 'The Swedish representative asked, exceptionally, for a transcript of the meeting "since we adopted an article (...) on the basis of a debate which I do not think is reflected in that decision"'

⁶⁷ CRC (n 12) art 38(1).

ensure respect' shows that the States Parties have to undertake negative as well as positive obligations to protect children in armed conflicts.⁶⁸ This automatically burdens them not only with the duty not to violate children's rights during armed conflicts, but also to monitor their protection. In other words, regarding the recruitment of children, States Parties have the obligation both of not recruiting children under 15 (as is the obligation under subsection 2 of article 38) and of making sure, using monitoring or any other mechanisms, that children under 15 are not being recruited. This constitutes progress in terms of enforcing the aforementioned obligation. However, what the provision seems to lack is any reference to whom the States Parties should exercise control over so as to ensure that they refrain from child recruitment. Is it non-State actors, other States Parties to the CRC, other States that are not Parties to it, or simply each one of them?⁶⁹ With respect to non-State actors, due to the lack of penal sanctions in international human rights law, it is improbable that they will feel bound by it. However, this provision is reflective of international humanitarian law, which is legally binding for non-State actors as well. Consequently, it seems that the States Parties to the CRC are responsible for the conduct of non-State actors during armed conflicts, and a mere policy of non-recruitment of children under the age of 15 into the national armed forces is not sufficient to cover the 'ensure respect' obligation.

Secondly, the phrase 'rules of international humanitarian law applicable'⁷⁰ to the States Parties betrays potential ambiguities. Since this body of law is 'scattered throughout various treaties which are not universally ratified',⁷¹ its application cannot possibly be uniform, and therefore there will always be uncertainties about *who has to do what*.⁷² However, this ambiguity might become clearer if this provision is to be interpreted by taking into account the obligations of customary status relevant to armed conflicts.⁷³

(ii) Article 38(2)

Article 38(2): States Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.⁷⁴

The formulation of this provision is exactly the same as that in article 77(2) of Protocol I, perhaps suggesting that there was little progress in child protection regarding the age limit and the total prohibition of any kind of participation in hostilities. Attempts to raise the age limit for recruitment to 18 were not successful because of the objections of the UK, France, and especially the US,⁷⁵ which practise voluntary recruitment of persons under 18. In particular, the US delegate stated that the CRC 'was not the proper vehicle

⁶⁸ Rachel Brett, 'Child Soldiers: Law, Politics and Practice' (1996) 4 *International Journal of Children's Rights* 115, 116.

⁶⁹ Fiona Ang, *Article 38: Children in Armed Conflicts* (Martinus Nijhoff Publishers 2005) 33 para.53, 35 para.56

⁷⁰ Kuper (n 17) 101.

⁷¹ *ibid*

⁷² (emphasis added)

⁷³ Ang (n 69) 25 para.35.

⁷⁴ CRC (n 12) art 38(2).

⁷⁵ Alison D Renteln, 'The Child Soldier: The Challenge of Enforcing International Standards' (1999-2000) 21 *Whittier Law Review* 191, 196. Seven Parties expressed disapproval of the low age limit and attached declarations to undertake obligations not to recruit children under 18. (Argentina, Austria, Columbia, Germany, Netherlands, Spain, Uruguay).

for rewriting humanitarian law.⁷⁶ This argument was ultimately accepted, in spite of the fact that still the US is not a Party to the CRC.

The weaknesses of the wording of this subsection are the same as those already discussed in relation to Protocol I - it is not clear what is meant by 'feasible', but obviously it is equivalent to 'practicable or practically possible' under the circumstances of an armed conflict.⁷⁷ Consequently, and given the humanitarian nature of these provisions, the practicality of any measures taken to prevent child recruitment is regulated by the principle of military necessity: violations of human rights are allowed, 'provided that the loss is not excessive in relation to the anticipated military advantage.'⁷⁸

Repeating the wording of article 77(2), this subsection actually undermines the standards set by article 4(3)(c) of Protocol II, where the prohibition on child recruitment is given with a much stronger formulation.⁷⁹ Regarding the types of participation, article 4(3)(c), which clearly has application only in internal conflicts, prohibits both direct and indirect participation. However, article 38(2), whose scope of application includes both international and internal conflicts, prohibits only the 'direct part in hostilities'. As a result, 'instead of [pushing the standard of protection] upward for children in international armed conflicts, article 38(2) pushes [it] downward for children in internal conflicts.'⁸⁰ Consequently, this provision is a step back in terms of establishing a firmer protection from child recruitment.

(iii) Article 38(3)

Article 38(3): States Parties shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years, States Parties shall endeavour to give priority to those who are oldest.⁸¹

With respect to this subsection, three interlinked observations are worth being made. Firstly, the prohibition of child recruitment is stated separately from the prohibition of taking a direct part in hostilities (as provided in subsection 2). Since there is no specific reference to armed conflicts, the prohibition of subsection 3 is valid both in wartime and peacetime, and, in case of wartime, both in international and internal conflicts. This becomes more significant as regards the second part of the provision, which leads to the second observation worth mentioning: the priority that has to be given to the oldest was not provided by Protocol II,⁸² which regulates internal conflicts. As a result, Article 38(3) goes a step further in regulating the conduct in internal armed conflicts. Lastly, the verb 'endeavour' which is used to express the obligation of the States Parties to give priority to the eldest children, is ultimately quite weak, since the only obligations it entails are the ones 'regarding the conduct and not regarding the result'.⁸³ However, it is suggested that 'endeavour' can go as far as to imply that the States Parties are obliged to establish a mechanism so as to ensure that indeed the eldest are given priority.⁸⁴

⁷⁶ Hamilton (no 15) 36.

⁷⁷ Kuper (n 17) 102.

⁷⁸ Hamilton (n 15) 22.

⁷⁹ See above 5.

⁸⁰ Ang (n 69) 37 para.63.

⁸¹ CRC (n 12) art 38(3).

⁸² Ang (n 69) 53 para.91.

⁸³ Ang (n 69) 56-57 para.98.

⁸⁴ *ibid* para 98-99.

(iv) Conclusions on Article 38

As concluding remarks, it can be said that article 38 does not distinguish between child combatants and child civilians. As such, it fails to amalgamate the highest protective standards of human rights and humanitarian law. The omission of the distinction is noteworthy, since the main purpose of this article is the protection of all children from the consequences of armed conflicts, among which recruitment is a prime danger. Any separate regulations for child combatants would not serve this purpose, because they would presuppose that children can become combatants and consequently, their conduct must be regulated.

Article 38 appears progressive on the grounds that it does not distinguish between international or internal armed conflicts and, in so omitting, tries to eliminate the double standards that have been created by Protocols I and II. However, it fails to move forward as regards the age limit for recruitment. Moreover, the adoption of the wording of article 77(2) in subsection 2 can only be seen as a failure on the part of the drafters to enhance the already inefficient capacity of Protocols I and II to prevent child recruitment. Fortunately, these weaknesses were made obvious even from the drafting process of the CRC. It soon became apparent that a protocol which would regulate the issue of child recruitment in stricter terms was necessary.

(b) *The 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*

The same year as the entry into force of the CRC, the United Nations appointed a working group to prepare a draft of an optional protocol, which would attempt to rectify the weaknesses of the CRC, laying emphasis on the age limit for recruitment.⁸⁵ After one decade, the prohibition of participation in hostilities and compulsory recruitment of persons under 18 years of age into the national armed forces became a reality under articles 1 and 2 of the Optional Protocol on the involvement of children in armed conflict (Optional Protocol).⁸⁶

The Optional Protocol contributes significantly to the enhancement of child protection from recruitment and extends the relevant provisions of article 38 of the CRC. Article 1 calls on States Parties to ensure that persons under 18 years of age do not directly participate in hostilities, while article 2 adopts the same age approach for the issue of compulsory recruitment into the national armed forces (in contrast to the age limit of 15 years in article 38(2) and (3) of the CRC respectively). Regarding voluntary recruitment, under article 3 States Parties can regulate their own age limit, which must still be higher than the one suggested in article 38(3) of the CRC. Consequently, States Parties can opt for any age limit from 16 to 18 years, and state it in a separate

⁸⁵ Jisha S Vachachira, 'Report 2002: Implementation of the Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict' (2002) 18 *New York Law School Journal of Human Rights* 543, 544.

⁸⁶ Optional Protocol (n 14) art 1 ('States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.') and art 2 ('States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.').

declaration.⁸⁷ To this end, article 3 sets four safeguards that have to be taken into account by the States Parties when recruiting volunteers under 18:

- a) they have to make sure that their recruitment is 'genuinely voluntary',
- b) the volunteers must have the consent of their parents or guardians,
- c) they have to be fully informed about the duties involved, and
- d) they will have to provide reliable age proof.⁸⁸

In addition, the Optional Protocol is even stricter with non-State actors, providing in article 4 that it is prohibited for them to generally recruit and use in hostilities any person under 18.⁸⁹

Considering this tranche of provisions, it is clear that the Optional Protocol sets very high standards of child protection. It codifies a legal norm, the violation of which could render States Parties accountable, and it calls for harmonisation of this norm with domestic legislation.⁹⁰ Nevertheless, there are several inadequacies to be observed regarding both the wording of the aforementioned provisions and the general capacity of the Optional Protocol to fulfil its potential.

Apart from the obvious vagueness of the phrases 'feasible measures' and 'direct participation',⁹¹ article 1 does not provide any age limit for indirect participation in hostilities.⁹² Similarly, article 2 does not provide a uniform age limit for voluntary recruitment,⁹³ and simply urges the State Parties to raise the minimum age requirement of 15 years suggested by the CRC.⁹⁴ These two omissions fail to establish a firm and unequivocal prohibition of child recruitment and leave a margin of appreciation to governments to define the concept of indirect participation and set their own limits for voluntary recruitment. Another hindrance against the total prohibition of child recruitment is set by article 3(5), which excludes military schools from raising the age limit for voluntary recruitment.⁹⁵

Criticising the general capacity of the Optional Protocol to fulfil its potential, one observation worth being made is that it creates double standards of protection with respect to State and non-State actors.⁹⁶ Non-State actors are not allowed to recruit even voluntarily any person under 18, something that is not the case with the national armed forces.⁹⁷ Arguably, it is somewhat unrealistic to set higher obligations for non-State actors than for the States themselves, since the former cannot sign, ratify or declare adherence in any way to the Optional Protocol. Secondly, given the difficulties in

⁸⁷ *ibid* art 3(1) ('States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3 [of the CRC]').

⁸⁸ *ibid* art 3(4).

⁸⁹ *ibid* art 4(1).

⁹⁰ Shara Abraham, 'Child Soldiers and the Capacity of the Optional Protocol to Protect Children in Conflict' (2003) 10(3) *Human Rights Brief* 15, 19.

⁹¹ See above 3-5 (Protocol I), 9-12 (CRC).

⁹² Ann Sheppard, 'Child soldiers: Is the optional protocol evidence of an emerging "straight-18" consensus?' (2000) 8 *International Journal of Children's Rights* 37, 62.

⁹³ *ibid*

⁹⁴ Optional Protocol (n 14) art 3(1).

⁹⁵ *ibid* art 3(5) ('The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties').

⁹⁶ Marsha L Hackenberg, 'Can the Optional Protocol for the Convention on the Rights of the Child Protect the Ugandan Child Soldier?' (1999-2000) 10 *Indiana International and Comparative Law Review* 417, 445.

⁹⁷ Optional Protocol (n 14) art 4(1) 'Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.'

enforcing the requirements set by the CRC, the enforceability of the Optional Protocol is highly disputed.⁹⁸ It does not introduce any enforcing or monitoring mechanisms, does not encourage non-State actors to adhere to it⁹⁹ and the assessment of the safeguards set in article 3(4) concerning voluntary recruitment is left to the States Parties.¹⁰⁰ Besides, focusing only on the age limit for recruitment is not a guarantee for the enhancement of child protection. It is suggested that ‘the age issue has become less divisive’¹⁰¹ since the causes of the problem are far more complicated: children are usually recruited by non-governmental groups, which makes the checking of their age more improbable, and, moreover, most of the time they join voluntarily.¹⁰² In this respect, the mere focus on the age limit for recruitment, without the introduction of supervisory mechanisms, can contribute only superficially to the promotion of child protection.

All in all, the attempt to incorporate humanitarian provisions in a human rights instrument is in itself a success in the promotion of child protection. The overriding of the age limit of 15 years and the call for compliance from non-State actors are significant steps towards the establishment of a universal principle of non-recruitment and non-participation of children in hostilities. However, the discrepancies between the instruments of international humanitarian and human rights law obstruct the uniform application of both bodies of law, creating grey zones of applicability, especially with respect to the minimum age requirement issue and the enforcement of international human rights law in non-international conflicts.

V. ADDRESSING THE DEFICIENCIES OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW IN THE PROTECTION OF CHILDREN FROM RECRUITMENT AND USE IN HOSTILITIES

The foregoing chapters examined to what extent instruments of international humanitarian and human rights law fail to promote child protection from recruitment in an effective way. As it has been already shown, the main weaknesses are to be found:

- a) in the minimum age requirement for recruitment and its vacillation from the 15 (as proposed by the two Protocols, the ICC Statute and the CRC) to the 18 age limit (as proposed by the Optional Protocol);
- b) in the different standards which regulate international and internal armed conflicts; and
- c) in the fact that non-State actors cannot adhere to these instruments and are not legally bound by international human rights law instruments.

In this Chapter, it will be suggested that in order to eliminate the discrepancies of child protection in both bodies of law, two crucial steps should be taken. Firstly, concerning international humanitarian law instruments, it is submitted that the age limit of 18 years should be adopted as the minimum age requirement for both compulsory and voluntary recruitment, and for both direct and indirect participation. Secondly, and concerning international human rights law instruments, the ‘stumbling blocks’ in their applicability in internal armed conflicts need to be analysed in order to suggest solutions to enhance the enforcement of international human rights law within States, and to make it enforceable for non-State actors as well.

⁹⁸ Hackenberg (n 95) 445 and ft 130.

⁹⁹ Abraham (n 89) 20.

¹⁰⁰ Wasantha Seneviratne, ‘International Legal Standards Applicable to Child Soldiers’ (2003) 15 *Sri Lanka Journal of International Law* 39, 44.

¹⁰¹ Renteln (n 74) 197.

¹⁰² *ibid*

(a) *The adoption of 18 years as the minimum age requirement for:*

(i) Compulsory and voluntary recruitment

In order to firmly establish 18 years as the minimum age requirement for recruitment, a holistic approach has to be adopted. This means that the limit of 18 years must be applied for any kind of recruitment and any kind of participation. Before continuing in analysing the significance of the introduction of the limit of 18 years for both types of recruitment (voluntary and involuntary) and for both types of participation (direct and indirect), it will be useful to examine why the prohibition of recruitment of persons under 18 *and*¹⁰³ the prohibition of participation in hostilities of those under 18 must be given equal emphasis in international humanitarian and human rights law. So far, the emphasis was laid mostly on the prohibition of participation in hostilities (and specifically direct participation) and not on the prohibition of recruitment.¹⁰⁴ It is submitted that both practices should be rendered totally unlawful, even in cases when children are recruited and not used in hostilities. Firstly, it is unrealistic to believe that in times of war, children that are recruited either compulsorily or voluntarily will not be obliged to participate in hostilities by their commanders, especially in cases of military necessity. In addition, even in cases when they are recruited but they do not actually participate in an armed conflict which is ongoing, they will still be regarded as combatants, something that will make them lawful military targets for the enemy armed forces.

Concerning compulsory recruitment of persons under the age of 18, the only instrument that calls for its prohibition is the Optional Protocol, whereas both Additional Protocols and the CRC adopt the 15 years age limit. It has been already argued why the age threshold of 18 should be the norm for compulsory recruitment.¹⁰⁵

Regarding the adoption of 18 as the minimum age requirement for voluntary recruitment, two main arguments can be put forward. Firstly, it is difficult to ensure that a child's decision to be recruited in the armed forces is genuinely voluntary.¹⁰⁶ Children can have mixed motives when deciding to be recruited, such as vengeance towards the enemy, indoctrination, indirect encouragement or poverty.¹⁰⁷ Furthermore, even when parental consent is available, it is not guaranteed that the parents' motives will be related to the best interests of their child, since a child's participation in the armed forces can be seen as a way to increase family financial resources.¹⁰⁸

Secondly, voluntary recruitment does not necessarily mean that a child will not have to face the same dangers during an armed conflict as a compulsorily recruited

¹⁰³ (emphasis added)

¹⁰⁴ See the wording of art 77(2) of Protocol I (n 9) ('The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, *in particular, they shall refrain* [emphasis added] from recruiting them into their armed forces') and art 2 of the Optional Protocol (n 14) ('States Parties *shall ensure* [emphasis added] that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.'). Both the phrases used do not actually call for a total and unequivocal prohibition on recruitment but rather urge or call the State Parties to 'refrain' from that practice or to 'ensure' that it does not happen.

¹⁰⁵ See above 8.

¹⁰⁶ The genuinely voluntary nature of a child's recruitment is one of the four safeguards that are introduced under the Optional Protocol in art 3a.

¹⁰⁷ Sheppard (n 91) 50.

¹⁰⁸ *ibid* 'Parents may encourage the children to join the army to ease the strain on the family's budget.'

soldier. Voluntary recruitment is not a safeguard that a child will be required to carry out lighter or less precarious duties. Moreover, and regarding the argument that a child may be recruited to the national armed forces as a career option, military schools have a role to play. Provided that attendance at the military schools does not involve any kind of military service, children can reap educational benefits and at the same time be protected from the physical dangers of military service or armed conflicts.¹⁰⁹

(ii) Direct and indirect participation

With respect to the distinction between direct and indirect participation, two observations are worth noting. The first follows the arguments made above about the reasons why children should not be recruited voluntarily under the age of 18. Once more, indirect participation in hostilities is not a guarantee that children will not face the dangers of war since it is highly probable that, in cases of national emergency, military commanders would want to make use of all their military personnel.¹¹⁰ Particularly in internal conflicts, it will be difficult for the States to ensure that children do not undertake responsibilities that can fall into the scope of direct participation. Furthermore, the definition of which acts constitute direct participation, namely acts that are 'likely to cause harm to the personnel and equipment of the enemy armed forces', is worryingly elastic.¹¹¹ It could be argued that any act of the military personnel of a Party to a conflict has as a purpose to cause harm to the adversary, directly or indirectly. In addition, even when children take indirect part in hostilities, they can still be lawful military targets for the enemy, as was already suggested above.¹¹²

The imprecision of the concept of 'indirect participation' allows States to define it for themselves according to a self-servingly wide margin of appreciation. It is not always clear, especially in wartime, whether an act of the armed forces can exclusively fall into the scope of indirect or direct participation, and consequently, be considered as lawful or unlawful. Practically, this means that it will depend on a margin of appreciation accruing to the State whether an act under given circumstances constitutes direct or indirect participation. This can only serve to obstruct the consistent application of the relevant provisions of the international instruments examined so far. All in all, in order to keep children away from any type of participation in hostilities, it serves no purpose to distinguish between lawful and unlawful roles that children can play during armed conflicts, since the borderline between them can but hardly be described as distinct.

In conclusion, if children are to be totally protected from recruitment, the minimum age requirement of 18 years should be adopted for both voluntary and involuntary recruitment, and for both direct and indirect participation. Practically, this means that the standards set by the Optional Protocol should be further enhanced to include the 18 years as the age limit for voluntary recruitment (instead of allowing State Parties to decide upon the age limit)¹¹³ and to prohibit in article 1 both types of participation. However, it must be taken into account that so far, the 'criminal' prohibition from recruitment sets 15 as the minimum age requirement. This discrepancy occurs from the relevant articles of the ICC Statute¹¹⁴ (article 8(2)(b)(xxvi) and (2)(e)(vii)) which, as already examined, criminalise the conscription, enlistment and use in hostilities of children under 15. Therefore, the adoption of 18 years as the minimum age requirement, if limited only to international humanitarian and human rights law, would

¹⁰⁹ *ibid* 51.

¹¹⁰ Sheppard (n 91) 51.

¹¹¹ See above ft.29.

¹¹² See above 15.

¹¹³ Optional Protocol (n 14) art 3(1).

¹¹⁴ See above Chapter II, 6-8.

be merely ink on paper. It is imperative that all bodies of international law which deal with this issue should address it in a uniform way in order that the concept of non-recruitment and non-participation of persons under 18 years of age becomes an unequivocal norm.

(b) *The 'stumbling blocks' in the applicability of international human rights law in non-international armed conflicts and how they can be overcome*

Introducing the limit of 18 as the minimum age requirement for recruitment is not a panacea for the elimination of this practice. A further impediment to the protection of children from recruitment is to be found in the double standards that the two Additional Protocols introduced with respect to international and non-international conflicts. As explained earlier,¹¹⁵ the prohibition set by Protocol II regarding non-international armed conflicts is much firmer than that set by Protocol I regarding international conflicts. However, the effectiveness of Protocol II is problematic because of its high threshold of applicability. Due to this high threshold, the provisions of Protocol II are only triggered in cases of high intensity non-international conflicts, leaving outside of its scope the majority of modern non-international conflicts, which do not reach this degree of intensity.¹¹⁶

However, this lacuna could have been overcome in international human rights law with the incorporation of humanitarian provisions in human rights law instruments, as is the case with the CRC and its Optional Protocol. In particular, and in respect of child protection from recruitment, the relevant humanitarian provisions found in these instruments do not distinguish between international and non-international armed conflicts, nor between high or low intensity non-international armed conflicts, as Protocol II does. This automatically makes them applicable for the States Parties to them. In addition, the fact that the CRC is a virtually universally ratified convention may constitute an optimistic sign that most States embrace the principles entrenched in it.

Why then is the applicability of international human rights law in practice so weak concerning non-international armed conflicts of either high or low intensity? This situation can be attributed to two inherent weaknesses of this field of law. Firstly, violations of international human rights law do not lead to individual criminal accountability, as is the case with violations of humanitarian law. Obviously, States are more prone to comply with rules, the violation of which carries penal sanctions. Violations of international human rights law do not bear any penal consequences for the States concerned, something that renders the commitments stemmed from human rights law instruments less legally binding for the States Parties. In addition, there is no forum for victims of human rights violations: there are no international courts having jurisdiction over this type of violations. National courts may be barred by the immunity status that military or political leaders enjoy, meaning that charges for human rights violations cannot always be brought against them before national courts.¹¹⁷ Consequently, violations of human rights law do not reach the courtroom, do not receive the international attention that violations of humanitarian law do, and thus have a weak influence on the overall conduct of the States which have signed human rights law instruments.

Secondly, international human rights law binds States and not non-State actors, which can be responsible for human rights violations as well. With respect to child

¹¹⁵ See above Chapter I, 3-6.

¹¹⁶ Hamilton (n 15) 29.

¹¹⁷ Konstantinos Mastrodimos, 'The Utility and Limits of International Human Rights Law and International Humanitarian Law's Parallel Applicability' (2009) 5 *Rev. International Law and Politics* 129, 139-140.

protection from recruitment, under international human rights law States have the obligation to ‘take all feasible measures’¹¹⁸ to ‘prevent’¹¹⁹ child recruitment and use in hostilities. These obligations may be interpreted to mean that States should control the practices of non-State actors concerning recruitment, but they do not bind non-State actors themselves. Admittedly, article 4(1) of the Optional Protocol¹²⁰ addresses this obligation to non-State actors, but in general it does not include in its provisions any means by which non-State actors can declare their adherence to it.

These inherent weaknesses of international human rights law can be addressed particularly in two ways. Firstly, the lack of penal sanctions in the international arena for human rights law violations does not necessarily mean that there should not be penal sanctions for the same violations at the national level. National laws can be modified in order to comply with international standards concerning the prevention, repression and criminalisation of child recruitment, as entrenched in the CRC and the Optional Protocol. In this way, violations during low intensity non-international conflicts which do not reach the degree of severity as prescribed by Protocol II could be adjudicated by national courts, and thus attract international attention.

Among the States which have adjusted their national legislation to international standards, two significant initiatives must be mentioned. The first is the Child Act of South Sudan (9 April 2009); constituting the first piece of legislation incorporating children’s rights which criminalises child recruitment and use in hostilities.¹²¹ The second noteworthy initiative comes from the US and its Child Soldier Prevention Act (23 June 2009), which limits the military assistance that the US can provide to States which are known for recruiting or allowing the recruitment of children by paramilitary groups.¹²² These efforts to harmonise municipal law with international law may eventually lead to the elimination of discrepancies in State practice of recruitment, and may furthermore contribute to the establishment of prohibition of child recruitment as an international legal norm.

Secondly, the problem of the non-engagement of non-State actors in international human rights law obligations can be resolved in several ways: (i) participation of non-State actors in the drafting process of international human rights law instruments, (ii) incorporation of provisions of adherence for non-State actors in international human rights law instruments, and (iii) participation of non-State actors in dialogue with UN organs. Firstly, their participation in the drafting process of international human rights law instruments will lead to their direct involvement in framing international human rights law, and may make them more willing to assume obligations since their voices would have been heard and taken into account. Secondly, international human rights law instruments should incorporate provisions for adherence of non-State actors distinct from the provisions concerning State entities. In this way, a further motive for adherence will be given to non-State actors, since they will promote their political legitimacy if they decide to adhere to international human rights law instruments. Thirdly, and in more practical terms, non-State actors can participate in dialogue and action plans with the organs of the UN, as is already the case with several

¹¹⁸ CRC (n 12), art 38(2).

¹¹⁹ Optional Protocol (n 13) art 4(2).

¹²⁰ *ibid* art 4(1). ‘Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.’

¹²¹ The Child Act 2008 (9 April 2009) arts 31 and 32 <<http://www.unhcr.org/refworld/docid/4c0383992.html>> accessed 7 March 2011.

¹²² Child Soldier Prevention Act of 2007, 110th Congress, 1st Session, S 1175, ss 4 and 5 <<http://thomas.loc.gov/cgi-bin/query/C?c110:/temp/~c110YlyYlf>> accessed 11 March 2011.

armed groups.¹²³ More specifically, the Security Council has already called country task forces for a dialogue, introducing action plans with military groups of States which practiced child recruitment.¹²⁴ Several action plans are already in their drafting stage with States including Myanmar, the DRC, and Sudan,. These action plans include initiatives such as the appointment of focal points in the States to work on the monitoring and reporting of the situation in their territories, the strengthening of birth registration mechanisms, the training on child rights and protection of military centres and training schools, the introduction of disciplinary measures for violators and the facilitation of access and visits by the UN to military and recruitment centres.¹²⁵ It is useful however that in these initiatives, both State and non-State armed groups should participate for the maximisation of the effectiveness of the abovementioned measures.¹²⁶

Overall, the conformity of national legislation with the international standards in child recruitment will increase the normative legitimacy of the CRC and the Optional Protocol at State level. In addition, the effort to involve non-State actors in defining the international human rights law framework could enhance their willingness to comply with it and regard it gradually as the norm for their practices. International human rights law cannot be imposed on States or non-State actors under the threat of penal sanctions for its violations, as is the case with international humanitarian and criminal law, but it can be instilled into their legal tradition and practice.

VI. CONCLUSION

This paper has examined the extent to which the international humanitarian and human rights law framework fails to secure effective protection of children from recruitment and use in hostilities. In particular, it analysed how the vague and weak formulations of article 77(1) and (2) of Additional Protocol I promote a low level of protection, and how Additional Protocol II, despite the strong language of article 4(3)(c), is limited in effect due to its high threshold of applicability. In an international criminal law context, the Rome Statute incorporates the recruitment of children under 15 years of age in its provisions as a war crime in both international and non-international conflicts under article 8(2)(b)(xxvi) and (c)(vii) respectively. It fails, however, to promote 18 years as the minimum age requirement, as is the current standard of international human rights law. Lastly, though the CRC and the Optional Protocol attempt to correct the deficiencies of the aforementioned international instruments, they nevertheless fail to establish a uniform application of 18 years as the minimum age requirement for both types of recruitment and both types of participation. In addition, they do little to encourage the compliance and adherence of non-State actors. In the last chapter, it was argued why the age of 18 years should be adopted unequivocally for all types of recruitment and participation, and how non-State actors can become more engaged in the development of and compliance with the legal framework of child recruitment. Without underestimating other obstacles to the promotion of the prohibition of child recruitment, such as the general lack of enforcing and monitoring mechanisms, it is submitted that convincing the States to change their attitude towards child recruitment is the most difficult and crucial step to take in order to eliminate this practice. The

¹²³ UNGA 'Report of the SG on the Promotion and Protection on the Rights of Children' (2010) UN doc A/64/742-S/2010/181, 3-5. Action plans have been signed between the UN and the Moro Islamic Liberation Front (MILF), the Sudan People's Liberation Army (SPLA), the Government of Nepal, the Unified Communist Party of Nepal-Maoist (UCPN-M), etc.

¹²⁴ See *ibid.*

¹²⁵ *ibid* 4 para.11

¹²⁶ *ibid* para.15. Some Governments did not allow the UN team contact non-State groups (Myanmar, Philippines).

introduction of international standards into municipal law and the compliance of States and non-State actors with them is the real challenge. It is on the evident lacunae and obstacles outlined herein that international humanitarian, criminal and human rights law should focus hereafter.

**BACK TO THE DRAWING BOARD: *AL-SKEINI V. UK* AND THE
EXTRATERRITORIAL APPLICATION OF THE EUROPEAN CONVENTION ON
HUMAN RIGHTS**

ALASTAIR STEWART

I. INTRODUCTION

To the relief of many international lawyers, the long-awaited judgment in the case of *Al-Skeini v UK*, issued by the Grand Chamber of the European Court of Human Rights ('ECtHR') on the 7th of July 2011,¹ goes some way towards clarifying the jurisprudence on the extraterritorial application of the European Convention on Human Rights ('ECHR').² The debate over the so-called '*espace juridique*' of the ECHR was put to rest and it was confirmed that there are two tests that determine the exceptional application of the ECHR extraterritorially: 'effective control over an area' and 'state agent authority and control'.³ The former, which refers to control over *territory*, I shall refer to as the 'spatial' test for jurisdiction; the latter relates to the exercise of control by state agents over *individuals*, what I shall call the 'personal' test.⁴

While the 'spatial' test is nothing new, the treatment of the 'personal' test for jurisdiction is novel, at least nominally if not in substance. In apparent contradiction with *Bankovic*,⁵ the ECtHR stated that the application of ECHR rights can be 'divided and tailored' according to the particular circumstances of the case.⁶ This refutes the theory that a state must be in a position to secure all ECHR rights to be exercising jurisdiction. 'State agent authority and control', however, is the general formulation of the 'personal' test, and will be satisfied only on the basis of one of three sub-tests. The scope of these sub-tests has far-reaching implications for governmental action abroad and future litigation in international and domestic courts. But the ECtHR's tendency to adapt its reasoning to fit its present needs has left unclear how they will apply in different circumstances. This essay, therefore, will examine the scope of these sub-tests.

Crucial to this assessment is a consistent understanding of jurisdiction under Article 1 ECHR. The failure in *Al-Skeini* to adopt a principled approach to jurisdiction prompted Judge Bonello, in a colourful concurring opinion, to call on his fellow judges to 'return to the drawing board'.⁷ He stated that 'jurisdiction is neither territorial nor extra-territorial: it ought to be functional'.⁸ This 'functional' test reflects the nature of Article 1 jurisdiction as being based on control rather than a state's national territory or its formal legal competence under international law. It also provides a starting point for the ECtHR to develop a test that holds

¹ *Al-Skeini and Others v. the United Kingdom*, no. 55721/07 ECHR 2011.

² Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), entered into force 3 September 1953.

³ *Al-Skeini* (ECtHR)(n1), para.133-40.

⁴ See R. Wilde, 'The "legal space" or "*espace juridique*" of the European Convention on Human Rights: is it relevant to extraterritorial state action?' (2005) 2 European Human Rights Law Review 115.

⁵ *Bankovic and Others v. Belgium* (dec.) [GC], no. 52207/99, ECHR 2001, para.75.

⁶ *Al-Skeini* (ECtHR)(n1), para.137.

⁷ *Al-Skeini* (ECtHR)(n1), Concurring Opinion of Judge Bonello, para.8.

⁸ *Al-Skeini* (ECtHR)(n1), Concurring Opinion of Judge Bonello, para.12.

up when applied to the myriad extraterritorial factual scenarios in which applicants allege violations of ECHR rights.⁹

This essay begins with an examination of the meaning of jurisdiction under Article 1 ECHR in Part II, identifying general principles in the jurisprudence and focusing on the shift in thinking between *Bankovic* and *Al-Skeini*. Part III attempts to determine the scope of the ‘personal’ test set out by the ECtHR in *Al-Skeini*, and in particular whether this encompasses the ‘power to kill’. Part IV argues that the ‘functional’ test, coupled with the positive developments in *Al-Skeini*, provides the first outlines of a principled approach to Article 1 jurisdiction.

II. ARTICLE 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The question of whether a state has violated one of its obligations under the ECHR arises only when the alleged victim was, at the relevant time, ‘within [its] jurisdiction’ in the meaning of Article 1.¹⁰ This is a preliminary issue, which must be addressed before a decision can be made on the merits.¹¹ It is also separate from the question of state responsibility under the general framework set out by the International Law Commission (“ILC”) in the Articles on State Responsibility.¹² It is in this narrow context that the concept of jurisdiction is relevant.

Jurisdiction under Article 1 depends on factual control, and cannot be equated to a state’s national territory or legal competence under public international law, as this analysis of the case law will show.¹³ While jurisdiction is ‘primarily territorial’,¹⁴ Article 1 is not based on a ‘territorially centred rule’.¹⁵ There is a presumption that the state exercises jurisdiction throughout its territory, which can be rebutted in exceptional circumstances where it is shown that the state is ‘prevented from exercising its authority in part of its territory’.¹⁶ This

⁹ From victims of aerial bombardment and populations under military occupation to refugees subjected to “push-back” policies in the Mediterranean Sea (*Hirsi and Others v. Italy*, no. 27765/09).

¹⁰ This is also, incidentally, the jurisdictional threshold for the ECtHR, which has authority to pass judgments only where the alleged victim was within the state’s jurisdiction.

¹¹ In practice it may be joined to the merits phase, as the question of jurisdiction will, at times, be very closely linked to that of whether there has been a substantive violation of an ECHR right.

¹² ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission on the Work of its 53rd session, Official Records of the General Assembly, 56th session, UN Doc. A/56/10 supplement No.10 (2001). On the distinction between primary and secondary rules of state responsibility, see J. Crawford, *The ILC’s Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge, 2002) pp.14-16.

¹³ Many academics adopt this position. See e.g. R. Lawson, ‘Life after *Bankovic*: on the extraterritorial application of the European Convention on Human Rights’ in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004); R. Wilde, ‘Iraq: ad bellum obligations and occupation: the applicability of international human rights law to the Coalition Provisional Authority (CPA) and foreign military presence in Iraq’ (2005) 11(2) ILSA Journal of International & Comparative Law 485; T. Meron, ‘Extraterritoriality of human rights treaties’ (1995) 89 American Journal of International Law 78.

¹⁴ *Bankovic* (n5), para.59.

¹⁵ S. Miller, ‘Revisiting extraterritorial jurisdiction: a territorial justification for extraterritorial jurisdiction under the European Convention’ (2009) 20(4) European Journal of International Law 1223, p.1245.

¹⁶ *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004, para.312.

may be the result of ‘acts of war or rebellion’¹⁷ or where another state is in effective control of territory through military occupation: for example, Turkey’s ‘effective overall control’ of northern Cyprus.¹⁸ Jurisdiction is ‘primarily territorial’ not owing to any ‘territorial rule’ in Article 1 but because it is presumed that the state exercises effective authority and control throughout its territory.

Often jurisdiction under Article 1 is confused with a state’s legislative, executive and judicial jurisdiction.¹⁹ Traditionally, under public international law, jurisdiction delimits the legal competence of a state to prescribe and enforce laws, and of its courts to adjudicate cases.²⁰ This right to regulate conduct is limited by the equal rights of other sovereign states. A state’s jurisdiction for the purposes of the ECHR, however, is much broader. In *Issa v. Turkey* it was held that if an individual is under the ‘authority and control’ of a state’s agents operating extraterritorially, ‘whether lawfully or unlawfully’, that individual is within that state’s jurisdiction.²¹ Accordingly, even if a state’s conduct constitutes an illegitimate exercise of its jurisdiction under public international law, Article 1 will still be engaged if it has ‘authority and control’ over the individual.²²

These cases demonstrate that jurisdiction under Article 1 cannot be equated to a state’s territory or its legal competence under international law. But the ECtHR has failed to approach the question of jurisdiction in a consistent, principled manner. As noted by Lord Rodgers in the House of Lords decision in *Al-Skeini*, its rulings ‘do not speak with one voice’.²³ In *Bankovic* the ECtHR made extensive reference to the traditional understanding of jurisdiction in public international law, as limited by the sovereign rights of other states.²⁴ Not only did this break from previous case law, which focused exclusively on factual control, whether lawful or unlawful,²⁵ it led to two puzzling conclusions on the extraterritorial application of the ECHR. First, it applies ‘in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States’.²⁶ Second, Article 1 does not allow for ECHR rights to be ‘divided and tailored in accordance with the particular circumstances of the extra-territorial act in question’, implying that the ECHR must apply either in its entirety or not at all.²⁷ These conclusions fit awkwardly with the general principle of jurisdiction as control. Fortunately, *Al-Skeini* has brought some coherence to the jurisprudence on the extraterritorial application of the ECHR.

¹⁷ *Ilascu* (n16), para.312.

¹⁸ See *Loizidou v. Turkey* (preliminary objections), no. 15318/89, ECHR 1995, para.62; *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2002, para.69-81.

¹⁹ See e.g. M. Happold, ‘Banković v Belgium and the Territorial Scope of the European Convention on Human Rights’ (2003) 3 Human Rights Law Review 77, pp.82-84.

²⁰ See generally V. Lowe, ‘Jurisdiction’ in M. Evans (ed.), *International Law* (2nd edn) (Oxford, 2006), p.335; M. Akehurst, ‘Jurisdiction in International Law’ (1972-73) 46 British Year Book of International Law 145.

²¹ *Issa and Others v. Turkey*, no. 31821/96, ECHR 2004, para.71.

²² For more on the distinction between different types of jurisdiction, see M. Milanovic, ‘From compromise to principle: clarifying the concept of state jurisdiction in human rights treaties’ (2008) 8(3) Human Rights Law Review 411.

²³ *R. (on the application of Al-Skeini and Others) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, para.67.

²⁴ *Bankovic* (n5), para.59-61.

²⁵ *Loizidou v. Turkey* (preliminary objections)(n21), para.59-64; *Cyprus v. Turkey* (GC)(n21), para.69-81.

²⁶ *Bankovic* (n5), para.80.

²⁷ *Bankovic* (n5), para.75.

The *Al-Skeini* judgment rejected any arbitrary territorial demarcation of jurisdiction. The ‘territorial principle’ was recognised to mean only that ‘[j]urisdiction is presumed to be exercised normally throughout the State’s territory’.²⁸ The unhelpful notion of ‘*espace juridique*’ was confined to the limited significance it had originally in *Bankovic*. It was elaborated only to address a situation where the occupation of one ECHR member state by another would result in a ‘vacuum’ in protection if the occupying state were not held accountable under the ECHR.²⁹ In *Al-Skeini* the ECtHR confirmed that this ‘does not imply, *a contrario*, that jurisdiction under Article 1... can never exist outside the territory covered by the Council of Europe Member States’.³⁰

The ECtHR set out the two tests for the exceptional application of the ECHR extraterritorially: ‘state agent authority and control’ and ‘effective control of an area’.³¹ The latter is well established and engages the state’s responsibility for the entire range of substantive ECHR rights. The ‘personal’ test, however, has never been set out so clearly:

[W]henver the State through its agents exercises authority and control over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under [the ECHR] *that are relevant to the situation of that individual*. In this sense, therefore, *the Convention rights can be ‘divided and tailored’*...³²

This is in direct contradiction with *Bankovic*, in the sense that a state does not have to be in a position to secure the entire range of ECHR rights to be held accountable for a particular violation. While earlier cases indicated that a state’s ECHR obligations could be watered-down or divided according to the degree of control they exercised over individuals or territory,³³ *Al-Skeini* is the first explicit statement of this principle. The ECtHR has, thus, taken a big step towards revising the unfortunate precedent left by *Bankovic*. In usual form, however, it failed to take a principled approach to jurisdiction under Article 1, leaving unclear the scope of the ‘personal’ test for jurisdiction and how it will apply in the future.

III. THE ‘PERSONAL’ TEST FOR JURISDICTION

In the *Al-Skeini* judgment, under the ‘state agent authority and control’ heading, there are three sub-tests. The first, which relates to the ‘acts of diplomatic and consular agents’, I shall not discuss.³⁴ The other two read as follows:

135. Secondly... when, through the consent, invitation or acquiescence of the Government of that territory, [the Contracting State] exercises *all or some of the public powers normally to be exercised by that Government* (*Banković*, [para.71])... 136. In addition... *the use of force by a State’s agents* operating outside its territory may bring the individual thereby brought under the

²⁸ *Al-Skeini* (ECtHR)(n1), para.131.

²⁹ *Bankovic* (n5), para.80.

³⁰ *Al-Skeini* (ECtHR)(n1), para.142.

³¹ *Al-Skeini* (ECtHR)(n1), para.137-38.

³² *Al-Skeini* (ECtHR)(n1), para.137.

³³ *Ilascu* (n16), para.330-31; *Issa* (n21); *Cyprus v. Turkey* (dec.), no. 6780/74 & 6950/75 ECHR 1975, para.8.

³⁴ *Al-Skeini* (ECtHR)(n1), para.134.

control of the State's authorities into the State's Article 1 jurisdiction... What is decisive in such cases is the exercise of *physical power and control* over the person in question.³⁵

I shall refer to these two sub-tests as the 'public powers' test (para.135) and the 'use of force' test (para.136), respectively. The ECtHR then applied the law to the facts, which for the purposes of this essay can be summarised as follows: six applicants alleged that the UK government had violated their relatives' right to an effective investigation under Article 2 ECHR. The sixth applicant's son, Baha Mousa, died in custody at a British military base in Basrah, whereas the other five applicants' relatives deaths occurred during security operations by British troops on patrol in Basrah city. Except for the third applicant's wife, it was undisputed that the deaths were caused by the acts of British soldiers. The ECtHR held that:

149... following the removal from power of the Ba'ath regime and until the accession of the Interim Government, [the UK] assumed in Iraq the *exercise of some of the public powers normally to be exercised by a sovereign government*. In particular, [it] assumed authority and responsibility for the maintenance of security in South East Iraq. *In these exceptional circumstances*, the [UK], through its soldiers engaged in security operations in Basrah during the period in question, *exercised authority and control over individuals killed in the course of such security operations*, so as to establish a jurisdictional link between the deceased and the [UK] for the purposes of Article 1 [ECHR].³⁶

The ECtHR applied the 'public powers' test, a sub-test for 'state agent authority and control'. Given that the UK was acting outside its own territory, it was on this exceptional basis that there was a jurisdictional link under Article 1.

THE USE OF THE 'PUBLIC POWERS' TEST

The implications of the decision will now be considered. Marko Milanovic, in a detailed commentary of *Al-Skeini*, has stated that the ECtHR

applied a *personal* model of jurisdiction to the *killing* of all six applicants, but it did so only *exceptionally*, because the UK exercised *public powers* in Iraq... But, *a contrario*, had the UK *not* exercised such public powers, the personal model of jurisdiction would not apply.³⁷

It does not seem to be a logical necessity, however, as Milanovic suggests, that because jurisdiction was established on the basis of the UK's exercise of public powers, it could not have been established under the 'use of force' test.

The 'public powers' test can be seen to have a broader application in this case than the 'use of force' test would have, if it had been applied. The public powers exercised by the UK over the maintenance of security in the region meant that they 'exercised authority and

³⁵ *Al-Skeini* (ECtHR)(n1), para.135-36 (emphasis added).

³⁶ *Al-Skeini* (ECtHR)(n1), para.149 (emphasis added).

³⁷ M. Milanovic, 'European Court Decides Al-Skeini and Al-Jedda' EJIL Talk! Thursday July 7, 2011 (emphasis original), available at: <http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/>.

control over individuals killed in the course of such security operations'.³⁸ The UK, therefore, had jurisdiction in respect of any individual killed in the course of such operations, not just the applicants' relatives. This is a broader basis for jurisdiction than could have been established under the 'use of force' test, which would require specific justification in relation to each individual. The UK's exercise of public powers gave it jurisdiction, rendering obsolete the 'use of force' test.

Milanovic refers to the ECtHR's use of the 'public powers' test as a 'rather bizarre mix of the personal model with the spatial one'.³⁹ But this stems from his conclusion that in *Bankovic* it related to the 'spatial' test.⁴⁰ *Bankovic* shows that a state can gain jurisdiction through the exercise of public powers 'through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory'.⁴¹ Here there are two 'public powers' tests for the exceptional application of the ECHR extraterritorially: through effective control over territory or through the consent of the territorial state. It is clear that both are limited by the sovereign rights of the territorial state. But the second exception has nothing to do with the 'spatial' test of control over territory. The 'public powers' test referred to in *Al-Skeini* never was 'spatial', even in *Bankovic*. As the ECtHR makes clear, it relates to state agent authority and control, through the exercise of public powers, over individuals, not territory.⁴² The distinction is crucial, as will be discussed below.

Milanovic's understanding of the relationship between the 'public powers' test and the 'use of force' test leads him to the conclusion that '[w]hile the power to kill is "authority and control" over the individual if the state has public powers, killing is not authority and control if the state is merely firing away missiles from an aircraft'.⁴³ Consider, however, the situation where an individual on the street is shot by a soldier at a distance of 5-10 metres, as with the first applicant's brother in *Al-Skeini*.⁴⁴ Would this "power to kill" constitute authority and control over that individual's life in the absence of the exercise of public powers by the state? Nothing in *Al-Skeini* indicates that it would not. There are in fact significant passages in the judgment, and other post-*Bankovic* cases, which support the conclusion that it would. Milanovic is right that *Al-Skeini* did not overturn *Bankovic* explicitly, but it must be acknowledged that the former represents a significant departure from the reasoning in the latter. While it is doubtful whether these developments would lead to a different result from *Bankovic* in another aerial bombardment case, they show a clear trend towards a more flexible approach to Article 1.

THE 'POWER TO KILL' AND THE 'USE OF FORCE' TEST

The ECtHR has never stated explicitly that the 'power to kill' would constitute authority and control over an individual. But in *Al-Skeini* there were two important developments in this regard: the affirmation that the ECHR rights can be 'divided and tailored', and the elaboration of the 'use of force' test.

³⁸ *Al-Skeini* (ECtHR)(n1), para.149 (emphasis added).

³⁹ Milanovic, EJIL Talk! (n37).

⁴⁰ Milanovic, EJIL Talk! (n37).

⁴¹ *Bankovic* (n5), para.71.

⁴² *Al-Skeini* (ECtHR)(n1), para.135.

⁴³ Milanovic, EJIL Talk! (n37)(emphasis added).

⁴⁴ *Al-Skeini* (ECtHR)(n1), para.35-36.

The ECtHR stated in no uncertain terms in *Bankovic* that Article 1 did not allow for the ECHR rights to be ‘divided and tailored in accordance with the particular circumstances of the extra-territorial act in question’.⁴⁵ But *Al-Skeini* affirmed that ECHR rights *can* be ‘divided and tailored’, which entails the obligation to secure to the individual the rights ‘that are relevant to the situation of that individual’.⁴⁶ This does not apply to the ‘spatial’ test, which is why the determination of the character of the ‘public powers’ test as ‘personal’ is crucial to the finding of jurisdiction. The UK, through its soldiers, was found to have authority and control, and thus jurisdiction, over the right to life of the applicants’ relatives.⁴⁷ It clearly did not, however, have sufficient authority and control to fulfill, for example, its positive obligation under Article 3 ECHR to take measures designed to ensure that those individuals would not be subjected to ill treatment by private individuals.⁴⁸ The degree of authority and control required for jurisdiction was dependent on the conduct of the state in relation to the specific right at issue, in the particular circumstances of the case. This highly tailored approach would not be possible under *Bankovic*. Without the ability to ‘divide and tailor’ the ECHR rights, the first applicant’s brother in *Al-Skeini* could not have been found to be within the UK’s Article 1 jurisdiction.

Keep the scenario involving the first applicant’s brother in mind, as it tests the limits of ‘authority and control’. He was found to be within the authority and control of the soldiers on patrol, and therefore within the UK’s jurisdiction, on the basis of the ‘public powers’ test. But would the application of the ‘use of force’ test have yielded the same result? Under *Bankovic*, there were only four legal tests mentioned explicitly regarding the exceptional application of the ECHR extraterritorially: effective control over territory through military occupation; the exercise of public powers with the consent of the territorial state; the activities of diplomatic or consular agents; acts on board craft and vessels registered in, or flying the flag of, the state.⁴⁹ The ECtHR also mentioned several cases that did not fit into these categories – including *Issa* and *Ocalan v. Turkey*,⁵⁰ both involving the acts of Turkish agents outside of territory under Turkey’s control and in the absence of public powers – which were dismissed in a rather summary fashion.⁵¹

In *Al-Skeini*, however, these cases were recognised as examples of the ‘use of force’ test, which was added to the other two sub-tests under the ‘state agent authority and control’ heading.⁵² It is unclear why there was no mention of this test in *Bankovic*. In the Court of Appeal judgment in *Al-Skeini*, Lord Justice Brooke considered that in *Bankovic* the ECtHR had not excluded the application of the test in principle, but merely that it did not apply to the NATO bombing, as it is limited to situations where a ‘person is in the custody or control of agents’ of the state.⁵³ It is correct that aerial bombardment was not viewed as engaging jurisdiction. It is not certain, however, that the ‘use of force’ test requires physical custody. While the only examples given in *Al-Skeini* were cases involving physical custody of

⁴⁵ *Bankovic* (n5), para.75.

⁴⁶ *Al-Skeini* (ECtHR)(n1), para.137.

⁴⁷ Note that although all six applicants alleged a violation of the procedural aspect of Article 2, it is parasitic to the substantive negative obligation under Article 2. The question of authority and control would apply in the same way to both obligations. See M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (New York, 2011), pp.215-19.

⁴⁸ *A v. the United Kingdom*, no. 25599/94, ECHR 1998, para.22.

⁴⁹ *Bankovic* (n5), para.71, 73.

⁵⁰ *Ocalan v. Turkey* [GC], no. 46221/99, ECHR 2005.

⁵¹ *Bankovic* (n5), para.81.

⁵² *Al-Skeini* (ECtHR)(n1), para.136.

⁵³ *R. (on the application of Al-Skeini and Others) v Secretary of State for Defence*, [2005] EWCA Civ 1609, [2005] All ER (D) 337 (Dec), para.80-81.

individuals, the ECtHR made clear that what is decisive is ‘the exercise of physical power and control over the person in question’.⁵⁴ Can shooting an individual at the distance of 5-10 metres be excluded from this?

In *Andreou v Turkey* it was held that ‘even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as “within [the] jurisdiction” of Turkey’.⁵⁵ The basis on which jurisdiction was established is unclear. There was no mention of the ‘use of force’ test, the Turkish agents fired the shots from an area under the control of Turkey, and the applicant was in an area under the control of Cyprus, and therefore within the ‘*espace juridique*’ of the ECHR. Nonetheless, the judgment indicates that close range shooting constitutes sufficient control to engage Article 1.

In *Pad v. Turkey* it was undisputed that seven Iranian men were shot and killed by a Turkish helicopter near the Turkey-Iran border.⁵⁶ Turkey accepted that it had jurisdiction, as it claimed that the men were killed after crossing the border illegally, whereas the applicants claimed that the shooting had occurred on Iranian territory. But the ECtHR decided that it was ‘not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants’ relatives’.⁵⁷ This indicates that the simple fact of killing was sufficient to engage Turkey’s jurisdiction, even if it had taken place extraterritorially, in Iran.

It is not possible to distinguish in a non-arbitrary manner the scenario involving the first applicant’s brother in *Al-Skeini*. Milanovic worries that the finding of jurisdiction was dependent on the exercise of public powers, and that *Al-Skeini* is irreconcilable with the finding in *Pad*.⁵⁸ But Thienel points out that it should be easy to read out of the judgment the condition of public powers.⁵⁹ The ECtHR would be hard pushed to exclude killing at gunpoint from ‘physical power and control’ over an individual under the ‘use of force’ test. Interestingly, it is also unclear on what basis it could exclude from this drone strikes or aerial bombardment. *Bankovic* can be distinguished from *Pad* only due to the height of the aircraft and the choice of weaponry. Indeed, it is a strained argument in any situation to say that the ‘power to kill’ an individual does not constitute ‘physical power and control’ over that individual’s life.⁶⁰ The language used for the ‘use of force’ test of ‘physical power and control’, and the affirmation that the ECHR rights can be ‘divided and tailored’, represent an important shift in thinking in *Al-Skeini*. But the ECtHR still lacks a principled approach to jurisdiction under Article 1.

IV. THE ‘FUNCTIONAL’ TEST

⁵⁴ *Al-Skeini* (ECtHR)(n1), para.136-37.

⁵⁵ *Andreou v. Turkey* (dec.), no. 45653/99, ECHR 2008.

⁵⁶ *Pad and Others v. Turkey* (dec.), no. 60167/00, ECHR 2007.

⁵⁷ *Pad* (n56), para.54.

⁵⁸ Milanovic, EJIL Talk! (n37).

⁵⁹ T. Thienel, EJIL Talk! (n37), first response, Thursday July 7, 2011.

⁶⁰ Compare the US approach to the Fourth Amendment to the US Constitution, which prohibits ‘unreasonable searches and seizures’. The US Supreme Court held that this includes physical custody, but also that ‘there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment’. *Tennessee v. Garner*, 471 U.S. 1, p.7 (1985).

In the absence of a consistent approach to the extraterritorial application of the ECHR, the Italian judge marked the end of his career with an appeal to his fellow judges to go back to the drawing board on Article 1. He lamented the piecemeal case law and the lack of a principled, broadly applicable test for jurisdiction. Setting aside the existing tests, Judge Bonello listed the ways in which the state ensures the observance of human rights: not violating rights; developing systems to prevent violations; investigating violations; punishing officials that commit violations; compensating victims; and fulfilling positive obligations.⁶¹ Accordingly, a state has jurisdiction ‘whenever the observance or the breach of any of these functions is within its authority and control’.⁶²

There is an admirable simplicity to the ‘functional’ test. If a state has control over the enjoyment of any aspect of an individual’s right, that individual will enjoy the protection of the law in that respect. The test also reflects the jurisprudence that tends towards the understanding of jurisdiction as control. For instance, in *Issa* the ECtHR, quoting the Human Rights Committee decision in *Lopez Burgos v. Uruguay*,⁶³ stated that Article 1 cannot be interpreted so as to allow a state to ‘perpetrate violations of the [ECHR] on the territory of another State, which it could not perpetrate on its own territory’.⁶⁴ This indicates that, as with the ‘functional’ test, if a state has the capacity to fulfill or breach one of its human rights obligations, it cannot deny that the individual over whose rights it had control is within its jurisdiction, even when acting abroad.

This might be criticised as placing obligations on states that would be impossible to fulfill. Dennis and Surena argue that such an approach is too broad and would ‘appear to include liability for any lack of vigilance by the state in preventing violations of human rights... by other actors present in areas under military occupation, including rebel groups acting on their own account’.⁶⁵ This raises a legitimate concern about the ability of the state to fulfill the positive obligation in Article 2 ECHR to put in place ‘effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions’.⁶⁶

As discussed above, however, the ECHR rights can be ‘divided and tailored’. While the state would have the negative obligation to respect the right to life, in the absence of effective control of territory, it would not have the capacity to put in place a law enforcement system to provide police protection to the individuals in the area in which it is operating, and would therefore not have authority and control over the right to enjoy such protection. Thus, it can be seen that the ‘functional’ test is not reduced to a ‘cause-and-effect’ interpretation of jurisdiction. Although the omission by state agents of not protecting those individuals is an *act of the state*, jurisdiction is not engaged because their right to such protection is not within *the state’s authority and control*.

It is also worth noting that even when the state does have jurisdiction, the ECtHR has been willing to give positive obligations a flexible interpretation. In *Osman v UK* it was held that the positive obligation in Article 2 could not be interpreted so as to ‘impose an impossible or disproportionate burden on the authorities’; it would have to be shown that

⁶¹ *Al-Skeini* (ECtHR)(n1), Concurring Opinion of Judge Bonello, para.10, 19.

⁶² *Al-Skeini* (ECtHR)(n1), Concurring Opinion of Judge Bonello, para.11.

⁶³ *Lopez Burgos v. Uruguay* (1981) 68 ILR 29.

⁶⁴ *Issa* (n21), para.71.

⁶⁵ M. Dennis and A. Surena, ‘Application of the International Covenant on Civil and Political Rights in times of armed conflict and military occupation: the gap between legal theory and state practice’ (2008) 6 European Human Rights Law Review 714, pp.724-25.

⁶⁶ *Osman v. the United Kingdom* [GC], no. 23452/94, ECHR 1998, para.115.

‘the authorities did not do all that could be reasonably expected of them’, in ‘light of all the circumstances of any particular case’.⁶⁷ The substantive obligations under the ECHR will vary according to the factual context.

The ‘functional’ test, therefore, can be seen to provide a principled approach to Article 1, addressing concerns that states would be overburdened with impracticable human rights obligations. A separate criticism is that, although the ‘functional’ test provides a sound theoretical framework for the assessment of jurisdiction, it does not provide legal certainty, in the sense that it will be impossible in practice for the state to judge when and to what extent it is exercising jurisdiction.

Milanovic proposes a solution to this problem – the ‘third model’ – whereby negative obligations would have no territorial limitation and positive obligations would be limited to areas under the state’s effective control.⁶⁸ It is a nuanced approach, distinguishing between prophylactic and procedural positive obligations, which are parasitic to the negative obligation – for example, the right under Article 2 to an effective investigation – and those positive obligations requiring effective control over territory.⁶⁹ However, it relies on a textual interpretation of human rights treaties that would exclude the application of jurisdictional clauses to negative obligations, rendering them territorially unlimited.⁷⁰ While the argument is compelling and impressive in its originality, it flies in the face of existing jurisprudence, which views Article 1 jurisdiction as applying to all ECHR rights. Moreover, the limitation of positive obligations to territory under the state’s control is arbitrary. A state in *full control of its territory* may invite another state to take charge of some governmental powers, including certain positive obligations regarding the rights of the population. The latter would, therefore, have the legal and actual capacity, under the ‘public powers’ test, to fulfill those obligations, without having control of any of the territory on which it exercises them.

The ‘functional’ test provides the right balance between universality and effectiveness. On the one hand, it does not place any arbitrary limitation on jurisdiction, either in the case of negative or positive obligations. On the other, the ability to ‘divide and tailor’ rights means that jurisdiction extends only insofar as the state has the authority and control to respect, protect or ensure any particular right, no further. Regarding legal certainty, the ‘functional’ test is no different, in theory, than the ‘personal’ test; its strength is that it spells out ‘state agent authority and control’ in more detail by identifying specifically the ways in which states secure rights, thereby preventing generalisations regarding jurisdiction. In addition, it is a flexible approach that applies in the same manner to any particular set of facts.

The ‘functional’ test presents the outlines of a principled approach to Article 1. It is now the ECtHR’s duty to fill in the gaps. It will not be long before it is called on to state clearly whether ‘physical power and control’ over an individual under the ‘use of force’ test includes killing by gunfire at close range. And if the NATO bombing of Tripoli gives rise to new claims,⁷¹ the problem of maintaining the distinction between this and aerial bombardment will not be as easy as drawing a line through *Bankovic*. The scope of the ‘personal’ test will have a significant impact on the number of individuals afforded the protection of the ECHR. Moreover, given the power and influence that the ECtHR has in

⁶⁷ *Osman* (n66), para.116.

⁶⁸ Milanovic, *Extraterritorial Application of* (n47), pp.209-22.

⁶⁹ Milanovic, *Extraterritorial Application of* (n47), pp.215-19.

⁷⁰ Milanovic, *Extraterritorial Application of* (n47), pp.212-15.

⁷¹ ‘Libya: Nato admits civilian deaths in Tripoli air raid’ *Guardian*, 20 June 2011, available at: <http://www.guardian.co.uk/world/2011/jun/19/nato-libya-strike-civilian-deaths>.

comparison with other international courts and human rights bodies, the direction that it takes will be of great relevance in international law more generally.

V. CONCLUSION

On the question of jurisdiction under Article 1 ECHR, Lord Justice Sedley, in the Court of Appeals judgment in *Al-Skeini*, stated that 'it is not an answer to say that the UK, because it is unable to guarantee everything, is required to guarantee nothing.... the one thing British troops did have control over, even in the labile situation described in the evidence, was their own use of lethal force'.⁷² However, *Bankovic* constituted a 'road-block' to this approach, as it did not allow for the ECHR rights to be 'divided and tailored'.⁷³ In rejecting this position, *Al-Skeini* represents a remarkable turn around. Moreover, although only the 'public powers' test was used, this essay has argued that the elaboration of the 'use of force' test calls for a reassessment of the ECtHR's position on the 'power to kill'. To argue that killing in the absence of physical custody requires the state to be exercising some form of public powers is at odds with decisions like *Issa* and *Pad*, not to mention the plain meaning of 'physical power and control'. While it is unclear on what principled basis this can be distinguished from aerial bombardment, *Al-Skeini* did not overturn the finding in *Bankovic*. It has, however, reopened the debate.

It may have been a rather cruel parting shot from Judge Bonello to pronounce the need for a drastic change in the ECtHR's approach to Article 1, only to leave this hazardous task to those still on the bench. But should his fellow judges choose to return to the drawing board, they will not be starting from scratch. The 'functional' test provides the outlines of an approach to Article 1 grounded in the principle of jurisdiction as control. It reflects the notion of 'dividing and tailoring', with the separation of the various 'functions' allowing for a more nuanced understanding of the jurisdictional link between the state and the individual. Most importantly, it provides a general theoretical framework flexible enough to apply to a broad range of factual scenarios.

Cases like *Pad*, *Andreou* and *Al-Skeini* indicate that the use of lethal force constitutes an exercise of jurisdiction under the ECHR. Why, then, has the ECtHR shunned the use in such cases of the 'use of force' test or an equivalent legal standard? As is often the case, what is not said is more revealing than what is. In recent years, there has been an exponential increase in the resort to air warfare by militarily powerful states: *Operation Desert Storm* (1991) and *Operation Iraqi Freedom* (2003) in Iraq, *Operation Allied Force* (1999) in Kosovo, *Operation Enduring Freedom* (2001) in Afghanistan, and *Operation Unified Protector* (2011) in Libya. There is also the more recent practice by the US of using unmanned aerial drones to conduct air strikes in Pakistan and Yemen, which has escalated under the Obama administration.⁷⁴

In this context, *Bankovic* 'is not explicable in terms of a legal approach but as an effort to avoid engaging in a politically sensitive area with negative impact on contemporary methods of combating terrorism through bombing and other military activities'.⁷⁵ The ECtHR did not refer to a 'use of force' test in cases like *Al-Skeini* and *Pad* precisely because its applicability to aerial bombardment and drone strikes becomes then only a logical

⁷² *Al-Skeini* (EWCA)(n53), para.197.

⁷³ *Al-Skeini* (EWCA)(n53), para.200-202.

⁷⁴ 'Drones Are Weapons of Choice in Fighting Qaeda' *The New York Times*, 16 March 2009, available at http://nytimes.com/2009/03/17/business/17uav.html?_r=1.

⁷⁵ L. Loucaides, 'Determining the extra-territorial effect of the European Convention: facts, jurisprudence and the Bankovic case', (2006) 4 European Human Rights Law Review 391, p.400.

extension. It is in order to avoid these hard cases that the ‘personal’ test for jurisdiction is artificially limited. Not only is this unprincipled, it creates perverse incentives for states. For example, public scrutiny of US detention policies abroad has led to an increased resort to the use of drones.⁷⁶ The arbitrary limitation of the ‘personal’ test to situations of physical custody encourages states to adopt a policy to kill rather than capture. The assassination of Osama Bin Laden is just one high profile and controversial example of a practice that is becoming much more widespread.⁷⁷

It is, therefore, crucial that the ECtHR take a clear stance on the extraterritorial application of human rights treaties. There is now less cause for concern, with *Al-Skeini* marking a concrete shift in the ECtHR’s approach to Article 1. But the most controversial questions remain unanswered. One might be forgiven for reading twice the reference in the ECtHR’s factsheet on the ‘Extraterritorial Jurisdiction of ECHR States’ to the area that was ‘bombed’ in the *Pad* case.⁷⁸ Of course, this is not legally binding and is most likely an oversight by one of the members of staff of the Press Service, which compiles the factsheets. Nonetheless, it highlights the astonishing contradictions in the ECtHR’s jurisprudence. This is exactly the type of executive summary that will be sitting on the desks of Europe’s leaders. They must be left with no doubt as to the scope of the human rights obligations of the state. To the rest of the world, Europe has been a shining example of an effective human rights monitoring system. It would be painfully ironic if the ECtHR were unable to provide the same guarantees when European states export their abuses abroad.

⁷⁶ ‘Special Report: How the White House learned to love the drone’ *Reuters*, 18 May 2010, available at: <http://www.reuters.com/article/idUSTRE64H5SL20100518>.

⁷⁷ ‘Getting Bin Laden: What happened that night in Abbottabad’ *The New Yorker*, 8 August 2011, available at: http://www.newyorker.com/reporting/2011/08/08/110808fa_fact_schmidle.

⁷⁸ Factsheet: ‘Extra-territorial Jurisdiction of ECHR States’ July 2011 (emphasis added), available at: http://www.echr.coe.int/NR/rdonlyres/DD99396C-3853-448C-AFB4-67240B1B48AE/0/3415038_Press_Unit_Factsheet_Extraterritorial_Jurisdiction.pdf.

***HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN
WORLDWIDE***

BOOK REVIEW

RICHA SANDILL

Half the Sky: Turning Oppression into Opportunity for Women Worldwide, 2009, is a highly recommended account of one of the most pervasive human rights issues in the world: equality for women.

Historically, writings on human rights have generally focused on arguments about the current state of the world, raising both topical and philosophical questions. In contrast, the trend in contemporary literature has been to highlight individual stories or problems as a means of rousing their readers into action. *Half the Sky* is one of those rare books that manages to incorporate all the above mentioned elements into its 279 pages and resultantly stands out as a fine example of what a book on human rights today should be: raw, truthful, and above all, impactful enough to empower the reader to make a change.

Written by two journalists, Nicholas D. Krisoff and Sheryl WuDunn, *Half the Sky* is a culmination of their experiences reporting and traveling over a number of years. As the title suggests, it centers around making a case for women's rights and empowerment, covering poignant topics including sex trafficking, forced prostitution, rape as a war weapon, maternal mortality, and family planning. *Half the Sky* also covers cultural issues such as societal biases against women in the name of honour and if certain religions such as Islam are truly as oppressive as they are made out to be. The stories that it tells are mainly of women in South Asia and Africa and are aimed primarily at Western readers.

The author's contrastive technique is the book's strongest feature: the ability to tell harrowing stories of oppression in a manner that makes the reader feel both revolted and stimulated at the same time. Through describing numerous real life incidences and interviews with women who may either be victims of various oppressive practices discussed in the book, or who are grass roots activists, the authors successfully capture the depth and seriousness of the issues at hand.

The authors' portrayal of the situations faced by many of those discussed in the book leaves a hard hitting impact. This is illustrated in a comment by the authors during the narration of the story of a prostitute and her two victimized children: "In a town where police officers, government officials, Hindu priests, and respectable middle-class citizens all averted their eyes from forced prostitution, the only audible voice of conscience belonged to an eleven year old boy who was battered each time he spoke up."¹

From a human rights perspective the book has a number of strengths as well. Not only does *Half the Sky* bring a good range of issues to the forefront, but it also looks at both sides of the arguments surrounding them. For example, when discussing prostitution, once the authors outline the numerous human rights violations posed by the practice of sex slavery, they then discuss two different legal models, the Swedish model where buying sex is illegal, and the Amsterdam model where prostitution is legalized, to assess how effective commonly suggested solutions are against one another. In this process the authors strongly convey their points of view, highlighting the importance of equality and opportunity – two essential aims of human rights.

Overall, this book is a delight to read. Filled with surprising facts and frank descriptions of the situations faced by women that a Western reader may not otherwise

¹ Nicholas D. Kristof and Sheryl WuDunn, *Half the Sky: Turning Oppression into Opportunity for Women World Wide* (First Published 2009, Vintage Books 2010)13.

fathom, *Half the Sky* narrates its points and runs its course in an intriguing manner. The stories about rape and maternal fistulas will haunt anyone who reads them. Even if the mood can be one of despair in the book, the authors mitigate that mood with inspirational stories of women and organizations that have fought the odds and succeeded. *Half the Sky*, provides a compelling motivation for readers to involve themselves in the women's rights causes described in the book.