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Special thanks to Leeds for Life and the Faculty of Arts for helping fund the production and printing of the journal. Thanks also to all the staff and students who gave their time and advice to contribute towards the success of the journal, particularly Tess Hornsby Smith, Shane Doyle, Rafe Hallett, Mark Davis, Lorna Waddington, Kerri Woods, Rosalee Dorfman, Jeremy Harmer and Matt Clark.

Letter from the Editor

Dear Readers,

It is with great excitement that I write this opening letter for the inaugural issue of the University of Leeds Human Rights Journal.

This publication represents a year's work by an incredibly talented and dedicated group of undergraduates. The journal was first conceived early in my final year when it became apparent to me that ambitious undergraduate researchers lacked a platform for their work. Beyond just gaining high marks, students considering a career in academia had no way in which to experience the world of academic publishing.

From my experience working on an undergraduate journal while studying abroad, I witnessed first hand how a multidisciplinary journal not only stretched students and encouraged high quality research, but also brought together those with shared interests from across disciplines and faculties, breaking down traditional barriers and fostering collaboration. This is therefore a journal *for* undergraduates *by* undergraduates, allowing students to also try their hand at peer reviewing and gain editorial experience. The topic of human rights stemmed from both my own passions and also a belief in its power to be truly multidisciplinary, allowing contributions from the arts, social sciences, sciences and technology to be printed side by side.

However, as when starting any new project, I had little idea how much interest there would be from the student body. Yet more students responded to my call for peer reviewers and editors than I could have possibly imagined. Stemming from the Faculty of Arts, Social Sciences, Law and Biological Sciences, the editorial board for this issue is diverse in their interests and academic background, making for a varied, strong and committed team with extremely high standards. Their level of dedication and diligence has been invaluable, and I owe them great thanks for their enormous contribution to this issue of the University of Leeds Human Rights Journal. It is through them that I hope the journal can be continued into future years, with successive students taking on editorial roles so undergraduates may continue to have the opportunity to contribute to academic research and publishing at the University of Leeds.

I also give particular thanks to those staff members who have supported the journal and offered their specific subject expertise when needed.

The whole editorial team behind the journal must also thank the outstanding contributors to the journal who have provided us with the rich body of this issue. The response to our call for submissions was astonishing, with nearly 100 academic and creative pieces submitted by students from virtually every Faculty and School at the University of Leeds, including Languages, Law, Medicine, Politics, History, English, Geography and Business Studies. As an editorial board we were therefore privileged in having so many submissions from which to shortlist, and the eventual competition was stiff. Once selected these contributors were also quick and open to making edits requested by the editorial board, and we were all impressed by their commitment to improving and perfecting their work. The final contributors should therefore be very proud of the work they have produced, and I hope their inclusion in the journal will help foster a continued interest in academic research and human rights issues in their futures.

This issue of the journal covers a wide range of human rights issues, and intermixed with academic papers readers will find poetry, photography and reflective writing addressing a range of human rights issues.

I hope that readers of the journal, whatever their background, are inspired to engage in academic research and human rights issues important to them, whether they be at home or abroad. Above all this publication aims to encourage students to follow their interests, and excel in both academic research and other creative mediums. University is about discovering *your* skills and specialisms, and it is from these that you can gain the greatest rewards.

In solidarity,

Hannah Tigerschiold
Editor-in-chief 2012-13

If you are interested in becoming involved in the journal as an editor or submitting your work to future issues, please visit our website at www.leeds.ac.uk/hrj for the most up to date information.

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What are the Benefits and Drawbacks of Adopting a Universal Understanding of Human Rights?

Angus Rance

This paper discusses the idea of a universal understanding of human rights. Initially, there is an analysis of the concept that a universal understanding of human rights has been adopted on a theoretical level through various United Nations instruments, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is argued that this acceptance hypothetically establishes an international minimum of dignity. Yet there are certain drawbacks of this established definition of human rights, and the significance of these shortcomings will be considered and reflected upon. This paper claims that two major drawbacks remain: the lack of ratification at a state level and a more general reluctance to cede sovereignty to supranational organisations. The contention is that, whilst there are benefits of a universal understanding of human rights, the drawbacks described prevent the adopted consensus from gaining national legal force. Nevertheless, a further benefit is presented in the form of an international legal framework or human rights jurisdiction. In analysing this jurisdiction, and the case of General Pinochet, a major benefit of the universal understanding of human rights is put forward. The paper concludes with the argument that although the universal understanding of human rights has become theoretically accepted, the practical implications and enforcement thereof remain arbitrary.

The Universal Declaration of Human Rights (UDHR) adopted in 1948 set out the terms by which human rights might be defined.[1] This laid the groundwork for a universal understanding of human rights to be adopted on the international stage. This declaration, together with its gradual international acceptance and additional international instruments, such as the International Covenant on Civil and Political Rights (ICCPR), set out 'minimum social and political' standards and rights necessary for upholding and protecting human rights.[2] This standardisation of rights became an evident benefit of this universal understanding, as demonstrated in the example of General Pinochet. However, this paper argues that the 'universal' understanding of human rights on the international stage has been, and continues to be, hampered by a weakness in its implementation

1 UN General Assembly. "Universal declaration of human rights." *Resolution adopted by the General assembly*. 10.12 (1948)

2 Donnelly, J. *International Human Rights*. 2nd ed. (Colorado: Westview Press, 1998), p.9

and the punishment of states, regimes or political systems that violate human rights.[3] This palpable lack of means to punish human rights violators remains a major drawback to a universal understanding of human rights in its current form. Additionally, the disadvantages caused by a lack of national ratifications, and a reluctance to sacrifice national sovereignty is hampering a 'universal' approach.

The main aim of the UDHR is to determine a universal set of moral rights that a person has by virtue of being human and that such rights 'provide a moral standard of national political legitimacy'.[4] Tomuschat further develops this argument when he states that 'everyone everywhere is considered to be a holder of the rights [set out in the UDHR]'.[5] This international standard setting, it must be argued, is therefore a major benefit of adopting a universal understanding of human rights. Despite philosophical debate regarding the source of human rights, which is beyond the remit of this discussion, from a political and international standpoint, a standard of rights appears to have been accepted.[6] This indicates that human rights have become a 'settled norm' of international relations.[7] Accordingly, the advantage of this is that states within the international community recognise that 'human rights are a good which need to be protected by states and by the international system'.[8] Hence, it could be argued that the value of adopting a universal understanding of human rights is that protection of these rights, regardless of debates about source or philosophy, becomes recognised on an international scale. This, it must be said is a great achievement of the latter half of the Twentieth Century and a major benefit of the UDHR.

Given the above acceptance of human rights discourse on an international level, it is important to note that there remains a lack of ratification throughout the international community. Donnelly provides an explanation for this drawback and highlights that, as a resolution of the General Assembly of the United Nations, the UDHR is not '*per se* legally binding'.[9] Other treaties however, specifically the International Covenant

3 Brown, C. 'Universal human rights: A critique'. *The International Journal of Human Rights*, 1:2 (1997). pp.41-46. p.53 and Donnelly, J. *Universal Human Rights in Theory and Practice*. (London: Cornell University Press, 1989). p.15

4 Donnelly, *International Human Rights in Theory and Practice*, p. 20

5 Tomuschat, C. *Human Rights: Between Idealism and Realism*. (Oxford: Oxford University Press, 2003), p. 58

6 Donnelly, J. *International Human Rights*, pp. 20-22. Here Donnelly sets out a useful introduction to philosophical debate and objections to human rights. See also Donnelly, J. *The Concept of Human Rights*. (London: Croom Helm, 1985), pp. 89-99 and Donnelly, J, *Universal Human Rights in Theory and Practice*, p. 40

7 Frost, M. *Towards a normative theory of international relations*. (Cambridge University Press: Cambridge, 1986), p. 120

8 ibid, p.126

9 Donnelly,J. *International Human Rights*, p. 7

on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), have been to some extent ratified and are by implication legally binding.[10] Together, these covenants and the UDHR, developed the 'Global Human Rights Regime'.[11]

Yet the important structures that concern this paper are the UN Commission on Human Rights and the Human Rights Committee created by the ICCPR. The operational efficiency of these structures can be determined by their effect in the case of General Pinochet. Between 1973 and 1990, the former Chilean dictator carried out countless human rights abuses and unleashed 'massive political violence … against [his] perceived enemies'.[12] The Commission on Human Rights condemned the deterioration of the situation and the persistent use of torture in Chile in 1981.[13] However, whilst it should be argued that the Commission helped to highlight these human rights violations, the downside to this universal instrument was that 'virtually nothing [was] achieved in the areas of international implementation or enforcement'.[14] Furthermore, the Human Rights Committee was hampered by a lack of acceptance or ratification by the ICCPR to such an extent that around half the world still remains immune from the Committee's criticism.[15] An optional protocol allowing the Committee 'to receive and consider individual complaints' also exists and has allowed Uruguayan abuses of rights, committed by the military from 1971 until 1985 under the auspices of an 'internal war' to come under scrutiny.[16] Nonetheless this protocol is again only recognised by a small minority of states.[17] That issues of ratification and recognition should hamper implementation of treaties at an international level is a major, practical drawback of the 'universal' definition put forward by the UDHR, ICCPR and ICESCR.

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10 UN General Assembly. "International Covenant on Civil and Political Rights." *Resolution adopted by the United Nations General Assembly 2200A [xxi]* (1966) and UN General Assembly. "International Covenant on Economic, Social and Cultural Rights". *Resolution adopted by the United Nations General Assembly 2200A [xxi]* (1966).

11 Donnelly, J. *Universal Human Rights in Theory and Practice*. pp. 206-213, especially, p.206

12 Stern, S.J. *Reckoning with Pinochet: The Memory Question in Democratic Chile, 1989-2006*. (Duke University Press: London. 2010), p. xxii.

13 UN Commission on Human Rights. *Question of human rights in Chile*. 26th February 1981. Doc no. E/CN.4/RES/9(XXXVII)

14 Donnelly, J. *Universal Human Rights in Theory and Practice*, p. 208

15 ibid, p. 209

16 UN Human Rights Council. *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowark*. 21st December 2009. Doc no. A/HRC/13/39/Add2. Office of the High Commissioner for Human Rights, p. 5 and Roniger, L. & Sznajder, M. *The Legacy of Human-Rights Violations in the Southern Cone: Argentina, Chile and Uruguay*. (Oxford University Press: Oxford, 1999), p. 13. See also pp.9-14 and pp. 25-28

17 Donnelly, J. *Universal Human Rights in Theory and Practice*, p. 210

Notwithstanding the challenges brought on by ratification, the UDHR established an international legal framework, although it is itself not legally binding. Despite being drafted by only 56 member states of the UN, the declaration was accepted into 'the body of common legal principles'.[18] It is therefore arguable that the establishment of a common international legal principle surrounding human rights represents a greater benefit than the drawback presented by a lack of ratification. Héctor Gros Espiell furthers such an argument in his discussion of the International Court of Justice.[19] He argues that in the case of military and paramilitary violations in Nicaragua in 1986, the Court has 'implicitly supported the universal character of human rights'.[20] This demonstrates how the UDHR and the apparent universal understanding that it represents, have come to be embodied in international law. Indeed, it provides a rebuttal of the fact that little implementation has been achieved through lack of ratification.

Additionally, Robertson supports the reasoning behind a universal understanding of human rights and provides an international framework when arguing for universal jurisdiction. Robertson's thoughts exemplify the way in which a notion of a universal jurisdiction for human rights might solve 'domestic immunities and amnesties and pardons'.[21] It was this principle that meant General Pinochet could be arrested in London in 1998, by a warrant issued in Spain, for crimes committed in Chile during his dictatorship.[22] This case illustrated the authority which the principles, set out in the UDHR and similar documents, had gained, and meant that administration of 'torture for systematic policy reasons' could not be ignored by the international community.[23] Subsequently, as Gros Espeill also argued, a universal understanding of human rights evoked the legal principle of *jus cogens*.[24] That is to say that such common understanding was held, that human rights had become 'a mandatory norm of general international law'.[25] This, as a benefit of a universal definition of human rights, begins to negate the drawback of a lack of international ratification of the ICCPR, and ICESCR respectively.

Conversely, the development of such a unilateral jurisdiction across international law brings into question national sovereignty. In what could

18 Tomuschat, C. *Human Rights: Between Idealism and Realism*, p. 64

19 Gros Espiell, H. "Universality of human rights and cultural diversity." *International Social Studies Journal*. 50.158. (1998). pp.523-534

20 ibid, p. 531

21 ibid, p.222

22 Connett, D., Hooper, J., Beaumont, P. "Pinochet arrested in London." *The Guardian* [online]. Sunday 18th October 1998.

23 ibid, p.347

24 Gros Espiell, H. "Universality of human rights and cultural diversity", p. 531

25 Garner, B.A. (ed in chief). *Black's law dictionary*. (7th ed). (St Paul, Minnesota: West Group, 1999), p. 864. See definition of *jus cogens*.

be considered a drawback to a universal understanding of human rights, Donnelly again argues that international human rights covenants have challenged the established order within international relations.[26] Initially, national sovereignty was seen as the governing principle and 'states [had] exclusive jurisdiction over their territory'.[27] However, the adoption of a universal understanding of human rights, challenges this concept, and it is this challenge that might be seen as a drawback of such universal values. Hedley Bull takes the debate further in arguing that by violating national sovereignty and challenging 'international society' human rights might destabilise the international system.[28] Destabilisation of this kind must undoubtedly be seen as a drawback to the assumption of a universal definition of human rights. Nevertheless, as was previously explored, Robertson suggests a drawback of this kind will negate 'sovereign impunity'.[29] It can therefore be argued that whilst being a drawback, changing the boundaries of national sovereignty in favour of a global human rights discourse is necessary to ensure that justice, as well as protection is possible.

It is therefore possible to deduce that there are clear benefits to the international community adopting a universal understanding of human rights. The global community of states, represented by the United Nations and exemplified in its treaties, declarations and covenants, has attempted to set a standard under which human existence must not fall. This, as explained in the introduction to this paper, is the main benefit of such a universal definition. It is the establishment of a minimum standard that is the aim of the UDHR, ICCPR and ICESCR both individually and as a collective.[30] Regardless of states, nations or citizenship, this standard, theoretically speaking, applies to all persons. We have seen states theoretically commit to this principle and this is irrefutably a considerable benefit. Moreover, the universal definition and the standard it sets, carries such weight that it has become subsumed into international law and legal precedence. This provides a further benefit to the adoption of a universal classification of human rights in the latter half of the Twentieth Century. Human rights, it may be argued, are now internationally protected.

Despite the assumed protection of human rights, illustrated in this paper, problems regarding the implementation of these rights and subsequent punishment of rights violators still occur. As previously explained, a lack of ratification by member states has led to inaction and

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26 Donnelly, J. *International Human Rights*, pp.26-27

27 ibid, p.26

28 Bull, H. *The Anarchical Society: A Study of Order in World Politics*. (3rd ed). (Columbia University Press: New York, 1977). p.85

29 Robertson, G. (QC). *Crimes against Humanity: the struggle for Global Justice*, p.347; see also pp. 190-224, pp. 348-357

30 Donnelly, J. *International Human Rights*, p.20

impotence.[31] This is an unquestionable drawback, and more measures need to be taken to address this as the international community moves to a more codified universal understanding of rights and responsibilities. If states are to complete the ratification, and thereby sacrifice a small amount of sovereignty, the international relations question may begin to be solved, as a universal definition of human rights becomes enshrined in local and national law. It is clear then that the theoretical benefits of a universal declaration have been accepted, the only drawbacks that remain are the practical implications of this universal understanding.

31 Donnelly, J. *Universal Human Rights in Theory and Practice*, pp. 206-213

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Footsteps, by Flora Donovan[1]

In July 2011, with the organisation Footsteps I went to work in three schools near the town of Kisumu on the edge of Lake Victoria, Kenya. Part of our trip was visiting the Katito Health Centre. This health centre, donated and built by Footsteps, is especially important in this part of Kenya which has been hit hard by HIV/AIDS. Many families are run by children or are headed by a sick parent, which acts as a barrier for children entering education.

In Kenya, education is the road out of poverty. However the classrooms I worked in were very dilapidated, with many broken desks and very little light. The children had very few writing materials, the classes were overcrowded and teaching was often done outside. Many NGOs have provided aid to these schools in the past but funding has dried up and many of these classrooms have fallen into disrepair.

Photo 1: David

With a mother seriously ill with AIDs, and unable to work or provide an income to support and feed her family, David and his brothers often go without food during the busy school day.

Photos 2 & 3: DAMA

When funds from the charity DAMA (The Doctors' Association for Medical Aid UK) dried up, education suffered. Many schools now lack necessary resources, while some classrooms are no longer used to teach in and are simply empty spaces.

Photo 4: Maternity Ward, Katito

Essential in improving maternal healthcare in a majority rural area. A step in addressing basic human rights in a country where 1 in 38 pregnant women die in childbirth.[2]

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1 Photography © Flora Donovan

2 Global Giving, *Project Report- Saving Kenyan Mothers Lives at the Community Level*, December 2011, http://www.globalgiving.org/projects/saving-kenyan-mothers-lives-at-the-community-level/updates/

Article 27. Every child has the right to a standard of living that is good enough to meet their physical, social and mental needs. Governments must help families who cannot afford to provide this, United Nations Convention on the Rights of the Child (UNCRC).

Article 26. Everyone has the right to education, Universal Declaration of Human Rights (UDHR).

Article 25 Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, UDHR.

Evaluating Immunities and Individual Criminal Responsibility in International Law

Oladimeji Sofowora

Heads of State and other State officials enjoy immunity from prosecution for crimes they commit. In the case of international crimes, their immunity may be excluded to ensure that they are individually criminally responsible. The objective of this article is to identify and critique the various steps in ensuring individual criminal responsibility in the presence of immunity. Section I introduces this article. Section II discusses universal jurisdiction because a State requires universal jurisdiction before prosecuting a State official, which ensures that the individual can be prosecuted in another State even if he is not a citizen of that State. However, because State officials enjoy State immunity for their actions, section III discusses state immunity and the fact that the universal jurisdiction of the prosecuting State in ensuring individual criminal responsibility of the official is impeded. Thus, section IV explains what individual criminal responsibility is. In order to understand the link between individual criminal responsibility and immunities, sections V and VI discuss immunity ratione personae and immunity ratione materiae respectively. Immunity ratione personae operates to prevent a State official from being prosecuted for acts committed whilst in office and immunity ratione materiae protects a State official from acts performed after the official has left office as it would be argued that those acts were committed in the performance of governmental functions. However, both international and national courts have attempted to restrict these immunities to ensure that the State official is individually criminally responsible for their international crimes. Consequently, section VII elucidates on the conflict between immunity ratione personae and ratione materiae and individual criminal responsibility.

I. *Introduction*

In international law, various contentious issues arise regarding State practice. Arguably, the most controversial is the question of whether, and to what extent, State officials are immune from prosecution when they commit international crimes, which would make them individually criminally responsible. In answering that question, there are several underlying issues usually considered, and these can be divided into: States having universal jurisdiction to prosecute; the possible rejection of that universal jurisdiction due to State immunity; the subsequent immunity – *ratione personae* and *ratione materiae* – conferred on State officials; and the inconsistency of immunity with the principle of individual criminal liability. With reference to Conventions, international and national court decisions and legislations,

as well as journal articles, this article will engage in a critical discussion of each of the above issues with the object of identifying the conflict between immunity granted to State officials when they commit international crimes, and the principle of individual criminal liability.

II. *Universal Jurisdiction*

Jurisdiction 'refers to a State's legitimate assertion of authority to affect legal matters'.[1] Harvard Research Draft Convention on Jurisdiction with Respect to Crime[2] asserts that a State exercises universal jurisdiction when an alien commits a crime in the territory of a State where his home State has no authority, and his act is one recognised as an offence where the crime is committed.[3] The Draft Convention does not have binding effect, however, because of State practice, it is customary international law.[4] This is due to the extensive research undertaken prior to the drafting of the Convention.[5] Despite this, the International Court of Justice (ICJ) is yet to declare a legally recognised definition of universal jurisdiction.[6] Hence, this has not only led to ambiguity, but controversy over the principle.

In the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the Arrest Warrant Case, it was indicated that for universal jurisdiction to occur, there is a requirement for the individual concerned to have a link to the State asserting jurisdiction.[7] Moreover, because 'no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction', this has led to uncertainty.[8] Furthermore, President Guillaume, who was the president of the ICJ at the time of the Arrest Warrant case, maintains that where States exercise jurisdiction, it is usually based on either the nationality of the victim or the perpetrator, or when the crime is committed in the State's territory.[9] President Guillaume's breadth of

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1 Kenneth C Randall, 'Universal Jurisdiction Under International Law' 66 Texas LR 785, 786

2 Harvard Research Draft Convention on Jurisdiction with Respect to Crime (1935) 29 AJIL Supp 433 at 445

3 Ibid. Article 10 at p.573.

4 David Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010) p228; For the importance of customary international law in the International Court of Justice's decision making process, see Article 38(1)(b) of the Statute of the ICJ

5 Ibid.

6 Martin Dixon, *Textbook on International Law* (6th edn, OUP 2007) p148

7 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* Judgment, I.C. J. Reports 2002, p. 3 at p. 76

8 Ibid.; See also Judge van Wyngaert's dissenting opinion: 'there is no generally accepted definition of universal jurisdiction in conventional or customary international law' Ibid., para 44 at p.165

9 Ibid. para 16 at p.44; Also see Cherif M Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' 42 Va J Int'l L 81 at p.83

experience in trying cases and identifying several State issues adds value to his assertion. Thus, the Eichmann case illustrates this view as Israel assumed jurisdiction for the crimes of Eichmann, a German national, who stood trial in Israel.[10] It is conceivable that Israel exercised jurisdiction over Eichmann because he committed crimes against Jewish people, and they were the only State that had a legitimate interest in his prosecution. Hence, States exercise universal jurisdiction where a link is established between the State and the individual concerned.

In contrast, it has been argued that universal jurisdiction can be exercised where no link is established with the prosecuting State.[11] Each State assumes jurisdiction in order to combat serious offences which are condemned by all states.[12] According to Lord Millet in the Pinochet case, there are two requirements to be met for international crimes to result in universal jurisdiction under customary international law.[13] The first condition is that '[the crime] must be contrary to a peremptory norm of international law so as to infringe a *jus cogens'*.[14] *Jus cogens* are internationally accepted norms of which derogation is prohibited; examples include genocide and crimes against humanity.[15] The second condition given by Lord Millet is that 'they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order'.[16] For instance, in *Demjanjuk v Petrovsky* a US court permitted Israel to exercise universal jurisdiction over a defendant who committed crimes against humanity.[17] This suggests that universal jurisdiction can be exercised upon the violation of *jus cogens* or an equally condemned act.

This is also emphasised by Treaties and UN General Assembly (UNGA) Resolutions. In the Geneva Convention of 1948, it was stated that genocide is a crime that can result in universal jurisdiction and States should try the individual through a suitable tribunal recognised to possess jurisdiction.[18] In addition, the UNGA Resolution 3074 states that war crimes and crimes against humanity should be punished by States both nationally and internationally and in cooperation, thereby

10 *Attorney-General of the Government of Israel v Eichmann* (1961) 36 ILR 5 District Court of Jerusalem

11 Ilias Bantekas & Susan Nash, *International Criminal Law* (2nd edn, Cavendish Publishing 2003) p. 156

12 Kenneth C Randall, p.788.

13 *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 3)* [2000] 1 AC 147, 275

14 Ibid.

15 Art 53 Vienna Convention on the Law of Treaties UNTS Vol 1155 p331 and Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) at p 511

16 See n 13

17 (1985) 776 F.2d 571

18 'Convention on the Prevention and Punishment of the Crime of Genocide' 78 UNTS 277, *entered into force* Jan. 12, 1951 (142 parties) Article 6 p.281-282

indicating universal jurisdiction for those crimes. The 142 parties to the Geneva Convention, and the 94 votes to none received by GA Resolution emphasises the willingness of States to curtail severe crimes through the exercise of universal jurisdiction.[19] Furthermore, Article 5(1) of the Torture Convention of 1984 confers universal jurisdiction for acts of torture 'where the alleged offender is present in [a foreign State]' and extradition does not occur.[20] It was on this basis that the UK exercised universal jurisdiction over Senator Pinochet's act of torture.[21] Hence, evidence seems to suggest that universal jurisdiction is inherent in customary international law and Treaties, making it binding and significantly influential on States. However, State immunity challenges the exercise of universal jurisdiction.

III. *State Immunity*

Universal jurisdiction can be hindered by State immunity.[22] In *The Schooner Exchange,*[23] which concerned a court's jurisdiction over a claim against a foreign ship visiting America, the US Supreme Court asserted that a State's territorial jurisdiction is 'necessarily exclusive and absolute'.[24] The maxim *par in parem non habet imperium*, which means that one equal cannot exert influence on another equal, was applied here, and is frequently cited in other cases.[25] Whilst the Schooner Exchange case asserts absolute immunity, some jurists propose a contrary theory of restrictive immunity. Restrictive immunity concerns distinguishing between States acting *jure imperii* and *jure gestionis.*[26] Lord Denning defined restrictive immunity as 'immunity to acts of a governmental nature, described in Latin as *jure imperii*, but no immunity to acts of a commercial nature, *jure gestionis'*.[27] This was affirmed by Lord Wilberforce in *Playa*

19 UNGA 'Principles of International cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity' Established by GA Res 3074 (XXVIII) (3 December 1973) (adopted by 94 votes to none; 9 abstentions) UN GAOR 28th Session Supp No 30 UN Doc A/9030 (1973) at pp.78-79

20 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' United Nations Treaty Series Vol 1465 (150 parties) p.85 and p.114

21 Per Lord Browne-Wilkinson in *Pinochet* at 200

22 Martin Dixon & Robert McCorquodale, *Cases & Materials on International Law* (4th edn, OUP 2003) pp301-302

23 *The Schooner Exchange v McFaddon* (1812) 7 Cranch 116; 11 US 116 (1812)

24 Ibid. per Marshall CJ

25 David Harris, p.260; See Lord Goff in Pinochet at 210: 'The principle of state immunity is expressed in the Latin maxim *par in parem non habet imperium*, the effect of which is that one sovereign state does not adjudicate on the conduct of another'

26 Harvard Research in International Law, 'Competence of Courts in regard to Foreign States', American Journal of International Law, vol. 26 (Supplement) (1932), pp. 451, 606

27 In *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, 555; *Empire of Iran case* (1963) 45 ILR 57, 80, Federal Constitution Court, German Federal Republic applied

Larga.[28] He stated that 'the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate'.[29]

Furthermore, State immunity applies where a civil action is brought in relation to criminal and human rights acts. For instance, in *Al-Adsani v Kuwait*, the Court of Appeal held that Kuwait was entitled to State immunity for acts of torture committed against the claimant.[30] This decision was upheld following a complaint to the European Court of Human Rights,[31] where it was held that, whilst acts of torture infringe upon *jus cogens*, a State is not civilly liable in damages because it does not concern individual criminal liability.[32] However, in the joint dissenting opinion Judges Rozakis et al, it was argued that acts of torture 'deprives the rule of sovereign immunity of all its legal effects'.[33] Nevertheless, the ICJ recently held in *Germany v Italy* that State immunity still exists where allegations of international human rights law are made.[34] Although these cases concerned civil claims, the principle nonetheless applies to criminal cases.

State immunity is further emphasised in Treaties and national legislation. The European Convention on State Immunity 1972 confirms State immunity and provides conditions on its operation.[35] Consequently, Lord Millett in *Holland* asserted that this Treaty affirms that State immunity is restrictive and its provisions are now held to be customary international law.[36] Prior to the judgment of *Holland*, the UK enacted the State Immunity Act which provided similar restrictive requirements for State immunity.[37] The relevant provisions are identified in section 14(1) (a)-(c) which referred to State as sovereigns and Heads of State, the government of the State and departments of that government.[38]

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28 *Playa Larga v I Congreso del Partido* [1983] 1 A.C. 244

29 Ibid. at 262

30 *Al-Adsani v Kuwait* (1996) 107 ILR 536; Times, March 29, 1996

31 In *Al-Adsani v United Kingdom*, Application No. 35763/97 (2002) 34 EHHR 11; (2001) 34 EHHR 273; See also Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another (Secretary of State for Constitutional Affairs and others intervening) where Al-Adsani was applied to uphold State immunity

32 Ibid. at (2002) 34 EHHR 11 at para 61

33 Ibid. 34 EHHR 273 at 300; See also dissenting opinion of Judge Ferrari Bravo at 300

34 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening),* 3 February 2012 Judgment

35 11 ILM 470 (1972) (ratified by eight EU Member States including the UK); See also United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 UN Doc A/RES/59/38 (not yet in force)

36 In *Holland v Lampen-Wolfe* [2000] 1 W.L.R. 1573 at 1583

37 UK State Immunity Act 1978; See also United States Foreign Sovereign Immunities Act 1976

38 Ibid. UK State Immunity Act 1978

IV. *Individual Criminal Responsibility*

The principle of individual criminal responsibility has been in existence since 1947 through the Nuremberg Military Tribunal, and is continually being developed.[39] The Nuremberg Military Tribunal held that 'international law imposes duties and liabilities on individuals...who commit [international crimes]'.[40] In order to impose criminal liability on individuals, the Security Council created two ad hoc international criminal tribunals – for the former Yugoslavia (ICTY) and Rwanda (ICTR).[41] According to Article 7(1) of the ICTY statute 'a person who planned, instigated, ordered, committed or otherwise aided a crime of the present Statute – [grave breaches of the Geneva Convention 1949 and crimes against humanity] – shall be individually responsible for the crime'.[42] This tribunal was established as a result of the strife that occurred in the former Yugoslavia.[43] For instance, following the break up of the Yugoslav Federation, a conflict by the countries in the Federation led to the killing of over 100,000 people, the majority of which were civilians.[44] Similar provisions in Article 7(1) of the ICTY Statute were contained in Article 6(1) of the ICTR Statute,[45] which was created after 800,000 civilians were victims of genocide.[46] Evidence of the ICTY's powers over international crimes can be seen in the *Tadic* case, where the accused was charged and sentenced to 20 years imprisonment for crimes against humanity and other offences.[47] Thus it is clear that steps are being taken in order to combat international crimes and ensure individuals are criminally responsible.

However, these tribunals have attracted some criticisms, which are mainly based on jurisdictional issues. This is because Article 1 of both the ICTY and ICTR Statutes confers power on the tribunals to prosecute individuals that commit international crimes in the territory of the former Yugoslavia and the territory of Rwanda and its neighbouring

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39 Helen Duffy, The 'War on Terror' and the Framework of International Law (1st edn, Cambridge University Press 2005) p.74.

40 Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceeding of the International Military Tribunal sitting at Nuremberg, Germany*, (1947) 41 AJIL 172

41 UNSC Res 827 (25 May 1993) UN Doc S/RES/827 and UNSC Res 955 (8 November 1994) UN Doc S/RES/955

42 Article 7(1) of the (Updated) Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res 827(1993)

43 Martin Dixon & Robert McCorquodale, p.297.

44 ICTY, 'The Conflicts' (n.d.) <http://www.icty.org/sid/322> [accessed 09 March 2013]

45 Article 6(1) Statute of the International Criminal Tribunal for Rwanda, SC Res 955 (1994)

46 Stephen Feldstein, 'Applying the Rome Statute of the International Criminal Court: A Case Study of Henry Kissinger' 92 California Law Review 1663, 1668

47 International Legal Materials 36 (1997) 908; CC/PIO/226-E The Hague, 14 July 1997

States respectively.[48] Hence, because their jurisdiction is firmly restricted by geography, the tribunals might not have a significant effect on the international community.[49] In addition to the limited jurisdiction, it has also been argued that the tribunals cannot create binding international law because the Security Council that created them is also not capable of legislating.[50] Furthermore, as the tribunals do not possess enforcement powers, albeit they can issue warrants, they have to rely profoundly on States in executing orders.[51]

Nevertheless, these weaknesses have been addressed, not directly but through the establishment of the International Criminal Court (ICC) by the Rome Statute of the International Criminal Court (hereinafter, ICC Statute).[52] According to Article 25 of the ICC Statute the Court has jurisdiction over individuals, who shall be 'individually responsible and liable to punishment' if they commit crimes that the Court has jurisdiction over.[53] These are serious international crimes such as 'genocide', 'crimes against humanity' and 'war crimes'.[54] In order to extend liability, the individual that commits the crime, as well as those that aid or abet and order the commission of the crime are also liable.[55] For instance, if a head of state orders the commission of a crime against humanity such as torture, that head of state will be individually responsible for that crime. This was illustrated in the *Pinochet case*. General Pinochet ordered the commission of acts torture while he was Head of State.[56] Article 25(4) provides that a State's responsibility is not affected by an individual's criminal liability.[57] This concurs with Sir Arthur Watts' assertion that, serious international crimes should not be attributed to the State, but to the individual that committed or ordered the crimes.[58] However, individual criminal responsibility is limited by immunity *ratione personae* and immunity *ratione materiae* on State organs.

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48 Article 1 Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res 827(1993); Article 1 Statute of the International Criminal Tribunal for Rwanda, SC Res 955 (1994)

49 Stephen Feldstein p.1668.

50 Daphna Shraga and Ralph Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' EJIL 5 (1994) 360 (-380), 363

51 Ian Brownlie, p.599.

52 Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force July 1, 2002 (121 parties excluding China, Russia and USA)

53 Ibid. Article 25(1) at p105 and Article 25(2)

54 Ibid. Article 5(1)(a) at p92, Article 5(1)(b) and Article 5(1)(c)

55 Ibid. Articles 25(3)(c) and 25(3)(b) at p105

56 *Pinochet case.*

57 Rome Statute Article 25(4)

58 Arthur Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' Recueil des cours 247 (1994-III) 9, 82

V. *Immunity Ratione Personae*

Immunity *ratione personae* refers to immunity from, *inter alia,* criminal jurisdiction enjoyed due to the official status of the individual – current Heads of States and heads of diplomatic missions – while he is still in office.[59] This type of immunity was the subject matter of the ICJ's decision in the Arrest Warrant case and has arguably been expanded.[60] Congo argued that an arrest warrant issued by a Belgian judge for crimes against humanity and breaches of the 1949 Geneva Conventions by the former Minister of Foreign affairs should not have been issued because the accused possessed diplomatic immunity due to his position.[61] The ICJ held in this respect that a high ranking State official 'such as the Head of State, Head of Government and Minister of Foreign Affairs'[62] enjoys immunity from criminal jurisdiction in order to ensure that an act of another State would not deter him from exercising his duties.[63] The main reasoning for that decision is due to the international nature of the position, as the officials would be expected to travel and represent the State.[64] This immunity is conferred regardless of whether he acted officially or in a private manner, including acts before assuming the position.[65] This view is supported by Lord Browne-Wilkinson's dicta in *Pinochet* that immunity *ratione personae* granted to a Head of State completely results in immunity from every act or liability.[66] Furthermore, Article 21 of the UN Convention on Special Missions confers immunity on Heads of States and Government as well as Foreign Affairs Ministers on special missions in other States.[67] Consequently, while considering various provisions, Fox stated that in cases where Treaties do not appropriately confer immunities on Heads of State, customary international law determines the rules on it.[68] Thus, the main contentious decision made by the ICJ in the *Arrest Warrant case* is the assertion that under customary international law, individuals eligible for immunity *ratione personae* are also immune when they commit international crimes such as crimes against humanity and war crimes.[69]

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59 Per Lord Millet in *Pinochet*, p.268.
60 *Arrest Warrant case*
61 Ibid.
62 Ibid. para 51
63 Ibid. para 54 at p.22.
64 Ibid. para 53
65 Ibid. para 55
66 *Pinochet*, p.201.
67 UN Convention on Special Missions 1969 1400 UNTS 231; See also Convention on the Privileges and Immunities of the United Nations 1946, 1 UNTS 15 and 90 UNTS 327, Art. IV, Section 11
68 Hazel Fox, *The Law of State Immunity* (New York: Oxford University Press, 2002) p426
69 *Arrest Warrant case*, para 58 at p24

However, against this view, Lord Millett contended that international crimes generally prohibited by the international community cannot then be subject to immunity as that will be contrary to the objections against the crimes.[70] Moreover, Judge Van den Wyngaert maintains Lord Millett's view and stated in this respect that there are no legal grounds for the ICJ's decision because there is neither any Treaty nor State practice that establishes that.[71] It could be argued here that Judge Wyngaert's views are biased due to the fact that she is an ad hoc judge nominated by Belgium. Nevertheless, her objections to extending immunity *ratione personae* have been accepted by some academics. Dapo Akande et al, for example, affirm that the extension by the ICJ of immunity *ratione personae* to State organs who are not Heads of State or Government is flawed and irrational.[72]

Immunity *ratione personae* has, nonetheless, been applied by States to other Government officials even where they have committed international crimes. For instance in *Re Bo Xilai*, the Chinese Minister of Commerce at the time was awarded immunity *ratione personae* for acts of torture.[73] This immunity was also enjoyed by Robert Mugabe, President of Zimbabwe at the time, after the District Judge held that he was not liable for allegations of torture following claims for his arrest and detention.[74] Although it granted immunity in the Arrest Warrant case, in an attempt to prevent abuse, the ICJ held that immunity *ratione personae* is not equivalent to impunity and the individual will not be exonerated of all crimes.[75] Four exceptions were given: where there is no prosecution by the individual's State; where the immunity is waived by the office holder's State; when the office holder leaves office, he can be prosecuted by a State for acts committed before and after his regime, as well as for private acts committed in that period, he can be tried by certain international courts, for instance the ICC, ICTY and ICTR, where they have jurisdiction.[76] The third requirement forms the basis of immunity *ratione materiae*.

70 Pinochet, p.278.
71 Ibid. p151
72 Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts'(2011) 21(4) EJIL 815, 825
73 (2005) 128 ILR 713
74 *Tatchell v Mugabe* (2004) 36 ILR 572; Judgment of 14 January 2004, (2004) 53 ICLQ 769, 770
75 *Arrest Warrant case*, para 60
76 Ibid. para 61

VI. *Immunity Ratione Materiae*

This is a functional immunity that 'operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual'.[77] Thus immunity *ratione materiae* operates to shield a former Head of State from acts committed after he has left office, as those acts are undertaken in the performance of governmental functions.[78] Immunity *ratione materiae* was the main concern in the *Pinochet case* Senator Pinochet was the former Head of State of Chile who had an international warrant issued against him, and was subsequently arrested in London for orders to his officials to commit acts of torture whilst he was in office.[79] The contentious issue that arose was whether a former Head of State is immune from prosecution for acts – which are international crimes – performed while in office.

It has been asserted that 'no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime'.[80] This is because acts that lead to international crimes violate *jus cogens* norms, which are generally not termed as 'official acts'.[81] Moreover, 'serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform'.[82] As a result, Lord Browne-Wilkinson, deciding the Pinochet case in consideration of torture, affirmed that because international crimes have the character of *jus cogens*, they cannot be regarded as performed officially.[83]

However, it had previously been held by Lord Slynn in *Pinochet (No. 1)* that international crimes can be protected by immunity *ratione materiae* and similarly, universal jurisdiction for such crimes is nonexistent.[84] Lord Goff acknowledged this view and dissented with the majority of the House of Lords in *Pinochet (No. 3)*.[85] A rationale for his decision is that the quid pro quo for excluding immunity *ratione materiae* would be that fomer Heads of State would be deterred from travelling, as they fear being prosecuted for

77 Per Lord Millet in *Pinochet*, p.269.

78 Ibid. per Lord Hope at 242; See also Article 39(2) of the Vienna Convention on Diplomatic Relations 1961, 500 UNTS 95: '…with respect to acts performed by [a Head of State] in the exercise of his functions…immunity shall continue to subsist'

79 *Pinochet*.

80 Ibid. Lord Phillips at 289

81 Dapo Akande and Sangeeta Shah (n 79) at 828

82 In the joint separate opinion of the the Arrest Warrant case, para 85

83 *Pinochet*, p.203.

84 *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 1)* [2000] 1 AC 61, 80; See also Lord Lloyd at 96

85 *Pinochet* p.207.

acts performed while in government, which would be tenuous.[86] This was evident after Israel banned senior officials from visiting the UK following an arrest warrant issued for a former foreign minister.[87] Nevertheless, to accept immunity *ratione materiae* for international crimes would be contrary to the principle of individual criminal liability. The same applies to immunity *ratione personae*.

VII. *Immunity Ratione Personae and Immunity Ratione Materiae in Relation to the Principle of Individual Criminal Responsibility*

The presence of immunity *ratione personae* and *materiae* on State officials, as indicated in sections V and VI respectively, hinder the prospects of national and international courts from imposing individual criminal liability. Nevertheless, provisions have been made in the Statutes of the ICTY, ICTR and ICC in relation to immunity. In addition, the ICJ has declared that a State official can be responsible for his crimes when tried by an international court that has jurisdiction.[88]

As regards the ICTY and ICTR, it is stated respectively that 'the official position of any accused person, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility'.[89] Thus, this strengthens the possibility of government officials being individually criminally responsible in the territory of the former Yugoslavia and Rwanda. For instance the ICTY charged and prosecuted Dario Kordic, the former president of the Croatian-Bosnian Republic under Article 7(1) for *inter alia* crimes against humanity.[90] This case places greater emphasis on Meron's assertion that the establishment of the ICTY is a success as it ensures the prohibition of potential international crimes.[91] However, immunity *ratione materiae* restricts a State organ from being subject to a *subpoena duces tecum*, that is, the individual is not permitted to produce documents in criminal proceedings.[92] Nevertheless, in addition to the ability of the tribunals to prosecute individuals that possess immunity, UN Member States can legally apprehend the individuals without having to confer immunity on

86 Ibid. p.221.

87 Ian Black, 'Tzipi Livni arrest warrant prompts Israeli government travel 'ban'' The Guardian, Tuesday 15 December 2009

88 See note 86.

89 Articles 7(2) and Art 6(2) of the ICTY Statute and ICTR Statute respectively.

90 In *Prosecutor v Kordic*, ICTY Case No IT-95-14/2-T, Judgment (26 February 2001) at para 372, p106; See also *Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T for a similar ICTR decision

91 Theodor Meron, The Normative Impact on International Law of the International Tribunal for Former Yugoslavia, in *WAR CRIMES IN INTERNATIONAL LAW,* Yoram Dinstein & Mala Tabory (ed), 1996, 211, 212

92 *Prosecutor v Blaskic Case* No IT-95-14-T, Judgment, Trial Chamber (3 March 2000) at para 43 p17

them if either tribunal requests.[93] Thus this suggests that individual criminal responsibility can still prevail over immunity, albeit with certain limitations including those identified in section IV.

Concerning the ICC, Article 27(1) of the ICC Statute states that, the Statute applies to every individual regardless of their official position such as Head of State or Government and other State officials, who will not be exempted from criminal responsibility.[94] It has been asserted that the ICC is 'perhaps the most innovative and exciting development in international law since the creation of the United Nations'.[95] Moreover, the ICC has been argued to be proficient in prosecuting international crimes.[96]

However, the effectiveness of the ICC has been criticised due to its creation by Treaty and dependence on States voluntarily consenting to its jurisdiction.[97] This indicates that the jurisdiction and decisions of the ICC only apply to States that have ratified the Statute.[98] Hence, because the US, China and Russia have not ratified the Statute, the jurisdiction of the Court will not be accepted by them, thereby limiting the powers of the ICC in making individuals criminally responsible to an extent. Nonetheless, the fact that 121 States have ratified the Statute signifies the collective acceptance by the international community of the ICC's jurisdiction in ensuring that immunities do not prevent individuals from being individually criminally responsible for their crimes.[99] Moreover, although Treaties do not bind non-parties, Article 38 of the Vienna Convention suggests that it could bind a non-party through a recognised customary international law rule.[100] This essentially means that, in the long run, non-parties to the ICC Statute might eventually accept the Court's jurisdiction under customary international law.

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93 Chanaka Wickremasinghe, Immunity of State Officials & International Organisations, in *International Law*, Evans, M (ed), 2010 pp404-405

94 Rome Statute of the International Criminal Court.

95 William Schabas, *An Introduction to the International Criminal Court* (1st edn, Cambridge University Press, 2001) p.20.

96 Stephen Feldstein, p.1690.

97 Kristina Miskowiak, *The International Criminal Court: consent, complementarity and cooperation* (DJOFPublishing, 2000) p.9.

98 Stephen Feldstein (n 50) 1688; also pursuant to Article 26 of the Vienna Convention on the Law of Treaties UNTS Vol 1155 p.331: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'

99 Diana Woodhouse, *The Pinochet Case: A Legal and Constitutional Analysis* (Hart Publishing, 2000) p.121.

100 Vienna Convention on the Law of Treaties UNTS Vol 1155

Conclusion

It is clear that the issue of jurisdiction and immunities is a very contentious area of international law. This stems from the difficulties inherent in the principle of universal jurisdiction as the ICJ has failed to legally recognise a particular definition. Nevertheless, customary international law has filled that void. It is also clear that immunity is conferred on States in order to prevent the adjudication of matters from other States even where acts of torture and *jus cogens* have been committed by them. Arguably, the most controversial area relates to the rule on immunity *ratione personae* and *materiae* and its relation to the principle of individual criminal liability, with regards to how the ICJ and House of Lords dealt with the issue and how the other international courts have mitigated the problem. Hence it can be asserted that, whilst Heads of State are immune from crimes, international law ensures that they can be held accountable for those crimes.

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Bamboo by Nirankar Phull

This poem addresses injustices in the world while questioning what is natural and unnatural. The reality is that human rights issues often exist due to prejudices created by mankind: we often forget about our power to influence and ability to be influenced and because of this, needless sacrifices continue to be made to this day.

The best of its kind:
Evolved, mighty, resourceful.
But what unnatural violation,
Abuse and mutilation
Corrupts this holy land?
Pools of blood go unseen.
Suffused in sin,
These advocates of hate and change
Threaten the fields of green;
A storm created by man
To plague his own people.
What happened to that wanderer
Above the sea of fog,
Who believed in our
Redemption and salvation?
Logic, sacrifice and strength
Will corner the molestations
Of this race.
Agog to see a world united:
A beauty divine and higher still.
Waiting on a dream:
Where man and man alike
Have a mutual respect,
An unparalleled understanding
Of a love unconditional.
Equality: a forgotten hardship.
A lesser evil;
A humane revolution.
We're yet to find out what it means
To be, and to be human.

Deep in a South-Asian forest,
A mass of bamboo senses danger,
Scatter their seeds
And die.

An Analysis of the Potential Negative Implications of Including a 'Public Morality' Clause in the ASEAN Human Rights Declaration.

Ciara McDonnell

The increasing prominence of the Association of Southeast Asian Nations (ASEAN) on the global stage means that the organisation's portrayal holds great weight. The ways in which member nations operate and the standards that they set, both as individual actors and as members of a collective organisation, are likely to affect diplomatic relations, trade links and investment opportunities. ASEAN's rigid and unchanging 'ASEAN way' means that its guiding principles of non-interference are compromising its legitimacy as an institution. It is widely considered to be systematically unwilling and unable to enforce a comprehensive regulatory framework particularly with regard to human rights on its member nations. This dilemma and its implications are exemplified by the proposed inclusion of 'public morality' in the ASEAN Human Rights Declaration (AHRD), a debate in which the aim of the regional institution to garner international support and credibility for its collaborative work is undermined by its reluctance to enforce a comprehensive status quo which protects human rights. This essay argues that the diversity within the ASEAN group acts as a significant barrier to the creation of a more comprehensive set of human rights standards within the organisation and that any such inclusion of a 'public morality' clause in the ADHR would undermine the aspirational ideals originally behind its conception. Any attempt by ASEAN to deviate from the current set of universal human rights is likely to be met with stiff opposition, particularly when this involves the addition of clauses that effectively provide grounds for the limiting of universal rights. Therefore, the pragmatic road for ASEAN to take is to safeguard the defined and generally well-respected current set of universal human rights, through upholding the UDHR.

Regionalism within ASEAN has become increasingly contested since ideas and values over what constitutes human rights have undergone the process of institutionalisation. Once normative concepts are set out in writing they come under more intense scrutiny and problems of region-wide application become apparent. This leads to disagreements among nation states and causes exasperation both within ASEAN as well as from external actors. ASEAN's main aims cover normative topics including the promotion of peace and prosperity, the encouragement of collaboration and cooperation, and the facilitation of cultural development.[1] Any action

1 ASEAN, About ASEAN: Overview (Jakarta: The ASEAN Secretariat 2012) <http://www.asean.org/asean/about-asean/overview> [accessed 4 March 2013]

by ASEAN to achieve these idealistic aims, however, is constrained by the six guiding principles of ASEAN, the first three of which stress non-interference.[2] This is the cornerstone of 'the ASEAN way'. The organisation is in a state of passive stasis because any meaningful action is vetoed by member nations unwilling to cede a degree of sovereignty for the sake of progress of the region as a whole. In the midst of this has arisen the debate over the AHRD and how this can best be configured to reflect the culturally relevant needs of Asian nations. Due to its potentially subjective application, 'public morality' is a term that causes concern in the international community. Reference to morality in human rights documents has been legitimised by Article 29(2) of the UDHR, which refers to both morality and public order in society as permitted limitations to universal human rights.[3]

Similarly several Asian nations, such as Japan, Myanmar and North Korea, make reference to public morality within their constitutions.[4] In general, concern stems from the fact that the inherent ambiguity of 'public morality' could allow for it to be used in a way that is an infringement of international human rights standards. Arguably this could potentially happen without resulting in any international sanctions due to the defensive labelling of the human right in question as breaching perceived 'public morality'. Before providing further analysis of the implications of this issue, a more authoritative definition of the term must be provided. Somera highlights how public morality has never been defined in any international human rights convention, unlike other concepts such as public health and safety.[5] It is instead 'interpreted based on the dominant patriarchal and religious hierarchies' and so what is deemed as 'public morality' will vary between ASEAN members, and even between communities and people within those members.[6] Gert defines public morality as referring to 'some codes of conduct put forward by a society'.[7] It is the lack of clarity over what these codes of conduct involve, and how they may be used to limit human rights, which raises concern over how the proposed ADHR may detract from, rather than add value to, current international human rights norms.

A key repercussion of the proposed inclusion of the term is how it

2 Ibid.

3 UDHR http://www.un.org/en/documents/udhr/index.shtml#atop

4 Asian Legal Resource Centre http://www.alrc.net/doc/mainfile.php/links/1/

5 Nina Somera*, AICHR: Drop 'public morality' from the ASEAN Human Rights Declaration* (Thailand: Change Organisation, 2012) <http://www.change.org/petitions/aichr-drop-public-morality-from-the-asean-human-rights-declaration> [accessed 20 October 2012]

6 Ibid.

7 Bernard Gert, *The Definition of Morality* (Stanford Encyclopaedia of Philosophy) <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=morality-definition> [accessed 31 October 2012]

may implicate minority and vulnerable groups such as women, lesbian, gay, bisexual and transgender (LGBT) communities and indigenous peoples, as these are often the groups who are repressed and stigmatised by ruling political elites through commonly accepted societal assumptions and patriarchal roles. Hence these are the people for whom the term 'public morality' may incite the most fear, as it may be used as a label to limit their human rights. For example, the International Gay, Lesbian, Bisexual, Trans and Intersex Association cites sections 377A, 377B, 377C and 377D of Malaysia's Penal Code as relating to 'unnatural offences' which are discriminatory towards LGBT communities.[8] In particular, Section 377D covers the elusive 'outrages on decency' which is completely subjective in application. The inclusion of the term 'public morality' in any regional human rights charter opens up space for the proliferation of discriminatory rulings, particularly against minority and vulnerable groups. The term is a barrier against the regional actor (ASEAN) intervening, even when gross violations against human rights have occurred within member nation states' boundaries.

In analysing the current debates surrounding the inclusion of 'public morality' in the AHRD, it is imperative to consider whether the ASEAN Intergovernmental Commission on Human Rights (AICHR) has adhered to the original aims and principles set out for building an ASEAN declaration on human rights. In ASEAN's 'Roadmap for an ASEAN Community 2009-2015', the phrase 'human rights' is mentioned 16 times, whilst 'public morality' is not mentioned or alluded to once.[9] The planned inclusion of the term therefore shows how ASEAN's philosophy on human rights has diverged from its original ideals, which reveals the fault lines and outright disparities between what are considered human rights norms throughout the region. The inclusion of the term 'public morality' would allow ASEAN to diverge from its responsibilities as a regional body to enforce human rights standards. The terms inclusion would also allow ASEAN to avoid intervention in the name of human rights as it has many subjective interpretations depending on the cultural norms, personal beliefs and societal values. This is highly concurrent with 'the ASEAN way', whereby cooperation among nations seems to have a higher degree of success when it deals with broad principles, and 'safe or non-sensitive' issues, rather than the actualities of specific policy.[10] The reality of the AHRD is

8 International Gay, Lesbian, Bisexual, Trans and Intersex Association, *What are the laws and policies like for LGBTI people in your country? (Malaysia: ILGA)* <http://ilga.org/ilga/en/countries/MALAYSIA/Law#lawsection_m2m> [accessed 3 November 2012]

9 ASEAN, *Roadmap for an ASEAN Community 2009 – 2015* (Jakarta: The ASEAN Secretariat) <http://www.aseansec.org/publications/RoadmapASEANCommunity.pdf> [accessed 20 October 2012]

10 J. Dosch, 'ASEAN and the Challenge of Regionalism in the Asia Pacific', in The New Global Politics of the Asia Pacific, ed. by M. K. Connors, R. Davison and J. Dosch (London: Routledge, 2002), pp. 121-139 (p.134)

that it has deviated from what it originally set out to do, both in terms of its actual content and through its method of composition. The 'Roadmap for an ASEAN Community 2009-2015' details how ASEAN will strive towards and promote 'gender-mainstreaming, tolerance, respect for diversity, equality and mutual understanding'.[11] Yet the term 'public morality' allows a limitation to be placed on these aspirational ideals. In cases where 'public morality' is perceived to be compromised, these rights are likely to be limited by the ruling elites, who may have the intention of upholding outdated, derogatory and sexist traditions and norms. This introduces a deeper political component into the debates surrounding a regional acceptance of human rights. An example of this is Section 377B of Malaysia's Penal Code which states that male to male relationships involving intercourse 'against the order of nature' is punishable by up to twenty years in prison and also whipping.[12] There will be no impetus for bettering human rights standards across ASEAN if members can use 'public morality' as a get-out clause for upholding patriarchal roles, oppressing vulnerable groups and repressing minorities.

A further issue for consideration when assessing the validity of inclusion of 'public morality' in the AHRD is the contested drafting process of the declaration. Official ASEAN documents, such as the 'Roadmap for an ASEAN Community 2009-2015', stress the benefits of full inclusion of civil society as having 'positive outcomes for the region'.[13] The reality, however, has been a stark neglect of involvement from major outside influences including civil society, as well as human rights organisations.[14] The Roadmap also highlights the relevance and importance of 'public participation', however the actuality of the construction of the AHRD has been that it is shrouded in secrecy; and far from the transparency it claims to strive towards.[15] Article 1.13 of the ASEAN Charter states that the organisation aims to; 'promote a people-oriented ASEAN in which all sectors of society are encouraged to participate'.[16] Contrary to this rhetoric, the drafting of the declaration has been conducted in an opaque manner with a noticeable lack of involvement of civil society; the token amount of involvement seems to have been for the purpose of lip

11 ASEAN, *Roadmap for an ASEAN Community 2009 – 2015*

12 International Gay, Lesbian, Bisexual, Trans and Intersex Association, *What are the laws and policies like for LGBTI people in your country?*

13 ASEAN, *Roadmap for an ASEAN Community 2009 – 2015*, p.7.

14 Amnesty International and others, *The ASEAN Human Rights Declaration: Drafts must be published and subject to meaningful consultations with local, national and regional civil society and human rights defenders.* (Amnesty International) <http://www.amnesty.org/en/library/asset/IOR64/002/2012/en/fa3e8a4a-6f53-43fd-b70b-00790db75e40/ior640022012en.pdf> [accessed 31 October 2012]

15 ASEAN, *Roadmap for an ASEAN Community 2009 – 2015*, p.15.

16 ASEAN, *The ASEAN Charter* (Jakarta: The ASEAN Secretariat) <http://www.asean-sec.org/publications/ASEAN-Charter.pdf> [accessed 20 October 2012] (p.5)

service rather than for any meaningful contribution.[17] Somera states that the civil society organisations (CSOs) who were involved were either government controlled or very closely affiliated with the government.[18] If a representative and diverse plurality of CSOs were included it is likely that the term 'public morality' would not have got to this stage of consideration, as CSOs representing and safeguarding the groups likely to be affected, as previously detailed, would have lobbied to get 'public morality' off of the agenda. Furthermore, limiting public participation in the drafting process is likely to 'erode public confidence in ASEAN's commitment' to being a transparent and inclusive organisation, which, as suggested by Article 1.13 of the ASEAN Charter, it is supposedly striving towards achieving.[19]

This point is echoed by a joint statement released in 2012 by a plethora of human rights organisations, which hold considerable influence on the international community, including Amnesty International, Reporters without Borders and Human Rights Watch. The joint statement aptly describes the drafting of the AHRD as a 'litmus test' of AICHR's 'willingness to constitute a credible, respected and effective regional human rights body'. It goes on to suggest that vital 'principles of transparency, accountability, and consultation are applied by the United Nations and all other regional bodies when they engage in human rights standard setting, and that the ASEAN must not fall below well-established international standards and practice'.[20] This is yet another example of how the AICHR has thus far fallen short of international criteria, thereby tarnishing its reputation for human rights protection. Rather than taking the creation of a regional human rights declaration as an opportunity to become a standard-bearer, ASEAN is trying to create loopholes that allow for a policy of non-intervention despite the occurrence of human rights abuses. This is part of 'the ASEAN way' consensus of non-intervention and upholding sovereignty regardless of context.

The planned inclusion of the term 'public morality' is not contradictory, as it allows 'the ASEAN way' of non-intervention to prevail, even when members abuse human rights. Three of the fourteen principles listed in ASEAN's Charter are emblazoned with strong undertones that suggest non-interference is a top priority. In actuality this has proven to mean that

17 Amnesty International and others, *The ASEAN Human Rights Declaration: Drafts must be published and subject to meaningful consultations with local, national and regional civil society and human rights defenders.*

18 Nina Somera*, AICHR: Drop 'public morality' from the ASEAN Human Rights Declaration* (Thailand: Change Organisation, 2012) <http://www.change.org/petitions/aichr-drop-public-morality-from-the-asean-human-rights-declaration> [accessed 20 October 2012]

19 Ibid..

20 Amnesty International and others, *The ASEAN Human Rights Declaration: Drafts must be published and subject to meaningful consultations with local, national and regional civil society and human rights defenders.*

non-interference has taken precedence over all else, even human rights.[21] Principle A concerns respect for the 'independence' and 'sovereignty' of all member nations.[22] Principle E regards 'non-interference in the internal affairs of ASEAN member states' as being paramount, whilst principle F echoes this with the statement that all should demonstrate 'respect for the right of every member state to lead its national existence free from external interference'.[23] Dosch's reasoning for this near-obsession with non-interference in the ASEAN region is that 'any centralised decision making is difficult to achieve and rejected by most actors, because practically all member states are still preoccupied with the process of nation building'.[24] Member states fear that binding policies that may result in interference will encroach on their sovereignty, and perhaps have the potential to stunt their economic growth. For example, if binding policies were made regarding setting a living wage for workers across ASEAN then the members may be rendered less lucrative production sites for Transnational Corporation (TNC) investment, in comparison to non-ASEAN members in the region. This is one example of why political leaders of member nations are 'reluctant to accept any proposal for regional cooperation which may infringe' upon national sovereignty.[25]

With regards to the proposed inclusion of public morality in the AHRD, this form of staunch reluctance towards interference is emblematic of the 'gap between ASEAN's grand vision for regional integration and the political realities of weak capabilities in collectively managing regionalism'.[26] Often 'the ASEAN way' is overridden with fear of interference and this results in idealistic and impotent visions. Ong describes ASEAN as 'disparate, disconnected and disintegrated', and stresses that what ASEAN needs is a more concrete plan of action towards regionalism, rather than a 'blueprint' (as in the ASEAN Charter of 2008).[27] Ong concludes that the Charter is 'too little and too late in a rapidly changing world'.[28] Supporters of ASEAN may suggest that its moves to integrate are commendable and progressive; that through creating a regional human rights declaration the normative values of the region can be harmoniously bound together for the better of ASEAN as a whole. Katsumata goes as far as saying that 'while

21 ASEAN, *The ASEAN Charter* (Jakarta: The ASEAN Secretariat) <http://www.asean-sec.org/publications/ASEAN-Charter.pdf> [accessed 20 October 2012]
22 Ibid. (p.6)
23 Ibid.
24 J. Dosch, 'ASEAN and the Challenge of Regionalism in the Asia Pacific', in The New Global Politics of the Asia Pacific, ed. by M. K. Connors, R. Davison and J. Dosch (London: Routledge, 2002), pp. 121-139 (p.134)
25 Ibid. (p.135)
26 Ibid. (p.136)
27 Timothy Ong, *Debate on the ASEAN Charter* (Asia Inc Forum, 2011) < http://wn.com/timothy_ong_debate_on_the_asean_charter_is_too_little_too_late_in_a_rapidly_changing_world> [accessed 22 October 2012]
28 Ibid.

there are numerous items on the agenda, the most urgent one can easily be singled out: The pursuit of liberalism, the elements of which include the norms of human rights and democracy'.[29] However, Katsumata also recognises that there are many obstacles standing in the way of these ideals being achieved, such as the issue of Myanmar.[30]

Myanmar represents a challenge that ASEAN will have to address eventually; it cannot keep downplaying its inherent responsibilities as a regional actor. The inclusion of the term 'public morality' is an attempt to codify the norm of non-intervention, in an effort to avoid dealing with issues such as Myanmar's abhorrent human rights record. Katsumata suggests that on a moral ground ASEAN will have to deal with the issues of human rights, but also on the premise that its international legitimacy will be entirely lost if it continues to 'turn a blind eye' to the human rights abuses which so clearly need rectifying.[31] Turbulence and uncertainty is triggered across the region due to Myanmar's continuously 'dismal' human rights reputation, such as the repression of the country's Rohingya Muslim minority who are considered illegal, stateless people by the region's many other ethnic groups.[32] Non-interference is criticised for hampering 'ASEAN from taking meaningful action over economic crises, problematic members like Myanmar, and transnational security threats'.[33] Jones furthers this point by stating that 'non-interference has been violated repeatedly and seriously', suggesting that the non-interference principle which constitutes much of 'the ASEAN way' is something which is purposefully used to avoid dealing with politically tenuous situations.[34] The combination of rogue states who challenge international human rights standards combined with lack of willingness to interfere on the part of ASEAN member states may mean that the overall legitimacy and purpose of ASEAN falls into disrepute in the eyes of the international community. Dorsch questions 'at what point will it be necessary to touch upon the sensitive issue of supra-nationality?' which is particularly central to any debate where regional collaboration and human rights are at stake.[35] However, it is also very difficult to answer when it appears that ASEAN members for the most part seem content to not interfere, particularly when this sets a precedent that almost guarantees

29 Hiro Katsumata, 'ASEAN and human rights: resisting Western pressure or emulating the West?', *The Pacific Review,* 22 (2009), 619-637 (p.625)

30 Ibid.. p.634.

31 Ibid.. p.637.

32 Jurgen Ruland, 'ASEAN and the Asian Crisis: theoretical implications and practical consequences for Southeast Asian Regionalism', *The Pacific Review*, 13 (2000), 421-451 (p.440)

33 Lee Jones, 'ASEAN's unchanged melody? The theory and practice of non-interference in Southeast Asia', *The Pacific Review,* 23 (2010), 479-502 (p.479)

34 Ibid.. p.450.

35 J. Dosch, 'ASEAN and the Challenge of Regionalism in the Asia Pacific', in The New Global Politics of the Asia Pacific, ed. by M. K. Connors, R. Davison and J. Dosch (London: Routledge, 2002), pp. 121-139 (p.135)

their own sovereignty will not be encroached upon.

The planned inclusion of the term 'public morality' in the ADHR could be used as a loophole to retain this agenda of non-interference, even when according to the UDHR, human rights abuses are occurring. Worryingly, this loophole may be exploited for political purposes. For example, as in the previous example regarding the Rohingya minority in Myanmar, 'public morality' could be cited as a reason for the mass deportation of the Muslim people, adding to the diaspora.[36] The government could suggest that this was not in violation of human rights according to the ADHR, as the minority may not be acting in accordance with the local customs and culture, leading to 'public morality' being compromised. It is highly likely that the term 'public morality' will be abused in this manner; without it politics seems to take primacy before human rights, and so with it this prioritisation will be enacted under a banner of legitimacy.[37] The Economist article highlights how the opposition leadership, led by Aung San Suu Kyi, has remained largely silent on the issue of the Rohingya Muslim dispute, most probably due to the fissure in the party's popularity which supporting the aggrieved minority would cause.[38] This is particularly poignant as when Aung San Suu Kyi, one of the key champions of human rights in the world, cannot place human rights over political gain, the outlook for the safeguarding of rights in the region looks incredibly gloomy.

Furthermore, the differing views and practices surrounding human rights in the region means that 'public morality' could be used to detract from a variety of infringements. Acharya states that polarisation within ASEAN occurs most notably along 'a liberal-conservative division based on degree of commitment to human rights and democracy, with Thailand and the Philippines in the former camp and the rest of ASEAN members in the other'.[39] Ruland echoes the view that some members are more dedicated to promoting human rights than others, by suggesting that Thailand is the main proponent of democracy in the region, the reason for

36 The Economist, 'No help, please, we're Buddhists: when offending the Muslim world seems a small price to pay', (Online: The Economist Newspaper Limited). <http://www.economist.com/news/asia/21564909-when-offending-muslim-world-seems-small-price-pay?fsrc=scn/tw/te/pe/nohelpBuddhist> [accessed 2 November 2012]

37 Amnesty International and others, *The ASEAN Human Rights Declaration: Drafts must be published and subject to meaningful consultations with local, national and regional civil society and human rights defenders.* (Amnesty International) <http://www.amnesty.org/en/library/asset/IOR64/002/2012/en/fa3e8a4a-6f53-43fd-b70b-00790db75e40/ior640022012en.pdf> [accessed 31 October 2012]

38 The Economist, 'No help, please, we're Buddhists: when offending the Muslim world seems a small price to pay', (Online: The Economist Newspaper Limited). <http://www.economist.com/news/asia/21564909-when-offending-muslim-world-seems-small-price-pay?fsrc=scn/tw/te/pe/nohelpBuddhist> [accessed 2 November 2012]

39 Amitav Acharya, *Whose Ideas Matter? Agency and Power in Asian Regionalism* (New York: Cornell University Press, 2009), p.207.

this being the insistence that the term 'open society' was included in the ASEAN Vision 2020, which is a complete contradiction to how the term 'public morality' would limit the ways in which members of society express themselves.[40] Additionally Thailand has actively pursued the establishment of the ASEAN Human Rights Commission.[41] Acharya suggests that human rights are at differing levels of development across the region, due to the varying historical, cultural and economic backgrounds of each member state.[42] The Malaysian Prime Minister, Mahathir bin Mohamad, is quoted by Acharya as saying that, 'the norms and percepts [sic] for the observance of human rights vary from society to society and from one period to another in the same society. Nobody can claim to have the monopoly of wisdom to determine what is right and proper for all countries and peoples'.[43] This statement supports the cultural relativist view that notions of human rights will vary depending on location, socio-economic background and time. However, in making this statement, Mahathir bin Mohamad inadvertently suggests that ASEAN itself should not attempt to enshrine what is right for all people and all regions through charters, declarations and other policies because it does not have the 'monopoly of wisdom'.[44]

However the question as to who enforces the definition of 'public morality' still stands and the term seems to have been designed with the specific purpose of allowing leeway for member nations to decide for themselves when human rights abuses are permitted. This subjective judgement will vary considerably from one member to the next. Rather than allowing the cultural relativist perspective to contribute to a more comprehensive, regional set of human rights it has been used as an excuse to limit universal human rights. This is because the use of the term is likely to enable the political and social ruling elites in each country to uphold outdated patriarchal assumptions and norms, to the detriment of repressed groups.[45]

The planned inclusion of the term 'public morality' is clearly an effort to codify the renowned 'ASEAN way' norm of non-interference. The spread of this norm into the realm of human rights, particularly when the term could limit the fundamental rights included in the UDHR, is a worrying prospect. This raises questions as to the extent of legitimacy, and degree of agency,

40 Jurgen Ruland, 'ASEAN and the Asian Crisis: theoretical implications and practical consequences for Southeast Asian Regionalism', *The Pacific Review*, 13 (2000), 421-451 (p.442).

41 Ibid.

42 Amitav Acharya, *Whose Ideas Matter? Agency and Power in Asian Regionalism* (New York: Cornell University Press, 2009), p.154.

43 Ibid.

44 Ibid.

45 International Gay, Lesbian, Bisexual, Trans and Intersex Association, *What are the laws and policies like for LGBTI people in your country? (Malaysia: ILGA)* <http://ilga.org/ilga/en/countries/MALAYSIA/Law#lawsection_m2m> [accessed 3 November 2012]

accorded to the ASEAN body as a whole. Its international reputation has already been damaged with the AHRD failing to benefit or protect vulnerable and repressed groups. Its legitimacy has been further undermined by the lack of involvement from civil society and external groups in the drafting process. The term 'public morality' can be viewed as a purposeful attempt to limit human rights, as it is likely that through its selective and subjective application the ruling elites will be enabled to uphold outdated, derogatory and sexist social norms and assumptions to the detriment of the most vulnerable societal groups. The term taken alone is not an outright attack on human rights, rather its ambiguity and contextual application by power holders are the issues which cause the greatest contention. If ASEAN wishes to be seen as a regional institution that commands respect in the international community and realise its guiding, high-minded principles, it needs to compromise on its policy of non-interference. Within the higher echelons of ASEAN decision-makers, it is recognised that nobody has the omniscience to decide what is right for all peoples at the international level.[46] Yet this recognition remains to be applied at the regional level, when considering how the term 'public morality' may have a negative impact on the diverse peoples of the ASEAN region.

Ultimately inclusion of the term 'public morality' would be a poorly concealed attempt by ASEAN to allow its members a get-out clause for committing human rights violations, and to provide justification for non-interference when these violations inevitably do occur. Any defence ASEAN can find from the UDHR or member states' own constitutions will ultimately not stand up to international critique. Activists are not calling for ASEAN to go beyond the UDHR and break new ground. As it stands, a region-specific declaration of human rights will detract from the UDHR and lead to varying levels of adherence to human rights protections among ASEAN members. There are multiple reasons for these variations, including cultural relativism, varying definitions of what constitutes 'public morality', and elite struggles to hold on to outdated norms and assumptions that facilitate the repression of certain societal groups, including LGBT communities, ethnic minorities and women. With this is mind, it is most fitting that ASEAN terminate its current plans to consolidate the proposed narrowed version of human rights, or at the very least remove the term 'public morality' which could so clearly be used for negative purposes.

46 Amitav Acharya, *Whose Ideas Matter? Agency and Power in Asian Regionalism* (New York: Cornell University Press, 2009), p.154.

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Life on the Forgotten Border by Jacob James[1]

The images below were shot between April 2012 and June 2012 whilst working on a humanitarian documentary project entitled 'Forgotten Borders,' detailing the lives of displaced people living along the Thai-Burmese border.

Political instability and ethnic conflict has caused mass displacement of the Karen, Mon, Burmese, Kachin and Shan people living along the border between Thailand and Myanmar. Many people have seen the horrific effects of the conflict in Arakan state between the Buddhist majority and Muslim Rohingya minority.[2] What very few people realise is that this conflict has been fought on all of Myanmar's borders since the end of World War II. The conflict between the Karen National Union (KNU) and the Burmese army is the longest running internal conflict in the world, however this is not just a war, this war is a dirty war fought with land mines, rapes, land grabbing and child soldiers.[3] It is estimated that because of war there are over 600,000 displaced people living in these border regions (International Rescue Committee, 2007). They are often housed in refugee camps or detention centres, forced into labour, human trafficking and prostitution, with no identity or nationality and shunned by authorities on both sides of the border.[4] This is life on the forgotten border.

Photo 1: The Apprentice

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance, UDHR Article 18.

Photo 2: Down By The Riverside

Every child has the right to a legal name and nationality, as well as the right to know and, as far as possible, to be cared for by their parents, UNCRC Article 7.

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1 Photography © Jacob James

2 UN News. 29 June 2012. "UN refugee agency redeploys staff to address humanitarian needs in Myanmar" Retrieved 29 June 2012.

3 Ashley South, Transnational Institute Burma Centre. 2011. Burma's Longest War: anatomy of the Karen Conflict.

4 International Rescue Committee, 2007. Life in Exile: Burmese Refugees along the Thai-Burma Border

Article 18. - Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance, UDHR.

Article 7 - Every child has the right to a legal name and nationality, as well as the right to know and, as far as possible, to be cared for by their parents. UNCRC.

How Should we Respond When Cultural Values Appear to Conflict with the Values of Human Rights?

Jenny Welch

As awareness of human rights values grows, the potential for conflict with cultural norms has become more apparent. This paper uses the examples of Islamic divorce law in Egypt and the practice of Female Genital Cutting in Senegal, where women's rights to individual liberty, non-discrimination based on sex and healthy living have been threatened by cultural norms, to identify an appropriate response to these conflicts. Using a theoretical basis from John Stuart Mill and Martha Nussbaum's interest in the rights of individuals, this paper explores how reform from within, based on legitimate authority, is perhaps the most appropriate course of action.

By their definition, human rights are universal, prescribing a set of entitlements to all of humanity simply by virtue of being human, without categorisation. This is supported by Article One of the Universal Declaration of Human Rights (UDHR) that states, 'all human beings are free and equal in dignity and rights'.[1] However, humanity is intrinsically diverse, and over history myriads of belief systems have developed that bind individuals into culturally distinct communities. In some cases, long held beliefs and values within cultures come into conflict with contemporary views on human rights. This paper will focus on examples of discrimination against women, firstly within Islamic societies and secondly within cultures that practise female genital cutting, to assess how we should respond to these conflicts. The paper argues that the presence of a legitimate authority appears key to reconciling cultural norms with human rights values. In the example of women's roles in Egyptian society, interpretations of sacred Islamic texts have been used as an illegitimate pretext for gender-biased cultural norms, and in the example of female genital cutting, long-held traditions exemplify an illegitimate authority conflicting with human rights values. In both these cases, identifying an illegitimate authority leads us to encourage individuals to be empowered by their own authority and agency. The values of human rights investigated in this paper are hence the values of an individual's rights to freedom, choice and autonomy of thought, as well as non-discrimination based on sex and the right to healthy living.[2]

1 United Nations, *Universal Declaration of Human Rights*. <Available from: http://www.un.org/en/documents/udhr/> [Accessed 15 March 2013].

2 Ibid.

The modern political philosopher John Stuart Mill felt that the individual was crucial to human development, suggesting that maintaining the sovereignty of an individual's choice in determining beliefs and values is vital to the flourishing of human life and society. In his essay *On Liberty*, Mill insists that independence of thought is paramount to a person's growth: 'Human nature is…but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing'.[3] Mill's beliefs were founded on the concept that humanity is essentially diverse, and that without freedom to pursue this diversity as an autonomous individual, we are denying the essence of humanity and therefore it's ability to flourish.[4] A person's 'own mode of laying out his existence is best, not because it is best in itself, but because it is his own mode'.[5] Martha Nussbaum uses this principle of individualism in contemporary feminist thought, stating 'we must insist on the universal importance of protecting spheres of choice and freedom, within which people with diverse views of what matters in life can pursue flourishing lives.'[6] Nussbaum states that 'insistence on the separateness of one life from another…seen on its own terms rather than as a part of a larger organic…whole' is an appropriate position for women to take, based on the prevalence of patriarchal societies that have jeopardised women's rights historically through to the present day.[7] As evidence of this, Nussbaum notes the 1993 UN *Human Development Report,* which stated 'there is no country in the world in which women's quality of life is equal to that of men'.[8] Nussbaum's view on autonomous empowerment supports Mill's insistence on the power of individualism to further humanity, but applies the principle to women's rights, in particular using their history as victims of patriarchal societies as a foundation. Based on Mill and Nussbaum's insistence on the importance of individualist autonomy in the pursuit of human flourishing, individual liberty forms the basis of human rights.

Validating this importance, personal freedom is central to several notable human rights documents. The 1776 American Declaration states that we are entitled to 'life, *liberty* and the pursuit of happiness', and according to Article 3 of the 1948 Universal Declaration of Human Rights (UDHR) 'Everyone has a right to life, *liberty* and security of person'. More recently, the first article of the International Covenant on Economic,

3 Susan Mendus, *Toleration and the Limits of Liberalism* (London: Macmillan, 1989), p. 50.

4 John Stuart Mill, *On Liberty*, ed. by G Himmelfarb (Penguin: Harmondsworth, 1978), p. 132.

5 Ibid.

6 Martha Nussbaum, *Sex and Social Justice* (Oxford: Oxford University Press: 1999), p. 9.

7 Ibid. p. 10.

8 Martha Nussbaum, *Women, Culture and Development* (Oxford: Oxford University Press: 1999), p. 2.

Social and Cultural Rights (ICESCR) expresses personal freedom as 'the right to self-determination'. Since personal liberty is a primary feature of both human rights doctrines and political theory, as identified in Mill and Nussbaum's philosophy, the values of human rights investigated in this paper are those of an individual's right to freedom, choice and autonomy of thought, which can be utilised in order to question the legitimacy of certain cultural authorities.

This paper will now assess the real life example of female discrimination in some Islamic societies. This topic is pertinent to human rights issues today since there has been a growing focus in improving gender equality, exemplified in the Millennium Development Goals, particularly goal three that aims to achieve improved gender equality and female empowerment by 2015.[9] Although it shouldn't be generalised that women in Islam are more oppressed than any other religion or culture,[10] the manipulation of Sharia law in some areas provides a strong example of cultural norms being given greater authority, thereby resulting in human rights violations. In Muslim culture, Sharia is the sacred law derived from the holy book, the Quran, and from the teachings of the Prophet Muhammad recorded in the Sunnah. Abdullahi An Na'im explores the sovereignty of Sharia Law in some Islamic cultures and proposes that certain aspects should be reformed to align with contemporary human rights values.[11] Yet unfortunately in some countries cultural norms have developed that violate women's rights. Mashhour claims that one explanation for this is the fact that Sharia is based on both divine writings, from the Quran and Sunnah, and human-derived interpretation, known as *ijtihad*. Women have never been involved in the latter, and so the predominance of patriarchal societies has led to some Islamic cultures developing patriarchal norms.[12] For example, Egyptian divorce law before 2000 only allowed women to initiate separation in cases where they had suffered proven harm.

In January 2000, the President reformed Personal Status Law and in Article 20 of what become known as *khul* law, women were given the right to divorce on the condition that they return their *dowry*. Despite the remaining conditionality, this was seen as a way for women to independently initiate divorce. This was treated as innovation and 'was the subject of contentious debate within the Parliament and the press' despite the fact that *khul* was

9 United Nation, *Millennium Development Goals*, <http://www.un.org/millenniumgoals/> [Accessed 14 February 2013].

10 Muhammed Zafrulla Khan, *Woman In Islam* (Surrey: Islam International Publications Ltd., 2008).

11 Abdullahi Ahmed An-Na'im, 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives – A Preliminary Inquiry', *Harvard Human Rights Journal,* 3 (1990), 13-52.

12 Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt', *Human Rights Quarterly*, 27:2 (2005), 562-596 (p. 594).

written in Islamic scripture fourteen centuries before.[13] Arabi notes that *khul* law, or as he rephrases women's right to 'divorce at will…seems to have guarded it's basic features until the pre-modern period'.[14] This example shows that restrictions on women's rights to divorce were based not on the legitimate authority of Islamic scripture, but on the male lawmakers of Egypt. Arabi backs this up by commenting that since the law was passed based on legitimate Islamic authority, 'contemporary jurists could thus have no qualms about the transgression of the heavy hand of tradition'.[15] The phrasing here is key to this paper's emphasis on questioning tradition as a legitimate authority as without individual freedom to evaluate cultural tradition and the legitimacy of it's authority, it risks becoming heavy-handed and oppressive. Mashhour supports the proposal that Islamic scripture has been manipulated to suit cultural norms: 'the deterioration of women's rights in many Islamic countries has nothing to do with their Islamic nature…but are mainly the result of traditional, patriarchal, male-dominated societies' whose aim is to subordinate women using Islamic pretexts.[16] The Executive Director of Sisters in Islam, an organisation advocating women's rights in Malaysia, agrees: 'it is not Islam that oppress women, but interpretations of the Quran influenced by cultural practices and values of a patriarchal society'.[17] These observations encourage new analysis of cultural norms that appear in reality to abuse and manipulate sacred Islamic texts, and in so doing violate universal human rights.

The legitimacy of some interpretations of Sharia against today's ethics is clearly questionable. An Na'im makes the point that in those societies where women are not given equal rights in divorce a 'new understanding would be informed by contemporary social, economic and political circumstances in the same way that the "old" understanding… was informed by the then prevailing circumstances'.[18] A common example from the Quran, used as a pretext to patriarchy, is the verse relating to the principle of *qawama,* the protection or leadership of men over women. Verse 4:34 of the Quran states 'Men have qawama [guardianship and authority] over women because of the advantage they [men] have over

13 Ibid. p. 583.

14 Usama Arabi, 'The Dawning of the Third Millenium on Sharia: Egypt's Law No. 1 of 2000, or women may divorce at will', in *Studies in modern Islamic law and jurisprudence* (The Hague: Kluwer Law International, 2001), pp. 169-188 (p.170).

15 Ibid. p.188.

16 Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt', *Human Rights Quarterly*, 27:2 (2005), 562-596 (p. 564).

17 Zainah Anwar, *Malaysia: Advocacy for Women's Rights Within the Islamic Framework: The Experience of Sister in Islam* (2003) <http://www.wluml.org/node/1186> [Accessed 23 March 2013].

18 Abdullahi Ahmed An-Na'im, 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives – A Preliminary Inquiry', *Harvard Human Rights Journal,* 3 (1990), 13-52 (p. 47).

them [women] and because they [men] spend their property in supporting them [women]'.[19] Mashhour highlights that this verse falls in the context of verses addressing financial issues and family relations; therefore 'it could be seen only as a part of the economic and social situation that existed at the time of revelation'.[20] In today's context, the supposed advantage men have over women, offered to validate male protection, is no longer relevant. In modern times, rule of law and economic independence overrides the physical protection a woman may have historically needed. The second condition of guardianship in *qawama* is based on men's access to property to support their wives. This again, can be overruled by women's modern day economic independence. Providing equal opportunities to women in the workplace would deem the condition of male provision of 'property' unnecessary and *qawama*'s patriarchal reading outdated. *Itjihad*, the human-derived authority in Islam, has an important role in responding to social change. It is integral that cultural norms derived from Sharia are 'not static but rather evolving', in order to suit contemporary contexts.[21]

Revaluating cultural norms is not easy, and could upset institutionalised prejudices against women in male-dominated societies such as Egypt. In order to avoid charges of apostasy, reforms require legitimacy. As advocated by Milton', if [a man] believes things only because his pastor says so, or the assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes heresy'.[22] Through use of the scriptures themselves to address human rights violations against women, legitimacy can be realised. One way then that misconstructions of *qawama* can be redressed is through recognition of other verses that concern guardianship. Verse 71 of the Quran states 'the believers, men and women are *awliya* one of another', meaning protectors, or like *qawama*, guardians.[23] The Quran preaches here that women can be protectors of men; therefore the concept of protection and guardianship cannot be used elsewhere to insist that men have absolute authority over women. This comparison supports continuing reinterpretation of texts and in so doing raises important challenges to patriarchal norms. The key to sustainable change lies in discussion and reinterpretation coming from within the communities themselves. This further supports the argument of

19 F. F. Martin, S. J. Schnably, R. Wilson, J. Simon, M. Tushnet, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge: Cambridge University Press, 2006), p. 952.

20 Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt', *Human Rights Quarterly*, 27:2 (2005), 562-596 (p. 593).

21 Ibid. p. 565.

22 J. Rawls, 'Lectures on Mill' in *Lectures on the History of Political Philosophy* (London: Belknap Press of Harvard University Press: 2007), 251-318 (p. 310).

23 Amira Mashhour, 'Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt', *Human Rights Quarterly*, 27:2 (2005), 562-596 (p. 593).

this paper on the importance of individual autonomy to make a choice and question established authority.

Another example of conflict between human rights values and cultural values can be found in the practice of Female Genital Mutilation (FGM), also known as Female Genital Cutting. This involves the cutting of female genitals to different extents 'based on cultural beliefs and a perceived need to control women's sexuality and fertility'.[24] The results of resisting the practice can be exclusion from society and damnation upon the entire family.[25] As just one example, Amnesty International reports that in some communities girls cannot carry water or prepare food if they do not undergo FGM, since they are considered unclean.[26] All types of FGM threaten women's health due to the complications both during the procedure and later in life,[27] violating their right to 'a standard of living adequate for…health and well-being.'[28] The cultural authority that legitimises this practice is contestable since it is 'widely resisted and indeed illegal, and …not supported by any religion', Nussbaum identifies the only supporting argument for FGM as 'cultural continuity'.[29] Therefore in contrast with Muslim *qawama* or *khul* law, which is based on interpretation of the Quran, the basis for FGM is intangible. However, this also makes reformation of the practice more difficult since the practitioners' and communitys' belief systems must be fundamentally challenged, without the same form of tangible legitimacy that An Na'im achieves in Islam. Responses considered in this paper are therefore more focused on community development, since in this example an alternative type of legitimacy is identified in the authority of peers in the community.[30]

There is widespread legal opposition to the practice of FGM, and in December 2012 the UN unanimously passed a resolution banning the

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24 N.F. Toubia and E. H. Sharief, 'Female Genital Mutilation: have we made progress?', *International Journal of Gynecology and Obstetrics,* 82:3 (2003), 251-261 (p.255).

25 E.M. Kisaakye, 'Women, Culture and Human Rights: Female Genital Mutilation, Polygamy and Bride Price', in eds. W Benedek, E.M. Kisaayke, G. Oberleiter, *Human Rights of Women (*London: Zed Books, 2002), 261-275 (p. 273).

26 Amnesty International, *What is Female Genital Mutilation?* <http://www.amnesty.org/en/library/asset/ACT77/006/1997/en/3ed9f8e9-e984-11dd-8224-a709898295f2/act770061997en.html > [Accessed 29 December 2012].

27 Carla Obermayer, 'The consequences of female circumcision for health and sexuality: and update on the evidence', *Culture, Health and Sexuality*, 7:5 (2005), 443-461 (p. 444).

28 United Nations, *Universal Declaration of Human Rights*. < Available from: http://www.un.org/en/documents/udhr/ > [Accessed 15 March 2013].

29 Martha Nussbaum, *Sex and Social Justice* (Oxford: Oxford University Press, 1999), p. 126.and p.125

30 Sarah Heyford, 'Conformity and Change: Community Effects on Female Genital Cutting in Kenya' *Journal of Health and Social Behavior*, 26:2 (Jun., 2005), 121-140.

practice.[31] Despite this and the work being done by NGOs to promote awareness of the dangers involved, there are still many women practicing FGM; in fact Kisaakye points out that 'females were more often likely to support continuation of female genital mutilation than males…in a bid to gain respect in their community'.[32] This idea of gaining respect from the community introduces an important factor in forming a response to FGM's conflict with human rights values – the influence of peers in the communities where FGM is practised. Hayford applies convention theory to the example of FGM, stating that communal attitudes towards the practise have an influential effect on individual's choices since FGM as a social practise is 'determined by group norms as well as individual decisions'.[33] Hayford bases this on the observation that 'the punishment for isolated non-conformers to the tradition is so great', as supported by Kisaakye's comment on respect from the community.[34]

As a result, the appropriate response when tackling FGM reform may be for groups to be addressed holistically as opposed to focussing solely on individuals. This challenges Mill's theoretical assertions that change should come from independent thought and choice. However, approaching communities holistically uses a key aspect of individualist empowerment – reform from within. The UN supports the idea that 'the decision must be widespread within the practising community in order to be sustained'[35] and Melching agrees that it is 'critical to involve everyone in the community'.[36] Molly Melching is the founder of Tostan, an NGO working in West Africa through participatory development programmes that have had a very positive impact on reducing cases of FGM in Senegal and neighbouring countries.[37] Public declarations against the practise have been seen as important factors in Tostan's successful, community-led development program in West Africa based on the 'communally identified

31 United Nations, *United Nations Bans Female Genital Mutilation* <http://www.un-women.org/2012/12/united-nations-bans-female-genital-mutilation/> [Accessed on 15 February 2013]

32 E.M. Kisaakye, 'Women, Culture and Human Rights: Female Genital Mutilation, Polygamy and Bride Price', in eds. W Benedek, E.M. Kisaayke, G. Oberleiter, *Human Rights of Women (*London: Zed Books, 2002), 261-275 (p. 273).

33 Sarah Heyford, 'Conformity and Change: Community Effects on Female Genital Cutting in Kenya' *Journal of Health and Social Behavior*, 26:2 (Jun., 2005), 121-140 (p. 123).

34 Ibid.

35 World Health Organisation, *Eliminating Female Genital Mutilation* <http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf> [Accessed 16 February 2013].

36 Diane Gillespie and Molly Melching, 'The Transformative Power of Democracy and Human Rights in Nonformal Education: The Case of Tostan', *Adult Education Quarterly*, 60 (2010), 477-498 (p.478).

37 Nafissatou J. Diop and Ian Askew, 'The Effectiveness of a Community-based Education Program on Abandoning Female Genital Mutilation/Cutting in Senegal', *Studies in Family Planning*, 40:4 (2009), 307-318.

social environment'.[38] Appealing to group mentality is clearly important. However, the sources of change must also be considered.

One way to empower individuals and communities to question harmful cultural practises is to provide participatory education, especially regarding their human rights.[39] Tostan's approach in Senegal was to encourage communities to create their own informal education programmes in order that they are informed on their right to health and freedom of expression and may safely and openly question entrenched practices. Drawing on Milton's idea that belief is merely heresy 'if a man believes things only because his pastor says so, or the assembly so determines, without knowing other reason', it is knowing this *'other reason'* - the source of change - that can bring about systemic reform.[40] By allowing individuals to request their curriculum requirements personally, human rights and democracy inherently became part of Tostan's education programmes. In this way, 'a discursive context for the introduction of democracy and human rights…created critical reflection…[and] emboldened participants to undertake actions that created new social norms'.[41] This led to improved human rights compliance and increasing reconciliation of cultural norms with rights to healthy living and freedom and speech. Programmes based on this participatory approach have shown that 'investment in self-empowerment through health and rights information…will result in altered individual and group consciousness that is self-sustaining'.[42] Tostan's work in Senegal, where communities have been influenced from within and educated about democratic rights, has provided individual empowerment that has led to widespread communal involvement in sustainable reform of FGM practices. Toubia and Sharief highlight that it is 'the trust built between the insiders and the outsiders' that is 'crucial to the positive outcome'.[43] This indicates that in the case of FGM, trust and respect for those influencing the changes to cultural norms is the best means of

38 Unicef, *Long-term evaluation of the Tostan Programme in Senegal: Kolda, Thies, and Fatick Regions* < http://www.childinfo.org/files/fgmc_tostan_eng.pdf> [Accessed 5 April 2013]. and N.F. Toubia and E. H. Sharief, 'Female Genital Mutilation: have we made progress?', *International Journal of Gynecology and Obstetrics,* 82:3 (2003), 251-261 (p.256).

39 Unicef, *Long-term evaluation of the Tostan Programme in Senegal.*

40 J. Rawls, 'Lectures on Mill' in *Lectures on the History of Political Philosophy* (London: Belknap Press of Harvard University Press: 2007), 251-318 (p. 310).

41 Diane Gillespie and Molly Melching, 'The Transformative Power of Democracy and Human Rights in Nonformal Education: The Case of Tostan', *Adult Education Quarterly*, 60 (2010), 477-498 (p.477).

42 N.F. Toubia and E. H. Sharief, 'Female Genital Mutilation: have we made progress?', *International Journal of Gynecology and Obstetrics,* 82:3 (2003), 251-261, p.260. and Nafissatou J. Diop and Ian Askew, 'The Effectiveness of a Community-Based Education Program on Abandoning Female Genital Mutilation/Cutting in Senegal', *Studies in Family Planning* Vol. 40, No. 4 (Dec., 2009), pp. 307-318, p.307

43 N.F. Toubia and E. H. Sharief, 'Female Genital Mutilation: have we made progress?', *International Journal of Gynecology and Obstetrics,* 82:3 (2003), 251-261, p.256

forming legitimate authority. In Senegal, a compromise between Hayford's convention theory and self-empowerment demonstrates that the authority of peers and community members provides the legitimacy for sustainable reform.

Martha Nussbaum's feminist adaptation of John Stuart Mill's political philosophy shows that values of human rights are directly related to the autonomy of the individual through the pursuit of liberty and self-determination. In the examples of FGM and patriarchal interpretations of Sharia law the freedom of the individual is compromised. In the specific cases of Islamic law in Egypt and FGM practices in West Africa, successful change has involved reinterpretation of sacred texts and community-led education schemes suggesting that it is essential to base reform on legitimate authority. In this way, we can maintain cultural values within communities, whilst encouraging discussions and reform in order to align with universal values of human rights. Sustainable change only seems possible when change originates from within cultures, and is not imposed upon them from outside. This respects rights to choice that are key to liberty as expressed by Mill, and also ensures change that is relevant to the specific wants and needs of individual communities. The thesis of this paper is therefore that when responding to conflicts between cultural values and universal human rights, empowering individuals to safely and confidently question and challenge entrenched cultural norms and the legitimacy of their cultural authorities is the most important engine for change. Underlying this is an emphasis on sustainable change through instilling reform from within, which can be achieved through the pursuit of legitimate cultural authority, be it the rule of law or grassroots community-led development. The examples of success in both Egypt and West Africa prove that it is possible to reconcile cultural norms with universal human rights. However they also show that progress can be slow and requires participation from individuals within communities in order to ensure participatory development, and therefore sustainable change.

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Transience by Paul Stott

Transience deals with the theme of mental illness, a poignant and current topic. In particular it aims to present the relationship between anxiety and depressive disorders and the frequent inability of many sufferers to seek and accept necessary help and advice. Mental health and human rights are increasingly a focus of international organisations, such as the World Health Organisation (WHO), promoting stronger mental health legislation and education programmes globally.

Darkness was my nemesis;
Now, a true companion.
I lie, lazy-eyed,
And wallow in its shadows.

Gravity, when eyes are closed
Indeed recedes around me.
I rise, flowing lightly now,
As night knows day again.

As dark and light dual softly,
Caressing every surface
In the room where I reside,
I find myself beside myself,
As day and dark collide.

Darkness was my nemesis;
Now, a true companion.
Blissful beams or wistful dreams
Devouring all they can.
Engorge all that I am!

Ghana's Children, Project Okurase by Leeor Ohayon[1]

The photos were taken over July/August 2012, in Okurase, Eastern Region, Ghana. I was in Okurase for 5 weeks volunteering and teaching everything from Science and English, to Citizenship studies and Art. During the last week I assisted with the project's Village Health Outreach, in which American doctors joined and provided free health care to the villagers. Project Okurase's objective is to assist the village in its quest to become self-sustaining. This is done by providing assistance and the necessary skills in the traditional arts of the village from the wood carvers to the gari, so that people are able to work and support themselves. The project deals with a number of aspects of village life including providing financial help to struggling families who cannot provide their families with health care or education, offering vocational training to disabled villagers and organizing and planning new projects such as the development of clean water access for villagers.

Photo 1: Sunday Best
Children loiter outside the church in their Sunday best. Religion plays a central role in traditional village life and the village of Okurase is considered to be tolerant and multicultural. Christianity, Islam and traditional African beliefs live side by side in a part of the world where ethnic and religious strife has often led to bloodshed. Muslim and Christian children are educated together and are taught about each other's beliefs. The village elders, who effectively govern the village, represent each religious group living in the village.

Photo 2: Three Ghanaian School Girls
Three Ghanaian school girls collect woodchips. The strength of these young girls to go out, find the wood and carry it back is astonishing. Like responsible adults they too have to muck in.

Photo 3: After School Club
This picture was taken an 'after school club' which provides after school tuition to children to practice their reading and writing. However, in reality the after school club mainly attracts children who can't afford to go to school. Many of them speak minimal English and malnutrition makes it difficult to work out their ages. Some of the poorer children arrive with their toddler siblings, for whom they are responsible. Colouring pencils and colouring books are a treat we award to the children at the end of the day and are bitterly fought over as prized possessions.

1 Photography © Leeor Ohayon

Article 18. Everyone has the right to freedom of thought, conscience and religion, UDHR.

Article 32. Governments must protect children from work that is dangerous or might harm their health or education, UNCRC.

Article 31. Every child has the right to relax, play and take part in a wide range of cultural and artistic activities, UNCRC.

Is Torture Ever Acceptable in Counter-Insurgency Operations? Can its Use Ever be Justifiable?

Luke Sandle

The debate surrounding torture often confines itself to the 'interrogational torture' debate – a discussion surrounding the merits or disadvantages of employing torture to gain intelligence. However, when one considers the nature of counter-insurgency, other forms of torture tend to be prevalent also. These types of torture, terroristic and punitive, are not only evident in counter-insurgency, but unlike interrogational torture, have little to no base for justification. The argument of this paper will therefore be that torture in counter-insurgency is unjustifiable because both the nature of torture and the nature of counter-insurgency ensures its 'terroristic' and/or 'punitive' form play an equal or even larger role in counter-insurgency operations, either deliberately or unintentionally. This is encapsulated by four cases of counter-insurgency in which torture became a frequently used tool: the Battle of Algiers, US torture in Abu Ghraib, British torture during the Mau Mau Emergency and the Ethiopian crackdown on the Ogaden National Liberation Front.

The effectiveness, utility and morals of torture have long been debated. A salient argument advanced within the torture debate is that it is a necessary evil for the greater good. Those with this utilitarian perspective seek to justify torture within the parameters of 'interrogational torture' to gain intelligence. However, often ignored are other types of torture, such as 'terroristic' (torture to terrorise) or 'punitive' (torture to punish). These types of torture are used for control, retribution and destruction and have little to no moral justification as well as no practical or strategic advantages. Furthermore, though those who seek to defend torture speak the language of 'interrogational torture', this paper will take the position that this language betrays the truth that the consistent appearance of terroristic and punitive torture in counter-insurgency (COIN) makes justifying torture exclusively on interrogational grounds invalid. It will also be advanced that there are two explanations for why this is the case. First, the very nature of torture will be examined to show why terroristic and punitive torture is often an unwanted by-product of interrogational torture. Second, it will be set out how terroristic and punitive torture is sometimes used as a deliberate tactic to promote the interests of counter-insurgency. This leads to the conclusion that torture in counter-insurgency and perhaps indeed in any style of warfare is unjustifiable, as the nature of torture always potentially enables its terroristic and punitive form to be prevalent.

The linkages between interrogational, terroristic and punitive torture

are acknowledged by scholars such as Shue, Lazreg and Steinhoff.[1] The general argument is that the intrinsic nature of torture itself makes any guarantee of torture being used exclusively for 'interrogational purposes' dubious. As Shue argues, 'it is hardly necessary to point out that very few actual instances of torture are likely to fall entirely within just the category of interrogational torture'.[2] This is not necessarily because counter-insurgencies deliberately choose to embark on a program of terroristic or punitive torture (although this is sometimes the case), but rather because even when torture is used in an interrogatory way, its very essence increases the likelihood of it becoming terroristic or punitive. Of course, this may not always be the case but the point remains that the former is susceptible to becoming the latter which means, as Ginbar argues, torture is always a moral and practical 'slippery slope'.[3]

What is it about torture that makes its 'interrogational' form susceptible to becoming 'terroristic' or 'punitive'? The answer lies in the relationship between the torturer and the victim. Although the motive of the torturer may be to illicit information from a subject, the fact that he or she has all the power means that the exercise almost inevitably becomes a pursuit of power rather than of information. As Marnia Lazreg argues, 'torture is not about intelligence, although some useful intelligence is generally gathered. It is about power, projecting an image of power through the use of force'.[4] Essentially, the aim of torture may well be to gather intelligence. However, the 'defencelessness'[5] of the victim affords the torturer a disproportionate amount of power, which often turns interrogational torture into its terroristic or punitive forms; this is because, as Lazreg points out, torture has addictive qualities.[6] The ability to control and intimidate a subject in a controlled environment, usually under a cloak of anonymity, means that torture, as Ginbar argues, is never limited to 'just once'.[7] Furthermore, according to Shue, torture has the potential to become ingrained and permanent when one views torture as a 'surrender to impulse'.[8] When Beaumont poses

1 Henry Shue, 'Torture', *Philosophy and Public Affairs*, 7 (1978) <http://www.jstor.org/stable/2264988> [Accessed 7th November 2012], p. 130-134.; Marnia Lazreg, 'Algeria as a Template: Torture and Counter-Insurgency in War, *Global Dialogue*, 12 (2010) <http://www.worlddialogue.org/content.php?id=462> [Accessed 28th November 2012]; Uwe Steinhoff, *War, Torture and Terrorism: Ethics and War in the 21st Century*, ed. by David Rodin, Torture: The Case for Dirty Harry and Against Alan Dershowitz (Oxford: Blackwell Publishing 2007).

2 Shue, p. 130-134.

3 Yuval Ginbar, *Why not Torture Terrorists? Moral, Practical and Legal Aspects of the "Ticking Bomb" Justification for Torture* (New York: Oxford University Press, 2010), p. 119-123

4 Lazreg, Algeria as a Template: Torture and Counter-Insurgency in War.

5 Shue, p. 130-134.

6 Lazreg, Algeria as a Template: Torture and Counter-Insurgency in War.

7 Ginbar, p. 119-123.

8 Shue, p. 130-134.

the question 'Is it attractive to be a torturer?'[9] he is forcing us to recognise that as soon as torture becomes a desire on the part of the torturer, rather than a necessity, motives become mixed and the decision of who to torture becomes more relaxed. In such a situation, the extent to which torture is being used exclusively for interrogational purposes is doubtful. It is contended that given the 'desire' aspect, torture is also used to exercise the torturer's desire for control, intimidation and power – which are often common features associated with both terroristic and punitive torture.

It is also necessary to examine the role that resentment and the wish for retribution play in the torturer-victim relationship – in a bid to provide a further linkage between interrogational torture and terroristic and punitive torture. It would indeed be naive to assume that a counter-insurgent will always view their insurgent victim from an objective standpoint. There is an extent to which, in a COIN operation, a counter-insurgency force may feel a large degree of animosity towards an opposing insurgent force. David Galula exemplifies this by stating that 'the necessity for eradicating the insurgent political agents from the population is evident. The question is how to do it rapidly and efficiently, with a minimum of errors and [bitterness]'.[10]

One can see, and perhaps even understand, how the 'bitterness'[11] Galula speaks about could find an outlet in a torture situation. Returning to Shue's view of torture – as an 'assault upon the defenceless'[12] – bitterness, resentment and the desire for retribution or punishment stand an excellent chance of being realised in a torture scenario. Moreover, as Michael Gross argues, it is in a torture situation that the torturer is presented with the greatest opportunity to 'settle personal scores'.[13] This further highlights the issue of mixed motives. The torturer, in a counter-insurgency scenario, may intend to utilise torture for interrogatory purposes. However, the possible animosity he or she may feel towards the insurgent victim could result in an overwhelming desire to inflict as much pain as possible. The primary purpose to gain intelligence for the perceived greater good becomes submerged in a volatile environment, where torture becomes a means of punishment and retribution, and boundaries become blurred.[14]

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9 Roger Beaumont, 'Thinking the Unspeakable: On Cruelty in Small Wars, *Small Wars and Insurgencies*, 1. 1 (1990) <http://0-dx.doi.org.wam.leeds.ac.uk/10.1080/09592319008422942> [Accessed 31st October 2012], (p.63)

10 David Galula, *Counterinsurgency Warfare: Theory and Practice* (London: Praeger Security International, 2006), p. 86.

11 Ibid., p.86.

12 Shue, p. 130.

13 Michael Gross, *Moral Dilemmas of Modern War: Torture, Assassination and Blackmail in an Age of Asymmetric Conflict* (New York: Cambridge University Press, 2010), p. 132.

14 Shue, p. 130.

It is now pertinent to examine the second explanation for why justifying torture exclusively on interrogational grounds is invalid; namely that terroristic and punitive torture is sometimes used as a deliberate tactic to promote the interests of counter-insurgency. The latter form of torture in these instances, are not simply an unwanted by-product of interrogational torture but rather a genuine and planned tactic employed by counter-insurgencies as a means to assert victory over insurgents. The ultimate explanation for this concerns norms such as power and control. A counter-insurgency force must avoid being seen as weak, an issue liberal democracies often face when having to balance ideals such as liberty, freedom and democracy with being an effective counter-insurgency outfit. A counter-insurgency force viewed as weak would likely result in a more confident and offensive insurgency that is better able to achieve and promote its goals, such as penetrating the local population through infiltration or even mounting attacks on opposing troops. As Lazreg and Chazelle point out, torture can almost always be seen to one degree or another as a tool to display power.[15] In the controlled torture scenario, power can be readily asserted within the immediate environment. One can see how this ability to degrade and harm a defenceless victim, when translated more broadly to a torture program with multiple victims, results in the use of terroristic torture for tactical benefit.

A controlled or intimidated local population by the counter-insurgency could potentially lessen the chance that 'sympathisers' side with the opposition. The perceived consequences that could be inflicted on the insurgency give the counter-insurgency force an advantage in terms of both revealing enemy forces within the local population and also limiting the degree to which the local population can be penetrated. In summary, as Shue argues, terroristic and punitive torture is encapsulated by 'the goal of the intimidation of people other than the victim'.[16] As such, terroristic torture can often be seen as having deeply political aims, which broadens its tactical utility.

Having shown the linkages between interrogational torture and terroristic and punitive torture, this study will now turn towards specific examples, which further highlight the moral complexities inherent in the use of torture. Examples discussed are varied, both in time period (1950s to 2000s) and the nature of the conflict (colonial conflicts, internal war and so-called 'neo-colonial' ventures). Not only were these cases chosen because of their primary focus upon torture, but also the clear chronological dissonance between them serves only to emphasise the universality of interrogational torture's vulnerability to terroristic and punitive torture.

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15 Lazreg, Algeria as a Template: Torture and Counter-Insurgency in War.; Bernard Chazelle, *How to Argue Against Torture* (2009) <http://www.cs.princeton.edu/~chazelle/politics/torture09.html> [Accessed 13 November 2012].

16 Shue, p.131.

To begin, however, the moral issues of non-interrogational torture merit discussion. The first moral issue with terroristic and punitive torture is its lack of a 'built-in end-point'.[17] Defenders of torture such as Fritz Allhoff point out that in interrogational torture, torture is justified because of both the indispensable nature of the information that a victim supposedly possesses, and also as a result of the fact that upon receipt of the information the torture ends.[18] This built-in end-point gives the victim a degree of control and although this remains morally contested, it gives torture a moral and indeed an empirical basis for discussion. Terroristic and punitive torture, on the other hand, has no built-in end-point. Here, torture is the end and not the means, the motives are to invoke terror and/or retribution and the victim has no power. There is little moral ambiguity here. Interrogational torture alone has the ability to engage in a debate surrounding its morality; terroristic and punitive torture lacks such a basis for discussion due to their theoretically indefinite nature.

The second moral issue is that of terroristic and punitive torture possibly increasing the range of people that are tortured leading to torturing the innocent.[19] Interrogational torture is often justified because only specific people with vital information will be tortured as the utility of this information is greater than the act of torturing, despite the fact of course, that mistakes surrounding who possesses information are sometimes made, which in turn can leads to innocents being tortured.[20] In terroristic and punitive torture however, the question of who to torture is arguably afforded fewer limitations. As previously discussed, the addictive nature of torture and the resentment a torturer may feel towards members of an insurgency results in a desire to torture. This desire can result in torturing victims with less than vital information or perhaps no information at all. Furthermore, when one views terroristic and punitive torture as a tactical tool of a counter-insurgency that will control and intimidate, it is arguably just as likely that an innocent civilian with no information will be tortured as an insurgent with vital information.

An example of this is the infamous 'Battle of Algiers' and the French counter-insurgency effort against the National Liberation Front (FLN). Here, we are presented with arguably the most comprehensive case of systematic and institutionalised torture in COIN history.[21] Though it is clearly the case that interrogational torture was the starting point in Algiers,

17 Ibid., p.133.

18 Fritz Allhoff, *Terrorism, Ticking time-bombs and Torture: a Philosophical Analysis* (Chicago: University of Chicago Press, 2012), p. 142

19 Ginbar, p. 119

20 Galula, p.86

21 Neil Macmaster, 'The Torture Controversy (1998-2002): towards a "New History" of the Algerian War', *Modern and Contemporary France*, 7 (2002), p. 449-459.

(for example by gaining information which could lead to the removal of nationalist leaders) terroristic and punitive tortures became an unintentional part of a broader interrogational torture program. The critical turning point in the Algiers case, and an example of the above point, was the handing over of police powers to General Massu and the 10th Parachute Division in 1957, where torture became a systematic tactic, justified in order to 'root out the terrorists and thereby protect many more innocent people'.[22] So systematic and widespread was the torture that it became the 'normal means' for interrogation even when other methods would have been more effective.[23] Essentially, torture became an institutionalised tactic of French counter-insurgency. This demonstrates the ease with which terroristic and punitive torture can merge into interrogational torture. As Lazreg argues: 'The use of torture as a means of displaying force, projecting power, intimidating and exerting control (terroristic torture) was clearly evident in Algeria'.[24]

Heggoy argues that the widespread use of torture in Algiers meant that it was often used on the ground indiscriminately which frequently resulted in the torturing of the innocent.[25] Though in some cases the action taken can be put down to the fervent desire and determination of French soldiers to acquire information, it is clear that the lines between interrogational, terroristic and punitive torture became blurred. Torture was used not to simply gain information, but also to terrorise and punish. Moreover, when one considers the addictive nature of torture it becomes possible to understand how torture becomes torture for its own sake. As Lazreg states, torture sessions in Algeria were often used 'as a pastime, to relieve boredom'.[26]

Furthermore, when one also considers the tactics employed by the FLN during the Battle of Algiers such as urban terrorism, it can be seen how bitterness and resentment may have crept into the torture chambers, resulting in punitive rather than interrogational torture. Indeed, torture was sometimes justified to the soldiers on a subtly punitive basis.[27] That is, it was inferred to soldiers that torture was necessary, to ameliorate the victim through punishment, whilst eliminating him as a threat at the same time. As Lazreg states, it was argued that: 'torture was good for the suspect, as it rehabilitates him spiritually and reconciles him with France'.[28]

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22 Alf Heggoy, *Insurgency and Counterinsurgency in Algeria* (Ontario: Fitzhenry and Whiteside Ltd, 1972), p. 233-235.
23 Ibid., p. 233-235
24 Lazreg, Algeria as a Template: Torture and Counter-Insurgency in War.
25 Heggoy., p. 233-235
26 Lazreg, Algeria as a Template: Torture and Counter-Insurgency in War
27 Ibid. p. 115
28 Ibid.

Another example of terroristic and punitive torture being deliberately employed for perceived tactical or even strategic use are evident in the acts of the Ethiopian armed forces (ENDF) in combating various insurgent groups in the 21st century. Ethiopia's counter-insurgency efforts in the Ogaden, an ethnically Somali region of Ethiopia, against the Ogaden National Liberation Front (ONLF) is a prime example. Though the academic literature on this is somewhat limited, Human Rights Watch has provided a comprehensive account of extensive torture against various insurgent groups. With specific reference to the ONLF, Human Rights Watch has given details of 'the arbitrary detention of hundreds of civilians and insurgents alike in military barracks where they experienced beatings, torture and widespread rape'.[29] Human Rights Watch goes on to state, 'the available information indicates that specific policies were chosen to deliberately terrorise and punish the civilian population'.[30] Essentially the ENDF employed torture as a means not only to quash the insurgency but also to quash support for the insurgency.

Cutting off support to the ONLF is perhaps only one explanation for the use of terroristic and punitive torture in the Ogaden. It is interesting to note that real, systematic and frequent cases of torture were most notably concentrated in 2007 and 2008, despite ongoing conflict since 1995. During this latter period, conflict between the ENDF and ONLF intensified as a reaction to an attack on a Chinese oil exploration site in the Ogaden by the ONLF, which killed 74 people.[31] In a report by the Daily Telegraph, classified information was revealed by Michael Gonzales, the section chief for the US embassy in Addis Ababa, as to possible reasons for the level and intensity of torture seen in 2007 and 2008.[32] Gonzales states the ONLF oil attack 'embarrassed the ENDF, making the military and government appear to the outside world as unable to control and secure its own territory'.[33] Gonzales went on to argue that this embarrassment increased the desire for retribution against the ONLF and so increased the magnitude of the accounted human rights violations.[34] In short, a well-documented case of terroristic and punitive torture occurring not just for its perceived tactical 'usage', but also as a way to exercise retribution born

29 Human Rights Watch, *Ethiopia: Army Commits Executions, Torture and Rape* (2008) <http://www.hrw.org/node/74305> [Accessed 21 November 2012]

30 Human Rights Watch, *Ethiopia: Submission to the UN Committee against Torture* (2010) <http://www.hrw.org/news/2010/11/02/submission-committee-against-torture-ethiopia> [Accessed 9 December 2012]

31 BBC News, *Scores Die In Ethiopia Oil Attack* (2007) < http://news.bbc.co.uk/2/hi/africa/6588055.stm> [accessed 23 December 2012]

32 Michael Gonzales, *Ogaden: Counterinsurgency Operations Hitting a Wall Part II* (2011) < http://www.telegraph.co.uk/news/wikileaks-files/somalia-wikileaks/8302118/OGADEN-COUNTER-INSURGENCY-OPERATIONS-HITTING-A-WALL-PART-II.html> [accessed 23 December 2012]

33 Ibid.,

34 Ibid.,

from resentment.

The use of torture in the iniquitous "Abu Ghraib scandal" during American counter-insurgency efforts in Iraq provides a further case-in-point. Though the conflict between the belligerents could initially be described as 'conventional warfare' it can be argued that post invasion, and certainly post establishment of a new Iraqi government, an insurgency–counter-insurgency conflict ensued. Donald Rumsfeld used the language of abuse rather than torture to describe what happened at Abu Ghraib.[35] This move was a political one, which sought to avoid labelling the Abu Ghraib scandal as torture, in order to maintain the legitimacy of the interrogational torture program conducted by the Bush administration in Guantanamo Bay and beyond. The actions by members of the US army, listed by Hersh, included punching, kicking, electrocution, rape and intimidation of Iraqi prisoners.[36] This was not simply interrogational torture. As Steinhoff argues, 'it is safe to assume that all the torture that happened in Abu Ghraib has nothing to do with ticking bombs (the routine interrogational torture justification) or hostages who are about to die'.[37] Ginbar agrees, arguing that torture at Abu Ghraib involved no discernible attempts at interrogation, instead showed all the signs of terroristic torture.[38] Hersh further notes, that the intimidation of the subjects was, for the torturers, the foremost concern.[39] Moreover, Lagouranis and Mikaelien state that Iraqis in Abu Ghraib were 'routinely tortured for no other reason than that they were there'.[40] When one takes into account that US army members videoed and photographed themselves smiling whilst the detainees were tortured, it becomes clear that the goal of Abu Ghraib was not interrogation. It was for control, intimidation and the desire for the exercise of power on the part of the torturers.

It is important to note however that this is not to imply the overall torture practice exhibited by the US in Iraq, Afghanistan and Guantanamo was deliberate terroristic or punitive torture. Clearly, torture was used mainly for interrogation, as stated by Hersh, who argues that 'interrogating prisoners and getting intelligence, including by intimidation and torture was the overall priority'.[41] Rather, it is to say that Abu Ghraib demonstrated the clear linkages between interrogational and terroristic torture. The precedent set by Bush and Rumsfeld in Guantanamo that torture is acceptable to elicit

35 Seymour Hersh, *Chain of Command: The Road to Abu Ghraib* (London: HarperCollins, 2004), p. 46.
36 Ibid., p. 46.
37 Steinhoff, p.108.
38 Ginbar, p. 120
39 Hersh, p. 46.
40 Tony Lagouranis and Alen Mikaelien, *Fear up Harsh: An Interrogator's Dark Journey Through Iraq* (Harmondsworth: Penguin, (2007),
41 Hersh, p. 46.

information ultimately gave torture a mandate. Moreover, this precedent was emphasised by the acknowledgement that torture could potentially 'soften up' detainees.[42] This paved the way for the use of all forms of torture and legitimised its use on the battlefield in places such as Bagram and Abu Ghraib. As Hersh states: 'the roots of the Abu Ghraib scandal lie not in the inclinations of a few army reservists, but in the reliance of George Bush and Donald Rumsfeld on coercion' to elicit information.[43]

Finally, British torture practices during the Mau Mau insurgency from 1953 to 1956 is a further case which suggests a relationship between all three types of torture. Here we see a striking and clear example of a counter-insurgency utilising systematic punishment and terror as a tactical strategy to help achieve victory. One might argue that this policy did indeed lead to success, as the Mau Mau insurgency was eventually defeated in 1956. However, the Mau Mau insurgents, whose aim was to end British colonial rule by tapping into support from the largest ethnic group in Kenya, the Kikuyu, were rounded up in detention camps and tortured on a punitive basis. As Elkins notes, anyone labelled a 'hardcore'[44] or the colour black (whites and greys were cooperative) were transferred to punitive camps in which David Anderson admits there was 'institutionalised and systematic as well as casual and haphazard torture'.[45]

Though in the detention camps there were undeniable attempts at extracting information, when one looks at the overall aims of the detention centres – as well as the torturing of members of the Kikuyu population themselves – it becomes fairly clear that torture was mainly being used to punish and terrorise. To win the war, the British felt they needed to rehabilitate the perceived backward and savage Mau Mau. As stated by Elkins in an interview, the British viewed their mission as a 'civilising mission'.[46] Thus torture became the tool to punish those who did not cooperate with the British rehabilitation program in the aforementioned punitive camps. As Pettus and Bennett note, this torture included beatings,

42 Pierre Tristam, *What was the Chain of Responsiblity for Abuse and Torture at Abu Ghraib?* (2009) http://middleeast.about.com/od/iraq/f/abu-ghraidb-responsibility.htm [Accessed 19 March 2013]

43 Hersh, p. 46.

44 Caroline Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (London: Jonathan Cape, 2005), p. 32

45 David Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire* (London: Phoenix, 2005), p. 293.

46 Elkins, p. 34

electrocution and rape.[47] Not only this, but in her book *Britain's Gulag: The Brutal End of Empire in Kenya*, Elkins also reveals attempts at repressing the entire Kikuyu population in emergency villages where torture was used to punish and terrorise sympathisers of the Mau Mau insurgency.[48] Ultimately, this was an effort to dissuade Kikuyu individuals from siding with the Mau Mau, in an attempt to win the conflict. This reinforces the tactical benefit terroristic and or punitive torture is often seen to possess.

To conclude, it has been advanced that the use of torture in COIN is neither acceptable nor justifiable from a practical or moral perspective. This has been argued not by theoretically debating the 'interrogational torture' debate, but rather by showing how terroristic and punitive torture – for which an attempt has been to show their unjustifiable nature – often play an equal if not larger role as interrogational torture in cases of torture in COIN. First, there are strong linkages between interrogational torture and terroristic and punitive torture. The nature of torture, as a tool to project power and enact resentment, often changes the reason to torture, from objectively acquiring information to terrorising and punishing. And second, terroristic and punitive torture are sometimes seen, arguably misguidedly so, as tactics which can be deliberately used to achieve the aims of a counter-insurgency. This could be to intimidate a local population from siding with an insurgency, or to punish members of an insurgency who do not cooperate, as can be seen from the Mau Mau uprising. Essentially, in holding a comprehensive debate of torture, it is important not to confine oneself to the assumption that torture always concerns the acquisition of intelligence. Often, both terroristic and punitive torture play more prevalent roles in counter-insurgency than is thought and therefore equal, if not more attention, should be devoted to these forms.

47 Ashley Pettus, '10 Downing Street's Gulag', *Harvard Magazine* (2005) <http://harvardmagazine.com/2005/03/10-downing-streets-gulag.html> [accessed 27 December 2012]; Huw Bennett, 'The Other Side of the COIN: Minimum and Exemplary Force in British Army Counterinsurgency in Kenya', *Small Wars and Insurgencies* 18. 4 (2007) <http://dx.doi.org/10.1080/09592310701778514 > [accessed 21 November 2012]

48 Elkins, p. 35

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American Warzone By Lenhardt Stevens

My goal in writing this reflective piece was to focus on the links between people who have had their right to life taken away and those people who actively took those rights through committing violent acts. I think it is important to lift the shroud covering these events through the use of words such as 'random', 'inexplicable', and 'senseless'. We must begin to investigate the causes underlying these events with the aim of rectifying their injustice. However improbable it may initially seem, I think that American gun violence and American war are inseparable. Preserving national hope while forfeiting deleterious misconceptions is a cultural objective I hope the national and international community can move towards.

I fired my first gun when I was still in my hormonal adolescent haze. There had been B.B. guns and paintball markers before that, but these were only preparing me for the big leagues, the main event. It was in Philmont New Mexico, the holy land of the Boy Scouts of America, where I held a pump action shotgun for the first time. We had all lined up to shoot, the scraggly Oregonian gents and me, full of insecurity and mischief. It was a time filled with the chaotic rhythms of sexual awakening. I was particularly frustrated when I heard that a couple of scouts had brought along issues of Playboy to camp, withholding the goods from the younger scouts. *When I am eighteen*, I must have told myself, *I'm going to buy all the Playboys I can get my hands on*. Instead, my equally vexed compatriot and I made women in the sand on the beach of a nearby lake. Funnily enough, it did not have the same appeal.

On the morning of October 15, 2012, Malala Yousufzai woke up to go to school. Minutes later, a Taliban member, who had the conviction that women educated in school went against the Koranic teachings, shot her. The only way, he deemed, to stop her from spreading her views was by taking her life. Maybe he hoped this would send a message across the community, that if you choose to go to school and you are a woman, you are choosing death. Wherever you stand on the issue of granting Pakistan its right to self-determination, it is in moments like this that the prospect of the Taliban becoming the most powerful political body in the country is terrifying not only for people watching but the women and nonbelievers subject to their merciless doctrine.

School shootings in the so-called freest nation on earth happen with great frequency, and our students are killed for far less ideological reasons. The Virginia Tech massacre was largely motivated by the insecurities and despair of a former student who had been denied love. The killer's previous encounters with women included a one-hour lap dance from Chastity Frye in a Roanoke, Virginia motel. Emily Hilscher had a boyfriend when she was stalked and later murdered by the assailant. Slaughter ensued driven

solely the deranged mission of the killer who guided it. This happened in 2007, when I was a junior in high school. We had a lockdown drill the same week, when the school prepares its students and staff for similar emergencies. I had art history during the drill. My teacher, even knowing it was an exercise, was pale with horror as we raced into the basement of the building. The real thing would have started the same way, her face said.

Earlier in 2012, before the attempt on Ms. Yousufzai's life, in the neighbouring country of Afghanistan, an American soldier, someone brought in to fight for the democratic values that were governed by his military ethic, slew sixteen civilians in cold blood. His family back in the United States could not understand what happened to their husband, father and son to make him perform such a heinous act. Staff sergeant Robert Bales had been diagnosed with a nervous breakdown before he unleashed his violence. His situation speaks to the state of mental health in the US military. Soldiers were more likely to die from suicide than from combat last year. Bates will not be tried in the country of his crime. He is back in the United States awaiting what will most likely be a mandatory life sentence or capital punishment. An outraged vocal group of Afghanis has said that this is an injustice, and that he should be tried and hanged in Afghanistan.

The Dark Knight Rises was a well-received film by the critics. It did not surpass its predecessor, the word shorter *The Dark Knight*, a film that mesmerised audiences with its hair raising from beyond the grave performance by Heath Leger. *Rises* was the type of film that had people asking not *if* they were going to see it, but *when*. Americans rallying for escapist cinema has been a past time since the early days of Hollywood. We watched D.W. Griffith tie women on train tracks and waited anxiously for the hero to come and rescue her. Batman is the type of superhero who made the most sense to audiences in a Post-9/11 mindset. He was willing to get things done, even when the populous could not understand it. A hero that never justified his actions, but was undoubtedly a force for protecting the city. The rightwing media attempted to paint George W. Bush as such a character. Wars in the middle east were like diplomatic vitamins; bitter on the way down, but necessary bursts of international violence in order to sustain domestic security. You know, Batman.

One man who died in the theatre where James Eagan Holmes, dressed as the villain of the previous film and armed with smoke grenades, killed twelve and injured fifty-eight people was a veteran on a date with his girlfriend. He put his body in front of hers and took fire. He died protecting her. Out of the senselessness of the violence came heroism of the selfless kind, the one that we contemplate in the dark possibilities of our imagination when we consider our loved ones and wonder how far to

the edge we would go. In Columbine High School, shooter Dylan Kebold asked students whether or not they believed in God. The students would reply, and depending on their answer they would be executed or live. It would be wrong to call anyone a coward who gave the answer that they believed would keep them alive. Death for some people acts as the last chance for them to commit. It draws a line in the sand and they choose which side they are on. Where one stands in these moments are denied the possibility to justify themselves in the way that Socrates had in his trial. They give a one-word response to someone acting as the judge, jury and executioner. Maybe our beliefs should not be so simple. I wish I could have talked to Kebold about that. But I think he was proving a different point.

Getting stymied in the wording of the second amendment is easily done. The writing says: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Who is regulating the militia? It should not be the government, because if that were true than that would not be a militia at all but rather an extension of the military. So the responsibility falls into the citizens' hands to regulate their own militia. This has been met with relative degrees of success. Some communities seem to be watching the democratic process fail so that their hyper paranoid delusions of an impending dictatorship rising from the ashes of a broken amendment can be fulfilled. In Idaho, there is a commune known as the Citadel. They are an organization that mandates each of its residents to own guns with at least a thousand rounds of ammunition. There is an application process to get your family qualified to live amongst the armed to the teeth residents of the Citadel. Obviously, because they are an exclusive and closed-off community in a beautiful mountainous state, they are not a militia with the intent of protecting the American people from the unchecked power of government. But then again here is where the line of thinking has gone to a whole new plateau of illogic.

The largest bastion of support for anti-gun restrictions comes from the belief that the second amendment was ratified by the constitution to protect its citizens from the threat of government oppression. Back when the constitution was ratified in 1789, it was a fairly equal playing field when comparing the arms that citizens could possess alongside the military. Today, the US Air Force is employing Lockheed Martin F-35 Lightning IIs. These fighter jets can use a 35mm machine gun, sidewinder and air to surface missiles, all while traveling at mach 1.61, or roughly 1,200mph. An American armed with any personal weapon would be unable to resist an attack from such a vehicle. Although, to some it may be more important to die valiantly in a hail of gunfire wielding an AK-47 than it is to comply with the government. I bid these people good luck.

We also fired muskets while we were at Philmont. I did everything to prepare the gun for firing; loaded the gun powder, bit off a piece of fabric (how this influences the chemical process of expelling a lead ball from the muzzle of the gun I to this day cannot tell you), and stuffed down metal ball in the same way men had done over two hundred years ago. I can honestly tell you I get nostalgic about it now, and I say this unabashedly. These guns, these arms, were used to fight for a new nation, and now they were in my hand. One of my favourite tasks while living in the United Kingdom has been to tell this type of story while not sounding like a lunatic. You tell me if I've succeeded.

When I fired that musket, somebody on the range told me, "There's a rumor that these weapons are inaccurate. This ain't true. Why earlier today, I shot a nail off a log from about thirty feet away." I don't know if that's true, but why would that man lie. The Bushmaster AR-15 assault rifle used to mow down twenty children and six adults in Connecticut last December is a replica of a military model M4 carbine. This weapon is compact while retaining the accuracy of the bulkier M16, the assault rifle used to kill thousands of Vietcong during the Vietnam War, thousands of Iraqi's during the Second Gulf War, and thousands of untold lives in numerous other conflicts our nation silently watches pass by. When we were using muskets, we were fighting a war against tyranny. I ask myself if we need guns for what we're fighting now.

Why Has Ethnic Cleansing and Genocide Been Such a Prominent Feature of the Twentieth Century?

Patricia Murray

The frequency and scale on which ethnic cleansing and genocide occurred during the Twentieth Century remains a shocking feature of the period, and one that requires further exploration. Through analysing several instances of ethnic cleansing and genocide it is possible to determine why such crimes against humanity were able to occur in modernised societies. In doing so it is possible to dismiss the often cited argument that ethnic violence stems from ancient hatreds. Instead, it becomes apparent that the high incidence of ethnic cleansing and genocide is in fact a result of a number of features of the Twentieth Century, namely the rise of nationalism, the process of industrialisation and the advent of total war. Through examining key case studies, including Armenia, the Holocaust and Rwanda, in the context of the Twentieth Century, this study advances the notion that ethnic cleansing and genocide is not so much a prominent feature of the period, but rather a product of it.

The practice of ethnic cleansing and genocide is not a modern phenomenon; archaeological evidence points towards genocide being perpetrated by competing local communities as early as the Stone Age.[1] Yet there is no doubt that the epoch of these crimes against humanity was the Twentieth Century, leading it to be labelled by some as the 'special era of death and destruction'.[2] Indeed, it was during this era that the word genocide first came into being, with Raphael Lemkin coining the term in 1944.[3] The definition of genocide was later codified in international law when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly 9 December 1948. Any act committed with the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group' constituted genocide.[4] Through exploring some of the most famous cases of the century, ranging from the mass killing of Armenians in Turkey in 1914 to that of the Bosnian Muslims in the former Yugoslavia in 1994, it is possible to determine

1 Ben Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven: Yale University Press, 2007), p. 1.

2 Mark Levene, 'Why Is the Twentieth Century the Century of Genocide?', *Journal of World History*, 11 (2002), 305–36 (p. 305).

3 Raphael Lemkin, Axis rule in Occupied Europe : Laws of Occupation, Analysis of Government, Proposals for Redress (New Jersey: Lawbook Exchange, 2005)

4 Avalon Project, <http://avalon.law.yale.edu/20th_century/genocide.asp> [accessed 13th May 2013]

several distinctive features of the Twentieth Century that compounded to make ethnic cleansing and genocide so prolific.

The existence of primordial hatreds has been purported by some as the root cause of ethnic cleansing and genocide in the Twentieth Century.[5] Proponents of this thesis suggest that individuals are bound by the 'congruities of blood, speech, custom and so on', and that conflict between diverse ethnic groups is the result of inherent differences in race, religion and culture.[6] Such conflict by this argument predates the modern era, and thus ethnic cleansing and genocide in the Twentieth Century are simply manifestations of ancient hatreds. For instance, Doder describes the Balkans as having 'long been haunted by conflict', and that tension between different ethnic groups dates back to the Fourth Century A.D.[7] These ancient animosities reached fruition in the ethnic cleansing perpetrated in this region during the late decade of the Twentieth Century. The Rwandan genocide of 1994 has also been accounted for in this way, with the brutal massacres being attributed to tribal animosities between Tutsi and Hutu.[8] By this view, ethnic cleansing and genocide featured so prominently in the Twentieth Century simply because it was so 'deeply embedded within the cultural archetypes of society'.[9] This argument suggests that mass killing was predestined and inevitable yet fails to explain why the Twentieth Century contained so many cases.

Academics such as Verdeja dispute the very basis of this thesis, contending that 'identities are neither fixed nor primordial', instead they develop as a response to 'specific social, cultural and political developments'.[10] Moreover, by attributing responsibility for ethnic cleansing and genocide to ancient hatreds, one ignores the extended periods of peaceful co-existence amongst different ethnic groups. Conversi also supports this view, arguing that in the case of the former Yugoslavia academics tend to 'forget that a rich tradition of diversity, pluralism and tolerance developed here over many centuries'.[11] The existence of primordial hatreds is therefore an inadequate explanation for ethnic cleansing and genocide. It is important to note however, that ancient animosities were evoked time and time again

5 Robert Kaplan, Balkan Ghosts: A Journey through History (New York: Picador, 2005)

6 Clifford Geetz, *The Interpretation of Cultures: Selected Essay* (New York: Basic Books, 2000), p. 259.

7 Dusko Doder, 'Yugoslavia: New War, Old Hatreds', *Foreign Policy*, 91 (1993), 3-23 (p. 7).

8 Linda Melvern, *A People Betrayed: The Role of the West in the Rwandan Genocide* (London: Zed, 2000), p. 4.

9 Levene, p. 324.

10 Ernesto Verdeja, 'On Genocide: Five Contributing Factors', *Contemporary Politics*, 8 (2002) 37-54 (p. 38).

11 Daniele Conversi, 'Resisting Primordialism (and other -isms)', in *Ethno-nationalism in the Contemporary World,* ed. by Daniele Conversi (London: Routledge, 2004), pp. 269–90 (p. 275).

by political elites through the Twentieth Century. Slobodan Milosevich is particularly notable for his 'ability to mould a medieval myth of Serb identity to his political purposes'.[12] This reveals a more crucial aspect in examining why ethnic cleansing and genocide were so prominent during this period; the emergence of nationalist ideology, espoused by ruthless political leadership.

In particular, the Twentieth Century witnessed the rise of a virulent form of ethno-nationalism, an ideology founded on the centrality of shared ethnic origins and a common culture. In ethno-nationalist regimes, members of a political nation are depicted in terms of race and ethnicity, which serves to alienate ethnic minorities and can lead to ethnic cleansing and genocide. Carmichael supports this further, arguing that the 'ideology of nationalism...is clearly a common culprit given that it introduced notions of different 'grades' of humanity'.[13] The role of ethno-nationalism was particularly prevalent in the Armenian genocide, as the Young Turks regarded Turkish nationalism as racially based, rejecting the multi-national character of the Ottoman Empire.[14] This pattern was repeated in the former Yugoslavia, where the ethno-nationalism within various groups played a more decisive role than Yugsolav patriotism in motivating the process of ethnic cleansing.[15] Indeed, Bauman depicts the 'supra-national quality of the Jews',[16] suggesting that this is why they were targeted for persecution. Even the Soviet Union promoted ethno-nationalism with the Russians elevated above all the others'.[17] Despite ethno-nationalism in its very nature leading to the segmentation of society, arguably it cannot result in ethnic cleansing and genocide without the actions of the political elite. Throughout the Twentieth Century several despotic leaders harnessed ethno-nationalism to propel their genocidal aims. For instance regional leaders in the former Yugoslavia relied on ethno-nationalism to legitimise and maintain their power bases.[18] This method was also employed in Rwanda, where the Hutu elite 'pushed a radically exclusivist political ideology that explicitly devalued Tutsi', with the intention of securing their own position.[19]

While the emergence of extreme nationalism was undoubtedly a

12 Doder, p. 15.

13 C. Carmichael, 'The Violent Destruction of Community during the "Century of Genocide" ', *European History Quarterly*, 35 (2005), 395-403 (p. 397)

14 Verdeja,p. 44.

15 Walker Connor, *Ethnonationalism: The Quest for Understanding* (New Jersey: Princeton University Press, 1994), p.197.

16 Zygmunt Bauman, *Modernity and the Holocaust* (Cambridge: Polity Press, 1989), p.52.

17 Norman Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth Century Europe* (Massachusetts: Harvard University Press, 2001), p. 89.

18 Doder, p. 14.

19 Verdeja, p.50.

fundamental component driving ethnic cleansing and genocide, the sheer scale on which it was achieved during the Twentieth Century would not have been possible without industrialisation. Advancement in technology 'provided states with the means of preparing unprecedented levels of death', for instance the advent of rapid mass transportation facilitated large-scale forced population transfers.[20] This is evident in the ethnic cleansing of the Armenians in Turkey, who were deported *en masse* by cattle freight.[21] In the case of the Rwandan Genocide of 1994, the impact of modern technology was apparent in the use of the media, particularly through the radio station *Libre des Mille Collines*.[22] By this period, transistor radios had become readily available in Rwanda, thus the vehement anti-Tutsi rhetoric was able to be broadcast to a far wider audience than previously possible.[23] Arguably the Holocaust remains the most striking instance of an industrialised genocide, following 'typically modern, technological-bureaucratic patterns of action'.[24] Bauman points to the organised and systematic nature of the killings to develop his thesis that not only was the Holocaust only possible in industrialised modern times, it was in fact a product of it.[25]

Yet industrialisation did not simply 'determine new ways of slaughter'.[26] Kiernan notes that in many instances 'rapid modernisation provoked neo-traditional ideological reactions that reinforced genocidal impulses'.[27] In this view, a cult of antiquity developed which involved the romanticism of the past and a desire to eradicate 'foreign contamination and return to an imagined pure origin'.[28] This fostered ideals of racial superiority, which led to ethnic cleansing and genocide. In *Mein Kampf*, Hitler declares that Germany's leaders in the First World War had fostered an 'industrialisation as boundless as it was harmful', highlighting his negative perception of modernised society.[29] Kiernan's assertion that 'only advanced industrial killing could give Germany back this primeval past' encapsulates the irony that the genocidal response to industrialisation was in reality facilitated by the advances of that very same process.[30] Due to their reputation as a commercially successful social group, the Jews

20 Martin Shaw, *War and Genocide: Organized Killing in Modern Society* (Cambridge: Polity Press, 2003), p. 86.
21 Richard Hovannisian, 'Etiology and Sequelae of the Armenian Genocide' in *Genocide: Conceptual and Historical Dimensions*, ed. By George J. Andreopoulos (Pennsylvania: Pennsylvania Press, 1997),p.124.
22 Verdeja, p.49.
23 Melvern, p. 70.
24 Bauman, p. 95.
25 Zygmunt Bauman, *Modernity and the Holocaust*.
26 Shaw, p. 86.
27 Kiernan, p. 394.
28 Kiernan, p. 27.
29 Adolf Hitler, *Hitler, Adolf, Mein Kampf* (London: Hutchinson, 1969), p. 233.
30 Kiernan, p. 429.

became the 'prime target of anti-modernist resistance', being persecuted as a result of their affiliation with modernisation and capitalism.[31] Opposition to industrialisation and the idealisation of the past were not only evident in Nazi Germany; in Cambodia, the Khmer Rouge movement wished to return to the glory of the Angkor Empire and promoted the ideal of the 'Original Khmer'.[32] The ethnic Vietnamese were regarded as contaminating this ideal and were consequently targeted for execution. While a preoccupation with racial purity might appear pre-modern in nature, Bauman notes how 'racism is unthinkable without the advancement of modern science'.[33] Indeed, following Hitler's rise to power, numerous scientific institutions were established in order to investigate the 'Jewish Question', enforcing Bauman's theory that ethnic cleansing and genocide is 'the practice of scientific management of human setting and interaction'.[34]

In many instances, cults of antiquity also resulted in the glorification of agriculture and the peasant class in diametric response to the process of urbanisation. Pol Pot's regime attempted to achieve the agrarian ideal by evacuating the cities and sending the entire population of Cambodia to work in the fields.[35] The population was then divided into two classes, the 'New-People, consisting of city people, and Base-People, the peasant class'.[36] The New People suffered extreme hardship at the hands of the Khmer Rouge, facing harsh treatment due to the fact they were urban dwellers with no experience of agricultural life.[37] Verwimp supports this thesis, proposing that in Rwanda the divisions between Tutsi and Hutu were aggravated by a 'mono-ethnic peasant ideology' which portrayed the Hutu as the 'real peasants of Rwanda', whilst the Tutsi were 'the feudal class' who were detrimental to the agricultural ideal.[38] Serbian nationalism too 'had long possessed a distinct anti-urban element', a notion that centred on the idea that Serbia's rural traditions were disappearing under the influence of industrialisation.[39] Thus when confronted with the process of industrialisation and urbanisation in the Twentieth Century, some states followed a path of ethnic cleansing and genocide in the hope of returning to an almost mythical bygone era of agricultural supremacy.

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31 Bauman, p.46.

32 S. Thion, 'Genocide as a Political Commodity' in *Genocide and Democracy in Cambodia: the Khmer Rouge, the United Nations and the International Community*, ed. by Ben Kiernan (New Haven: Yale University Press, 1993), 163-190 (p. 169).

33 Bauman p.61.

34 Bauman p.73.

35 Samantha Power, A Problem from Hell: America and the Age of Genocide (London: Harper Perennial, 2007), p.88.

36 Verdeja, p. 46.

37 Verdeja, p.46.

38 Philip Verwimp, 'Peasant Ideology and Genocide in Rwanda Under Habyarimana', *MacMillan Centre for International and Area Studies,* 19 (2006), 1-44 (p. 3).

39 Kiernan, p. 592.

In examining the growth of nationalism and the multi-faceted role of industrialisation it is clear they are integral features of the Twentieth Century that compelled ethnic cleansing and genocide. Yet in many instances during the Twentieth Century, cases of ethnic cleansing and genocide coincided with the outbreak of warfare, be it localised or on a global scale. Indeed, Levene maintains that it is 'no great accident that the first great wave of contemporary genocides comes out of the actuality and aftermath' of the First World War.[40] Clearly ethnic cleansing and genocide are inextricably linked with the process of modern warfare. This is partly due to the cover that war provides for political elites intent on genocide, an argument enforced by Verwimp's statement that 'in a context of war, a regime can blame the other army for the massacres'.[41] Verwimp cites the Rwandan genocide as a prime example of such action, with the civil war providing 'context and the occasion to execute the final solution'.[42] Moreover, war provided ethnically exclusivist regimes with a 'justifiable purpose to the unlimited violence necessary to create a homogenous state and society', portraying those targeted for persecution as enemies trying to defeat the state from within.[43] Yet perhaps most important when examining the role of war in instances of ethnic cleansing and genocide in the Twentieth Century, is the advent of total war. In mobilising the whole of society, total war 'stimulated militarist, statist tendencies in economics and societies, which in turn supported unprecedented practices of mass killing'.[44] The only seeming exception would be Cambodia, a country not at war when the genocidal action began. However, the shadow of the Cold War coupled with the impact of the Vietnam War played a key role in the events that unfolded, with Cambodia being consigned to 'play the role of pawn in world politics'.[45] This would suggest that, even indirectly, modern warfare can propel ethnic cleansing and genocide in the Twentieth Century.

In many ways it was consequences of warfare that also led to the advent of state sponsored ethnic cleansing during the Twentieth Century. The practice first occurred in the aftermath of the First World War, with the Treaty of Lausanne being signed on 24 July 1923. The treaty effectively authorised the forced population transfer between the remaining Greeks in Anatolia and the Turks in Greece. This instance set a precedent in international relations, one which was to be emulated in the peace treaties following the Second World War. Article XIII of the Potsdam

40 Levene, p. 324.
41 Verwimp, p. 4.
42 Verwimp, p.3
43 Richard Hovannisian, 'Etiology and Sequelae of the Armenian Genocide' in Genocide: Conceptual and Historical Dimensions, ed. By George J Andreopoulos (Pennsylvania: Pennsylvania Press, 1997) 111-140 (p.123).
44 Shaw, p. 88.
45 Michael Haas, Genocide by Proxy: Cambodian Pawn on a Superpower Chessboard (London : Praeger, 1991)

Treaty recognised that 'the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken'.[46] Naimark notes the influence of war on such a policy, arguing that 'the vast movements of peoples during the war itself made population transfers, especially ones involving the hated Germans, unproblematic'.[47] The official sanctioning of ethnic cleansing created its appearance as a legitimate tool of governance that could be utilised to create a racially homogenous population. Indeed, it was a policy also employed by nationalist Yugoslav leaders, perhaps influenced by this 'indication of the acceptability of ethnic cleansing'.[48]

Through examining the key features of this period it is possible to determine why 'for many groups in numerous regions across the globe in the long Twentieth Century, ethnic violence, displacement or death shaped their entire lives'.[49] Political elites from across the ideological spectrum promoted the tenets of ethno-nationalism, evoking notions of ancient animosity in order to segment society. In some cases, leaders were simply concerned with maintaining and consolidating power, turning to ethnic cleansing and genocide to achieve this aim. Yet in several instances the genocidal intent of the political elites also stemmed from an intrinsic ideological belief in the superiority of their race. Industrialisation enforced these inherent beliefs as it provoked a cult of antiquity, which promoted a pure agrarian ideal leaving no room for members of the state who did not conform. Paradoxically, the process of industrialisation was crucial in facilitating the perpetration of genocide, as it provided the necessary technology for committing mass atrocities on a scale previously unimaginable. Moreover, the advent of total war in the modern era created the conditions necessary for ethnic cleansing and genocide, mobilising the entire society for violence. It was in the aftermath of war that the international community turned to state sponsored population transfers as a useful means of restoring ethnically pure states, thus the legitimisation of ethnic cleansing featured prominently in the Twentieth Century. While mass killing is a common component of modern history, the Twentieth Century stands as an example of the power of ethno-nationalist ideology, modern technologies and the backdrop of warfare in providing the necessary conditions for ethnic cleansing and genocide. At no point before the Twentieth Century were so many of these factors present so frequently across the world, and it for this reason predominantly that the period ranks as one of the most genocidal.

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46 The Avalon Project 'The Berlin (Potsdam) Conference, July 17-August 2, 1945' <http://avalon.law.yale.edu/20th_century/decade17.asp> [accessed 25 March 2013]

47 Naimark, p.108.

48 William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2009) p.227.

49 Carmichael, p. 44.

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Sulphur Mines, Indonesia by Alasdair Glen

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Men of all ages work in the harsh conditions of the Kawah Ijen sulphur mine in East Java, Indonesia. Formed from a volcanic crater, poisonous sulphuric fumes fill the air in which the workers must pass through at least twice a day if they are to earn even a minimal wage.

Although collecting sulphur for large organisations, they are provided with no inhalation protection and simply protect their airways with a rag cloth.

Their job, which is to walk the 3km path up to the crater and then return with a full load of sulphur, is rewarded with extremely low pay for their efforts and health risks. For each kilogram of sulphur they return with they are currently paid 400 Indonesian Rupiah, the equivalent of 3p per kilogram. Typical loads, which are carried over their shoulders in bamboo baskets, usually weigh between 80-100kg which results in an average daily wage of around £5.

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