

SOAS LAW JOURNAL

Volume 3 — Issue 1 — February 2016



SOAS
LAW JOURNAL

VOLUME 3 – ISSUE 1

FEBRUARY 2016

ISSN: 2055-2068

<http://www.soaslawjournal.org/>

Published in the United Kingdom
By the © SOAS LAW JOURNAL

Supported by the School of Law, SOAS, University of London.

Faculty of Law and Social Sciences
SOAS, University of London
Thornhaugh Street, London WC1H 0XG

No part of this publication may be reproduced, transmitted, in any form or by any means, electronic, mechanical, recording or otherwise, or stored in any retrieval system of any nature, without the prior written permission of the publisher. Articles must be attributed and cannot be altered or used for commercial purposes. All rights reserved.

The views expressed by the authors are not necessarily those of the Editorial or Honorary Board of the SOAS Law Journal, nor of its sponsors or the SOAS, University of London School of Law. While every effort has been made to ensure the information within this Journal is correct, the Editorial Board cannot accept any responsibility for any errors or inaccuracies.

Volume 3 – Issue 1 (February 2016)
ISSN: 2055-2068 (Online)
ISSN: 2057-3006 (Print)

© SOAS LAW JOURNAL

Editorial Board

Executive Board

Elizabeth Jane Lawrence

Co-Editors-in-Chief

Ahmed Hegazi

Executive Editors

Hilina Berhanu Degefa

Natalie McCauley

Poorna Mishra

Kirsten Odily Mönkemüller

Ashley Roach-McFarlane

Hadeer Soliman

Tamara Tamimi

Managing Editors

Muhammad Umar Ali

Kay Lee

Kenneth Noronha

Su Mei See

Jun Sean Wong

Editorial Staff

Senior Editors

Charles Jun Ji Ho

Mohammed Subhan Hussain

Funmi Makinwa

Asryman Rafanan

Asryman Rafanan

Aziz Shehadeh

Nigel Kin Bong To

Aradhna Tandon

Associate Editors

Sameera Abdulrehman

Abbas Al Abbas

Mustafa Kamran Ahmed

Suad Akhundov

Sara Alqamish

Ehsan Malik

Daynnie Mohamed

Ying Zhi Wang

Academic Board

Mr Paul Kohler

Professor Diamond Ashiagbor

Professor Fareda Banda

Professor Philippe Cullet

Dr Gina Heathcote

Professor Kevin Jon Heller

Dr Paul O'Connell

Dr Lutz Oette

Dr Nimer Sultany

Honorary Board

The Hon Dame Linda Dobbs DBE

Professor Anne Griffiths

Professor Andrew Harding

Professor Mohammad Hashim Kamali

Professor Duncan Kennedy

Professor Emeritus Werner Menski

Dr Richard Small

Professor David Takacs

Professor Robert A Williams

Contents

Foreword

Professor Emeritus Werner Menski viii

Introduction

Elizabeth Jane Lawrence and Ahmed Hegazi, Co-Editors-in-Chief x

The Contingency of Credibility: Gender-Related Persecution, Traumatic Memory and Home Office Interviews

Isabella Mighetto 1

Trials in Absentia at the Special Tribunal for Lebanon: an Effective Measure of Expediency or an Inconsistency with Fair Trial Standards?

Maya Trad 39

Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute

Andrew Sumner Hagopian 56

Towards a 'Sensitive' Approach to Ending Female Genital Mutilation/Cutting in Africa

Lwamwe Muzima 74

The Mediterranean Sea and the Right to Know about the Fate of Missing Relatives: Access to Justice for Families of Missing Migrants

Sara Lodi 104

'Equality Can't Wait': Challenging Inequality in and through the International Human Rights System

Lizzy Willmington 133

Foreword

Professor Emeritus Werner Menski
SOAS, University of London

It is of enormous satisfaction and much pride to introduce the third volume of the SOAS Law Journal. While I was teaching at SOAS from 1980-2014, I always sought to encourage and cultivate research skills and motivated many students to publish their work, sometimes as monographs. As a member of the Honorary Board, and long-term editor of another Journal, *South Asia Research* (New Delhi, SAGE), I am now helping to advise our budding Editorial Team on ways to gather strength and reputation from year to year. The SOAS Law Journal cannot be a one-off project of a single ambitious individual. It has to be a joint effort involving many participants, who learn as much about processes of producing a journal and the topics involved as about each other and themselves. Striving for continuity and seeking to secure the highest possible quality of presentation and analysis in an extremely wide range of law-related topics, so typical for what motivates the SOAS Law School, makes working on this Journal an exciting and empowering experience.

This Issue covers several important legal topics that will interest many readers. A common theme connecting these Articles appears to be a robust and constructive scepticism about why so many long-standing contentious legal issues are still not being adequately addressed. This is observed despite the ameliorative efforts of international law interventions and human rights activism of various kinds. We know at SOAS that it is too simple to just blame 'religion' and 'tradition' for these continuing frightful aberrations and often gruesome violations of fundamental rights.

Starting this string of articles is an Article addressing the issue of credibility of evidence in asylum applications in an institutional framework marred by a 'culture of disbelief', as I know from my own practice as a cultural-cum-country expert in such cases. In effect, deliberately abusive, this disregards and undercuts the underlying protective spirit and formally protective provisions of relevant international law instruments. Focusing on the impact of trauma in scenarios where victims are forced to recall their experiences of gender-related persecution in front of hostile decision-makers infected with the virus of the 'culture of disbelief', this Article raises disturbing questions about the extent to which existing processes of decision-making can themselves be coherent and plausible.

The topic of various Tribunals in international criminal law occupies many legal minds these days, while there is no global agreement over what the respective purposes of such activities should or could be. The second Article focuses on Lebanon's practice of trial in absentia and questions the fairness of such trials.

However, if those who systematically evade trial are given some kind of benefit of doubt, that must raise other important questions. Related to such issues of fuzziness over the drawing of boundaries in terms of procedure and substance are other persistent ambiguities over what types of gender discrimination should or should not be justiciable or protectable by international criminal law. These are also raised in the third Article, which basically argues that existing protective mechanisms in the field of LGBTI discrimination do not yet go far enough.

Next, an Article on female genital mutilation argues, in my view persuasively, that as abuses in this regard are sanctioned by specific aberrations of culture, ameliorative strategies have to incorporate and engage with such local cultures and value systems to bring about empowerment and positive change for vulnerable individuals. This Article applies the deeply plural internally competitive and overlapping perspectives within the wide field of 'law' in an interactive engagement that may be state-led or driven by modern international and human rights norms, but cannot simply ignore the voices of 'culture' and 'tradition'. One could give other examples than the now-extinct Chinese custom of foot binding to show that societies do have the capacity to learn that certain locally developed practices, which may have morphed into incoherent and unsustainable abuses may need revision, yet with the active involvement of the very people who are affected by such forms of abuse.

The ongoing drama of large numbers of people drowning in the Mediterranean Sea while trying to reach EU territory forms the context of the penultimate Article. More specifically, it is argued that a family's right to know about the fate of missing relatives should be improvable by using modern technologies, including biometric data. Yet, while many of the affected migrants are deliberately invisible, there also seems to be no concerted political will or legal strategy to employ such new technologies for the benefit of those who are officially said to have a right to know about their missing relatives.

Finally, concluding this Journal is an Article claiming that equality cannot wait any longer and inequality needs to be challenged more effectively. Remarkably, the growing wealth on the planet is distributed in increasingly inequitable ways, challenging not only national legal orders but also the international law system to reconsider distributive remedies. Those will be found in areas beyond the immediate reach of those two abovementioned legal actors, however, which means incorporating non-statist factors and agents into a plural remedial framework that development experts, economists, but also social scientists of other orientations can tell us more about.

It is a fitting conclusion here to congratulate and commend the Editorial Team for producing this impressive issue of the SOAS Law Journal. May they succeed in motivating the next cohort of editors to carry on this laborious and exciting task.

Introduction

Elizabeth Jane Lawrence and Ahmed Hegazi

Co-Editors-in-Chief

We are delighted to present to you the February issue of the third volume of the SOAS Law Journal. For the first time, we have produced a thematic Issue, with each of the selected articles sharing the common thread of implementing a rights-based approach and focus of enquiry.

Each author has undertaken a novel and thoroughly engaging endeavour in conducting their analysis, with perspectives acknowledging the intersectionality of the issues concerning the subject-matters discussed and applying holistic methodologies in an effort to argue for a more appropriate and viable resolution to the examined problems. All of the questions explored within this issue are very much of contemporary relevance, with the authors taking it upon themselves to deconstruct and challenge the mainstream narrative surrounding their topic of choice. Of particular interest is the manner in which the authors have chosen not to restrict themselves to the domain of 'law' *stricto sensu*, delving into a multitude of works spanning a variety of other academic disciplines and bringing to light the emphasis on interdisciplinary study that SOAS has long represented.

We would like to extend our thanks to all those that have participated in the production of this latest issue of the SOAS Law Journal: to all of the authors for their contributions, to our Honorary Board and the SOAS Law Faculty for their continued advice and support, and to our Editorial Board, without whom the continued growth and success of this Journal would not be possible.

Yours sincerely,



Elizabeth Jane Lawrence and Ahmed Hegazi

Co-Editors-in-Chief
SOAS LAW JOURNAL

The Contingency of Credibility: Gender-Related Persecution, Traumatic Memory and Home Office Interviews

Isabella Mighetto*

Credibility, defined as the 'coherence and plausibility' of a personal narrative, is used to determine asylum claims in Home Office interviews. This Article argues that since credibility assessment is subjective – and contingent – such criteria are inappropriate. Informed by Asylum Policy Instructions, non-governmental organisation (NGO) reports and psycho-legal research, it takes theories of memory as a point of departure and moves through the impact of trauma on recalling and relaying experiences of gender-related persecution. It discusses the internal and external barriers to disclosure during Home Office interviews. It then problematizes the way in which a decision-maker receives and interprets this personal story. Finally, through a deconstruction of credibility and an exploration of the pervasive 'culture of disbelief', it asks: is contingency-as-policy deliberately exclusionary?

A Note on Names

- Interviewer, case-owner and decision-maker will be used interchangeably, as will interviewee, claimant, asylum-seeker, appellant and applicant
- UKBA = United Kingdom Border Agency
- UNHCR = United Nations High Commission for Refugees
- PTSD = Post Traumatic Stress Disorder

I. INTRODUCTION

Question (Q): What is the focus of this Article?

Answer (A): UK Home Office (hereafter HO) asylum interviews: the initial screening interview and the substantive interview later, and how the telling of trauma (of gender-related persecution) (does not/cannot) fit(s) into this process. It explores how (a) persecutory event(s) travel(s) from the moment(s) of occurrence through the recall process to the translation of memory into an act of

* Isabella read for a BA in French and Spanish at Oxford University before completing her MA in Human Rights Law at SOAS. She would like to thank the Feminist Theory Writing group for their support and insight.

speech (and the difficulty of recounting sexual violence), and how this account of persecution is then interpreted by the decision-maker. Lastly, the (mal)functioning of the interview is explored against the backdrop of a wider and obsessive politics of 'credibility',¹ in a climate of mutual distrust.²

Q: Why this focus?

A: Most research on asylum decision-making looks at the system as a whole or disproportionately at the appeal and/or judicial review and beyond.³ In 2012, 30 per cent of the UKBA's initial decisions to refuse asylum were overturned on appeal,⁴ indicating the dubious and substandard nature of initial decision-making,⁵ which has long been known. I explore the barriers to protection and acceptance apparent at this initial stage of the asylum process. I am interested in the idea of ownership of a narrative and how, ultimately, decision-making is not based on claimants' lived experience but instead on how their story is told, and how it is received and processed by the interviewer.

Q: Why gender-related persecution?

A: Sexual violence⁶ against men and boys remains under-researched and under-reported due to stigma and silence;⁷ but I focus on persecution experienced

¹ Jessica Anderson and others, 'The culture of disbelief: An ethnographic approach to understanding an under-theorised concept in the UK asylum system' (2014) 102(1) *Refugee Studies Centre Working Paper Series* 1.

² Melanie BE Griffiths, "'Vile Liars and Truth Distorters": Truth, Trust and the Asylum System' (2012) 28(5) *Anthropology Today* 8.

³ Heaven Crawley, *Refugees and Gender: Law and Process* (Jordan 2001); Nick Gill, 'Presentational State Power: Temporal and Spatial Influences over Asylum Sector Decision-Makers' (2009) 34(2) *Transactions of the Institute of British Geographers* 215; Gregor Noll, *Proof, evidentiary assessment and credibility in asylum procedures* (Martinus Nijhoff 2005); Christel Querton, "'I feel like as a woman I'm not welcome": A gender analysis of UK asylum law, policy and practice' (*Asylum Aid*, 6 January 2012) <www.asylumaid.org.uk/wp-content/uploads/2013/02/ifeelasawoman_report_web_.pdf> accessed 16 August 2014.

⁴ Anderson and others, 'The culture of disbelief: An ethnographic approach to understanding an under-theorised concept in the UK asylum system' (n 1) 14.

⁵ Helen Muggeridge and Chen Maman, 'Unsustainable: the quality of initial decision-making in women's asylum claims' (*Asylum Aid*, January 2011) <www.asylumaid.org.uk/wp-content/uploads/2013/02/unsustainableweb.pdf> accessed 16 August 2014.

⁶ This Article works within broadly inclusive definitions of gender-related persecution and sexual violence involving a multiplicity of traumatic experiences (Ben Feder, 'A credible judge of character? A psycho-legal analysis of credibility assessments for asylum applicants with a history of sexual violence' (2010) 24(4) *Journal of Immigration, Asylum and Nationality Law* 295, 303) including 'physical, sexual or psychological harm... threats of such acts, coercion or arbitrary deprivation of liberty' (Declaration on the Elimination of Violence Against Women, UNGA Res 48/104 (20 December 1993) UN Doc A/RES/48/104 art 1).

specifically by women, whose asylum claims often contain particular complexities due to higher rates of sexual violence⁸ and non-state persecution.⁹ Women asylum seekers experience both sexism and racism. As Feder states, gender-related asylum claims occur within ‘overlapping cultures of disbelief’ that negatively impact credibility assessment.¹⁰

Q: Why credibility?

A: Unlike other areas of law, where there may be corroborating evidence, in asylum interviews, the acceptance or rejection of a claim is often based on nothing but the claimant’s narrative account of persecution. The Immigration Rules state that aspects of an applicant’s statement *do not need to be backed up by evidence* if five conditions are met. I will investigate two of these conditions, due to their particularly subjective nature:

(iii) the person’s statements are found to be *coherent and plausible*.

(v) the *general credibility* of the person has been established.¹¹

UNHCR guidelines,¹² UKBA Asylum Instructions,¹³ and Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 reflect this. The ‘determinative weight credibility findings play in the decision-making process’ is uncontested.¹⁴ Negative credibility findings form the core of refusals.¹⁵

I examine credibility assessment, using guidelines for decision-makers,¹⁶ and deconstruct the very notion of credibility which, bound up in subjective,

⁷ A Nicholas Groth and Ann Wolbert Burgess, ‘Male rape: offenders and victims’ (1980) 137(7) *American Journal of Psychiatry* 806–10.

⁸ Human Rights Watch, ‘Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK’ (Human Rights Watch, February 2010) 17
<www.hrw.org/sites/default/files/reports/uk0210webwcover.pdf> accessed 18 August 2014.

⁹ Muggeridge and Maman (n 5) 20.

¹⁰ Feder (n 6) 305.

¹¹ Immigration Rules 2016, para 339L.

¹² UNHCR ‘Note on Burden and Standard of Proof in Refugee Claims’ (Geneva 16 December 1998).

¹³ UKBA Asylum Instructions 2012, para 4.1.

¹⁴ Feder (n 6) 296.

¹⁵ Querton (n 3) 37.

¹⁶ Home Office Asylum Policy Instruction 2014; UKBA Asylum Instructions 2010; UKBA 2012 (n 13); UNHCR ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’ (Geneva January 1992) UN Doc HCR/IP/4/Eng/REV.1; UNHCR ‘Note on Burden’ (n 12); UNHCR ‘Guidelines on

gendered and culturally-constructed notions of 'coherence' and 'plausibility', is based on fallacy. The assumptions that imbue decision-making contradict the widely available psycho-legal research on the effects of trauma on memory and the difficulties of disclosing sensitive, distressing experiences.

Credibility assessment is particularly problematic for claimants, like Voice 1, who have undergone the trauma of gender-related persecution, but this is merely a starting point for critique. The research presented here will challenge the political construct of 'credibility' and highlight the structural unfairness and discomfort of the interview system for all involved: applicants, interviewers, traumatised and non-traumatised alike.

Q: So why fictional Voices 1 and 2?

A: They are not the basis of the Article. Although fictional, the voices were born out of wide research: HO/UKBA/UNHCR guidelines, NGO reports, peer-reviewed psychological journals, trauma theory, legal theory and literary theory. The Article is also based on a variety of primary evidence: interview transcripts, refusal letters and documents which have been made accessible to me, along with conversations with asylum seekers and campaigners in London. I am unwilling and unable to disclose these sources. My methodology is interdisciplinary to show that, although HO interviews are a cog in the wheel of asylum law, the process depends on a multiplicity of intertwining realities and subjectivities that transcend purely legal analysis.

Having chosen this particular focus for my research, I am unfortunately unable to discuss many aspects of interviews which in other circumstances are central. Nor is it the scope of this Article to explore the asylum decision-making trajectory beyond interviews. My own decision-making and editing process in the writing of the Article, of limiting, excluding and choosing,¹⁷ is representative of how arbitrary the asylum decision-making process is: what questions are asked, what questions are side-lined. I want to illustrate the contingency¹⁸ of the situation: anything could influence the interview and anything could happen during its course. This is why I think fictional voices actually add a level of 'credibility', showcasing the dizzying breadth of

International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (7 May 2002) UN Doc HCR/GIP/02/01.

¹⁷ Michel Foucault, 'What Is an author?' in Paul Rabinow (ed), *The Foucault Reader* (Pantheon 1984) 119.

¹⁸ I use a Sartrean notion of 'contingency' (Jean-Paul Sartre, *La Nausée* (Gallimard 1938)) as arbitrary/fragile/dependent on chance.

possibility. There is something more specific about fiction that empirical evidence cannot offer.

Writing on subjectivity, I felt it was important to include my own subjectivity too. Writing on the difficulty of constructing a linear, coherent and consistent narrative of trauma, I felt my own writing should reflect this. Attempting a clinical and objective piece of writing, I believe, would undermine my argument.

II. CHAPTER ONE: SETTING THE SCENE

Q: How do Home Office interviews work?

A: The screening interview is the first stage of the asylum process and occurs after making a claim for asylum. If the claim is made at an entry point into the UK (a port), then an immigration officer will conduct the interview immediately. If the interview is conducted at the entry point ('the physical space of entrance into the country but also the metaphorical door of the law'¹⁹), very shortly after arrival, the likelihood is that claimants are exhausted, frightened and confused.²⁰ However, around 88 per cent of asylum applications in the UK are made 'in country';²¹ at an Asylum Screening Unit (ASU) such as Lunar House in Croydon for example, or from within an Immigration Removal Centre (IRC). Questions are limited to establishing nationality and identity ('bio-data') and 'where that person claims to reside'.²² This is determined by facts cross-checked alongside Country of Origin Information (COI) and sometimes through linguistic analysis, outsourced to a company called Sprakab.²³

¹⁹ Costas Douzinas and Ronnie Warrington, 'A Well-Founded Fear of Justice: Law and Ethics in Postmodernity' in Jerry D Leonard (ed), *Legal Studies as Cultural Studies: A Reader in (Post)Modern Critical Theory* (State University of New York Press 1995) 212; as in the parable 'Before the Law' in Franz Kafka, 'The Trial' in Willa Muir and Edwin Muir (tr), *Franz Kafka: The Complete Novels* (Vintage 2008).

²⁰ Louise Pirouet, *Whatever Happened to Asylum in Britain? A Tale of Two Walls* (Berghahn Books 2001) 47.

²¹ Asylum Information Database, 'National Country Report: The United Kingdom' (Asylum Information Database, 2013)

<www.asylumaid.org.uk/wp-content/uploads/2013/08/AIDA_UK.pdf> accessed 6 August 2014, 14.

²² UKBA 2012 (n 13) para 8.1.

²³ The reliance on Sprakab for determining the language and dialect of asylum applicants has resulted in thousands of asylum seekers being 'wrongly deported'; see Chris Green, 'Hundreds of asylum seekers 'wrongly deported' after 'inappropriate' advice from Swedish linguistics firm' (*The Independent*, 22 May 2014) <www.independent.co.uk/news/uk/politics/hundreds-of-asylum-seekers-wrongly-deported-after-inappropriate-advice-from-swedish-linguistics-firm-

The screening interview is made up of a pro forma questionnaire. Questions about their journey to the UK (to determine whether the UK is actually responsible for considering the asylum claim)²⁴ and their physical health form the bulk of the interview. The applicant is asked only two questions about the basis of their claim: 'What was your reason for coming to the UK?' (4.1), and 'Can you BRIEFLY explain why you cannot return to your home country?' (4.2).²⁵

It is from this BRIEF claim summary that a decision is made on whether the applicant will enter through the Detained Fast Track (DFT), where they will be detained (in an IRC). A 'quick decision' is possible,²⁶ should the case be deemed 'uncomplicated'.²⁷ A claim is usually decided within two or three days, and if refused (in 2008, 96 per cent of claims were refused on first instance²⁸), claimants only have two days to appeal. Individuals are deported upon refusal. This procedure has recently been challenged by *Detention Action*²⁹ and was found to operate with 'too high a risk of unfair determination for those who may be vulnerable applicants'.³⁰

The screening interview is followed by a substantive interview which is arranged through an 'Invite to Interview Letter'.³¹ It is in the substantive interview that the claimant is questioned in detail about reasons for claiming

9421187.html> accessed 5 July 2014. Instead of aiming for scientific accuracy, it seems to be a deliberate means of deterring migrants; see Aisha Maniar, 'Language Testing of Asylum Claims: A Flawed Approach' (*Institute of Race Relations*, 7 August 2014) <www.irr.org.uk/news/language-testing-of-asylum-claimants-a-flawed-approach/> accessed 16 August 2014.

²⁴ The Dublin Regulation (Council Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31) entered into force in July 2013 and became applicable to applicants for international protection from 1 January 2014. It aims to establish the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

²⁵ Screening interview transcripts show that 'BRIEFLY' is written in upper case letters on the form.

²⁶ UK Visas and Immigration, 'Detained Fast Track Processes' (GOV.UK, 11 June 2013) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/257435/detained_fast_processes.pdf> accessed 11 August 2014.

²⁷ 'Right to Remain' <www.righttoremain.org.uk> accessed 11 August 2014.

²⁸ Human Rights Watch (n 8) 1.

²⁹ *R (on the application of Detention Action) v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin).

³⁰ *ibid* [221].

³¹ UKBA 2014, para 3.1.

asylum.³² If the interview results in a negative credibility finding, the claimant will be notified by a Reasons for Refusal Letter (RFRL). Voices 1 and 2 take place in the context of a substantive interview.

Q: So what is expected of asylum seekers?

A: Despite the many guidelines for interviewers, asylum seekers do not receive guidelines explaining what to expect. There are widely-held assumptions that claimants know what they need to do to fulfil the asylum process,³³ when in fact, many people do not understand the procedure to apply for asylum and may feel that it is safer to enter the UK by way of another category, as a visitor for example,³⁴ despite qualifying for refugee protection. Such misunderstandings are often the reason for delays to making an asylum claim.

However, from the very first encounter with the asylum process, claimants are expected to: explain ('BRIEFLY') the grounds of their claim, why they fear return, give a 'coherent and plausible' account of persecution suffered in their country of origin, and demonstrate how this persecution is a result of one of the reasons set out in Article 1.A of the 1951 UN Convention Relating to the Status of Refugees (hereafter the Refugee Convention):

Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [her] nationality and is unable, or owing to such fear, is unwilling to avail himself [herself] of the protection of that country; or... is unable or, owing to such fear, is unwilling to return to it.³⁵

Retrieving accurate, detailed memories of pain and persecution, all the while behaving in a manner that will elicit the distrusting interviewer's confidence (Noll describes credibility as 'the subjective capacity to inspire belief'³⁶), whilst also making sure to be consistent and to reveal everything related to the claim at once is a lot to ask of someone who may be in shock/suffering from anxiety/PTSD/depression. It is a lot to ask of anyone.

³² Right to Remain (n 27).

³³ Jane Herlihy and others, 'What Assumptions about Human Behaviour Underlie Asylum Judgements?' (2010) 22(3) *International Journal of Refugee Law* 351, 359.

³⁴ Crawley (n 3) 210.

³⁵ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A.

³⁶ Noll (n 3) 149.

Q: And what about 'fear of persecution': how is that assessed?

A: Fear of persecution is routinely checked against so-called 'objective' Country of Origin Information (COI). COI can perpetuate stereotypes of country-wide experience through accounts which subsume a claimant's singular story by blinkering the interviewer with a façade of evidential information. As Ben Okri writes, 'Beware the stories you read or tell... they are altering your world.'³⁷ For women, the narrative the COI provides is problematic. Sexual violence and gender-related persecution are commonly under-reported,³⁸ and only a short section in the COI addresses issues affecting women.³⁹ 'Women often constitute an invisible group in human rights and COI reports'.⁴⁰

Persecution has been interpreted as serious harm plus the failure of State protection.⁴¹ There must be an absence of state protection for non-state actors to be actors of persecution.⁴² Not being able to prove failure of state protection often results in refusals justified by Internal Flight Alternatives (IFA). If internal relocation is found not to be 'unduly harsh',⁴³ claimants are told where they would allegedly be able to relocate to in their home country. Asylum Aid found that some RFRLs gave a list of such towns 'but with no reasoning to support this'⁴⁴: a manifestation of contingency.

[VOICE 1]

You are a young woman from an un-named country. You are sitting very still and breathing too quickly. You are not going to talk about the journey you undertook from your village that evening some time ago: the fear, the noises, the intimidation, the threats, the thirst, the pain, inside your body in the night-time, from the driver, and then from the security official, somewhere along the way, at some checkpoint, and then again from the men who you were in the

³⁷ Ben Okri, *Birds of Heaven* (Phoenix 1996) 34.

³⁸ Sophia Ceneda and Clare Palmer, "'Lip Service' or implementation? The Home Office Gender Guidelines and women's asylum claims in the UK' 46 (*Asylum Aid*, March 2006) <www.asylumaid.org.uk/wp-content/uploads/2013/02/Lip_Service_or_Implementation.pdf> accessed 19 August 2014.

³⁹ Muggeridge and Maman (n 5) 20.

⁴⁰ Country of Origin Research and Information, 'Country of Origin Information' (Country of Origin Research and Information 2014) <www.cori.org.uk/8.html> accessed 5 August 2014.

⁴¹ James C Hathaway, *Law of Refugee Status* (Butterworths 1991) 125.

⁴² Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9 art 6(c).

⁴³ UKBA Asylum Instructions 2013 para 5.1.5.

⁴⁴ Querton (n 3) 47.

van with. These are details that you are not going to go into now. There is enough other darkness to tell and you would like an opportunity for someone kind to listen to you, to understand that this story is not an easy one to tell. That much patience is needed. That sometimes this story will be very confusing and jumbled up, and not make sense at all to whoever listens to it, or reads it. Their problems and life and experiences do not really have any comparison with yours, even though they will nod their head and say I understand what you went through, tell me more about it, when did this happen, who did this to you, why do you want to stay here, when did it happen, how did you get those papers, when was it, who were you with, you told us this happened why are you changing your mind, how long were you there for, when was it tell us more...

The questions keep on and all you can hear are the sounds of the soldiers' boots and the cries and the rain and the shots outside and the footsteps coming closer and closer and you can smell the burning and taste the sourness of death on your tongue. The door bursts open onto you and your sisters.

The door opens violently and in comes a tall man who looks like an official.⁴⁵ He does not look at you. He speaks to the man sitting down opposite you. He leaves again. The rain is beating, drumming against the window, desperate to force its way into the little cold room.⁴⁶ He does not ask you if you would like some food, or a drink, or something warm to put around your shoulders.⁴⁷

⁴⁵ UNHCR notes that the interview should be free from 'interruptions and distractions', yet they have witnessed personal interviews being interrupted by phone calls and colleagues of the interviewer entering and exiting; see UNHCR 'Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice – Detailed Research on Key Asylum Procedures Directive Provisions' (UNHCR 2010) 144 <www.unhcr.org/4c7b71039.pdf> accessed 16 August 2014. Not only does this inhibit disclosure by creating distractions and impeding consistent questions and answers, it can also be anxiety-producing; a reminder of officials from the claimant's home country. For people who have suffered ill-treatment from authority figures, it is 'especially difficult to disclose information to someone in uniform'; see Querton (n 3) 44.

⁴⁶ Bögner and her colleagues found that the smallness of the room and 'sitting too close to the male interviewer' made claimants feel uncomfortable; see Diana Bögner and others, "'Refugees' Experiences of Home Office Interviews: A Qualitative Study on the Disclosure of Sensitive Personal Information' (2010) 36(3) *Journal of Ethnic and Migration Studies* 519, 529. It was only in 2012 that the UKBA changed the spatial arrangement of the Asylum Screening Unit (ASU) to make private rooms available during the screening interview; see Asylum Information Database (n 21) 15. Prior to this, a plastic screen was placed between interviewer and interviewee – hardly conducive to an atmosphere of confidentiality and trust.

⁴⁷ Breaks are to be 'offered at the discretion of the interviewer' (HO (n 16) para 5.10) but Asylum Aid found that interviewers frequently did not pick up on hints that claimants were struggling and needed a break; see Muggeridge and Maman (n 5) 37.

I don't remember.

I am sorry.

You cannot answer that question. He is a man. He should not ask you this. Can they hear from outside the door? Your eyes are swimming with tears and all you want is the cold clear rain to envelop you and wash away your shame and your dirt and your thoughts and make it all go away, but he keeps asking his questions,⁴⁸ and you cannot focus on how to answer. There is not enough time and you are tired.⁴⁹ Your throat is burning. Your stomach is burning.

This man is a stranger to you.⁵⁰ Will he believe you?⁵¹ How do you know he will not pass on information to the authorities in your country?⁵² How do you know he will not touch you, hurt you, arrest detain deport you?

[VOICE 2]

Your back hurts and your neck aches and your eyes are sore from straining to read the small print on the forms in front of you. Maybe you have a cold. You play with your pen and re-assemble the papers so that the Home Office logo can be seen and you trace the outline of the letters and idly shade in the spaces in between.⁵³ Sometimes you think that there must be other jobs out there where you hear happy stories, where people just tell you something nice about their

⁴⁸ 'The interview may last several hours and you will be asked lots of questions. You may be asked questions several times in different ways'; see *Right to Remain* (n 27).

⁴⁹ Sufferers of PTSD in particular have sleep problems due to nightmares, avoidance of sleep because of the distress that nightmares can cause and high anxiety which prevents sleep. Sleep deprivation impacts on the way memory functions as well as the type of memories recalled; see Jane Herlihy, 'Evidentiary Assessment and Psychological Difficulties' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff 2005) 123, 132.

⁵⁰ One meeting is barely sufficient to build trust with an interviewer; *ibid* 124.

⁵¹ 'Be prepared for not being believed: this is the standard position of the Home Office'; see *Right to Remain* (n 27).

⁵² Guidelines state that case-owners should explain that all information will be dealt with in confidence and will not be disclosed to the authorities of the claimant's country; see HO (n 16) para 4.2. However, in 2011, the UKBA organised a meeting between Sudanese asylum seekers and the representatives of the very government that had persecuted them in order to 'verify personal data'. They were asked questions related to the whereabouts of their families and the problems they had with the government; see Stuart Crosthwaite, 'The Border Agency are playing a game to scare us', (*Migration Pulse*, 10 August 2011)

<www.migrantsrights.org.uk/migration-pulse/2011/border-agency-are-playing-game-scare-us-0> accessed 26 August 2014.

⁵³ The UNHCR Quality Initiative Project (QIP) describes frequent displays of 'disinterest' from interviewers including 'staring out of windows and doodling'; see UNHCR 'Quality Initiative Project: Third Report to the Minister' (London 2006) para 2.4.43.

day, and what they say is obviously true because they have no need to deceive you. You think about all those conversations you used to have where you could joke around and not worry about offending anyone and not have to keep repeating the same questions as though you were a broken record.

She looks so fragile and you get a momentary pang of something like desire where you wish you could put your arms around her and tell her it will be okay and that you will make her laugh and maybe you could have a pint together and she would see what a nice guy you are. But that could never happen.

You sigh and wish it were simpler, that there would be something obvious that would take away your responsibility to judge how likely this woman's story is going to be. Really, it would be easier if you only had interviews with men. She could ask to talk to one of the women officers, but you have been assigned her case.⁵⁴ You cannot be bothered to check if she wants a woman interviewer now. It's easier just to get on with it. It will be over soon.

The rain is so heavy, your head is heavy.

What. Is. Your. Name.

How. Do. You. Spell. That.

Please check and sign this.⁵⁵

III. CHAPTER TWO: DIFFICULTIES OF DISCLOSURE

3.1 (Mis)remembered: Memory and Trauma

To articulate the past historically does not mean to recognize it "the way it really was" ...It means to seize hold of a memory as it flashes up at a moment of danger.

—Walter Benjamin, *Theses on the Philosophy of History*⁵⁶

⁵⁴ Each applicant will have been asked at screening to indicate a preference for a male or female interviewer, 'requests made on the day of an interview... should be met as far as is operationally possible'; see UKBA 2010 (n 16) para 7.1. However, in reality – and as above – claimants are not always aware of this option; see Bögner and others (n 46) 527. Furthermore, Asylum Aid found that the majority of women interviewed for their research had not understood the full implications of the question and did not want to appear 'difficult' or 'picky' and on hindsight would have preferred a female interviewer; see Muggeridge and Maman (n 5) 35.

⁵⁵ The identity of the claimant must be verified; see HO (n 16) para 4.2. This involves checking and signing at the bottom of pages 2-4 of the screening interview form; *ibid* para 4.5. Decision-makers are conditioned to distrust even whether claimants are really who they say they are.

*What you witness
severs you from yourself,
then binds you tighter
to the shattered world.*

—Karen Connelly, *The Border Surrounds Us*⁵⁷

While memory is generally regarded to be the brain's ability to remember the past, it also has a more nebulous, abstract formation.⁵⁸ If we see memory as constituting an individual's perception of the past self's experiences, it is necessarily a subjective, constantly adjustable process.⁵⁹ Sartre, in developing ideas of facticity,⁶⁰ contended that an individual's past is subject to changing values and interpretations. Memory (and by consequence the self), is thus 'born every day, springing from the past and set against it'.⁶¹ Memory, specifically autobiographical memory, is an 'imaginative reconstruction... built out of the relation of our attitude towards a whole mass of organised past reactions or experience'.⁶² Therefore, rather than being immutable and fixed, it evolves as a synthesis of experiences rather than as the replay of a videotape.⁶³ Antze and Lambek, referring to Ricoeur's hermeneutic spiral of interpretation,⁶⁴ posit that memory can be updated and re-explored in light of what transpires later.⁶⁵ Furthermore, memory is subject to distortion, inaccuracy and failure.⁶⁶

These observations render problematic a fundamental assumption in the asylum process that autobiographical memories can be recalled reliably, consistently and accurately.⁶⁷ Such assumptions are bound up in narrow attitudes to credibility, codified in guidelines, which state:

⁵⁶ Walter Benjamin, *Illuminations* (Fontana 1973).

⁵⁷ Karen Connelly, *The Border Surrounds Us* (McClelland & Stewart 2000).

⁵⁸ Patricia Fara and Karalyn Patterson (eds), *Memory* (CUP 1998) 1.

⁵⁹ Poststructuralism proposes a 'subjectivity which is precarious... constantly being reconstituted in discourse each time we think or speak'; see Chris Weedon, *Feminist Practice and Poststructuralist Theory* (2nd edn, Blackwell 1997) 32.

⁶⁰ Jean-Paul Sartre, *L'Être et le Néant* (Gallimard 1943).

⁶¹ Eduardo Galeano, *The Book of Embraces* (Cedric Belfrage tr, WW Norton & Company 1992) 124.

⁶² Frederic C Bartlett, *Remembering: A Study in Experimental and Social Psychology* (CUP 1932) 213.

⁶³ Elizabeth F Loftus, 'Our changeable memories: legal and practical implications' (2003) 4 *Nature Reviews Neuroscience* 231.

⁶⁴ Paul Ricoeur, *Interpretation Theory: Discourse and the Surplus of Meaning* (Texas Christian University Press 1976).

⁶⁵ Paul Antze and Michael Lambek (eds), *Tense Past: Cultural Essays in Trauma and Memory* (Routledge 1996) xix.

⁶⁶ Herlihy and others, 'What Assumptions about Human Behaviour Underlie Asylum Judgements?' (n 33).

⁶⁷ *ibid.*

The level of detail... about the past and present is a factor which may influence a decision maker when assessing internal credibility... It is reasonable to expect that an applicant who has experienced an event will be able to recount the central elements in a broadly consistent manner.⁶⁸

However, if the 'incompleteness and tentativeness' of an account attests to its veracity,⁶⁹ and if fragmentation and disorganisation are characteristic of trauma recall,⁷⁰ which a high proportion of asylum seekers' memories will involve, then should that which is judged as damaging credibility in fact be aiding it? It is particularly unreasonable to expect individuals with PTSD to recall details about traumatic events.⁷¹ Research, contrary to lay assumptions, suggests that detail is in fact *impeded* by traumatic experience.⁷²

Traumatic memories are generally composed of fragments, often sensory impressions accessed vividly and involuntarily in the form of flashbacks,⁷³ as though occurring in the present.⁷⁴ Flashbacks can be provoked through triggers. Triggers are defined as 'cues that symbolise or resemble' an event,⁷⁵ and are

⁶⁸ UKBA 2012 (n 13) para 4.3.1.

⁶⁹ Laurence J Kirmaya, 'Landscapes of Memory: Trauma, Narrative and Dissociation' in Paul Antze and Michael Lambek (eds), *Tense Past: Cultural Essays in Trauma and Memory* (Routledge 1996) 173, 174.

⁷⁰ Chris R Brewin, 'Autobiographical memory for trauma: Update and four controversies' (2007) 15(3) *Memory* 227, 236.

⁷¹ Caruth describes PTSD as 'the direct imposition on the mind of the unavoidable reality of horrific events, the taking over of the mind, psychically and neurobiologically, by an event it cannot control; see Cathy Caruth, *Unclaimed Experience: Trauma, Narrative and History* (John Hopkins University Press 1996) 58. It is important to remember that categorical diagnoses of PTSD do not apply to all individuals; not everyone who has experienced trauma develops PTSD; Arieh Y Shalev, 'PTSD: A Disorder of Recovery?' in Laurence J Kirmayer and others (eds), *Understanding Trauma: Integrating Biological, Clinical and Cultural Perspectives* (CUP 2007) 207. It is common to have symptoms without meeting all the criteria; see Jane Herlihy and Stuart Turner, 'Should discrepant accounts given by asylum seekers be taken as proof of deceit?' (2006) 16(2) *Torture* 81, 84. The absence of diagnosis should not negate trauma-related stress and anxiety that individuals may be experiencing. Turning such reactions into a psychiatric condition can be problematic: pathologising grief and distress and universalising and reducing heterogeneous experience. There is also the danger of focussing on the prefix 'post-' as though the trauma is consigned to the past; for many refugees and asylum seekers, isolation, uncertainty and destitution mean that trauma is ongoing.

⁷² Brewin (n 70).

⁷³ Bessel A van der Kolk, 'Trauma and Memory' in Bessel A van der Kolk and others (eds), *Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society* (Guildford Press 1996) 279, 289.

⁷⁴ Herlihy and Turner (n 71) 86.

⁷⁵ Herlihy, 'Evidentiary Assessment and Psychological Difficulties' (n 49) 130.

often themselves sensory (as in the Proustian involuntary flooding of memory through the Madeleine⁷⁶). Because such memories are triggered rather than being consciously controlled, different aspects, experiences or events are likely to be recalled depending on the triggering incidents in the interview. This exemplifies the contingency of the interview; anything could be remembered and narrated. Further, HO interviews are highly anxiety-producing,⁷⁷ and memory is known to be distorted by emotional state at the time of recall,⁷⁸ especially as remembering trauma often means that people 'feel or act as if they were being traumatized all over again'.⁷⁹ Stress and anxiety have debilitating effects on recall capacity,⁸⁰ producing a vicious cycle of anxiety and forgetting.

There are numerous psychological conditions, including depression, Dissociative Amnesia and Generalised Anxiety Disorder,⁸¹ which further complicate memory retrieval and concentration,⁸² and these can be exacerbated by interview proceedings. I wish to focus on two symptoms (of PTSD in particular) which are especially relevant to the difficulties of disclosure experienced by many asylum seekers: avoidance and dissociation. Avoidance describes the tendency to make deliberative efforts to avoid thoughts, feelings, or conversations about the traumatic event.⁸³ It negatively impacts asylum claims⁸⁴ because evading trauma-specific questions in the interview can be interpreted as a 'failure without reasonable explanation to answer a question', behaviour allegedly 'designed or likely to conceal information or to mislead'.⁸⁵ Avoidance can also explain failing to claim asylum 'at the earliest possible time', behaviour deemed damaging to general credibility.⁸⁶ It is unreasonable to expect asylum seekers to voluntarily and immediately impart sensitive and traumatic events in an interview when they are unwilling or unable to access

⁷⁶ Marcel Proust, *Du Cote du Chez Swann* (Bernard Grasset 1913).

⁷⁷ Diana Bögner and others, 'Impact of sexual violence on disclosure during Home Office interviews' (2007) 191 *British Journal of Psychiatry* 75.

⁷⁸ van der Kolk (n 73) 281.

⁷⁹ *ibid* 284.

⁸⁰ Jane Herlihy and others, 'Just Tell Us What Happened To You: Autobiographical Memory and Seeking Asylum' (2012) 26(5) *Applied Cognitive Psychology* 661, 664.

⁸¹ Characterised by apprehensions outside a person's control, and associated with fatigue, it severely impacts on general social functioning and the ability to focus; see American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th edn, American Psychiatric Association 1994).

⁸² J Mark G Williams and others, *Cognitive Psychology and Emotional Disorders* (2nd edn, Wiley 1996).

⁸³ American Psychiatric Association (n 82) 468.

⁸⁴ Herlihy and others, 'Just Tell Us What Happened To You: Autobiographical Memory and Seeking Asylum' (n 80) 665.

⁸⁵ Asylum and Immigration Act 2004, s 8(3)(e).

⁸⁶ Immigration Rules 2016, para 339L(iv).

these memories in the first place due to such avoidance mechanisms. The same applies to symptoms of dissociation, compounded by high stress environments such as asylum interviews. It has been found that people with a history of subjection to sexual violence show greater avoidance and dissociative symptoms.⁸⁷ Dissociation can also occur peritraumatically (at the time of the traumatic event) as a psychological defence mechanism to protect a victim who is trapped.⁸⁸ If this is the case, the individual will be unable to recall the event because effectively they were not present, psychologically, when it occurred.

For asylum decision-makers, the above is nothing new. Asylum guidelines ostensibly show 'sensitivity and awareness of the effects of trauma on memory',⁸⁹ and acknowledge that there may be 'difficulties in recounting the details because of the sensitive nature of those experiences'.⁹⁰ Decision-makers are also reminded to be aware of behaviour symptomatic to 'women who have been sexually assaulted', such as:

persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, shame, a pervasive loss of control and memory loss or distortion.⁹¹

Yet despite this, credibility assessments are still based on erroneous assumptions about how memory functions and HO interviews continue to be negatively impacted by inaccuracies of recall, inconsistencies and so-called incoherence.⁹² One RFRL stated that 'It is considered reasonable to expect you to recall with consistency the years in which your family members were allegedly killed'.⁹³ An anonymous immigration judge assumed a 'raped person' would know (and remember and disclose) they were raped 'given that rape is such a serious thing to happen to any woman'.⁹⁴ Not only does this statement epitomise structurally sexist misconceptions of rape, but it is based on misguided expectations of how traumatic memories, particularly of a sexual nature, are formed, accessed and verbalised, or not. If certain memories are

⁸⁷ Bögner and others (n 77) 78.

⁸⁸ Edna B Foa and Barbara Olatov Rothbaum, *Treating the Trauma of Rape: Cognitive-Behavioural Therapy for PTSD* (Guildford Press 1998) 29–30.

⁸⁹ HO (n 16) para 5.4.

⁹⁰ *ibid* para 5.7.

⁹¹ UKBA 2010 (n 16) para 7.2.

⁹² Bögner and others (n 77); Herlihy and Turner (n 71); Herlihy and others, 'What Assumptions about Human Behaviour Underlie Asylum Judgements?' (n 33); Feder (n 6).

⁹³ Muggeridge and Maman (n 5) 55.

⁹⁴ Herlihy and others, 'What Assumptions about Human Behaviour Underlie Asylum Judgements?' (n 33) 361.

inaccessible, and incapable of being processed, they cannot be narrated in order for the guidelines to even be realised and for credibility to be assessed at all.

I now move to a discussion on the barriers to the verbal act of disclosing trauma in HO interviews.

3.2 (Un)told: Pain, Shame and 'Coherence'

Pain comes unshareably into our midst as at once that which cannot be denied and that which cannot be confirmed. Whatever pain achieves, it achieves through its unshareability and it ensures this unshareability in part through its resistance to language.

–Elaine Scarry, *The Body in Pain*⁹⁵

We are surrounded by [chaos], and equipped for coexistence with it only by our fictive powers.

–Frank Kermode, *The Sense of an Ending*⁹⁶

If pain is intrinsically unassimilable,⁹⁷ resisting simple comprehension,⁹⁸ how is articulation possible? Van der Kolk states that traumatic memory has 'no linguistic components'.⁹⁹ This can explain why for many asylum seekers traumatic experiences are not disclosed, and if they are, 'coherence' is difficult,¹⁰⁰ quite simply because no complete verbal narrative of their experience exists.¹⁰¹ Silence, 'what is unsayable',¹⁰² may be the only option.

There is another type of silence: that which is brought about by shame. Heller's general theory of shame proposes that it is simultaneously a primary, socialised effect, externally imposed and internally generated.¹⁰³ Pre-migration denial and silence may have been internalised, especially in cultures of deeply-engrained notions of propriety and honour. Survivors of rape may wish to protect the

⁹⁵ Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (OUP 1985).

⁹⁶ Frank Kermode, *The Sense of an Ending: Studies in the Theory of Fiction* (OUP 1968).

⁹⁷ Ann Scott, *Real Events Revisited: Fantasy, Memory and Psychoanalysis* (Virago 1996) 43.

⁹⁸ Caruth (n 71) 6.

⁹⁹ van der Kolk (n 73) 289.

¹⁰⁰ Immigration Rules 2016, para 339L(iii).

¹⁰¹ Herlihy and Turner (n 71) 86.

¹⁰² Veena Das, 'Violence and the Work of Time' in Anthony P Cohen (ed), *Signifying Identities: Anthropological Perspectives on Boundaries and Contested Values* (Routledge 2000) 59.

¹⁰³ Agnes Heller, *The Power of Shame: A Rational Perspective* (Routledge and Kegan Paul 1985) 13.

social position of their relatives,¹⁰⁴ feeling personally to blame.¹⁰⁵ Disclosing the experience of rape would be admitting ‘something bad about themselves, rather than the perpetrator’.¹⁰⁶ Feelings of shame are also bound up in PTSD avoidance symptoms,¹⁰⁷ and asylum applicants who have been subjected to sexual violence have a higher prevalence and severity of such psychological symptoms, inhibiting their ability to disclose and describe experiences.¹⁰⁸ Profound feelings of shame are recognised in asylum guidelines as a ‘major obstacle to disclosure’,¹⁰⁹ yet asylum seekers are expected to ‘immediately tell strangers – UKBA officers and legal representatives – of any violence, including sexual violence’, experienced.¹¹⁰

The expectation for asylum seekers to make claims promptly (and fully) is unfair.¹¹¹ It is widely recognised that many people will never speak about sexual violence or will remain silent about it for many years.¹¹² Late disclosure is to be expected of any traumatic remembering, what Caruth refers to as ‘the inescapability of its belated impact’.¹¹³ Guidelines acknowledge this, stating that late disclosure of gender-based violence should not automatically count against credibility,¹¹⁴ yet the reality is that delayed reporting does adversely impact credibility assessments.¹¹⁵

Whether an asylum claim is delayed or made promptly, one of the key elements of credibility assessment is if a person’s statements are found to be ‘coherent’.

¹⁰⁴ Marian Tankink, ‘Silence as a means of controlling the explosive nature of sexual violence’, (CARE FULL, Medico-Legal Reports and the Istanbul Protocol in Asylum Procedures conference, Amsterdam, 15 November 2006) 2

<www.freedomfromtorture.org/sites/default/files/documents/Marian%20Tankink%20presentation%20CARE%20FULL.pdf> accessed 14 August 2014.

¹⁰⁵ Bögner and others (n 46) 521.

¹⁰⁶ Jan Shaw and Rachel Witkin, ‘Get it Right: How Home Office decision making fails refugees’ (Amnesty International UK 2004) 36.

¹⁰⁷ Bögner and others (n 77) 79.

¹⁰⁸ Feder (n 6).

¹⁰⁹ Nathalia Berkowitz and Catriona Jarvis, ‘Immigration Appellate Authority: Asylum Gender Guidelines’ (Crown Copyright 2000) <doubleviolence.free.fr/spip/IMG/pdf/GB_gender_-_copie.pdf> accessed 19 August 2014, para 5.43.

¹¹⁰ Human Rights Watch (n 8) 3.

¹¹¹ Immigration Rules 2016, para 339L(iv).

¹¹² Berkowitz and Jarvis (n 109).

¹¹³ Caruth (n 71) 7.

¹¹⁴ UKBA 2010 (n 16) para 7.2.

¹¹⁵ Bögner and others (n 77); Ceneda and Palmer (n 38) 84-86; Louise Ellison and Vanessa E Munro, ‘Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility’ (2009) 49(2) British Journal of Criminology 202, 203.

This is defined as:

adj. 1 (of a person) able to speak intelligibly and articulately. 2 (of speech, an argument, etc.) logical and consistent; easily followed. 3 cohering; sticking together.¹¹⁶

The guidelines specify coherence of 'statements' not 'of a person';¹¹⁷ but in reality, demeanour and behaviour also impact on 'general credibility'. What constitutes coherence, both of a person and of speech, is subjective: the judgement of speaking 'intelligibly and articulately' is likely to be racialised and classist, and there is no universal logic against which to assess an account. Culture, world-view and language play a significant role in how an account is received. Whether an account can be 'easily followed' depends not only on the speaker, but on the listener's ability and motivation to listen. The presence of an interpreter adds an extra layer to the assessment of coherence but unfortunately there is no space to explore this here.

Furthermore, if trauma is incommunicable/unshareable, then the assessment of coherence is destined to fail. Das writes that in the aftermath of violence, 'if words now appear, they are like broken shadows of the notion of everyday words';¹¹⁸ collecting them and making sense of them is no easy task.

I will now explore coherence-as-consistency. Consistency of an asylum claim is key to determining internal credibility.¹¹⁹ Guidelines state that an applicant's inability to remain consistent... may lead the decision maker not to believe the applicant's claim.¹²⁰ Yet, it also states that claimants should be given the opportunity to 'explain or clarify' discrepancies.¹²¹ However, Amnesty International found that UKBA officers often fail to give asylum seekers the opportunity to rectify apparent discrepancies between the screening interview and the substantive interview.¹²² Refusal letters written *ex post facto* often cite discrepancies from the interviews, which have been spotted 'later on' and inserted into the RFRL.¹²³

¹¹⁶ Oxford English Dictionary (2nd edn, Oxford University Press 1996).

¹¹⁷ Immigration Rules 2016, para 339L(iii).

¹¹⁸ Das (n 102) 69.

¹¹⁹ Herlihy and Turner (n 71) 82; Pär Anders Granhag and others, 'Granting Asylum or Not? Migration Board Personnel's Beliefs about Deception' (2005) 31(1) *Journal of Ethnic and Migration Studies* 29, 38.

¹²⁰ UKBA 2012 (n 13) para 4.3.1.

¹²¹ *ibid.*

¹²² Shaw and Witkin (n 106) 32.

¹²³ *ibid.* 20.

Discrepancies in (re)telling are, however, to be expected. As has been discussed, memory is subject to change and (re)interpretation in different circumstances and over time. The same applies to a narrative. Something is inevitably lost or gained in the act of speech:¹²⁴ 'Breaking is a hazard of transmission'.¹²⁵ When people retell events they take different perspectives for different audiences and purposes,¹²⁶ and there will always be distortions in successive accounts.¹²⁷ Cohen draws on psychological studies¹²⁸ to substantiate that 'no two reformulations can be absolutely identical', and that repeated recall over time increases error rate.¹²⁹ Studies have shown that for people with PTSD, more discrepancies are found the longer the time between successive accounts.¹³⁰ This is particularly relevant because there may be a significant time lapse between the initial screening interview and the substantive HO interview. As Herlihy argues, if discrepancies continue to be used to refute credibility, asylum seekers with PTSD (or, as mentioned earlier, who have experienced trauma but do not necessarily meet all the criteria for diagnosis) are more likely to be rejected systematically the longer their application takes.¹³¹ The long drawn-out decision-making process should thus be challenged, even more so if it has a disproportionately adverse impact on traumatised claimants.

It is worth noting that when asked to repeat information that has already been given, people can assume that the first account was unsatisfactory and therefore supply extra or different information or 'fill in the blanks [to] complete the picture'.¹³² Similarly, where accuracy over dates is demanded, and when people

¹²⁴ Philosophers of language, eg Searle (John R Searle, *Speech Acts: An Essay in the Philosophy of Language* (CUP 1969)) characterise speaking as the performance of 'speech acts' and explore the connection between what is said, what is intended, what a sentence means and what the hearer understands.

¹²⁵ Stefania Pandolfo, *Impasse of the Angels: Scenes from a Moroccan Space of Memory* (University of Chicago Press 1997) 281.

¹²⁶ Elizabeth J Marsh, Barbara Tversky and Michael Hutson, 'How Eyewitnesses Talk About Events: Implications for Memory.' (2005) 19(5) *Applied Cognitive Psychology* 531.

¹²⁷ Antze and Lambek (n 65) xii.

¹²⁸ Stephen J Anderson and others, 'Rewriting the Past: Some Factors Affecting the Variability of Personal Memories' (2000) 14 *Applied Cognitive Psychology* 435.

¹²⁹ Juliet Cohen, 'Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be said to Undermine Credibility of Testimony' (2001) 69(1) *Medico-Legal Journal*

<www.freedomfromtorture.org/sites/default/files/documents/JulietCohenRecallandCredibility.pdf> accessed 16 August 2014, 4.

¹³⁰ Jane Herlihy and others, 'Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study' (2002) 324 *British Medical Journal* 324, 326.

¹³¹ *ibid* 327.

¹³² van der Kolk (n 73) 297.

cannot remember clearly, the temptation can be to 'invent' a date.¹³³ When there is so much at stake in an interview, it is understandable for claimants to want to give an account close to the 'appropriate image of the "convention refugee"' in order to satisfy decision-makers' expectations.¹³⁴ The notion of an 'appropriate image' assumes gendered stereotypes and similarly 'appropriate' emotional expressions, particularly when speaking of gender-related violence.¹³⁵

Kaufman and his colleagues found that credibility judgments were strongly influenced by the emotions displayed and 'not by the content of the story'.¹³⁶ For claims related to sexual violence, this issue creates a catch-22: 'the complainant's distress is not seen as corroborative, but absence of distress can be used against her'.¹³⁷ Spijkerboer writes that 'in sum, applicants should display emotion but not too much'.¹³⁸ Guidelines state that decision-makers should not be influenced by 'subjective factors, for example, if the applicant appears nervous... or entirely calm and rational'.¹³⁹ The fact that this has to be stated in the guidelines suggests that assumptions about demeanour play a part in decision-making.

Ultimately, telling is performative: 'We select, we omit, we exaggerate, we embellish, and we dramatize as we relate events'.¹⁴⁰ It must be remembered that an account is not given in a vacuum, it is related to a listener whose presence, as well as verbal and non-verbal responses, will mould and shape a narrative. This brings us onto the dynamic relation between the speaker and listener in an interview setting.

IV. CHAPTER THREE: HOW A STORY IS RECEIVED

4.1 (Un)heard: What is 'plausible'?

¹³³ Pirouet (n 20) 50.

¹³⁴ Cécile Rousseau and others, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' (2002) 15(1) *Journal of Refugee Studies* 43, 51.

¹³⁵ T Spijkerboer, *Gender and Refugee Status* (Ashgate Publishing Company 2000) 56.

¹³⁶ Geir Kaufmann and others, 'The Importance of Being Earnest: Displayed Emotions and Witness Credibility' (2003) 17(1) *Applied Cognitive Psychology* 21.

¹³⁷ Sue Lees, *Carnal Knowledge: Rape on Trial* (Hamish Hamilton 1996) 119.

¹³⁸ Thomas Spijkerboer, 'Stereotyping and Acceleration: Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers 2005) 72.

¹³⁹ UKBA 2012 (n 13) para 4.3.1.

¹⁴⁰ Marsh, Tversky and Hutson (n 126).

*What might have been is an abstraction
Remaining a perpetual possibility
Only in a world of speculation.
– T.S. Eliot, *Burnt Norton*¹⁴¹*

*Facts are hard to establish and capable of being given many meanings. Reality is built
on our own prejudices, gullibility and ignorance.
– Salman Rushdie, *Midnight's Children*¹⁴²*

Once told, it is the role of the decision-maker to interpret an account not only for its credibility-as-coherence but also for its credibility-as-plausibility. Findings of plausibility, especially when there is a lack of objective evidence, are generally based on assumptions about human interaction and behaviour.¹⁴³ Interpretation is an inherently problematic terrain and will always be reductive, even stifling.¹⁴⁴ In the same way that there is never an objective narrator,¹⁴⁵ there can never be an objective listener. Everyone has their own set of biases that will destabilise neutrality and this, from the outset, problematizes credibility as the method of asylum decision-making.

UNHCR states that 'disbelief is a very human coping strategy that undermines objectivity and impartiality'.¹⁴⁶ This section explores how such disbelief comes about.

The definition of plausible is as follows:

adj. 1 (of an argument, statement, etc.) seeming reasonable or probable. 2 (of a person) persuasive or deceptive.¹⁴⁷¹⁴⁸

Again, it is the plausibility of a person's 'statement' which is being assessed,¹⁴⁹ not ostensibly the person themselves. However, outward displays of emotion and behaviour impact on general credibility.

¹⁴¹ TS Eliot, *Burnt Norton* (Faber and Faber 1941).

¹⁴² Salman Rushdie, *Midnight's Children* (Jonathan Cape 1981).

¹⁴³ Herlihy and others, 'What Assumptions about Human Behaviour Underlie Asylum Judgements?' (n 33) 364.

¹⁴⁴ Susan Sontag, *Against Interpretation and Other Essays* (Farrar, Straus and Giroux 1966).

¹⁴⁵ Foucault (n 17).

¹⁴⁶ UNHCR 'Beyond Proof: Credibility Assessment in EU Asylum Systems' (Brussels 2013) 40.

¹⁴⁷ The word 'deceptive' is surprising here, but is not the meaning attached to plausibility by the UKBA.

¹⁴⁸ Oxford English Dictionary (n 116).

¹⁴⁹ Immigration Rules 2016, para 399L(iii).

The assessment of plausibility is rooted in subjective processes of reasoning.¹⁵⁰ The word 'reasonable' crops up time and again in the UKBA guidelines on determining credibility,¹⁵¹ and the phrase 'a reasonable explanation must itself be believable' shows just how vague and subjective such assessment is,¹⁵² begging the question of whose reasonableness is being applied. In relation to assessing fear of persecution, the UNHCR Handbook recognises that fear itself is 'subjective',¹⁵³ and in order for the expressed fear of persecution to be deemed credible, such fear must, again, be 'reasonable'.¹⁵⁴ As Douzinas and Warrington state, 'fear is either reasonable and can be understood... or is unreasonable and therefore non-existent'.¹⁵⁵ In one RFRL (from April 2014), the very fact of having *survived* persecution was used as a reason for not qualifying fear of persecution:

You were able to live in Bangladesh until 2006 without coming to any harm... This is considered to be inconsistent with your claim that you will be killed by these people upon your return to Bangladesh.¹⁵⁶

In this case, the appellant's fear was not seen as plausible, her claim was not credible and so she was refused asylum.

Conceptions of plausibility are culturally-constructed and propped up by remnants of colonial hegemonic prescriptions of authenticity in narratives. Spijkerboer posits that the 'norm' by which accounts are judged is 'Western and often traditional'.¹⁵⁷ Actions that might therefore seem implausible or illogical by such western standards would not be so if viewed within their specific cultural and local context.¹⁵⁸ Take for example decision-makers' assumptions on how authorities 'over there' behave,¹⁵⁹ which mould the perception of 'failure of state protection', integral to claims of persecution. Culturally-imbued assumptions are also relevant to understandings of sexual violence, which are shaped by context-specific factors including socio-cultural values, historicity

¹⁵⁰ Feder (n 6) 299.

¹⁵¹ UKBA 2012 (n 13).

¹⁵² *ibid* Annex A.

¹⁵³ UNHCR 1992 (n 16) 37.

¹⁵⁴ *ibid* 41.

¹⁵⁵ Douzinas and Warrington (n 19) 208.

¹⁵⁶ RFRL from an unnamed source to author (April 2014). I cannot and am unwilling to disclose any further information as aforementioned.

¹⁵⁷ Spijkerboer (n 138) 77.

¹⁵⁸ Ellie Smith, 'Right First Time? Home Office Asylum Interviewing and Reasons for Refusal Letters' (Medical Foundation 2004) 32.

¹⁵⁹ Herlihy (n 33) 359.

and constructed gender roles.¹⁶⁰ Furthermore, we all have a frame of reference, affected, of course, by cultural setting, but also by lived experience. This is often referred to as 'schemata', a term developed by Frederic Bartlett and described as a jumble of 'innumerable traces'.¹⁶¹ Everyone relies on this personal and integrated world-view and set of stereotypes to predict the 'possible and likely behaviour' of others.¹⁶² However, there are certain experiences that we cannot relate to or even imagine and 'in these realms, our otherwise useful stereotypes are insufficient'.¹⁶³

Yet the assessment of plausibility in asylum decision-making is frequently predicated upon personal assumptions or how-I-would-behave-in-your-situation, even if the situation is outside the lived experience of the decision-maker:

Since no evidence is provided to support such allegations of implausibility, it can only be assumed that they are based... on what the Secretary of State would do if [s]he was a prison guard, a guerilla or a drugs baron... Equally, the refusal letter will claim that the Secretary of State knows how your client would and would not have acted... how much torture she would take without confessing, or whether she would risk returning to her village.¹⁶⁴

Such assumptions are 'based on nothing more than the sensibilities of the caseworker themselves, in accordance with their own view of what would constitute 'rational' behaviour in a given situation'.¹⁶⁵ An RFRL cited in Asylum Aid's 2011 report states: 'You claim you 'fell in love'. This is not consistent with the fact that you saw him three times in total'.¹⁶⁶

If behaviour does not conform to expectations, then it is seen as implausible. Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act

¹⁶⁰ Michael Peel (ed), 'Rape as a Method of Torture' (Medical Foundation 2004) <www.freedomfromtorture.org/sites/default/files/documents/rape_singles2.pdf> accessed 16 August 2014.

¹⁶¹ Bartlett (n 62) 214.

¹⁶² Herlihy and others, 'What Assumptions about Human Behaviour Underlie Asylum Judgements?' (n 33) 363.

¹⁶³ *ibid.*

¹⁶⁴ Mark Henderson and Alison Pickup, *Best Practice Guide to Asylum and Human Rights Appeals* (Electronic Immigration Network 2012) <www.ein.org.uk/bpg/chapter/1> accessed 23 August 2014, para 1.35.

¹⁶⁵ Shaw and Witkin (n 106) 19.

¹⁶⁶ Muggeridge and Maman (n 5) 55.

2004 gives a list of behaviours deemed 'damaging to credibility'. RFRLs will pick up on such behaviour, often totally unrelated to the claim itself, stating (in a sentence that crops up so often that it must just be 'cut and paste') that 'credibility has been damaged as a result of your actions'.¹⁶⁷ Subsection 3(a)-(d) of section 8 of the Act describes failure to produce a (valid) passport or travel documents, 'without reasonable explanation', as 'kinds of behaviour... treated as designed or likely to conceal information or mislead.' However, such standards are arbitrary and misguided. Not possessing 'valid' travel documents is in fact often a consequence of persecutory experience. In the words of an asylum-seeker I spoke to on the subject of HO interviews, when fleeing persecution, 'getting all the right documents in order is not going to be your priority – running for your life is going to be your priority'.

Not only does certain behaviour outside HO interviews affect the credibility assessment, but behaviour during the interview is also scrutinised in order to ascertain truth-telling or lying, again, based on (false) assumptions. Vrij and his colleagues outline some of the lay assumptions on deception, including the fact that professionals tend to overestimate their ability to detect deceit.¹⁶⁸ For example, the assumption that liars change their story leads, by fallacious reasoning, to the idea that changes in a story indicate lies,¹⁶⁹ which is why credibility is often negatively impacted by discrepancies. Another common assumption is that lying and telling the truth each produce differing body language. However, signs of nervousness and shame, such as avoiding eye contact and fidgeting, can wrongly be interpreted as symptoms of dishonesty.¹⁷⁰ Averting one's gaze, for example, is one of many culturally-mediated forms of non-verbal communication. As Granhag and his colleagues write, it is a sign of respect in certain African cultures (as in parts of South Asia), whereas, in western cultures, it can be interpreted as an indicator of deception.¹⁷¹ As well as being problematic from a cultural perspective, interviewers may see such demeanour as embarrassment at having engaged in the 'reprehensible act of lying'.¹⁷² Such interpretations are reductive. There are multiple reasons, beyond and instead of the allegedly embarrassing act of being caught lying, which

¹⁶⁷ RFRL (n 156).

¹⁶⁸ Aldert Vrij and others, 'Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection' (2010) 11(3) *Psychological Science in the Public Interest* 89.

¹⁶⁹ Juliet Cohen, 'Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be said to Undermine Credibility of Testimony' (n 129) 11.

¹⁷⁰ Vrij and others (n 168) 100.

¹⁷¹ Granhag and others (n 119) 31.

¹⁷² Vrij and others (n 168) 96.

explain such demeanour. For example, the fear of not being believed will often result in body language which jeopardises credibility.¹⁷³

There is also the assumption that deception is more taxing than truth-telling.¹⁷⁴ However, the opposite is more likely since recalling details of once-repressed traumatic memories, attempting to overcome barriers of shame, and the difficulties of summarising a complex account of gender-related persecution (possibly in a language that is not one's own), together with the bureaucratic complexity of an unfamiliar, frequently hostile environment, are plenty of reasons for displays of high-effort recall and anxiety.

An interview is a two-way process. I will now explore the role of the interviewers in more detail, showing that there are more than just personal assumptions at play in the decision-making process.

4.2 (Mis)trusted: 'Just a Few Bad Apples' or Contingency-as-Policy?

*But the border guard is not
amused, he does not
believe, he is paid
to doubt you.*

–Karen Connelly, *The Border Surrounds Us*¹⁷⁵

*Take note: I am powerful. But from room to room stand gatekeepers, each more powerful
than the other.*

–Franz Kafka, *The Trial*¹⁷⁶

The assessment of credibility (as-coherence-and-plausibility) is irrefutably subjective, and as Herlihy and her colleagues write, 'where there is subjectivity there is inevitably inconsistency'.¹⁷⁷ Such inconsistency manifests itself in arbitrary decision-making and high administrative error rates.¹⁷⁸ If asylum is granted based on 'a nice judge on a good day',¹⁷⁹ from a selection of a 'highly

¹⁷³ Herlihy and others, 'Just Tell Us What Happened To You: Autobiographical Memory and Seeking Asylum' (n 80) 670.

¹⁷⁴ *ibid.*

¹⁷⁵ Connelly (n 57).

¹⁷⁶ Kafka (n 19).

¹⁷⁷ Herlihy and others, 'What Assumptions about Human Behaviour Underlie Asylum Judgements?' (n 33) 364.

¹⁷⁸ Griffiths (n 2) 10.

¹⁷⁹ Bail for Immigration Detainees, 'A nice judge on a good day: immigration bail and the right to liberty' (Bail for Immigration Detainees 2010).

heterogeneous population' of officials,¹⁸⁰ then the outcome of HO interviews will be contingent.

Too many examples exist of substandard decision-making and incompetent interviewers. If credibility is to be used to determine asylum claims, then it should at least be employed by informed decision-makers. Yet Asylum Aid documented a limited awareness of the UK's legal obligations under the Refugee Convention,¹⁸¹ as well as a limited awareness of the Home Office Gender Guidelines.¹⁸² For example, despite Female Genital Mutilation (FGM) being explicitly mentioned in the guidelines, one interviewer told a claimant: 'I have not heard of female circumcision'.¹⁸³ Similarly shocking statements have been issued by HO employees, such as the viewing of trafficking as a 'labour contractual relationship' when one trafficked applicant was refused asylum on the basis that she had gained 'valuable work experience which could be put to use on return to her country of origin'.¹⁸⁴

The UNHCR Handbook reminds decision-makers that claims should be assessed with a 'spirit of justice and understanding',¹⁸⁵ yet claimants have reported feeling persecuted and physically unsafe during interviews.¹⁸⁶ Furthermore, asylum seekers commonly report feeling disbelieved,¹⁸⁷ with interviewers making no effort to hide incredulity despite guidelines stating that this should be avoided: 'improbable' statements should not be accompanied by 'facial expressions of disbelief'.¹⁸⁸ In the same way that interviewers may be influenced by a claimant's body language, so too will interviewers' non-verbal and verbal responses inhibit or facilitate claimants' disclosure.

Suggestibility, or how a narrative is constructed by the questions asked, or the *way* in which they are phrased, is often a consequence of what the interviewer *wants* or *does not want* to know. They may seek information confirming existing beliefs or expectations,¹⁸⁹ referred to by Vrij and his colleagues as 'confirmation bias'.¹⁹⁰ This is recognised by UNHCR as a risk that:

¹⁸⁰ Gill (n 3) 215.

¹⁸¹ Muggeridge and Maman (n 5) 5.

¹⁸² Ceneda and Palmer (n 38) 25.

¹⁸³ Muggeridge and Maman (n 5) 39.

¹⁸⁴ Querton (n 3) 30.

¹⁸⁵ UNHCR (n 16) para 202.

¹⁸⁶ Bögner and others (n 46) 526.

¹⁸⁷ Griffiths (n 2); Querton (n 3); Muggeridge and Maman (n 5).

¹⁸⁸ HO (n 16) para 5.1.

¹⁸⁹ Herlihy and others, 'What Assumptions about Human Behaviour Underlie Asylum Judgements?' (n 33).

¹⁹⁰ Vrij and others (n 168) 97.

decision-makers may, consciously or unconsciously, categorize applications into generic case profiles and make predetermined assumptions about their credibility.¹⁹¹

Interviewers' predetermined assumptions can lead to closed questions which allow only yes/no answers rather than a narrative space.¹⁹² Furthermore, due to the malleable nature of memory, suggestive questions can 'contaminate' memory,¹⁹³ whereby memory is updated with additional (mis)information.¹⁹⁴ People have been prevented from going into detail or from bringing up an issue relevant to their claim.¹⁹⁵ This is problematic since guidelines specify that a lack of detail may influence internal credibility.¹⁹⁶ It is doubly unfair to assess credibility if a claimant has been prevented from giving a full account.

Interviewers' desire to avoid hearing traumatic stories,¹⁹⁷ to escape 'vicarious trauma',¹⁹⁸ can explain the above. Decision-makers' jobs are clearly difficult,¹⁹⁹ and being responsible for a decision that has 'dramatic repercussions' for a claimant's life brings 'psychological weight'.²⁰⁰ However, when a claimant's safety, mental health and chance of a chosen life are ultimately dependent on the decision-maker's interpretation of their story and subsequent judgement of credibility, this cannot justify reductive questioning, stereotyping or silencing.

Nonetheless, Feder suggests that decision-makers should be supported in recognising and managing symptoms of vicarious trauma, which could help penetrate the 'refusal mind-set'.²⁰¹ Individual case-owners should not simply be vilified as 'bad apples', as this runs the risk of depoliticising restrictive asylum

¹⁹¹ UNHCR 'Beyond Proof: Credibility Assessment in EU Asylum Systems' (n 146) 40.

¹⁹² Juliet Cohen, 'Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be said to Undermine Credibility of Testimony' (n 129) 4.

¹⁹³ Elizabeth F Loftus, 'Planting misinformation in the human mind: A 30-year investigation of the malleability of memory' (2005) 12 *Learning and Memory* 361.

¹⁹⁴ Lawrence Patihis and others, 'Memory Myths' (2003) 23(3) *Catalyst* 6.

¹⁹⁵ Bögner and others (n 77) 78–79.

¹⁹⁶ UKBA 2012 (n 13) para 4.3.1.

¹⁹⁷ Rousseau and others (n 134) 58; Helen Baillot and others, 'Second-hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context' (2013) 40(4) *Journal of Law and Society* 509.

¹⁹⁸ Charles R Figley, *Compassion Fatigue: Coping with Secondary Traumatic Stress Disorder in Those Who Treat the Traumatized* (Routledge 1995).

¹⁹⁹ Griffiths refers to HO employees as 'undertrained, underpaid, overworked' (Griffiths (n 2) 12) and time pressure exacerbates stress levels, with HO workers facing 'tight deadlines, strict targets and monotonous work schedules'; see Gill (n 3) 228.

²⁰⁰ Rousseau and others (n 134) 49.

²⁰¹ Feder (n 6) 318.

determinations.²⁰² Decision-makers are akin to cogs in the wheel of the asylum system, subject to 'state-justified ideational conditioning',²⁰³ internalised through an institutionalised culture of disbelief.²⁰⁴ The oppressively negative decision-making environment²⁰⁵ is part of the UK's agenda of exclusion,²⁰⁶ aimed at reducing immigration and deterring future applicants.²⁰⁷ The Home Office has the dual function of processing asylum claims and reducing net migration; Teresa May has stated a target of cutting it to below 100,000.²⁰⁸

This accounts for the structural deficiency in the way narratives are allowed to be presented and the way credibility assessment is designed to catch claimants out,²⁰⁹ rather than elicit a full, human story, instead provoking discomfort, intimidation and time pressure. The New Asylum Model (NAM)²¹⁰ introduced shorter time scales through a 'new tightly managed process',²¹¹ but what may have been gained through the focus on bureaucratic efficiency has been lost in fairness and thoroughness.²¹² Speed and quality of decision-making are 'rarely a matching pair'.²¹³ Accelerated procedures (the BREVITY of the screening interview and the DFT) produce barriers to disclosing sensitive information,²¹⁴ and asylum seekers often feel they have to 'hurry up',²¹⁵ entering onto a 'fast-

²⁰² *ibid* 302.

²⁰³ Gill (n 3) 218.

²⁰⁴ Griffiths (n 2).

²⁰⁵ Anderson and others, 'The culture of disbelief: An ethnographic approach to understanding an under-theorised concept in the UK asylum system' (n 1) 14.

²⁰⁶ The Guardian reported the HO incentivising decision-makers to refuse asylum claims by offering rewards such as High Street shopping vouchers, cash bonuses and extra holidays; see Diane Taylor and Rowena Mason, 'Home Office staff rewarded with gift vouchers for fighting off asylum claims' (*The Guardian*, 14 January 2014)

<www.theguardian.com/uk-news/2014/jan/14/home-office-asylum-seekers-gift-vouchers> accessed 6 September 2014.

²⁰⁷ Noll (n 3) 2–3.

²⁰⁸ 'May says immigration targets "getting more difficult"' (*BBC News*, 25 May 2014) <www.bbc.co.uk/news/uk-politics-27563904> accessed 2 September 2014.

²⁰⁹ Shaw and Witkin (n 106) 19.

²¹⁰ Practised from April 2007; see Immigration Law Practitioners' Association, 'All Information Sheets (A-Z)' (*Immigration Law Practitioners' Association*, 5 March 2007)

<www.ilpa.org.uk/pages/ilpa-information-service-further-information-sheets.html> accessed 28 August 2014.

²¹¹ Home Office, *Controlling Our Borders: Making Immigration Work for Britain* (Crown Copyright, 2005) 36.

²¹² Saulo B Cwener, 'Faster, Faster, Faster: The Time Politics of Asylum in the UK' (2004) 13(1) *Time and Society* 71, 85.

²¹³ Human Rights Watch (n 8) 31.

²¹⁴ UK Lesbian & Gay Immigration Group, 'Missing the Mark: Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims' (UK Lesbian & Gay Immigration Group 2013) 12.

²¹⁵ Muggeridge and Maman (n 5) 36.

moving treadmill with structural features inhibiting or even preventing [women] from making their cases effectively'.²¹⁶ Whilst the asylum system can be dizzyingly fast, enforced extensive waiting for claims to be processed,²¹⁷ as well as excruciatingly slow red-tape and a backlog of cases,²¹⁸ create temporal uncertainty, moving 'quickly only when it suits, and slowly when it does not'.²¹⁹ Ultimately, the way in which HO interviews are conducted, the time pressures, the waiting, the uncertainty, do nothing to ease difficulties in relaying traumatic memories of gender-related persecution or in facilitating disclosure of any sort. Instead, difficulties are exacerbated. The obsession with credibility, assessed by measures proven unfair and unsustainable,²²⁰ points to being deliberately, paradoxically, inappropriate and flawed. Credibility is a self-destructive political construct: it is based on fallacy and sets out to keep out the very people that the Refugee Convention claims to protect and welcome.

V. CONCLUSION

"Truth" is not a feature of current propositions which are asserted of an "object" by a human "subject" and then "are valid" somewhere, in what sphere we know not. Rather, truth is disclosure of beings through which an openness essentially unfolds.

–Martin Heidegger, *The Essence of Truth*²²¹

As I have shown, credibility as a means to determine asylum claims is inappropriate. The way in which it is assessed is inconsistent with psycho-legal research that highlights the difficulties of accessing traumatic memories and of processing and disclosing them.²²² Factors like the lack of 'coherence' in a narrative, discrepancies, a lack of detail, late disclosure, certain demeanour and types of behaviour – which negatively impact credibility assessments, are in fact manifestations of trauma and often the consequence of fear, shame and

²¹⁶ Human Rights Watch (n 8) 3.

²¹⁷ Deirdre Conlon, 'Waiting: feminist perspectives on the spacings/timings of migrant (im)mobility' (2011) 18(3) *Gender, Place and Culture* 353.

²¹⁸ Melanie BE Griffiths, 'Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees' (2014) 40(12) *Journal of Ethnic and Migration Studies* 1991.

²¹⁹ *Detention Action* (n 29) [196].

²²⁰ Muggeridge and Maman (n 5).

²²¹ Martin Heidegger, *The Essence of Truth: On Plato's Cave Allegory and Theaetetus* (Ted Sadler tr, Continuum 2002).

²²² Feder (n 6); Juliet Cohen, 'Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be said to Undermine Credibility of Testimony' (n 129); Diana Bögner, 'What prevents refugees and asylum seekers exposed to violence from disclosing trauma?' (DClinPsy thesis, University College London 2005); Bögner and others (n 77); Herlihy (n 49); Herlihy and others, 'Just Tell Us What Happened To You: Autobiographical Memory and Seeking Asylum' (n 80).

anxiety. Further, this is worsened by the stressful interview process. In sum, credibility is undermined when the elements used to judge it are based on misconceptions, assumptions and fabrications.

The difficulty of accessing and disclosing traumatic memories of gender-related persecution is exacerbated by the responses (and presence) of the recipient of the personal account: a uniformed, time-pressured Home Office employee who is conditioned to be sceptical and required to judge a story for its 'plausibility'. I have critiqued plausibility as a culturally problematic and gender-insensitive construct. HO decision-makers are not only vessels of individual, subjective and heterogeneous assumptions rendering decision-making contingent, but they are also affected by the climate of suspicion and xenophobia within the Home Office, engendered by net migration-reducing targets.

In this conclusion, I could suggest recommendations for HO interviews. Interviewers could receive rigorous training in and guidance on how to assess veracity and reliability/plausibility.²²³ But that would be condoning credibility as the standard by which claimants should be judged. I could suggest minor improvements in the initial screening interview, like additional pieces of paper given with the questionnaire, to allow more space to give reasons for seeking asylum so it is not just to be outlined BRIEFLY. Or, I could suggest that more up-to-date/gender-sensitive/varied Country of Origin Information be used. Or better qualified interpreters. Or more time to reflect on answers without the pressure of being hurried. Or more breaks in those interviews that drag on when people are tired/stressed/traumatised. Or a free lunch. If this adversarial, hostile and dehumanised/ing system is to remain in place, maybe it is better to suggest such improvements. But all of the above recommendations have already been made and systematically ignored. This means that the (mal)functioning of credibility assessments in HO interviews, the *intentional* discomfort they elicit by *intentionally* failing to cater for the needs of people who require time to process traumatic experiences and a safe space in which to disclose such experiences, points to a wider politics of hostility to legitimise exclusion.

Ultimately, the above conclusions and recommendations are so very disappointing when what is required is for the UK asylum system to be transformed radically and unrecognisably. People seeking asylum should not be mistrusted from the outset.

²²³ Granhag and others (n 119) 46.

BIBLIOGRAPHY**BOOKS**

- American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th edn, American Psychiatric Association 1994)
- Antze P and Lambek M (eds), *Tense Past: Cultural Essays in Trauma and Memory* (Routledge 1996)
- Bartlett FC, *Remembering: A Study in Experimental and Social Psychology* (CUP 1932)
- Benjamin W, 'Theses on the Philosophy of History' in Hannah Arendt (ed), *Illuminations* (Harry Zohn tr, Jonathan Cape 1970)
- Caruth C, *Unclaimed Experience: Trauma, Narrative, and History* (John Hopkins University Press 1996)
- Caruth C (ed), *Trauma: Explorations in Memory* (John Hopkins University Press 1995)
- Connelly K, *The Border Surrounds Us* (McClelland & Stewart 2000)
- Crawley H, *Refugees and Gender: Law and Process* (Jordan 2001)
- Das V, 'Violence and the Work of Time' in Cohen AP (ed), *Signifying Identities: Anthropological Perspectives on Boundaries and Contested Values* (Routledge 2000)
- Douzinis C and Warrington R, 'A Well-Founded Fear of Justice: Law and Ethics in Postmodernity' in Leonard JD (ed), *Legal Studies as Cultural Studies: A Reader in (Post)Modern Critical Theory* (State University of New York Press 1995)
- Eliot TS, *Burnt Norton* (Faber and Faber 1941)
- Fara P and Patterson K (eds), *Memory* (CUP 1998)
- Felman S and Laub D, *Testimony: Crises of Witnessing in Literature, Psychoanalysis and History* (Routledge 1992)
- Figley CR, *Compassion Fatigue: Coping with Secondary Traumatic Stress Disorder in Those Who Treat the Traumatized* (Routledge 1995)
- Foa EB and Rothbaum BO, *Treating the Trauma of Rape: Cognitive-Behavioural Therapy for PTSD* (Guildford Press 1998)
- Foucault M, 'What Is an author?' in Rabinow P (ed), *The Foucault Reader* (Pantheon 1984)
- Galeano E, *The Book of Embraces* (Belfrage C tr, WW Norton & Company 1992)
- Hathaway JC, *Law of Refugee Status* (Butterworths 1991)
- Heidegger M, *The Essence of Truth: On Plato's Cave Allegory and Theaetetus* (Ted Sadler (tr), Continuum 2002)
- Heller A, *The Power of Shame* (Routledge and Kegan Paul 1985)
- Herlihy J, 'Evidentiary Assessment and Psychological Difficulties' in Noll G (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff 2005)
- Kafka F, 'The Trial' in Muir W and Muir E (tr), *Franz Kafka: The Complete Novels* (Vintage 2008)
- Kermode F, *The Sense of an Ending: Studies in the Theory of Fiction* (OUP 1968)
- Kirmaya LJ, 'Landscapes of Memory: Trauma, Narrative and Dissociation' in Antze P and Lambek M (eds), *Tense Past: Cultural Essays in Trauma and Memory* (Routledge 1996)
- Lees S, *Carnal Knowledge: Rape on Trial* (Hamish Hamilton 1996)

- Noll G (ed), *Proof, evidentiary assessment and credibility in asylum procedures* (Martinus Nijhoff 2005)
- Okri B, *Birds of Heaven* (Phoenix 1996)
- Pandolfo S, *Impasse of the Angels: Scenes from a Moroccan Space of Memory* (University of Chicago Press 1997)
- Parfit D, *Reasons and Persons* (OUP 1984)
- Pirouet L, *Whatever Happened to Asylum in Britain? A Tale of Two Walls* (Berghahn Books 2001)
- Proust M, *Du Cote du Chez Swann* (Bernard Grasset 1913)
- Ricoeur P, *Interpretation Theory: Discourse and the Surplus of Meaning* (Texas Christian University Press 1976)
- Rushdie S, *Midnight's Children* (Jonathan Cape 1981)
- Sartre J-P, *La Nausée* (Gallimard 1938)
- — *L'Être et le Néant* (Gallimard 1938)
- Scarry E, *The Body in Pain: The Making and Unmaking of the World* (OUP 1985)
- Scott A, *Real Events Revisited: Fantasy, Memory and Psychoanalysis* (Virago 1996)
- Searle JR, *Speech Acts: An Essay in the Philosophy of Language* (CUP 1969)
- Shalev AY, 'PTSD: A Disorder of Recovery?' in Kirmaya LJ, Lemelson R and Barad M (eds), *Understanding Trauma: Integrating Biological, Clinical and Cultural Perspectives* (CUP 2007) 207
- Sontag S, *Against Interpretation and Other Essays* (Farrar, Straus and Giroux 1966)
- Spijkerboer T, *Gender and Refugee Status* (Ashgate Publishing Company 2000)
- — 'Stereotyping and Acceleration: Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System' in G Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martin Nijhoff Publishers 2005)
- van der Kolk BA, 'Trauma and Memory' in van der Kolk BA, McFarlane A and Weisaeth L (eds), *Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society* (Guildford Press 1996)
- Weedon C, *Feminist Practice and Poststructuralist Theory* (2nd edn, Blackwell 1997)
- Williams JMG, Watts FN, Macleod C and Mathews A, *Cognitive Psychology and Emotional Disorders* (2nd edn, Wiley 1996)

JOURNAL ARTICLES

- Anderson SJ, Cohen G and Taylor S, 'Rewriting the Past: Some Factors Affecting the Variability of Personal Memories' (2000) 14 *Applied Cognitive Psychology* 435
- Baillet H, Cowan S and Munro VE, 'Second-hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context' (2013) 40(4) *Journal of Law and Society* 509
- Bögner D, Herlihy J and Brewin CR, 'Impact of sexual violence on disclosure during Home Office interviews' (2007) 191 *British Journal of Psychiatry* 75
- Bögner D, Brewin CR and Herlihy J, 'Refugees' Experiences of Home Office Interviews: A Qualitative Study on the Disclosure of Sensitive Personal Information' (2010) 36(3) *Journal of Ethnic and Migration Studies* 519

- Brewin CR, 'Autobiographical memory for trauma: Update and four controversies' (2007) 15(3) *Memory* 227
- Cohen J, 'Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be said to Undermine Credibility of Testimony' (2001) 69(1) *Medico-Legal Journal* 25
- Conlon D, 'Waiting: feminist perspectives on the spacings/timings of migrant (im)mobility' (2011) 18(3) *Gender, Place and Culture* 353
- Cwener SB, 'Faster, Faster, Faster: The Time Politics of Asylum in the UK' (2004) 13(1) *Time and Society* 71
- Edwards D and Potter J, 'The Chancellor's Memory: Rhetoric and Truth in Discursive Remembering' (1992) 6 *Applied Cognitive Psychology* 187
- Ellison L and Munro VE, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) *British Journal of Criminology* 202
- Feder B, 'A credible judge of character? A psycho-legal analysis of credibility assessments for asylum applicants with a history of sexual violence' (2010) 24(4) *Journal of Immigration, Asylum and Nationality Law* 295.
- Gill N, 'Presentational State Power: Temporal and Spatial Influences over Asylum Sector Decision-Makers' (2009) 34(2) *Transactions of the Institute of British Geographers* 215
- Granhag PA, Strömwall LA and Hartwig M, 'Granting Asylum or Not? Migration Board Personnel's Beliefs About Deception' (2005) 31(1) *Journal of Ethnic and Migration Studies* 29
- Griffiths MBE, "'Vile Liars and Truth Distorters": Truth, Trust and the Asylum System' (2012) 28(5) *Anthropology Today* 8
- — 'Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees' (2014) 40(12) *Journal of Ethnic and Migration Studies* 1991
- Groth AN and Burgess AW, 'Male rape: offenders and victims' (1980) 137(7) *American Journal of Psychiatry* 806
- Herlihy J and Turner S, 'Should discrepant accounts given by asylum seekers be taken as proof of deceit?' (2006) 16(2) *Torture* 81
- Herlihy J, Gleeson K and Turner S, 'What Assumptions about Human Behaviour Underlie Asylum Judgements?' (2010) 22(3) *International Journal of Refugee Law* 351
- Herlihy J, Jobson L and Turner S, 'Just Tell Us What Happened To You: Autobiographical Memory and Seeking Asylum' (2012) 26(5) *Applied Cognitive Psychology* 661
- Herlihy J, Scragg P and Turner S, 'Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study' (2002) 324 *British Medical Journal* 324
- Kaufman G, Drevland GCB, Wessel E, Overskeid G and Magnussen S, 'The Importance of Being Earnest: Displayed Emotions and Witness Credibility' (2003) 17(1) *Applied Cognitive Psychology* 21
- Loftus EF and Burns TE, 'Mental shock can produce retrograde amnesia' (1982) 10(4) *Memory and Cognition* 318

- Loftus EF 'Our changeable memories: legal and practical implications' (2003) 4 *Nature Reviews Neuroscience* 231
- — 'Planting misinformation in the human mind: A 30-year investigation of the malleability of memory' (2005) 12 *Learning and Memory* 361
- Marian V and Kaushanskaya M, 'Self-construal and emotion in bicultural bilinguals' 51 *Journal of Memory and Language* 190
- Marsh EJ, Tversky B and Hutson M, 'How Eyewitnesses Talk About Events: Implications for Memory.' (2005) 19(5) *Applied Cognitive Psychology* 531
- Rousseau C, Crépeau F, Foxen P and Houle F, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' (2002) 15(1) *Journal of Refugee Studies* 43
- Vrij A, Granhag PA and Porter S, 'Pitfalls and Opportunities in Nonverbal and Verbal Lie Detection' (2010) 11(3) *Psychological Science in the Public Interest* 89

CASES

- R (on the application of Detention Action) v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin)

STATUTES

- Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

INTERNATIONAL LAW SOURCES AND TREATIES

- Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12
- Declaration on the Elimination of Violence Against Women, UNGA Res 48/104 (20 December 1993) UN Doc A/RES/48/104

REPORTS

- Anderson J, Hollaus J, Lindsay A and Williamson C, 'The culture of disbelief: An ethnographic approach to understanding an under-theorised concept in the UK asylum system' (2014) 102(1) *Refugee Studies Centre Working Paper Series* 1
- Bögner D, 'What prevents refugees and asylum seekers exposed to violence from disclosing trauma?' (DCLinPsy thesis, University College London 2005)
- Home Office, *Controlling Our Borders: Making Immigration Work for Britain* (Crown Copyright, 2005)
- 'Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK' (Human Rights Watch, February 2010)
- Querton C, "'I feel like as a woman I'm not welcome": A gender analysis of UK asylum law, policy and practice' (*Asylum Aid*, 6 January 2012)

- Shaw J and Witkin R, 'Get it Right: How Home Office decision making fails refugees' (Amnesty International UK 2004)
- Smith E, 'Right First Time? Home Office Asylum Interviewing and Reasons for Refusal Letters' (Medical Foundation 2004)
- UK Lesbian & Immigration Group, 'Missing the Mark: Decision making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims' (UK Lesbian & Gay Immigration Group 2013)
- UNHCR 'Beyond Proof: Credibility Assessment in EU Asylum Systems' (Brussels 2013)
- — 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (7 May 2002) HCR/GIP/02/01
- — 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (Geneva January 1992) HCR/IP/4/Eng/REV.1
- — 'Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice: Key Gender Related Findings and Recommendations' (Brussels March 2010)
- — 'Note on Burden and Standard of Proof in Refugee Claims' (Geneva 16 December 1998)
- — 'Quality Initiative Project: Third Report to the Minister' (London 2006)

WEBSITES AND OTHER SOURCES

- Asylum Information Database, 'National Country Report: The United Kingdom' (Asylum Information Database, 2013)
<www.asylumaid.org.uk/wp-content/uploads/2013/08/AIDA_UK.pdf>
accessed 6 August 2014
- 'Asylum Policy Instruction: Asylum Interviews' (Home Office 2014)
<www.gov.uk/government/uploads/system/uploads/attachment_data/file/298853/Asylum_interview_policy_guidance_v_5.pdf> accessed 30 July 2014
- Bail for Immigration Detainees, *A nice judge on a good day: immigration bail and the right to liberty* (Bail for Immigration Detainees, July 2010)
<www.irr.org.uk/pdf2/bid_good_judge.pdf> accessed 25 August 2014
- BBC, 'May says immigration targets "getting more difficult"' (*BBC News*, 25 May 2014)
<www.bbc.co.uk/news/uk-politics-27563904> accessed 2 September 2014
- Berkowitz N and Jarvis C, 'Immigration Appellate Authority: Asylum Gender Guidelines' (Crown Copyright 2000)
<doubleviolence.free.fr/spip/IMG/pdf/GB_gender_-_copie.pdf> accessed 19 August 2014
- Cabinet Office, *Call to End Violence Against Women and Girls: Action Plan* (Crown Copyright 2011)
<www.gov.uk/government/uploads/system/uploads/attachment_data/file/118153/vawg-action-plan.pdf> accessed 6 August 2014
- Ceneda S and Palmer C, 'Lip Service' or implementation? The Home Office Gender Guidelines and women's asylum claims in the UK' (Asylum Aid, March 2006)
<[www.asylumaid.org.uk/wp-](http://www.asylumaid.org.uk/wp-content/uploads/2006/03/Lip-Service-or-implementation.pdf)

- content/uploads/2013/02/Lip_Service_or_Implementation.pdf> accessed 19 August 2014
- Country of Origin Research and Information, 'Country of Origin Information' (*Country of Origin Research and Information*, 2014)
<www.cori.org.uk/8.html> accessed 5 August 2014
- Crosthwaite S, 'The Border Agency are playing a game to scare us', (*Migration Pulse*, 10 August 2011)
<www.migrantsrights.org.uk/migration-pulse/2011/border-agency-are-playing-game-scare-us-0> accessed 26 August 2014
- Green C, 'Hundreds of asylum seekers 'wrongly deported' after 'inappropriate' advice from Swedish linguistics firm' (*The Independent*, 22 May 2014)
<www.independent.co.uk/news/uk/politics/hundreds-of-asylum-seekers-wrongly-deported-after-inappropriate-advice-from-swedish-linguistics-firm-9421187.html> accessed 5 July 2014
- Henderson M and Pickup A, *Best Practice Guide to Asylum and Human Rights Appeals* (Electronic Immigration Network 2012)
<www.ein.org.uk/bpg/chapter/1> accessed 23 August 2014
- 'Humanitarian Protection' (Home Office 2013)
<www.gov.uk/government/uploads/system/uploads/attachment_data/file/257431/huma-prot.pdf> accessed 6 August 2014
- Immigration Law Practitioners' Association, 'All Information Sheets (A-Z)' (*Immigration Law Practitioners' Association*, 5 March 2007)
<www.ilpa.org.uk/pages/ilpa-information-service-further-information-sheets.html> accessed 28 August 2014
- Maniar A, 'Language Testing of Asylum Claims: A Flawed Approach' (*Institute of Race Relations*, 7 August 2014)
<www.irr.org.uk/news/language-testing-of-asylum-claimants-a-flawed-approach> accessed 16 August 2014
- Muggeridge H and Maman C, *Unsustainable: the quality of initial decision-making in women's asylum claims* (*Asylum Aid*, January 2011)
<www.asylumaid.org.uk/wp-content/uploads/2013/02/unsustainableweb.pdf> accessed 16 August 2014
- Patihis L, Tingen IW and Loftus EF (2013) 'Memory Myths' (2003) 23(3) *Catalyst* 6
- Peel M (ed), *Rape as a Method of Torture* (Medical Foundation 2004)
<www.freedomfromtorture.org/sites/default/files/documents/rape_singles2.pdf> accessed 16 August 2014
- 'Right to Remain'
<www.righttoremain.org.uk> accessed 11 August 2014
- Tankink M, 'Silence as a means of controlling the explosive nature of sexual violence' (CARE FULL, Medico-Legal Reports and the Istanbul Protocol in Asylum Procedures conference, Amsterdam, 15 November 2006)
<www.freedomfromtorture.org/sites/default/files/documents/Marian%20Tankink%20presentation%20CARE%20FULL.pdf> accessed 14 August 2014
- Taylor D and Mason R, 'Home Office staff rewarded with gift vouchers for fighting off asylum claims' (*The Guardian*, 14 January 2014)

- <www.theguardian.com/uk-news/2014/jan/14/home-office-asylum-seekers-gift-vouchers> accessed 6 September 2014
- UK Border Agency, 'Asylum Instruction: Considering the Protection (Asylum) Claim and Assessing Credibility' (Home Office 2012) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/257426/considering-protection-.pdf> accessed 31 July 2014
- — 'Gender Issues in the Asylum Claim' (*GOV.UK*, 29 September 2010) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/257386/gender-issue-in-the-asylum.pdf> accessed 31 July 2014
- — Asylum Instruction, 'Non Suspensive Appeals (NSA) Certification under Section 94 of the NIA Act 2002' (Home Office 2013) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/257463/certificationundersection94.pdf> accessed 31 July 2014
- UK Visas and Immigration, 'Detained Fast Track Processes' (*GOV.UK*, 11 June 2013) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/257435/detained_fast_processes.pdf> accessed 11 August 2014
- Wilson-Shaw L, Pistrang N and Herlihy J, 'Non-clinicians' judgements about asylum-seekers' mental health: how do legal representatives of asylum seekers decide when to request medico-legal reports?' (2012) 3 *European Journal of Psychotraumatology* <www.ejpt.net/index.php/ejpt/article/view/18406> accessed 4 September 2014

Trials *in absentia* at the Special Tribunal for Lebanon: an Effective Measure of Expediency or an Inconsistency with Fair Trial Standards?

Maya Trad*

Article 22 of the Statute of the Special Tribunal for Lebanon (STL) represents a very interesting feature proper to the STL. It gives the Tribunal the ability to hold trials without the presence of an accused; in other words, trials in total absentia. This feature is unique since it distinguishes the STL as the only tribunal that conducts trials in which a hearing may start and end without the accused ever being present before the court. Trials in absentia have generated debates between the national traditions of the common law and civil law systems. Many scholars have criticised Article 22 for not being compliant with fair trial standards. This Article, however, seeks to prove that the provisions of Article 22 respect the right of the accused to be present as well as the right to retrial, both of which are major components of fair trial standards. This Article will further demonstrate that the in absentia practice represents a measure of expediency in international criminal law. Indeed, this practice could, on the one hand, be interpreted as a solution to the problem of the non-appearance of the accused and the non-cooperation of states in handing over indicted figures; and on the other hand, a measure to avoid delays in proceedings.

I. INTRODUCTION

On 13 December 2005, the Government of Lebanon requested that the United Nations (UN) establish an international tribunal to try the perpetrators of the bomb attack of 14 February 2005 that cost the lives of former Lebanese Prime Minister Rafiq Hariri and 22 others.¹ Three years after the assassination of

* Maya graduated in 2015 with an MA in International Law at SOAS, University of London. She previously graduated with a BA in Political Science from the St Joseph University in Beirut in 2013. She is currently involved in different human rights and humanitarian projects between Paris and Beirut.

¹ United Nations Security Council, 'Letter Dated 13 December 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General' (13 December 2005) UN Doc S/2005/783. In a letter addressed to the UN Secretary-General, Prime Minister Fouad Siniora requested the Security Council to establish an

Hariri, the UN Security Council, under Resolution 1757 (2007),² established the Special Tribunal for Lebanon (STL) to prosecute responsible persons. The decision was taken under Chapter VII of the Charter of the United Nations (UN Charter) of 1945 after determining that the bomb attack constituted a threat to international peace and security.

The legitimacy of the STL has been the subject of many controversies that will be mentioned further in this Article. This Article will tackle a characteristic unique to the Tribunal, which is its ability to hold trials *in absentia*, found in Article 22 of its Statute.³ Indeed, this 'very special tribunal' has the capability to prosecute accused persons in their absence under specific circumstances. This practice has not occurred since the Nuremberg Tribunal and the only defendant tried in his absence before the International Military Tribunal (IMT) at Nuremberg was Martin-Bormann, who was convicted in 1946 for war crimes and crimes against humanity.⁴ This unique provision is very much specific to the STL and differentiates it from the International Criminal Court (ICC) and other *ad hoc* tribunals. The *in absentia* principle has generated numerous debates among international criminal and human rights lawyers. Notwithstanding, the STL held its first trial *in absentia* in January 2014, marking the second time that such a trial was held in the history of international criminal law.⁵

This Article will therefore evaluate whether the practice of trials *in absentia* is an effective measure of expediency at the STL, or rather a violation of internationally recognised fair trial standards and thus a violation of international human rights law. After introducing the conceptual background of trials *in absentia* in Section II, this Article will discuss the general framework in which the principle of *in absentia* can be placed. The purpose of this discussion is to examine whether the STL Statute is compliant with minimum fair trial standards and international human rights law, and whether Article 22 meets the requirements of legality. It will be argued that in the case of the STL, the *in absentia* procedure is compliant with the right to be present and the right

International Tribunal to try those responsible for the bombing attack against former Prime Minister Hariri.

² Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, Annex to UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757 art 1(1).

³ *ibid* art 22.

⁴ Elizabeth Herath, 'Trials in Absentia: Jurisprudence and Commentary on the Judgment in Chief Prosecutor v. Abul Kalam Azad in the Bangladesh International Crimes Tribunal' (2014) 55 *Harvard International Law Journal* 1, 2.

⁵ Paola Gaeta, 'Trial *In Absentia* Before the Special Tribunal for Lebanon' in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014) 229, 231.

to a retrial. In Section III of this Article, I will argue that the practice of trials *in absentia* in the case of the STL is not only the ultimate solution to the problem of the non-appearance of the accused and the non-cooperation of states in handing over indicted figures, but it is also a measure to avoid delays in proceedings.

II. CONCEPTUAL BACKGROUND: THE COMMON LAW VERSUS CIVIL LAW SYSTEMS AND ARTICLE 22 OF THE STL STATUTE

Trials *in absentia* have been the subject of many debates in domestic and international jurisdictions. At the national level, the discussion regarding this practice revolves around the different practices found in common law and civil law systems, which implement different mechanisms used in the quest for justice. The practice of holding trials *in absentia* is accepted only in specific circumstances in common law systems, namely when a defendant voluntarily waives his/her right to be present after having attended the start of the trial.⁶ In the civil law tradition, the *in absentia* principle has been adopted by some countries as part of their criminal systems (depending on the national law of the state).⁷ For example, Germany does not admit the practice of trials *in absentia* at all, but other states in the European Union such as France, Italy, Belgium and the Netherlands do, with certain safeguards. Other countries such as Lebanon, Egypt and Tunisia allow trials *in absentia* without any kind of reservation.

To contextualise the *in absentia* principle on the international level, this practice is not unfamiliar to some international criminal tribunals. In fact, as previously mentioned, the IMT introduced the concept of 'total *in absentia* trials'⁸ with the accused, Martin Bormann, not taking part in *any* of the procedures. However, modern tribunals tend to admit only partial *in absentia* trials, where the accused appears at the beginning of the trial but not subsequently.⁹ Similarly, the Rome Statute allows the ICC to hold trials without the presence of the accused *only* if the defendant would be found disruptive.¹⁰

Although the *in absentia* practice has been dormant for many years now, it has been reinstated recently at the STL through the provision of Article 22 of the

⁶ Geert-Jan Alexander Knoops, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (2nd edn, Brill 2014) 327.

⁷ *ibid* 328.

⁸ Chris Jenks, 'Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?' (2009) 33(1) *Fordham International Law Journal* 57, 68.

⁹ Herman Schwartz, 'Trials in Absentia' (1996) 4(1) *Human Rights Brief* 12, 14.

¹⁰ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, last amended 11 June 2010) 2187 UNTS 90/37 ILM 1002 (Rome Statute) art 63(1).

STL Statute.¹¹ There are three situations in which Article 22(1) authorises trials *in absentia* to take place. These are when the accused has:

- (a) expressly and in writing waived his or her right to be present;
- (b) not been handed over to the Tribunal by the state authorities concerned; or
- (c) absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges.¹²

Furthermore, in order for trials *in absentia* to be held, the STL has to fulfil certain requirements. It must ensure that the person accused:

- (a) has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the state of residence or nationality;
- (b) has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;
- (c) whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.¹³

Finally, Article 22 stipulates that in the case of condemnation, the defendant has the right to a retrial in the event where the accused was not represented at trial by counsel of their choice, unless the defendant consents to the judgment.¹⁴

Article 22 makes the Tribunal unique because it distinguishes it as the only international tribunal today that conducts trials in which a hearing may begin *and* end without the accused ever being present before the court.¹⁵

The following Sections will examine, first, the human rights debate on the practice and, second, the impact that such trials has on the international criminal justice system.

¹¹ Statute of the Special Tribunal for Lebanon (STL), art 22(1).

¹² *ibid.*

¹³ *ibid* art 22(2).

¹⁴ *ibid* art 22(3).

¹⁵ Paola Gaeta, 'To Be (Present) or Not To Be (Present)' (2007) 5 *Journal of International Criminal Justice* 1165.

III. THE HUMAN RIGHTS ARGUMENT

Jordash and Parker have both argued that Article 22 ‘reflects a triumph of politics over fair trials standards’, contending that trials *in absentia* are a violation of internationally recognised minimum fair trial standards, and thus a violation of international human rights law.¹⁶ Additionally, critics maintain that such trials violate fair trial provisions of both international and regional human rights bodies, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR).¹⁷ Nevertheless, many scholars have challenged this argument.¹⁸ Accordingly, this Section argues that *in absentia* proceedings are not incompatible with the right to be present so long as certain safeguards are respected.

3.1 The *Right to be Present*

There are two doctrines that incorporate the right to be present at trial and these may be read to contest the principle of holding trials *in absentia*. Firstly, the ICCPR, which is monitored by the Human Rights Committee (HRC), in its Article 14 states that everyone shall be entitled ‘to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing’.¹⁹ Secondly, the ECHR, which is monitored by the European Court of Human Rights (ECtHR), only implies the right to be tried in one’s presence through its Article 6 that asserts the right to a fair trial.²⁰

In the case of the ICCPR, it could be argued that its Article 14 affirms the right to be present but does not *absolutely* prohibit trials to be held without the presence of the defendant. Shaw makes the distinction between the ‘obligation’ and the ‘right’ to be present at one’s trial, arguing that if Article 14 recalls that defendants cannot be forbidden from being able to attend trial and defend themselves, the Article neither explicitly nor implicitly conditions that their

¹⁶ Wayne Jordash and Tim Parker, ‘Trials *In Absentia* at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law’ (2010) 8 *Journal of International Criminal Justice* 487.

¹⁷ Jenks (n 8); Jordash and Parker (n 16).

¹⁸ Maggie Gardner, ‘Reconsidering Trials *In Absentia* at the Special Tribunal for Lebanon: An Application of the Tribunal’s Early Jurisprudence’ (2011) 43 *George Washington International Law Review* 91.

¹⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(3)(d).

²⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) 1950 art 6.

presence is absolutely required in order to hold it.²¹ The cases of *Mbenge v Zaire*²² and *Maleki v Italy*²³ are both recurrent examples when arguing that trials *in absentia* do not violate Article 14 of the ICCPR. These cases clearly acknowledge that a trial without the presence of the accused could take place in certain circumstances, including when the accused has properly been informed of the hearing and has waived his/her right to be present.²⁴

Comparable to the *Maleki* case, the ECtHR in *Sejdovic v Italy* also recognised that proceedings *in absentia* do not contravene the right of the accused to be present at his/her own trial, provided that the accused has been properly notified of the proceedings taking place.²⁵ On the authority of these principles, therefore, as long as the STL is able to prove that the defendant has knowledge of the charges and the proceedings taking place but still chooses not to appear in court, trials *in absentia* at the STL do not violate international human rights standards of fair trial. Yet, the issue persists of ensuring that the accused has been properly notified of the charges. Jenks argues that it is not enough to prove that the court has taken all reasonable steps to notify the accused; rather, it must also be shown that the court has succeeded in informing the defendant.²⁶ In the *Mbenge* case, the HRC noted that even though Mbenge had heard of the charges through media coverage of the trial, the State itself had failed to inform the defendant of the proceedings and so it violated the rights of the accused.²⁷ Jenks contends that the 'notice-otherwise-given' stipulation found in Article 22(2)(a) of the STL Statute, which deems notice to be given to the accused through the media or by notifying the State of residence or nationality, is a violation of the ICCPR's notice requirements. The provision, according to this argument, fails to state the responsibility of the Tribunal to prove that an accused has been properly informed and is aware of the charges against him/her before conducting a trial *in absentia*.²⁸ Gardner argues that 'by including the concept of notice, the drafters signalled an interest in the *effect* of the advertisement and transmittal of the indictment'.²⁹ According to the latter, the

²¹ Gary J Shaw, 'Convicting Inhumanity *In Absentia*: Holding Trials *In Absentia* at the International Criminal Court' (2012) 44 *George Washington International Law Review* 107, 140.

²² *Mbenge v Zaire* Comm no 16/1977 (25 March 1983) UN Doc CCPR/C/18/D/16/1977 paras 1.1, 13.

²³ *Maleki v Italy* Comm no 699/1996 (27 July 1999) UN Doc CCPR/C/66/D/699/1996.

²⁴ Gardner (n 18) 126.

²⁵ *Sejdovic v Italy* App no 56581/2000 (ECtHR, 1 March 2006).

²⁶ Jenks (n 8) 81.

²⁷ *Mbenge v Zaire* (n 22).

²⁸ Jenks (n 8) 81.

²⁹ Gardner (n 18) 127.

text does indeed require that the defendant have actual knowledge of the charges but it also permits the ‘fact of knowledge to be established indirectly’.³⁰

The question thus arises as to how it can be proven that the accused has received notice of the indictment. It would create great uncertainty to expect an indicted individual to publicly acknowledge the receipt of their summons. In some cases, the court might therefore never know. In other cases, however, it seems that notice can be assumed. For example, Joseph Kony of the guerrilla group in Uganda and Omar al-Bashir of Sudan are both high-profile figures that have been indicted before the ICC. It would seem realistic to assert that these men have received notice of indictment, an assertion that would allow justice to prevail, instead of continuing to delay their trials as a result of the Court’s failure to capture them. The same assertion can be made for the four men indicted by the STL. In 2011, one of the men implicitly stated in an interview that he was well aware of the charges against him, and that if the Lebanese authorities wanted to arrest him, they would have done it already.³¹ This argument will be explored in more depth in Section IV. The question now becomes what prevents proceeding with justice.

3.2 The Right to a Retrial

The question of whether an accused should have the right to a retrial has sparked many debates. It has been demonstrated in both the *Maleki* and *Sejdovic* cases that the HRC and ECtHR allow trials to be held *in absentia* when an accused is granted the right to obtain a retrial if they did not waive their right to be present.³² In this situation, the right to a retrial operates as a remedy to any potential violations of the right to be present. With regard to the STL, retrial is possible under Article 22(3) of its Statute, which stipulates that in the case of condemnation, an accused has the right to a retrial if not represented at trial by the counsel of their choice. Gaeta makes an important distinction: in contrast to the aforementioned case law, the right to a retrial at the STL does not represent a remedy to a possible violation of the right of the accused to be present at trial caused by a lack of notice or otherwise.³³ Instead, Article 22(3) provides the right to a retrial even when no such violation occurred, and it is interpreted as a

³⁰ *ibid.*

³¹ Niccolò Pons, ‘Lebanese Trial in Absentia Faces Many Obstacles to Justice’ (*JURIST*, 3 December 2011) <<http://jurist.org/hotline/2011/12/niccolo-pons-lebanon-absentia.php>> accessed on 3 March 2015.

³² Jenks (n 8) 61.

³³ Gaeta ‘Trial *In Absentia* Before the Special Tribunal for Lebanon’ (n 5) 247–48.

primary right of the accused that can be appealed once certain requirements are met.³⁴

This provision has been identified as ‘controversial’ by Jenks, who highlights the risk that such retrial would not take place, since the tribunal is scheduled to end.³⁵ Jenks rightly argues that:

for the *in absentia* trial provisions of the STL to comply with human rights norms, the tribunal would seemingly need to operate, or have the ability to reconvene, for as long as someone convicted *in absentia* has not been retried.³⁶

Therefore, if a retrial were to take place when the Tribunal was no longer operational, Article 22 of the STL Statute would be inconsistent with international standards of fair trial.³⁷ Nonetheless, even if the agreement between the Government of Lebanon and the United Nations to establish the STL initially scheduled for the Tribunal to ‘remain in force for a period of three years from the date of the commencement of the functioning of the Special Tribunal’, the STL has received sufficient contribution to finance its establishment and operation for a longer period.³⁸

Moreover, Article 5(1) of the STL Statute provides that once a person has been tried by the STL, he or she cannot be tried again for the same acts by the national courts of Lebanon.³⁹ This provision therefore limits the possibility of retrial. It could be argued, however, that Article 22(3) ‘does not explicitly require the retrial to be conducted before the STL’.⁴⁰ Thus, even if the STL was no longer operational, retrial would remain possible if the accused requested a new trial.⁴¹ Gaeta argues that the responsibility would be upon the Security Council to find an alternative. One possibility would be to hold a special *ad hoc* trial.⁴²

Finally, as long as the court succeeds in notifying the accused of his/her indictment, there is no reason to believe that trials conducted *in absentia* are not

³⁴ *ibid.*

³⁵ Jenks (n 8) 62.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ STL, art 21; Jenks (n 8) 62, 65. The STL was established on 1 March 2009.

³⁹ Gaeta ‘To Be (Present) or Not To Be (Present)’ (n 15) 1169.

⁴⁰ *ibid* 1173 (emphasis added).

⁴¹ *ibid.*

⁴² Gaeta ‘Trial *In Absentia* Before the Special Tribunal for Lebanon’ (n 5) 249.

fair. Consequently, Gaeta concludes that there is no reason they should have a right to retrial.⁴³ After all, one could ask what would be the purpose in conducting a trial in the first place, if a retrial were so easy to obtain.

IV. TRIALS *IN ABSENTIA* AT THE STL: A MEASURE OF EXPEDIENCY

While it seems odd to conceive of a trial without the presence of the accused, scholars have argued that trials *in absentia* are nonetheless an effective measure of expediency in criminal justice, as long as certain safeguards are set and rules respected.⁴⁴ If, in theory, trials held in the presence of the accused are more legitimate and assure better protection of the rights of the defendant,⁴⁵ trials *in absentia* should not be ignored as a necessary and effective method in some situations.⁴⁶ The final Section of this Article will argue that holding trials *in absentia* at the STL is the ultimate solution to the problem of the non-appearance of the accused and the non-cooperation of states in handing over indicted figures, as well as a measure to avoid delays in the proceedings.

4.1 *A Solution to the Non-appearance of the Accused and the Non-cooperation of States in Handing over Indicted Figures*

The legitimacy and effectiveness of international justice and international criminal tribunals have been questioned many times when faced with the recurring problems that various international tribunals, such as the ICTY, the ICTR and the ICC, have faced at earlier stages. Said problems are, firstly, the non-appearance of the accused and, secondly, the problem of non-cooperation of States in handing over indicted figures.⁴⁷ International criminal courts have often been criticised for their apparent failure to apprehend and try those charged with serious crimes.⁴⁸ For example, Judge McDonald upholds that one of the main challenges of the ICTY is the 'lack of direct enforcement powers on its efforts to function effectively when confronted with overwhelming non-

⁴³ Gaeta 'To Be (Present) or Not To Be (Present)' (n 15) 1171.

⁴⁴ Ralph Riachy, 'Trials in Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon: Challenges or Evolution' (2010) 8 *Journal of International Criminal Justice* 1295–97; Gardner (n 18).

⁴⁵ Dov Jacobs, 'Guest Post: in Favour of Trials in Absentia in International Tribunals' (*Spreading the Jam*, 24 November 2009) <<http://dovjacobs.com/2009/11/24/guest-post-in-favour-of-trials-in-absentia-in-international-tribunals/>> accessed 3 March 2015.

⁴⁶ *ibid.*

⁴⁷ Gardner (n 18) 108.

⁴⁸ Lilian A Barria and Steven D Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) 9(3) *International Journal of Human Rights* 349, 360.

compliance by states'.⁴⁹ Indeed, since the Security Council made the decision to create the ICTY under Chapter VII of the UN Charter, all States have had a binding obligation to cooperate with the Tribunal by virtue of Article 25,⁵⁰ and to 'take whatever steps are required to implement the decision'.⁵¹ However, it is not within the Tribunal's capacity to ensure this cooperation; ultimately, only the Security Council can effectively enforce its decisions.⁵² This lack of enforcement mechanism has allowed several war criminals to escape justice. Ratko Mladić and Radovan Karadžić, former leaders of the Bosnian-Serbs, accused of having committed genocide and other serious crimes during the 1992 Bosnian War, spent 16 and 13 years respectively on the run before being captured and tried before the ICTY.⁵³ Omar al-Bashir, who was indicted six years ago, remains free due to the continued non-cooperation of States in arresting and rendering him to the ICC.⁵⁴

The context in which the STL operates is very special and differs from other *ad hoc* tribunals. Since its creation, the STL has been dogged by disparagements on both legal and political grounds. While some perceive the STL as the only way toward reconciliation and a tool to end impunity for perpetrators,⁵⁵ critics have denounced its highly selective justice and portrayed it as a foreign tool imposed on the country, labelling the Tribunal 'not... an impartial justice process, but rather... an imposed western agenda targeting Lebanon's foremost political

⁴⁹ Gabrielle Kirk McDonald, 'Problems, Obstacles and Achievements of the ICTY' (2004) 2 *Journal of International Criminal Justice* 558, 559.

⁵⁰ First Annual Report of the ICTY to the General Assembly and Security Council of the United Nations (29 August 1994) UN Doc S/1994/1007-A/49/342 para 84.

⁵¹ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (3 May 1993) UN Doc S/25704 para 125; Charter of the United Nations (UN Charter) (24 October 1945) 1 UNTS XVI art 25.

⁵² McDonald (n 49) 559. It is in an attempt to remedy the problem of (non) cooperation of States that the ICTY included Rule 61 as an alternative to *in absentia* trials. Rule 61 was introduced allowing 'Trial Chamber to receive evidence of the commission of crimes when an arrest warrant was not executed'.

⁵³ 'Profile: Radovan Karadžić' (*BBC News*, 1 October 2014)

<<http://www.bbc.co.uk/news/world-europe-19960285>> accessed 6 March 2015; Mark Lowen, 'Ratko Mladic arrested: Bosnia war crimes suspect held' (*BBC News*, 26 May 2011) <<http://www.bbc.co.uk/news/world-europe-13561407>> accessed 6 March 2015.

⁵⁴ Gwen P Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34 *Fordham International Law Journal* 1584, 1602.

⁵⁵ Jan Erik Wetzel and Yvonne Mitri, 'The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country' (2008) 7 *The Law and Practice of International Courts and Tribunals* 81, 111.

party: Hizbollah'.⁵⁶ While this Article does not focus on whether the STL is a legitimate institution, it is worth noting that the four accused⁵⁷ of the 2005 Lebanon bombing attack have been reported to be directly affiliated with Hizbollah,⁵⁸ the primary detractors of the STL and who have assiduously refused to cooperate with it since its creation.⁵⁹ Moreover, according to the first report of the Independent International Investigation Commission (IIIC) – the fact-finding mission that was sent to Lebanon after Hariri's assassination – high-ranking Syrian security officials were reported to be implicated in the attack.⁶⁰ While the STL has the capacity to indict a Syrian official without the official's presence, Syria has no responsibility to cooperate and surrender the accused, since under international law the only State obliged to cooperate with the Tribunal is Lebanon.⁶¹ Some would qualify trials *in absentia* as mere 'show trials' since the Tribunal 'would not be able to impose and enforce any sentence on an absent defendant upon conviction'.⁶² This peculiarity highlights once again a weakness of trials *in absentia*: a verdict without the capability of enforcement is useless. This inability, in turn, undermines the credibility of the international criminal justice system.⁶³ However, one could sustain the argument that the *in absentia* provision represents instead a kind of proactive justice that attributes more credibility to the STL in judging defendants, as it is more credible to have a Tribunal that would take measures to impose justice than a passive Tribunal that 'waits and hopes for its accused to be apprehended

⁵⁶ Are Knudsen and Sari Hanafi, 'Special Tribunal for Lebanon (STL): Impartial or Imposed International Justice?' (2013) 31(2) Nordic Journal of Human Rights 176, 178. Hizbollah is a political and military party that is part of the current Lebanese government coalition.

⁵⁷ Michelle Flash, 'Trials In Absentia in the Special Tribunal for Lebanon' (*Human Rights Brief*, 14 March 2012) <<http://hrbrief.org/2012/03/trials-in-absentia-in-the-special-tribunal-for-lebanon/>> accessed 1 March 2015. Four persons suspected of having a role in the 2005 bombing attack are currently being tried in absentia in the STL: Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Oneissi, and Hassan Sabra. Despite being indicted in June 2011, they have yet to appear before justice.

⁵⁸ 'Profiles of accused at Rafik Hariri tribunal in The Hague' (*BBC News*, 16 January 2014) <<http://www.bbc.co.uk/news/world-middle-east-25757367>> accessed 2 March 2015.

⁵⁹ Imad Salamey, *The Government and Politics of Lebanon* (Routledge 2014) 89–90.

⁶⁰ Marko Milanović, 'The Oddity that is the Hariri Tribunal' (Social Science Research Network Paper, 5 September 2007) <<http://ssrn.com/abstract=1014906>> accessed 13 February 2015.

⁶¹ Göran Sluiter, 'Responding to Cooperation Problems at the STL' in Alamuddin, Jurdi and Tolbert (eds) (n 5) 137, 151.

⁶² Nadim Shehadi and Elizabeth Wilmshurst, 'The Special Tribunal for Lebanon: The UN on Trial?' (Middle Eastern/International Law Briefing Paper, Chatham House 2007) 12.

⁶³ Herman Schwartz and Susan Lamb, 'Should Indicted War Criminals Be Tried in Absentia?' *Transitions* (Prague, Czech Republic, 1997) 84–87 <<http://sks.sirs.bdt.orc.scoolaid.net/cgi-bin/hst-article-display?id=SZZRES-0-4390&artno=0000018028&type=ART&shfilter=U&key=Justice&title=Should%20Indicted%20War%20Criminals%20Be%20Tried%20in%20Absentia%3F&res=Y&ren=Y&gov=Y&Ink=Y&ic=Y>> accessed 6 March 2015.

by third party actors over whom it has no control'.⁶⁴ Kersten advocates that the problem of non-appearance of the accused is actually an issue of politics and not law, the source of the problem being the lack of enforcement of international instruments.⁶⁵ He states that:

The courts rely on states to hand over indictees and it is in this mechanism that there is failure — states often protect those with ICC arrest warrants, until it is politically inconvenient. The solution lies in politics rather than law and the focus should be on getting states to engage and cooperate with international courts in order to arrest the accused.⁶⁶

4.2 Avoid Perpetual Delays in the Proceedings

Another argument put forward in favour of the *in absentia* practice that supports the previous discussion is that trials *in absentia* are a means of preventing continuous delays in proceedings.⁶⁷ Indeed, one of the main criticisms on the efficacy and efficiency of the ICC and other international criminal courts has been that '(pre)-trial proceedings are quite time-consuming and do not deliver swift justice.'⁶⁸ As previously mentioned, the STL is far from an ordinary international tribunal for many reasons, one being the fact that it is concerned with the case of the 2005 bombing *only*. The work of the Tribunal is therefore limited to the investigation of this particular event and its proceedings would be left suspended if no accused were present in the hearings. In that respect, the Tribunal's *in absentia* principle would constitute a remedy to trials being constantly deferred due to the non-appearance of defendants. As Kersten states, 'delays frustrate justice.'⁶⁹

Leaving trials in suspension would also jeopardise necessary evidence in cases where defendants are not captured within a reasonable period of time and would also mean losing considerable amounts of money, time and effort.⁷⁰ As Thieroff and Amley highlight:

⁶⁴ Shaw (n 21) 138.

⁶⁵ Mark Kersten, 'Defendants on the Run – What's a Court to do?' (*Justice in Conflict*, 16 April 2012)

<<http://justiceinconflict.org/2012/04/16/defendants-on-the-run-whats-a-court-to-do/>> accessed 6 March 2015.

⁶⁶ *ibid.*

⁶⁷ Shaw (n 21) 138.

⁶⁸ Knoops (n 6) 324.

⁶⁹ Kersten (n 65).

⁷⁰ Shaw (n 21) 139.

There are a variety of... pragmatic reasons for the speedy introduction of information that tends to incriminate the accused. For example, evidence tends to degrade over time. Witnesses may forget important facts and details about the actions of the accused or the context in which the alleged violations took place. They may also die from natural causes.⁷¹

Holding trials *in absentia* would be advantageous in terms of helping to collect evidence and testimony, thereby increasing the chances of a successful prosecution.⁷²

IV. CONCLUSION

Article 22 of the STL Statute represents a very interesting feature of the STL. Indeed, the STL has the ability to hold trials without the presence of an accused or, in other words, trials *in total absentia*. This feature is very unique since it distinguishes the STL as the only tribunal that conducts trials in which a hearing may start and end without the accused ever being present before the court.

Trials *in absentia* have generated debates between the national traditions of the common law and civil law systems. Although many scholars have criticised Article 22 for not complying with fair trial standards, this Article has sought to prove that its provisions respect not only the right of the accused to be present but also the right to a retrial, both of which are major components of fair trial standards.

This Article has further demonstrated that the *in absentia* practice represents a measure of expediency in international criminal law. Indeed, this practice could be interpreted both as a solution to the problem of the non-appearance of the accused and the non-cooperation of States in handing over indicted figures, as well as a measure to avoid delays in proceedings.

As Pons has stated, there is a need to find a solution to 'reconcile the right of the accused to be present at trial and the interest of the judicial system in pursuing

⁷¹ Mark Thieroff and Edward A Amley, Jr, 'Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61' (1998) 23 Yale Journal of International Law 231, 251; Ryan Rabinovitch, 'Universal Jurisdiction In Absentia' (2004) 28(2) Fordham International Law Journal 500, 525.

⁷² *ibid.*

accountability'.⁷³ It seems today that the exception of Article 22 of the STL Statute is actually a way of ensuring that the STL is not thwarted by its deficiency of enforcement capabilities and will thus continue to serve justice.

⁷³ Niccolò Pons, 'Some Remarks on in Absentia Proceedings before the Special Tribunal for Lebanon in Case of a State's Failure or Refusal to Hand over the Accused' (2010) *Journal of International Criminal Justice* 1307.

BIBLIOGRAPHY

BOOKS

- Alamuddin A, Jurdi N and Tolbert D (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014)
- Gaeta P, 'Trial *In Absentia* Before the Special Tribunal for Lebanon' in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014)
- Knoops G-JA, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study* (2nd edn, Brill 2014)
- Salamey I, *The Government and Politics of Lebanon* (Routledge 2014)
- Sluiter G, 'Responding to Cooperation Problems at the STL' in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (OUP 2014)

JOURNAL ARTICLES

- Barnes G, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34 *Fordham International Law Journal* 1584
- Barria LA and Roper SD, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR' (2005) 9(3) *International Journal of Human Rights* 349
- Gaeta P, 'To Be (Present) or Not To Be (Present)' (2007) 5 *Journal of International Criminal Justice* 1165
- Gardner M, 'Reconsidering Trials *In Absentia* at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence' (2011) 43 *Geo Wash Intl L Rev* 91
- Herath E, 'Trials in Absentia: Jurisprudence and Commentary on the Judgment in Chief Prosecutor v. Abul Kalam Azad in the Bangladesh International Crimes Tribunal' (2014) 55 *Harvard International Law Journal* 1
- Jenks C, 'Notice Otherwise Given: Will in Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?' (2009) 33 *Fordham International Law Journal* 57
- Jordash W and Parker T, 'Trials *In Absentia* at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law' (2010) 8 *Journal of International Criminal Justice* 487
- Knudsen A and Hanafi S, 'Special Tribunal for Lebanon (STL): Impartial or Imposed International Justice' (2013) 31(2) *Nordic Journal of Human Rights* 176
- McDonald GK, 'Problems, Obstacles and Achievements of the ICTY' (2013) 2 *Journal of International Criminal Justice* 558
- Pons N, 'Some Remarks on *In Absentia* at the Special Tribunal for Lebanon in Case of a State's Failure or Refusal to Hand Over the Accused' (2010) 8 *Journal of International Criminal Justice* 1307
- Rabinovitch R, 'Universal Jurisdiction In Absentia' (2004) 28 *Fordham International Law Journal* 500

- Riachy R, 'Trials in Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon: Challenges or Evolution' (2010) 8 *Journal of International Criminal Justice* 1295
- Schwartz H, 'Trials in Absentia' (1996) 4(1) *Human Rights Brief* 12
- Shaw GJ, 'Convicting Inhumanity *In Absentia*: Holding Trials *In Absentia* at the International Criminal Court' (2012) 44 *George Washington International Law Review* 107
- Thieroff M and Amley, Jr EA, 'Proceeding to Justice and Accountability in The Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61' (1998) 23 *Yale Journal of International Law* 231
- Wetzel JE and Mitri Y, 'The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country' (2008) 7 *The Law and Practice of International Courts and Tribunals* 81

CASES

- Maleki v Italy* Comm no 699/1996 (27 July 1999) UN Doc CCPR/C/66/D/699/1996
- Mbenge v Zaire* Comm no 16/1977 (25 March 1983) UN Doc CCPR/C/18/D/16/1977
- Sejdovic v Italy* App no 56581/2000 (ECtHR, 1 March 2006)

INTERNATIONAL LAW SOURCES AND TREATIES

- Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, Annex to UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757
- Charter of the United Nations (UN Charter) (24 October 1945) 1 UNTS XVI
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) 1950
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
- Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, last amended 11 June 2010) UNTS 90/37 ILM 1002
- Statute of the Special Tribunal for Lebanon, Attachment to Annex to UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757
- United Nations Security Council, 'Letter Dated 13 December 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General' (13 December 2005) UN Doc S/2005/783

REPORTS

- First Annual Report of the ICTY to the General Assembly and Security Council of the United Nations (29 August 1994) UN Doc S/1994/1007-A/49/342
- Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (3 May 1993) UN Doc S/25704

WEBSITES AND OTHER SOURCES

- Flash M, 'Trials In Absentia in the Special Tribunal for Lebanon' (*Human Rights Brief*, 14 March 2012)

54 Trials *in absentia* at the Special Tribunal for Lebanon: an Effective Measure of Expediency or an Inconsistency with Fair Trial Standards?

- <<http://hrbrief.org/2012/03/trials-in-absentia-in-the-special-tribunal-for-lebanon/>> accessed 1 March 2015
- Jacobs D, 'Guest Post: in Favour of Trials in Absentia in International Tribunals' (*Spreading the Jam*, 24 November 2009)
<<http://dovjacobs.com/2009/11/24/guest-post-in-favour-of-trials-in-absentia-in-international-tribunals/>> accessed 3 March 2015
- Kersten M, 'Defendants on the Run – What's a Court to do?' (*Justice in Conflict*, 16 April 2012)
<<http://justiceinconflict.org/2012/04/16/defendants-on-the-run-whats-a-court-to-do/>> accessed 2 March 2015
- Lowen M, 'Ratko Mladic arrested: Bosnia war crimes suspect held' (*BBC News*, 26 May 2011)
<<http://www.bbc.co.uk/news/world-europe-13561407>> accessed 6 March 2015
- Milanović M, 'The Oddity that is the Hariri Tribunal' (Social Science Research Network Paper, 5 September 2007)
<<http://ssrn.com/abstract=1014906>> accessed 13 February 2015
- Pons N, 'Lebanese Trial in Absentia Faces Many Obstacles to Justice' (*JURIST*, 3 December 2011)
<<http://jurist.org/hotline/2011/12/niccolo-pons-lebanon-absentia.php>> accessed on 3 March 2015
- 'Profile: Radovan Karadžić' (*BBC News*, 1 October 2014)
<<http://www.bbc.co.uk/news/world-europe-19960285>> accessed 6 March 2015
- 'Profiles of accused at Rafik Hariri tribunal in The Hague' (*BBC News*, 16 January 2014)
<<http://www.bbc.co.uk/news/world-middle-east-25757367>> accessed 2 March 2015
- Schwartz H and Lamb S, 'Should Indicted War Criminals Be Tried in Absentia?' Transitions (Prague, Czech Republic, 1997)
<<http://sks.sirs.bdt.orc.scoolaid.net/cgi-bin/hst-article-display?id=SZZRES-0-4390&artno=0000018028&type=ART&shfilter=U&key=Justice&title=Should%20Indicted%20War%20Criminals%20Be%20Tried%20in%20Absentia%3F&res=Y&ren=Y&gov=Y&lnk=Y&ic=Y>> accessed 6 March 2015
- Shehadi N and Wilmshurst E, 'The Special Tribunal for Lebanon: The UN on Trial?' (Middle Eastern/International Law Briefing Paper, Chatham House, 2007)

Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute

Andrew Sumner Hagopian*

While LGBTI discrimination and persecution violates international human rights law, the degree to which sexual and gender minorities are protected under international criminal law remains ambiguous. This Article attempts to clarify the position of sexual and gender minorities as protected groups within the context of the crime against humanity of persecution. It will be argued that sexual and gender minorities may, in some cases, be considered groups on political or gender grounds, as listed in Article 7(1)(h) of the Rome Statute. Despite increasingly robust protection under international law more generally, sexual and gender minorities do not yet meet the required standard to be considered discrete groups within the Statute's category of 'other grounds universally recognised as impermissible under international law'.

I. INTRODUCTION

Crimes against humanity occupy a unique position within international criminal law. Prosecutions for crimes against humanity by the International Criminal Court (ICC) 'may assume a preventive role'¹ and 'may serve as the predicate for ICC intervention *before* war and its accompanying atrocities completely overwhelm a civilian population'.² The crime against humanity of persecution, in particular, was expanded considerably with the adoption of the Rome Statute.³ The general scope of its definition, 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity', allows it to contend with a wide range of

* Andrew Sumner Hagopian recently completed an MA in International Law with Distinction from SOAS, University of London. He obtained his undergraduate degree from the University Professors Program at Boston University. Andrew would like to thank Dr Kate Grady, Dr Kevin Heller and Dr Maria Frederica Moscati for their valuable insight.

¹ Leila Nadya Sadat, 'Crimes Against Humanity in the Modern Age' (2013) 107 *American Journal of International Law* 334.

² *ibid.*

³ *ibid.* 352; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) (Rome Statute) 2187 UNTS 3.

issues that other international crimes are unable to address.⁴ Due to its focus on the identity of the victims, the crime against humanity of persecution encompasses the specific harm that is caused when individuals are targeted for the simple fact of their membership within a group.

Sexual and gender minorities are particularly vulnerable to persecutory and discriminatory acts. These acts are widely documented and include the loss of homes and incomes, arbitrary arrests, physical threats, torture and murder.⁵ In the first case of its kind, LGBTI⁶ persecution is currently being addressed in *Sexual Minorities Uganda (SMUG) v Lively*.⁷ The case, brought by Ugandan plaintiffs against an American pastor under the Alien Tort Statute,⁸ is the first in any jurisdiction that labels the persecution of sexual and gender minorities as a crime against humanity. The outcome of *SMUG v Lively* will likely have tremendous implications for the LGBTI community in Uganda, and the case itself is an important way for the community to achieve a measure of redress for the widespread persecution to which they are subjected.

Notwithstanding that *SMUG v Lively* is a civil case that was brought under domestic jurisdiction, the connection between the charges and international human rights law is apparent. The persecutory acts at issue in *Lively* constitute violations of international human rights law.⁹ To what extent, however, can

⁴ Rome Statute (n 3) art 7(2)(g).

⁵ See 'From Torment to Tyranny: Enhanced Persecution in Uganda Following the Passage of the Anti-Homosexuality Act 2014' (*Sexual Minorities Uganda*, 9 May 2014) <sexualminoritiesuganda.com/wp-content/uploads/2014/11/SMUG-From-Torment-to-Tyranny.pdf> accessed 31 January 2016. In 2011, the founder of SMUG, David Kato, was murdered after his being outed by a newspaper that carried his photo, among others, and a caption that read, 'Hang them'. While this report is specific to the experience of sexual and gender minorities in Uganda, such persecution is widespread and is not confined to any geographical area.

⁶ While recognising that the acronym 'LGBTI' (lesbian, gay, bisexual, transgender and intersex) excludes some categories of sexual and gender minorities, it will be used in this Article, for convenience, to refer to all such minorities.

⁷ *Sexual Minorities Uganda v Scott Lively* Civil Action 3:12-CV-30051 (MAP) (US District Court for the District of Massachusetts). According to the original complaint, the case was brought, under the Alien Tort Statute, in response to 'the decade-long campaign [Lively] had waged, in association with his Ugandan counterparts, to persecute persons on the basis of their gender and/or sexual orientation and gender identity.' (Dkt No 27, Am Compl, para 1). Lively was instrumental in the drafting of Uganda's 2009 Anti-Homosexuality Bill.

⁸ Alien Tort Statute, 28 USC § 1350.

⁹ Human rights violations resulting from Lively's campaign include, among others, violations of the rights to life, liberty and security of person, freedom from torture and ill treatment and equality before the law. See the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR) 999 UNTS 171, arts 6(1), 7, 9 and 26.

such persecution be considered a crime against humanity under international criminal law?

Central to a consideration of the crime against humanity of persecution is the definition and composition of groups enumerated in Article 7(1)(h) of the Rome Statute. As a crime against humanity, persecution must occur:

against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender... or other grounds that are universally recognised as impermissible under international law.¹⁰

Thus, whether or not sexual and gender minorities conform to the definition of one or more of the groups listed in Article 7(1)(h) will determine if the persecution of these minorities can be considered an international crime.

This Article will argue that sexual and gender minorities, in the context of Article 7(1)(h), may be classified as groups on political or gender grounds and thus derive protection from international criminal law on those bases. While including these groups under the heading of 'other grounds universally recognised as impermissible under international law'¹¹ would validate LGBTI identity under the law and acknowledge the harm that LGBTI individuals face as a result of their identity, sexual and gender minorities do not yet meet the universally recognised standard articulated in the Rome Statute.

Section II will examine whether LGBTI persons constitute a group, for the purposes of the Statute, on the basis of political or gender grounds. Section III will then examine the meaning of the phrase 'other grounds universally recognised as impermissible under international law' and determine whether sexual and gender minorities conform to the standard set forth in the Statute.¹² Finally, Section IV will conclude by affirming that the limited protections afforded to sexual and gender minorities under international criminal law may accurately reflect instances of persecution against these groups.

¹⁰ Rome Statute (n 3) art 7(1)(h). As sexual and gender minorities do not *prima facie* conform to the definitions of racial, national, ethnic, cultural or religious grounds, these categories will not be discussed.

¹¹ *ibid.*

¹² As sexual and gender minorities do not *prima facie* conform to the definition of racial, national, ethnic or cultural grounds, these categories will not be considered.

II. SEXUAL AND GENDER MINORITIES AND PERSECUTION ON POLITICAL OR GENDER GROUNDS

Victims of the crime against humanity of persecution must belong to a particular group or collectivity identified in Article 7(1)(h). In determining exactly how membership in the group is defined, the jurisprudence of the ICC and the *ad hoc* and special tribunals reveals two important elements that are relevant to the present discussion. Firstly, ‘the victim’s membership in a group [is] defined by the perpetrator’.¹³ Following on from that, the ‘group does not only comprise persons who *personally* carry the... criteria of the group,’¹⁴ but it also comprises persons who are perceived (by the perpetrator) to be part of the group.¹⁵ The fact that the perpetrator can both define the group, as well as include within the group persons who might not actually be a part of it, has implications for the placement of sexual and gender minorities within the scope of Article 7(1)(h).

2.1 Persecution on Political Grounds

The crime against humanity of persecution on political grounds is common to the ICC and many of the *ad hoc* and special tribunals.¹⁶ The definition of

¹³ *Prosecutor v Kaing Guek Eav alias Duch* (Judgment) 001/18-07-2007/ECCC/TC (26 July 2010) para 377. See also fn 12 and accompanying footnotes and text, citing ICTY precedent. The perpetrator’s definition of the group also speaks to the discriminatory intent (*mens rea*) of the act.

¹⁴ *Prosecutor v Naletilić and Martinović* (Judgment) IT-98-34-T (31 March 2003) para 636.

¹⁵ See, *inter alia*, Situation in the Republic of Côte d’Ivoire in the Case of *The Prosecutor v Laurent Gbagbo* (Decision on the Confirmation of Charges against Laurent Gbagbo) ICC-02/11-01/11 (12 June 2014) paras 67 and 205. Notably, in *Prosecutor v Milorad Krnojelac*, Trial Chamber II held that individuals who were mistakenly targeted on the basis of their perceived membership in a protected group could not be considered victims of persecution: ‘[T]o argue that this act amounts nonetheless to persecution if done with a discriminatory intent needlessly extends the protection afforded by that crime to a person who is not a member of the listed group requiring protection in that instance.’ See *Prosecutor v Milorad Krnojelac* (Judgment) IT-97-25-T (15 March 2002) para 432, fn 1293. The Appeals Chamber held that this interpretation was ‘erroneous’. See also *Prosecutor v Milorad Krnojelac* (Judgment) IT-97-25-A (17 September 2003) para 185. Subsequent decisions have reinforced this position. The perception that victims belong to a certain group, whether or not they actually do, may also reveal discriminatory intent, satisfying the *mens rea* of the crime against humanity of persecution. See *Kaing* (n 13) paras 377–80.

¹⁶ See Rome Statute (n 3) art 7(1)(h); Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993 by UNSC Resolution 827) (ICTY), art 5(h); Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994 by UNSC Resolution 955) (ICTR), art 3(h); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia 2001 (as amended 2004) (ECCC), art 5; and Statute of the Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 138 (SCSL), art 2(h).

'political grounds', as provided by the jurisprudence of the Court and the tribunals, has been well established. As a basis for the crime against humanity of persecution, political grounds do not require membership in a political party. In *Kaing*, the Supreme Court Chamber of the ECCC affirmed that:

The group or groups persecuted on political grounds may include various categories of persons, such as: officials and political activists; persons of certain opinions, convictions and beliefs; persons of certain ethnicity or nationality; or persons representing certain social strata.¹⁷

Individual members of groups that undertake political activism in order to advance the rights of sexual and gender minorities meet the definition of a political group as articulated by the ECCC. Individuals who take part in such activism, but who are not themselves LGBTI, could also be considered part of a political group in the context of Article 7(1)(h).

Although groups that advocate for LGBTI rights may be considered 'political' for the purposes of the Rome Statute, the fact that membership within a group is determined by the perpetrator complicates the position of sexual and gender minorities as a political entity. Attacks that are motivated by homophobia, transphobia or genderphobia usually occur on the basis of the perpetrator's perception of the victim within the LGBTI spectrum and not on the basis of the victim's membership in a politically active group. Therefore, it is not immediately clear that the Court would consider persecutory attacks on individuals who advocate for LGBTI rights as attacks committed on political grounds. There does, however, exist some room for further interpretation.

In the *Media Case*,¹⁸ the Trial Chamber I found that the accused 'essentially merged [the] political and ethnic identity [of their victims], defining their political target on the basis of ethnicity and political positions relating to ethnicity'.¹⁹ A background of the case here would perhaps help to illustrate this point. While ethnicity itself is a protected status under Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR), the defendants in this case were charged with, *inter alia*, crimes against humanity of persecution on

¹⁷ *Prosecutor v Kaing Guek Eav alias Duch* (Appeal Judgement) 001/18-07-2007-ECCC/SC (3 February 2012) para 272.

¹⁸ *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (Judgment and Sentence) ICTR-99-52-T (3 December 2003) (*Media Case*).

¹⁹ *ibid* para 1071. The Chamber held that attacks against members of the Tutsi ethnic group and their supporters could be defined in political as well as ethnic terms, although 'the political component predominated'.

political (not ethnic) grounds. The ethnicity of the victims served to refine the perpetrators' definition of the political group that was targeted. Indicators of perceived membership in a political group, therefore, do not require protected status; they are simply definitional elements of the protected group that perpetrators may use to identify and target their victims.

As political targets, then, it is not necessary to determine whether sexual and gender minorities are protected groups for the purposes of the Rome Statute. LGBTI individuals may be considered members of a political group if a perpetrator defines them as 'gay activists' or 'gender activists'. In this way, the perpetrator would be defining the political group based on certain features that he or she perceives to indicate membership within that group. It may be possible to broaden this proposition even further. For example, it is not tenuous to posit that the mere act of living openly as an LGBTI person in certain places is a political statement and that such an act could be understood to indicate certain political positions or membership in a political group.

2.2 Persecution on The Grounds of Gender

The inclusion of gender within Article 7(1)(h) prompted much debate during the drafting of the Rome Statute; those delegations that opposed its inclusion cited sexual orientation as among the reasons for their opposition.²⁰ In the end, gender was included, subject to the definition found in Article 7(3), which states that "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.²¹ Ultimately, Article 7(3) placated parties on both sides of the debate.

[It] gave comfort to those opposed to "gender" because they saw it as reaffirming the "two sexes, male and female", while those supportive felt that it was harmless because it reaffirmed the valuable sociological reference to the "context of society".²²

²⁰ For a detailed account of negotiations surrounding the inclusion of the term 'gender' in the Rome Statute, see generally Valerie Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 Harvard Human Rights Journal 55. Delegations opposed to including gender in the Rome Statute argued that the category 'could imply rights more expansive than those currently recognised in many states, with the main concern being that the term might sanction rights based on sexual orientation' (Oosterveld at 63).

²¹ Rome Statute (n 3) art 7(3).

²² Oosterveld (n 20) 65.

While Article 7(3) may have provided a basis for agreement among the negotiating parties, it did not resolve the underlying question of whether sexual orientation and gender identity can be read into the Statute's definition of gender.²³ Some scholars insist that the definition excludes sexual orientation outright and claim that, as a concession to more conservative parties, '[d]ebates in Rome resulted in [the adoption of] a limit[ed] definition to ensure that persecution on the basis of sexual orientation would not be covered'.²⁴ Others argue that the definition does not 'implicitly preclude "gender" from encompassing sexual orientation'²⁵ and that the last sentence of Article 7(3) is 'tautological and superfluous',²⁶ leaving room for further interpretation.

Given the definition of gender as it stands, it is quite possible to argue that both sexual and gender minorities are included within the Statute's definition of 'gender' in Article 7(3). Firstly, 'it is "dubious to argue that any ambiguity should be resolved in favour of discrimination"'.²⁷ To read discrimination into the definition of gender, however vague the definition may be, seems contrary to the idea of including persecution as a crime against humanity in the Rome Statute. Secondly, sexual orientation and gender identity are fundamentally tied to, though not exclusively defined by, gender (and vice versa).

Since 'conceptions of "gender" and sexual orientation are inextricably linked',²⁸ the persecution of men or women on the basis of their sexual orientation is

²³ For a more detailed discussion of arguments on either side of the debate, see Oosterveld (n 20) 76–78.

²⁴ Oosterveld (n 20) 76 citing Stephanie Farrow, 'The Rights of Women in International Human Rights Law Textbooks: Segregation, Integration, or Omission?' (2003) 12 *Columbia Journal of Gender & Law* 587, 598.

²⁵ *ibid* 77.

²⁶ *ibid*. Some scholars suggest that the drafters of the Statute squandered an opportunity to develop a clear definition of gender in international law. See Oosterveld (n 20) 76–77 and Solange Mouthaan, 'The Prosecution of Gender-based Crimes at the ICC: Challenges and Opportunities' (2011) 11 *International Criminal Law Review* 775, 800. As the issue remains under the purview of the Court, however, there exists an even greater opportunity to develop a definition of gender that reflects contemporary notions of gender, gender identity and sexual orientation. Had the definition of gender been settled conclusively in 1998, it may have been limited to a narrow rendering of the concept of sexual orientation, reflecting developments only until that time, and gender identity may not have been considered at all.

²⁷ Oosterveld (n 20) 78 citing Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217, 237.

²⁸ *ibid*. Note that categories of gender-based and sexual crimes found in Article 7(1)(g) of the Rome Statute, even if 'too restrictive... should not preclude [the protection of] further gender categories, such as homosexuals or transvestites': Mouthaan (n 26) 798. Unlike the crime against humanity of persecution, the crime against humanity of rape, for example, does not require discriminatory intent. The act of rape is, irrespective of the group to which the victim belongs, still rape. Patterns of so-called 'corrective rape' provide one such example. It is irrelevant, for

necessarily persecution on the basis of the victims' gender. Based on the same logic presented above with regard to the *Media Case*,²⁹ it is plausible that perpetrators may conflate victims' sexual orientation and gender and use the former to characterise the latter. The sexual orientation of the victims may provide evidence of discriminatory intent, based on the perpetrator's definition of the group, but is not the sole defining feature of the targeted group (that is, gay *men* or lesbian *women*). In other words, it can be argued that the persecution of individuals based on their sexual orientation is persecution on the basis of gender (with, again, the victims being either male or female) for reasons of the victims' sexual orientation. Gender may therefore be characterised, but not completely defined by, the sexual orientation of the victims.

Whereas sexual minorities may conform to the definition of gender even in its most narrow rendering (that is, only male or female), the position of gender minorities is more complicated. Brian Kritz argues that the definition of 'gender' in Article 7(3) may extend protection to transgendered individuals who self-identify as either male or female,³⁰ but he maintains that Article 7(3) denies outright any protection to individuals who 'identify as a gender, do not have a gender identity or refuse to be classified as male or female'.³¹ This position, whilst acknowledging the fact that some gender minorities may benefit from protection under the Rome Statute, is based on an arguably flawed reading of Article 7(3) and ignores relevant jurisprudence.

Kritz takes the phrase 'within the context of society' to mean 'within our combined global societal notions of male and female'³² and, as a test, asks if gender minorities have 'become mainstreamed in all countries throughout the globe'.³³ It is difficult to accept such a reading of the Statute when there is nothing in *A Commentary on the Rome Statute*,³⁴ in contemporary scholarly literature or in the jurisprudence of the ICC to support this interpretation.³⁵

the purposes of Article 7(1)(g), that 'corrective rape' is committed against gay or lesbian individuals with the intention of changing the victims' sexual orientation.

²⁹ *Media Case* (n 18).

³⁰ See Brian Kritz, 'The Global Transgender Population and the International Criminal Court' (2014) 17 *Yale Human Rights & Development Law Journal* 36.

³¹ *ibid.*

³² *ibid* 37.

³³ *ibid* 36. 'The answer,' Kritz writes, 'seems a resounding "no".'

³⁴ See William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 186.

³⁵ This Article contends that the two phrases 'two sexes male and female' and 'within the context of society' were inserted into Article 7(3) simply to placate the two opposing sides of the gender debate during the drafting of the Statute and not to provide a complete definition of the term 'gender'. See above fns 11-13. Notwithstanding the last sentence of the article, which refers

Further, Kritz's argument is based on the premise that the victims' self-identity informs membership within a protected group for the purposes of the Rome Statute, disregarding jurisprudence that indicates otherwise. As stated above, it is the perpetrators who define — accurately or not — their victims' status as members of a certain group.³⁶

In its Decision on the Confirmation of Charges in the *Kenya Situation*,³⁷ the ICC addressed the degree to which assumptions provided a basis for defining groups under Article 7(1)(h). The Court affirmed that attacks on ethnic groups based on those groups' 'assumed political allegiance... does not diminish the fact that the identification of the targeted population was essentially on political grounds'.³⁸ The Court found that the perpetrators' underlying assumption was enough to satisfy the definition of a political group. One could argue, therefore, that persecution on the basis of a group's perceived gender could likewise satisfy, for the purposes of Article 7(1)(h), the definition of an 'identifiable group or collectivity' on gender grounds.

Perpetrators of crimes committed with discriminatory intent against gender minorities act on the basis of gender, whether or not the victims outwardly express their gender in conformity with the strict male-female dyad. If the crime concerns the persecution of female transgendered individuals, for example, it is committed on the basis of gender, against a group of people whom the perpetrators assume or perceive to be male, even if the victims themselves do not identify with this perception. Similarly, persecution of those who are agender, intersex, genderqueer or gender fluid may be committed against individuals whom the perpetrators assume or perceive to be either male or female, even if they do not comport with a certain standard of 'maleness' or 'femaleness'.

While to contend that gender as defined in Article 7(3) includes within its scope both sexual and gender minorities is to extend meaningful protection to LGBTI

back to a definition that is already legally unclear and remains the subject of much debate, Kritz's reading of 'within the context of society', rather than provide any clarification around the term, further obscures the meaning of Article 7(3). See also above fn 21.

³⁶ See above fn 13.

³⁷ Situation in the Republic of Kenya in *The Case of the Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012) (*Kenya Situation*).

³⁸ *ibid* para 144. As in the *Media Case*, the ethnic character of the group is secondary, given that the defendants in the *Kenya Situation* were charged with crimes against humanity of persecution on political, not ethnic, grounds. See *Kenya Situation* para 21. Note that the charges in the *Kenya Situation* were eventually dropped.

persons through international criminal law, placing such protection within the definition of gender fails to validate the identity of LGBTI individuals. As crimes against humanity are uniquely able 'to fully capture the social harm suffered by victims',³⁹ it is important to address this harm as much as possible. Tying LGBTI persecution to gender denies a certain aspect of one's identity and does not fully address the social harm that follows from gross violations of human rights that are committed with the intent to discriminate against sexual or gender minorities. To recognise and validate LGBTI identity more fully, it is necessary to examine whether, if at all, it is possible to include the category of LGBTI, on its own and without reference to other characteristics, elsewhere within the scope of Article 7(1)(h).

III. PERSECUTION ON OTHER GROUNDS UNIVERSALLY RECOGNISED AS IMPERMISSIBLE UNDER INTERNATIONAL LAW

In addition to the specific categories listed in Article 7(1)(h), the crime against humanity of persecution can be committed on the basis of 'other grounds that are universally recognised as impermissible under international law'.⁴⁰ While the very 'reference to "other grounds" in the final version of Article 7(1)(g) [*sic*] invites the Court to extend the scope of persecution',⁴¹ the requirement that such grounds be *universally* recognised seems to present a significant challenge to the inclusion of new categories within the scope of the Article. Noting the 'relatively primitive stage of international law in the area',⁴² Schabas writes that the category of other universally recognised grounds excludes sexual orientation, but he further maintains that 'the situation will undoubtedly change with the progressive development of international human rights law'.⁴³

Scholars who argue that sexual minorities meet the universally recognised standard have done so while omitting an analysis of the standard itself.⁴⁴ As the standard was inserted into the Statute in order to avoid any imprecision that

³⁹ Sadat (n 1) 344. Mouthaan also emphasises the 'physical, mental, social and cultural suffering' of victims of gender-based crimes: Mouthaan (n 26) 783.

⁴⁰ Rome Statute (n 3) art 7(1)(h).

⁴¹ Schabas (n 34) 177. The text's reference to Article 7(1)(g) is erroneous. The section in which it is found refers only to the crime of persecution and not to the sexual crimes outlined in Article 7(1)(g).

⁴² *ibid.*

⁴³ Schabas (n 34) 177 fn 309.

⁴⁴ See Oosterveld (n 20) 79 and see Josh Scheinert, 'Is Criminalisation Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution' (2015) 24 *Tulane Journal of Law & Sexuality* 99, 130–34.

might violate the principle of legality,⁴⁵ such an analysis is critical to the discussion at hand.

To illustrate a group against whom persecution is universally recognised as impermissible, Schabas provides the example of persons with disabilities, referring to both a footnote in the Preparatory Committee Draft Statute and the Convention on the Rights of Persons with Disabilities (CRPD).⁴⁶ While a treaty such as the CRPD is an authoritative statement of the degree to which a category of persons is protected under international law, the existence of a treaty is not, arguably, required to fulfil the ‘universally recognised’ standard.⁴⁷ Inasmuch as the CRPD reveals the position of disabled persons within international law, it is worth noting that the treaty itself, with 153 states parties to it at present, is not universally ratified and that some states have failed, at the policy level, to address and combat discrimination against persons with disabilities.⁴⁸ While such discrimination does not rise to the level of persecution as defined in Article 7(2)(g) of the Rome Statute,⁴⁹ it does constitute a violation of international human rights law. Considering Schabas cites international human rights law as one source of universal recognition within the scope of Article 7(1)(h),⁵⁰ and given that the standard of universal recognition applies with regard to the identity of the group or collectivity being persecuted, a conflict arises between the standard and the way in which it is expressed through state practice. On the one hand, it may be universally recognised that persecution of disabled persons is impermissible; on the other hand, it is possible to violate one of the underlying premises (that is, international human rights law) that gives rise to such universal recognition.

It is possible, then, that the universal recognition standard may not be as insurmountable as a cursory reading of the Statute might at first imply.⁵¹ ‘Universal’ likely does not need to be construed in a literal sense, and the standard itself is probably influenced by a combination of positive law,

⁴⁵ Darryl Robinson, ‘Defining “Crimes Against Humanity” at the Rome Conference’ (1999) *Developments in International Criminal Law* 43, 54.

⁴⁶ Schabas (n 34).

⁴⁷ The elderly provide an example of a group that might conform to the universally recognised standard without being the subject of a treaty. Persecution of certain classes of people, such as that which occurred during China’s Cultural Revolution, might also fit this standard.

⁴⁸ See, for example, World Health Organization, *World Report on Disability* (World Health Organization 2011) <www.who.int/disabilities/world_report/2011/en/> accessed 31 January 2016.

⁴⁹ See fn 4.

⁵⁰ See fn 38.

⁵¹ Universal recognition remains, if not insurmountable, ‘a very high threshold’. See Oosterveld (n 20) 79 fn 144 and Robinson (n 45) 54.

customary law and international norms. With Schabas' example of persons with disabilities as a guide, state practice on its own may not factor as heavily as other sources of law and custom when determining which groups meet the standard, since such practice may diverge from international human rights norms and obligations. Nevertheless, it remains an important factor to consider.

While sexual and gender minorities are increasingly protected under international law, some states still continue to criminalise homosexual acts and non-cisgender identity.⁵² Penal codes, some of which have been inherited from former colonial powers and remain in force, contain references to 'the abominable crime of buggery',⁵³ 'outrages on decency'⁵⁴ and 'unnatural offences'⁵⁵ and have been used to prosecute sexual and gender minorities. The more recent passage of discriminatory legislation,⁵⁶ including the Anti-Homosexuality Act in Uganda⁵⁷ and the so-called 'gay propaganda bill' in Russia, reveals that anti-LGBTI sentiment remains a contemporary issue, with serious, and sometimes fatal, consequences for members of these communities. In other places, however, state practice indicates a move towards decriminalisation of, and more legal protections for, sexual and gender minorities.⁵⁸

It is perhaps these positive developments that have led some scholars to argue that the category of 'other grounds' may include sexual minorities. Oosterveld and Scheinert, for instance, both suggest that sexual orientation could be included as a protected group under Article 7(1)(h), citing international and

⁵² See, for example, Aengus Carroll and Lucas Paoli Itaborahy, 'State Sponsored Homophobia: A World Survey of Laws: criminalisation, protection and recognition of same-sex love' (10th edn, ILGA 2015).

⁵³ Offences against the Person Act (Jamaica) (1864, last amended 2010) § 76.

⁵⁴ *ibid* para 79.

⁵⁵ Penal Code Act 1950 (Uganda), § 145. Additional examples abound.

⁵⁶ The UN Human Rights Council (HRC) has found that enacted discriminatory legislation is 'in breach of international human rights law, since [it] violate[s] the rights to privacy and non-discrimination... [The] arrest and detention of individuals [under such laws] is discriminatory and arbitrary.' See UN Human Rights Council, 'Discrimination and violence against individuals based on their sexual orientation and gender identity' (4 May 2015) UN Doc A/HRC/29/23 para 43. See also below fn 57.

⁵⁷ There have been two attempts to pass an Anti-Homosexuality Act in Uganda. The second proposal, unlike its previous iteration did not contain the death penalty, was signed into law in 2014 but was subsequently overturned by the Constitutional Court of Uganda on a procedural technicality. LGBTI persons are still criminalised under section 145 of the Penal Code Act 1950, which provides a life sentence for those convicted of 'unnatural acts'. See above fn 55.

⁵⁸ States such as Mozambique, São Tomé and Príncipe and Palau have recently repealed statutes that criminalised homosexual acts, while in Lithuania, a 'gay propaganda bill' was tabled in parliament (though its reintroduction remains a possibility).

domestic human rights jurisprudence, as well as a number of documents from UN treaty bodies.⁵⁹ Additional developments at the international, regional and domestic levels have contributed to the recognition of LGBTI individuals as a protected group under international law more generally.⁶⁰

⁵⁹ See Oosterveld (n 20) 79 and fn 137 and see Scheinert (n 44) 130–34. Scheinert also contends that the lack of enforcement of antigay laws in states where such legislation exists is evidence that persecution of sexual minorities is universally recognised as impermissible. See Scheinert (n 44) 133. In the context of his article, which maintains that the enforcement of antigay laws, in some instances, may rise to the level of the crime against humanity of persecution, this argument is unconvincing. The very existence of discriminatory legislation, whether enforced or not, is persecutory. In *Norris v Ireland*, the European Court of Human Rights (ECtHR) held that Irish antigay legislation rendered the applicant, who was homosexual, a victim, despite the fact that he had not been prosecuted under national law. ‘A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time... The applicant can therefore be said to “run the risk of being directly affected” by the legislation in question.’ See *Norris v Ireland* App no 10581/83 (ECtHR, 26 October 1988) para 33. The ECtHR then cited Mr Justice McWilliam, who presided over the *Norris* case in the Irish High Court: ‘One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease.’ Thus, it cannot be argued that non-enforcement of antigay legislation is evidence that the persecution of sexual minorities is universally recognised as impermissible, particularly since the existence of such legislation reinforces a climate of hostility toward these minorities that contributes to persecution and discrimination.

⁶⁰ Various UN organs have adopted treaty body resolutions and other soft law instruments and statements that affirm LGBTI protection through existing non-discrimination clauses in international treaties. See, *inter alia*, UN Human Rights Council, ‘Human rights, sexual orientation and gender identity’ (22 September 2014) UN Doc A/HRC/27/L.27/Rev.1; UN Human Rights Council, ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’ (17 November 2011) UN Doc A/HRC/19/41; The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (March 2007); UN Committee on Economic, Social and Cultural Rights, ‘General Comment 20, Non-discrimination in economic, social and cultural rights’ (2 July 2009) UN Doc E/C.12/GC/20 para 32 (stating explicitly that discrimination on the grounds of sexual orientation is prohibited). International refugee law has also moved to provide protection to LGBTI persons seeking asylum from persecution in their home countries by considering the category of LGBTI as a protected group. Some scholars ‘have been particularly engaged with shifting attention away from the applicant’s social group characteristics... in order to focus on the treatment or conduct by the state in question towards social groups’. See Derek McGhee, ‘Persecution and Social Group Status: Homosexual Refugees in the 1990s’ 2001 14 *Journal of Refugee Studies* 20, 26. Regional bodies have also affirmed LGBTI protections. See also, for example, African Commission on Human and Peoples Rights, Resolution 275 on the Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity (2014). Additionally, a number of states have protected LGBTI rights in non-discrimination and marriage equality legislation.

Positive law and emerging international norms underpin the extensive development of the rights of sexual and gender minorities in international law. In light of the universally recognised standard, however, this Article disagrees with the assertion that sexual minorities comprise a discrete group under the 'other grounds' category listed in Article 7(1)(h). Furthermore, there is not enough evidence to conclude that gender minorities similarly comprise such a group.

While the universally recognised standard should not be read in literal terms, there is a troublesome lack of consensus around LGBTI protections in state practice. As state-sponsored discrimination against sexual and gender minorities violates such fundamental principles of international human rights law,⁶¹ one cannot discount state practice entirely when determining which groups benefit from universal recognition under Article 7(1)(h). Additionally, despite a growing consensus on the international level, it is significant to note that the Human Rights Council in 2011 only narrowly approved a resolution 'expressing grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity'.⁶² Given the lack of consensus around the position of sexual and gender minorities within customary law, and persistent state practice that denies the rights of these groups, it is difficult to argue that either group fulfils the standard of universal recognition as required by Article 7(1)(h).

IV. CONCLUSION

While to contend that political and gender grounds may serve as a basis for LGBTI protection under Article 7(1)(h) is to extend meaningful recognition to sexual and gender minorities under international criminal law, placing such protections within political and gender categories does not adequately acknowledge the identity of LGBTI individuals under the law. As argued above, due to the fact that the prosecution of crimes against humanity is uniquely able 'to fully capture the social harm suffered by victims',⁶³ it is important to address this harm as much as possible. Positioning the persecution of sexual and gender minorities within political or gender categories recognises

⁶¹ See generally UN Human Rights Council, 'General Comment 18, Non-discrimination' (10 November 1989) UN Doc HRI/GEN/1/Rev.9.

⁶² UN Human Rights Council, 'Human rights, sexual orientation and gender identity' (15 June 2011) UN Doc A/HRC/17/L.9/Rev.1. The resolution was approved with 23 votes in favour, 19 against and 3 abstentions.

⁶³ Sadat (n 1) 344. Mouthaan also emphasises the 'physical, mental, social and cultural suffering' of victims of gender-based crimes: Mouthaan (n 26) 783.

their victimhood only inasmuch as it is linked to gender and not to LGBTI identity itself.

Until a stronger consensus develops in state practice and sexual and gender minorities are universally recognised under the Rome Statute, LGBTI individuals will be denied protection based on their identity alone. The inclusion of LGBTI persons within the scope of Article 7(1)(h) on political and gender grounds is, however, very important and may still accurately reflect the experience of LGBTI persons in places where persecution on the basis of sexual orientation and gender identity continues to occur.

BIBLIOGRAPHY**BOOKS**

Schabas W, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010)

JOURNAL ARTICLES

- Copelon R, 'Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law' (2000) 46 McGill Law Journal 217
- Farrior S, 'The Rights of Women in International Human Rights Law Textbooks: Segregation, Integration, or Omission?' (2003) 12 Columbia Journal of Gender & Law 587
- Kritz B, 'The Global Transgender Population and the International Criminal Court' (2014) 17 Yale Human Rights & Development Law Journal 1
- McGhee D, 'Persecution and Social Group Status: Homosexual Refugees in the 1990s' (2001) 14 Journal of Refugee Studies 20
- Mouthaan S, 'The Prosecution of Gender-based Crimes at the ICC: Challenges and Opportunities' (2011) 11 International Criminal Law Review 775
- Oosterveld V, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 Harvard Human Rights Journal 55
- Robinson D, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 American Journal of International Law 43
- Sadat LN, 'Crimes Against Humanity in the Modern Age' (2013) 107 American Journal of International Law 334
- Scheinert J, 'Is Criminalisation Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution' (2015) 24 Tulane Journal of Law & Sexuality 99

CASES

- Norris v Ireland* App No 10581/83 (ECtHR, 26 October 1988)
- Prosecutor v Kaing Guek Eav alias Duch* (Appeal Judgement) 001/18-07-2007-ECCC/SC (3 February 2012)
- Prosecutor v Kaing Guek Eav alias Duch* (Judgement) 001/18-07-2007/ECCC/TC (26 July 2010)
- Prosecutor v Milorad Krnojelac* (Judgment) IT-97-25-A (17 September 2003)
- Prosecutor v Milorad Krnojelac* (Judgment) IT-97-25-T (15 March 2002)
- Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (Judgment and Sentence) ICTR-99-52-T (3 December 2003)
- Prosecutor v Naletilić and Martinović* (Judgment) IT-98-34-T (31 March 2003)
- Sexual Minorities Uganda v Scott Lively* Civil Action 3:12-CV-30051 (MAP) (US District Court for the District of Massachusetts)
- Situation in the Republic of Côte d'Ivoire *in the Case of The Prosecutor v Laurent Gbagbo* (Decision on the Confirmation of Charges against Laurent Gbagbo) ICC-02/11-01/11 (12 June 2014)
- Situation in the Republic of Kenya *in The Case of the Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the

Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012)

STATUTES

Alien Tort Statute, 28 USC §1350

Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia 2001 (as amended 2004)

Offences Against the Person Act (Jamaica) (1864, last amended 2010)

Penal Code Act 1950

Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994 by UNSC Resolution 955)

Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993 by UNSC Resolution 827)

Statute of the Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 138 (SCSL) art 2(h)

REPORTS

African Commission on Human and Peoples Rights, 'Resolution 275 on the Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity' (2014)

Carroll A and Itaborahy LP, 'State Sponsored Homophobia: A World Survey of Laws: criminalisation, protection and recognition of same-sex love' (10th edn, ILGA 2015)

UN Committee on Economic, Social and Cultural Rights, 'General Comment 20, Non-discrimination in economic, social and cultural rights' UN Doc. E/C.12/GC/20, 2 July 2009

UN Human Rights Council, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' UN Doc A/HRC/19/41, 17 November 2011

— — 'Discrimination and violence against individuals based on their sexual orientation or gender identity' (4 May 2015) UN Doc A/HRC/29/23

— — 'General Comment 18, Non-discrimination' (10 November 1989) UN Doc HRI/GEN/1/Rev.9

— — 'Human rights, sexual orientation and gender identity' (15 June 2011) UN Doc A/HRC/17/L.9/Rev.1

INTERNATIONAL LAW SOURCES AND TREATIES

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR) 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR) 993 UNTS 3

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3

The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (March 2007)

WEBSITES AND OTHER SOURCES

- 'From Torment to Tyranny: Enhanced Persecution in Uganda Following the Passage of the Anti-Homosexuality Act 2014' (*Sexual Minorities Uganda*, 9 May 2014) <sexualminoritiesuganda.com/wp-content/uploads/2014/11/SMUG-From-Torment-to-Tyranny.pdf> accessed 31 January 2016
- World Health Organization, *World Report on Disability* (World Health Organization 2011) <www.who.int/disabilities/world_report/2011/en/> accessed 31 January 2016

Towards a 'Sensitive' Approach to Ending Female Genital Mutilation/Cutting in Africa

Lwamwe Muzima*

Female genital mutilation (FGM) remains one of the worst forms of gender discrimination in some communities in Africa (and beyond). Owing to the fact that FGM is sanctioned by culture (albeit abusive ones), intervention to end its practice has often been fruitless and counterproductive, arousing debates about 'cultural relativism' and 'universalism'. In an effort to find better alternatives, I have researched scholarly journals, international human rights law instruments and other literature on the topic. In this Article I propose that mothers who procure the cuttings for their daughters, and the women who perform them, be treated as victims rather than perpetrators. I thus recommend that African states abandon criminal punishment as a response to FGM and focus their resources towards sensitisation campaigns. Inspired by the Tostan model and the campaign against the now extinct Chinese foot binding practice, such campaigns will be meaningful if they are culturally sensitive and adopt a holistic approach to women's human rights. FGM can be abandoned only if its victims are empowered enough to reflect on their social conditions and be the primary agents of their social transformation.

I. INTRODUCTION

Female genital mutilation (hereafter FGM) remains an issue of concern in many parts of Africa. It is deemed a rite of passage and an aspect of culture in practicing communities.¹ Yet, it has come to be considered by international bodies as an affront to women's human rights.² This has aroused debates about

* Lwamwe Muzima holds a Master's Degree in International Law from SOAS, University of London. He earned his Bachelor's in Political Science and Peace and Social Justice from Berea College, in the United States. He wishes to thank Dr Lutz Oette for his guidance and encouragement; and Dr Barbara Harell-Bond for sharing her expertise on the subject. This Article is dedicated to the late Dr Michelle Tooley, who instilled in me the values of social justice.

¹ Carlos DL Sulkin, 'Anthropology, Liberalism and Female Genital Cutting' (2009) 25(6) *Anthropology Today* 17.

² 'Female Genital Mutilation' (*World Health Organization*)

cultural relativism and universalism as they relate to international human rights. Like any other human rights violation, FGM cuts across national borders and this requires that everyone in the human family undertakes to play a role in ending its practice.

This Article builds on research by academics and other experts in the field of FGM in an attempt to develop a better human rights approach, which can be invoked in the campaign to end the practice. In this Article I argue that mothers who procure genital cutting for their daughters, and the women who perform such cuttings, are victims rather than perpetrators. I then propose that African states move their focus away from criminal punishment as a response to FGM and instead channel their resources towards supporting programmes that are devoted to sensitising communities on the broader issues of human rights. Such sensitisation should respect practicing communities' cultural values and empower women to reflect on their social conditions, which will turn them into agents of their own social transformation.

The first part of this Article reopens the debate between cultural relativism and universalism and offers an overview of FGM, including the rationale behind the practice, as well as the legal frameworks that provide legitimacy for intervention. The second part of this Article points out the problems with the current approaches taken by African states in addressing FGM, while proposing alternatives drawn from the experiences of Tostan³ and lessons from the campaign to end foot binding in China.

II. RELATIVISM v UNIVERSALISM: DEBATE

Proponents of FGM point to cultural relativism⁴ as an argument for non-intervention. Sandra Lane and Robert Rubinstein, for example, posit that cultural values differ in that each value has its own meaning, and therefore should be understood in its own context.⁵ Anti-FGM advocacy need not seek to

<<http://www.who.int/mediacentre/factsheets/fs241/en/>> accessed 15 June 2015.

³ Tostan means 'breakthrough' in Wolof, a West African language. It is a Senegal-based international organisation working to improve the lives of rural communities, including FGM abandonment. Tostan has expanded its work from Senegal to five other West African countries, namely Guinea, Guinea-Bissau, Mali, Mauritania, and the Gambia. See 'Where We Work' (*Tostan*) <<http://www.tostan.org/where-we-work>> accessed 15 June 2015.

⁴ Cultural relativism is the principle that an individual human's beliefs and activities should be understood by others in terms of that individual's own culture. For more on this concept, see 'Cultural Relativism' (*All About Philosophy*) <<http://www.cultural-relativism.com>> accessed 15 June 2015.

⁵ Sandra D Lane and Robert Rubinstein, 'Judging the Other: Responding to Traditional Female Genital Surgeries' (1996) 26(3) *The Hastings Center Report* 31.

establish whether FGM-practising cultures are good or bad. Some of its adherents may claim to draw benefits while many outsiders see only a violation of human rights.⁶ Rather, I believe the real debate is about who has the legitimacy to make such a judgment and, as a result, to speak on behalf of the victims. Afua Twum-Danso Imoh links human rights to globalisation, implying that human rights judgments can be made on local and global scales. She concludes that 'the reality of people's lives shows that they live their lives at the crossroads of culture and global standards, leading to a situation whereby the outlook of many communities incorporates both local and global values'.⁷

Rising interconnectedness between people around the world, and the resulting discovery of foreign cultures, may lead to the inevitable tendency to make ethnocentric value judgments.⁸ Carlos D Londono Sulkin warns of the harmful human potential to overlook personal biases when evaluating foreign cultures.

Without some ironic awareness that our preference and convictions, even if we are willing to fight for them, are a function of the contingencies of our biographies, our causes can become coarse battering rams with no consideration for different points of view or room for subtlety, and may therefore start perpetuating our own cruelties.⁹

Universalists, on the other hand, argue that 'moral judgments would seem to be essentially universal'.¹⁰ Regardless of which perspective anti-FGM advocates take when formulating intervention tactics, there is a need to grasp FGM's cultural underpinnings so as to sensitively negotiate a solution for its abandonment. Richard Shweder has suggested that interventionists construct a 'synoptic account of the inside point of view, from the perspective of those many African women for whom such practices seem both normal and

⁶ For the Kono people of Sierra Leone, for example, a woman who has had excision of the genitalia is 'admirable, informed, courageous, capable of dealing with pain, mature, and womanly'. See Sulkin (n 1) 18. Elsewhere, such as in Sudan, excision of the female genitalia entails 'getting married, pleasing a husband, and having children'. See Ellen Gruenbaum, 'The Cultural Debate Over Female Circumcision: The Sudanese Are Arguing This One Out for Themselves' (1996) 10(4) *Medical Anthropology Quarterly* 455.

⁷ Afua Twum-Danso Imoh 'Rites vs Rights: Female Genital Cutting at the Crossroads of Local Values and Global Norms' (2013) 56(1) *International Social Work* 39.

⁸ A person brought up in a communitarian culture — in Africa for example — may be shocked to see white people taking their aged parents into nursing homes rather than taking care of them at home.

⁹ Sulkin (n 1) 18.

¹⁰ Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) *Human Rights Quarterly* 400.

desirable'.¹¹ Ellen Gruenbaum similarly suggests that intervention would be more effective if 'change efforts are sophisticated, culturally informed, and socially contextualized'.¹² She argues that 'while cultural values are indeed powerful in structuring thought and action, human actors regularly critique their backgrounds, making choices that reinterpret their cultural and religious values and add new elements'.¹³ Gruenbaum's assertion leads to the idea that cultures do not remain stagnant; they evolve.

Writing about interventions to end other human rights abuses in Africa, Josiah Cobbah has pointed to 'a dysfunction that plagues the imposition of Western liberalism over communal African lifestyle'. He goes on to argue that 'we may be seeing these abuses because we are attempting too hard to make Westerners out of Africans'.¹⁴ Cobbah's argument implies that it is unfair to criticise Africans for violating women and children's rights so long as such violations are sanctioned by their culture. However, this author believes that no human rights violation can ever be justified by claims of cultural relativism. Inflicting unnecessary pain on an unwilling individual amounts to an abuse of human rights.¹⁵ By the same token, to say that 'human rights are universal' is to simply demand that everybody be treated equally – with dignity – regardless of who they are.¹⁶

Ann-Belinda S Preis has argued that '[h]uman rights have become "universalized" as values subject to interpretation, negotiation, and accommodation. They have become "culture"'.¹⁷ Preis goes on to suggest that 'culture must not be viewed as an externalized impediment to the struggle towards human rights, but an integral part of the struggle itself'.¹⁸ Indeed, any meaningful anti-FGM intervention will have to be informed by the debates about the cultural claims around which FGM takes place, so as to design intervention approaches which are culturally sensitive.

¹¹ Richard A Shweder, 'What About "Female Genital Mutilation"? And Why Understanding Culture Matters in the First Place' (2000) 129(4) *Daedalus* 216.

¹² Ellen Gruenbaum, 'Socio-Cultural Dynamics of Female Genital Cutting: Research Findings, Gaps, and Directions' (2005) 7(5) *Culture, Health & Sexuality* 429.

¹³ *ibid* 430.

¹⁴ Josiah AM Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9(3) *Human Rights Quarterly* 326.

¹⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7.

¹⁶ See Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR).

¹⁷ Ann-Belinda S Preis, 'Human Rights as Cultural Practice: An Anthropological Critique' (1996) 18(2) *Human Rights Quarterly* 290.

¹⁸ *ibid* 296.

Victims of FGM might not regard themselves as such, as they are socialised into believing that genital mutilation is mandatory for a variety of reasons defined by their particular society.¹⁹ Yet, this does not exclude the fact that they are indeed victims of social injustice, of which FGM is a part. Some women may be aware of the adverse health consequences associated with FGM but at the same time 'deem the practice to have positive and even necessary effects as far as maturation, health, bodily comfort, and beauty are concerned'.²⁰ No one should claim to possess the legitimacy to set the standard for beauty, and as Shweder has warned, we should not assume that 'our perceptions of beauty and disfigurement are universal'.²¹ Thus, the debate should not be one that seeks to determine the rationality of the perceived benefits of FGM, as this may result in endless debates about cultural relativism, about what the standards for benefit are within individual cultures. Rather, the debate should be about the nature of the political and socioeconomic forces which facilitate and perpetuate the practice.

Victims are forced to undergo genital cuttings due to societal norms. Abdullahi Osman El-Tom has argued that '[o]ne could be forgiven for concluding that Female Cutting is designed by men not only to subjugate and humiliate women, but equally to satisfy some bizarre and sadistic aptitude for sexual pleasure'.²² Amede Obiora thinks otherwise. She suggests that:

Instead of being subject to a monolithic regime of patriarchs, it may well be that African women resort to female genital circumcision to create notions of womanhood adept for their peculiar conditions of existence.²³

¹⁹ In Sierra Leone, for example, FGM/C is explicitly a sacrifice for the fertility both of the individual and the community. FGM is undergone to eliminate the ambiguity of gender identity; initiation is the occasion for the social/cultural construction of male and female genders. FGM/C is believed to ensure that women will desire conjugal relations over masturbation, and thus guarantee reproduction. It is often believed that an un-cut woman will not bear live or healthy children and is often 'required' if a girl is to be marriageable. See more at

<<http://www.refugeelawaidinformation.org/female-genital-mutilation>>.

²⁰ Sulkin (n 1) 18.

²¹ Shweder (n 11) 216.

²² Abdullahi Osman El-Tom, 'Female Circumcision and Ethnic Identification in Sudan With Special Reference to the Beti of Darfur' (1998) 46(2) *GeoJournal* 166.

²³ L Amede Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision' (1997) 47 *Case Western Reserve Law Review* 275, 316.

El-Tom's statement is not without merit, although he might be too extreme in suggesting that FGM is designed by men, given the fact that the custom is 'typically controlled and managed by women'.²⁴

In order to assess the merits of El-Tom and Obiora's opposing statements, it is vital that we answer the following two questions: what is (are) the rationale(s) behind FGM and who are its real beneficiaries? Answers to these enquiries will be found in the next Section, which opens with a review of the scope of FGM in Africa and closes with a discussion about FGM-related health and other complications.

III. OVERVIEW OF FGM (IN AFRICA)

3.1 Scope of the Problem

FGM is prevalent in the west, east, north and north-eastern regions of Africa, as well as in some parts of Asia and the Middle East and additionally among some immigrant communities from these regions in Western countries.²⁵ According to the World Health Organization (WHO), more than 125 million girls and women alive today have undergone FGM in the 29 countries where the practice is prevalent,²⁶ 27 of the countries being African.²⁷ A common element of the practice is the environment in which it is performed. According to International Refugee Rights Initiative, an Oxford, UK-based international non-profit organisation, '[i]t is unlikely that anesthetics or antiseptics are used, as enduring pain is considered integral to the meaning of the ritual'.²⁸ Instruments such as 'knives, scissors, and pieces of glass or razor blades' are used to 'circumcise' the victims.²⁹

²⁴ The Public Policy Advisory Network on Female Genital Surgeries in Africa, 'Seven Things to Know About Female Genital Surgeries in Africa' (2012) 42(6) *The Hastings Center Report* 23.

²⁵ 'Female Genital Mutilation: Grounds for Seeking Asylum' (*International Refugee Rights Initiative*)

<<http://www.refugeelaidinformation.org/female-genital-mutilation-grounds-seeking-asylum>> accessed 22 January 2016.

²⁶ Quoted in UNICEF, *Female Genital Mutilation/Cutting: a statistical overview and exploration of the dynamics of change, 2013* (as cited in World Health Organization, 'Female Genital Mutilation: Key Facts'

<<http://www.who.int/mediacentre/factsheets/fs241/en/>> accessed 15 June 2015).

²⁷ UNICEF, 'Female Genital Mutilation/Cutting: a statistical overview and exploration of the dynamics of change' (UNICEF 2013) 6.

²⁸ 'Female Genital Mutilation: Grounds for Seeking Asylum' (n 25).

²⁹ *ibid.*

The term 'female genital mutilation' is said to have been first coined by Fran Hosken, an American writer, feminist and author of *The Hosken Report: Genital and Sexual Mutilation of Females* (1979).³⁰ The practice is believed to predate the introduction of the three major religions (Judaism, Christianity and Islam) in Africa and could be as old as 4,000 to 5,000 years.³¹ FGM varies in type and prevalence from one country and culture to another and is performed on victims at ages ranging from infancy to adulthood.³² African countries with the highest rates of prevalence are reportedly Somalia (98%), Guinea (96%), Djibouti (93%), Egypt (91%), Sierra Leone (91%), Eritrea (89%), Sudan (89%) and Mali (85%).³³ Countries such as Kenya, Côte d'Ivoire and Ghana, where '[e]thnicity or cultural group is the best predictor of circumcision', have relatively lower rates (50%, 43% and 30%, respectively).³⁴

As is the case with prevalence, the mode of operation, or the extent of tissue removed from the victims' genitalia, varies from one procedure to the other, creating four categories as recognised by the WHO.³⁵

Clitoridectomy: partial or total removal of the clitoris and, in very rare cases, only the prepuce.³⁶

Excision: partial or total removal of the clitoris and the labia minora, with or without removal of the labia majora.

Infibulation:³⁷ narrowing of the vaginal opening through the creation of a covering seal, which is formed by cutting and repositioning the inner, or outer, labia, with or without removal of the clitoris.

³⁰ Sara Johnsdotter and Birgitta Essen, 'Genitals and Ethnicity: The Politics of Genital Modifications' (2010) 18 (35) *Reproductive Health Matters* 30.

³¹ El-Tom (n 22) 163.

³² 'Seven Things to Know About Female Genital Surgeries in Africa' (n 24) 21.

³³ Shweder (n 11) 2016–17.

³⁴ *ibid.*

³⁵ Rebecca J Cook, 'Ethical Concerns in Female Genital Cutting' (2008) 12(1) *African Journal of Reproductive Health* 7.

³⁶ The removal of the prepuce of the clitoris is also referred to as 'sunna'. It is practiced mainly by the Zabarma of Sudan, who regard it as a milder form of FGM. As the name 'sunna' implies, this form of FGM appears acceptable in Islam. See Ellen Gruenbaum (n 6) 458.

³⁷ This type of procedure is also referred to as 'pharaonic circumcision' and is common among the Kenana of Sudan, for example. See Gruenbaum (n 6) 458.

Other: all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterising the genital area.³⁸

Schweder has deplored the amount of publicity that 'infibulation' has received in the 'anti-FGM literature' even though it is not typical in most ethnic or cultural groups and accounts for only 15 per cent of all cases.³⁹ Other commentators, such as Rebecca Cook, have voiced their concerns regarding the choice of terms used to describe FGM in general. Cook's concern may be an attempt to denounce the generic nature of the term 'mutilation', given variations in types of cuttings and amount of tissue removed during the aforementioned procedures.⁴⁰

Others, such as Carla Obermeyer, Sandra Lane and Robert Rubinstein, find the term 'circumcision' to be inappropriate. They argue (and rightly so) that the term 'circumcision' implies an analogy between female and male circumcision, when the former involves removal of much more 'anatomical structures'.⁴¹ This is more so in cases involving excision and infibulation. Christine Walley sees a 'relativistic tolerance' in the term 'circumcision' and 'moral outrage' in the term 'mutilation'.⁴² Although Obermeyer regards the term 'mutilation' as an effort to 'capture the extent of the operations' and to maximise their 'dramatic impact', he deplores what he sees as an implied 'value judgement' about the intent of its practitioners that is implicit when using the term mutilation to describe the practice.⁴³

From these discussions, it becomes evident that the WHO's classification of the procedures as described earlier, under one rubric of 'FGM', is problematic. The grouping under one term fails to account for variations both in the extent and gravity of the cuttings and the motivations behind the practice, as we will see in the next Section. In an effort to find an appropriate language — one which accounts for the cultural sensitivities around this topic without losing touch

³⁸ 'Female Genital Mutilation: Key Facts' (*World Health Organization*)

<<http://www.who.int/mediacentre/factsheets/fs241/en/>> accessed 15 June 2015.

³⁹ Schweder (11) 218.

⁴⁰ Cook (n 35) 7.

⁴¹ Carla Makhlouf Obermeyer, 'Female Genital Surgeries: The Known, the Unknown, and the Unknowable' (1999) 13(1) *Medical Anthropology Quarterly* 84. See also Lane and Rubinstein (n 5) 35.

⁴² Christine J Walley, 'Searching for "Voices": Feminism, Anthropology, and the Global Debate Over Female Genital Operations' (1997) 12(3) *Cultural Anthropology* 408.

⁴³ Obermeyer (n 41) 84.

with the victims' physical and emotional pain — I will use a more objective term, 'female genital cutting',⁴⁴ for the rest of this Article.

3.2 Rationale Behind FGC

We have seen that FGC varies in extent from one cultural/ethnic group to another. The same can be said about the meaning and motives behind the practice.⁴⁵ Alison Slack suggests that a 'society's cultural, traditional, historical, economic, and religious background' are determinants of the meaning and motives for the practice.⁴⁶ An understanding of and a thorough reflection on the rationale behind FGC will enable change-makers to grasp the real forces behind the practice. This will in turn help us to devise efficient ways to interact with the locals in an attempt to reach a consensus on ways to end it.

Although FGC is believed to predate both Christianity and Islam in Africa, conformity to religious beliefs, especially those tied to Islam,⁴⁷ appears in the literature as one of the rationales.⁴⁸ Eugenie Anne Gifford, for example, has argued that 'The strict demands of chastity and sexual repression imposed by Islamic tradition certainly contribute to the perpetuation of the custom'.⁴⁹ Another explanation is based on the idea of a possible agreement between African societies and both the Koran and the Bible on the necessity of certain values, among them 'virginity' and 'modesty'.⁵⁰ However, given the fact that many non-practicing communities also adhere to Christianity or Islam, religion cannot possibly be the explanation behind the practice. Although it could be a motivation, religion has proven to be a weaker claim compared to other rationales, which have featured in many discussions about the topic. Anti-FGC advocates could thus tailor their message around religion as one of the ways to dissuade people from the practice.

Other possible explanations suggest that FGC is not just a religious requirement, but also a practice that is beneficial to its victims. For example, for

⁴⁴ The term cutting seems objective. Rather than mutilation, it does not imply a value judgment.

⁴⁵ 'Seven Things to Know About Female Genital Surgeries in Africa' (n 24) 21.

⁴⁶ Alison T Slack, 'Female Circumcision: A Critical Appraisal' (1988) 10(4) Human Rights Quarterly 445.

⁴⁷ *ibid* 445–46.

⁴⁸ Note, however, that many researchers have argued that the Koran does not specifically recommend female genital cutting, and that any connection between the practice and Islam is just implied by adherents of the practice. See for example, Abdullahi Osman El-Tom (n 22) 164.

⁴⁹ Eugenie Anne Gifford, "'The Courage to Blaspheme': Confronting Barriers to Resisting Female Genital Mutilation' (1994) 4(2) UCLA Women's Law Journal 343.

⁵⁰ Shelley Simms, 'What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision' (1993) 106(8) Harvard Law Review 1951.

Kono women and men of Sierra Leone, cut female genitalia are cleaner and nicer looking. The Kono believe that FGC is a source of admiration, courage, maturity and awareness for women.⁵¹ El-Tom reports that for the Berti of Darfur (Sudan), cut female genitalia are synonymous with fertility, cleanliness, beauty and are considered 'sweet-smelling', among other positive things.⁵² These perceptions might not necessarily be real but they are couched in cultural beliefs. Therefore, any effort to end FGC would necessitate negotiations with adherents of the practice in ways that are respectful and mindful of these beliefs.

However, although the aforementioned rationales imply that FGC is beneficial to its victims, other popular reasons for the practice epitomise a lingering system of gender discrimination. The most common of such rationales include 'marriageability' and female chastity.⁵³ These two notions are closely tied to issues of honour.⁵⁴ In FGC practicing societies, 'honour' entails control of women's sexuality, for such reasons as the belief that '[i]f not properly channelled, female sexuality is the greatest possible source of disgrace to both the immediate family and tribe'.⁵⁵ Therefore, 'circumcision' as FGC is believed to be, is perceived as 'a way to prevent social shame for the family that might come if an unmarried teenage daughter has sexual relations'.⁵⁶ This is evidence of gender discrimination — a form of violence against women — as a teenage male's sexuality is not regarded with the same level of scrutiny. As Cook has pointed out, in these societies 'female purity, exhibited in the virginity of brides and fidelity of wives' is a cultural requirement, whereas men's pre-marital or extra-marital sexual relationships are tolerated and even praised as 'sexual adventure'.⁵⁷

FGC is a rite of passage and an important cultural practice for many of its victims. When asked about the rationale behind the practice, many such victims have no answer other than 'the continuation of their tradition'.⁵⁸ For the victims, getting their daughters 'circumcised' is an expression of love and care and a mark of 'cultural identity'.⁵⁹ Yet, these beliefs hide an ugly and oppressive system of discrimination against women.

⁵¹ Sulkin (n 1) 18.

⁵² El-Tom (n 22) 163–64.

⁵³ *ibid.*

⁵⁴ Lane and Rubinstein (n 5) 34.

⁵⁵ Walley (n 42) 414.

⁵⁶ V Berggren and others, 'Being Victims or Beneficiaries? Perspectives on Female Genital Cutting and Reinfibulation in Sudan' (2006) 10(2) *African Journal of Reproductive Health* 29.

⁵⁷ Cook (n 35) 9.

⁵⁸ Slack (n 46) 448.

⁵⁹ Imoh (n 7) 40.

Some commentators have argued that:

Although the maintenance of a group's cultural identity and the promotion of social and political cohesion are legitimate objectives, the right to belong — to contribute to and participate in one's community as a full member — should not be conditioned on a practice of human suffering.⁶⁰

The idea of 'human suffering' inherent in FGC, as epitomised by the gruesome pain which the victims are made to endure,⁶¹ defies all claims of cultural relativism. Gruesome physical pain cannot be said to be relative, and no one should be unnecessarily made to endure it under any circumstance, including cultural obligations.

That the practice is mainly controlled and managed by women,⁶² even those belonging to matrilineal societies, such as the Kono of Sierra Leone,⁶³ does not preclude these same women from being victims. Gruenbaum challenges us to deeply examine the practice of FGC and identify its beneficiaries. This, in turn, would enable us to channel our resistance towards the right audience.⁶⁴ There is little doubt, in my opinion, that FGC is but one of the many manifestations of a system of male privilege. Such a system suggests that it is the responsibility of girls and women to be guardians of family honour, to endure the gruesome pain of infibulation, for example, in order to satisfy their future husbands' sexual desires, even at the cost of jeopardising their health.

3.3 Health and Other Concerns

In addition to enduring physical and psychological pain,⁶⁵ victims of FGC are also prone to health complications, both immediate and long-term.⁶⁶ Among the most cited immediate risks are 'shock, bleeding, bacterial infection, urine

⁶⁰ Simms (n 50) 1950.

⁶¹ We have seen earlier that these procedures are conducted without anesthesia in the majority of cases, thus implying that the victims are subjected to gruesome pain.

⁶² 'Seven Things to Know About Female Genital Surgeries' (n 24) 23.

⁶³ Shweder (n 11) 217.

⁶⁴ Gruenbaum (n 6) 460–61.

⁶⁵ Linda Morison and others, 'The Long-term Reproductive Health Consequences of Female Genital Cutting in Rural Gambia: a Community-Based Survey' (2001) 6(8) *Tropical Medicine and International Health* 650.

⁶⁶ 'Female Genital Mutilation' (n 2).

retention, open sores in the genital region, and injury to nearby genital tissue'.⁶⁷ However, more severe immediate consequences can occur considering the manner in which the cuttings are carried out. Karungari Kiragu was on point when she argued that 'the proficiency of the circumciser, the bluntness of the instruments, and the struggles of the young girl during the operation' could lead to even more severe consequences, including death.⁶⁸ One could also argue that the more extreme the operation, the more dangerous it could be in terms of immediate and long-term health repercussions.⁶⁹ Long-term health consequences, especially in cases of infibulation, include 'formation of scar tissue, keloids, and cysts around the wound and stitch line, and pain during urination'.⁷⁰

Other problems include difficulty and pain during sexual intercourse and child birth.⁷¹ The more extreme cases of child birth difficulties include '[the necessity for] caesarian sections, incision into the perineum, excessive blood loss, and resuscitation for the new-born baby'.⁷² Without proper precautions, there is a risk of HIV transmission, especially if the same instrument is used on many 'initiates'.⁷³ These findings were confirmed by various studies, including one conducted by the WHO in six African nations.⁷⁴ Nevertheless, there is a substantial amount of research that either minimises these risks or denies them altogether. For example, referring to health and other related problems, Sulkin has argued that 'a body of clinical and ethnographic research does not support this, and questions the scientific rigor of the admittedly enormous literature that does support it'.⁷⁵ Furthermore, a study conducted in The Gambia found

⁶⁷ Anna Winterbottom, Jonneke Koomen and Gemma Burford, 'Female Genital Cutting: Cultural Rights and Rites of Defiance in Northern Tanzania' (2009) 52(1) *African Studies Review* 59. See also 'Female Genital Mutilation' (n 2).

⁶⁸ Karungari Kiragu, 'Female Genital Mutilation: A Reproductive Health Concern' (Population Reports, Meeting the Needs of Young Adults, Series J, No 41, Vol XXIII, No 3, 1995).

⁶⁹ Infibulation and excision are the most severe types of cutting.

⁷⁰ Kiragu (n 68) 2.

⁷¹ A Elnashar and R Abdelhady, 'The Impact of Female Genital Cutting on Health of Newly Married Women' (2007) 97(3) *International Journal of Gynecology and Obstetrics* 239.

⁷² L Melhado, 'Risks of Adverse Obstetric and Perinatal Outcomes Increase With Severity of Female Genital Mutilation' (2006) 32(3) *International Family Planning Perspectives* 154.

⁷³ Emmanuel Monjok and others, 'Female Genital Mutilation: Potential for HIV Transmission in Sub-Saharan Africa and Prospect for Epidemiologic Investigation and Intervention' (2007) 11(1) *African Journal of Reproductive Health* 39.

⁷⁴ Friday Okonofua, 'Female Genital Mutilation and Reproductive Health in Africa' (2006) 10(2) *African Journal of Reproductive Health* 8. See also Lars Almroth and others, 'Urogenital Complications Among Girls with Genital Mutilation: A Hospital Based Study in Khartoum' (2005) 9(2) *African Journal of Reproductive Health* 121.

⁷⁵ Sulkin (n 1) 18.

'little evidence of any difference in infertility between cut and uncut women'.⁷⁶ Some commentators have pointed out 'cigarette smoking during pregnancy',⁷⁷ and other pressing issues affecting most African women, such as malaria and diarrhoea,⁷⁸ as being more dangerous than FGC. Unlike undergoing FGC, pregnant women are not coerced into smoking, and malaria and diarrhoea can be unavoidable in some living conditions in Africa. Cigarette smoking and said diseases are a cause for concern but this does not justify inaction regarding FGC, which can be avoided as it is both unnecessary and potentially harmful to women's health.

Pointing out the immediate and long-term health and other related risks does not amount to suggesting that all instances of FGC lead to adverse health consequences. Rather, it is an effort to highlight the possibility of said risks, so as to allow the concerned women, who might not be aware of these consequences,⁷⁹ to make informed choices regarding their daughters' wellbeing. Moreover, the bulk of the reported research findings that appear to refute the possibility of FGC-related health problems simply minimise them. Advocating FGC abandonment does not require showing that all cases result in adverse health consequences or deaths. This would be an exaggeration, and therefore counter-productive.⁸⁰ However minimal health issues caused by FGC may be, they are a cause for concern, and worthy of consideration because they can be avoided simply by abandoning the practice.

Despite the lack of agreement in research findings regarding long-term FGC-related health complications, there is no denying the agony that the victims are subjected to during the cuttings. The same can be said about the pain that infibulated women have to endure during 'di-infibulation' and 're-infibulation' at and after childbirth.⁸¹ Moreover, reports of post-traumatic stress disorder⁸² only reaffirm the anguish inherent in the practice. Thus, FGC is part and parcel of gender-based violence, which is an affront to human rights. The next Section explores the various ways in which international human rights law can be invoked as a rationale to advocate FGC abandonment in Africa.

⁷⁶ Morison and others (n 65) 651.

⁷⁷ Quoted in 'Seven Things to Know About Female Genital Surgeries in Africa' (n 24) (as cited in Conroy, 'Female Genital Mutilation').

⁷⁸ Gruenbaum (n 6) 460.

⁷⁹ Simms (n 50) 1948.

⁸⁰ Morison and others (n 65) 652.

⁸¹ Okonofua (n 74) 7.

⁸² Alice Behrendt and Steffen Moritz, Posttraumatic Stress Disorder and Memory Problems after Female Genital Mutilation' (2005) 162(5) American Journal of Psychiatry 1001.

IV. LEGAL FRAMEWORK

International law should not be invoked in a confrontational manner against the mothers who procure the cuttings for their daughters or the women who perform the said cuttings. Rather, it should be used as a safeguard for women's human rights by stimulating dialogue geared towards behavioural change. This Section discusses three particular human rights provisions, which can be invoked as legal ground for advocating FGC abandonment in Africa.

4.1 Protection Against Cruel, Inhuman or Degrading Treatment

Unnecessary infliction of cruel, inhuman or degrading treatment on any individual is prohibited under international human rights law.⁸³ Given the circumstances in which FGC is carried out, there is no doubt that it violates the above-mentioned provision. Nonetheless, the said provision should not be restricted to the typical method of genital cutting (one with no access to a health specialist). To suggest otherwise would amount to making a case for the medicalisation of FGC, which, as the WHO warns, 'would obscure its human rights aspects'.⁸⁴ Rather, the aforementioned provision pertains to FGC in and of itself.

Mothers do not get their daughters' genitalia altered out of cruelty or lack of concern. Arguably, they do so with their mistaken perception of what is their daughters' best interest. Nevertheless, this does not exclude the fact that FGC constitutes a cruel and degrading treatment which has for far too long been sustained by a belief system which subjugates women.

As we have seen earlier, the practice is mostly performed on young girls who by law are not capable of giving consent, especially for such an unnecessary and life-changing procedure. The Convention on the Rights of the Child (CRC) condemns FGC in unequivocal terms. Article 37(a) prohibits all forms of torture and inhuman or degrading treatment directed against children⁸⁵ and tasks States Parties to take all necessary steps to abolish 'traditional practices prejudicial to the health of children'.⁸⁶ This is a very important provision; it refutes all claims generally used to support FGC, such as the right to practice culture and the right of parents to decide what is good for their children. So

⁸³ ICCPR (n 15).

⁸⁴ 'Female Genital Mutilation and Other Harmful Practices' (*World Health Organization*) <http://www.who.int/reproductivehealth/topics/fgm/fgm_trends/en/> accessed 22 January 2016.

⁸⁵ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

⁸⁶ *ibid* art 24(3).

long as FGC has been proven to cause health and other psychological repercussions on its victims, its prohibition becomes an obligation under international human rights law. This, in turn, implies an obligation on African states to take the necessary steps to eliminate it.⁸⁷

4.2 Right to Health

Every individual has the right to enjoy the highest attainable standard of health.⁸⁸ States Parties to the International Covenant on Economic, Social and Cultural Rights (ESCR), for example, must recognise this right, which is also explicitly confirmed under the CRC.⁸⁹ Due to the proven health and psychological complications associated with its practice, FGC risks the capacity for girls and women to fully enjoy their right to health.

Although not all cases of FGC actually result in health complications, the primary purpose of 'the right to health' is to ensure that measures are put in place to allow everyone to enjoy it. It is not a right to be enjoyed as an after-effect but one that necessitates proactive protection measures. Therefore, African states must ensure that all necessary measures are in place so as to enable every individual to live in good health. FGC, as we have seen, can cause health problems, which in turn hinders the ability of its victims to realise their right to health. Consequently, it must be prohibited.

4.3 Protection Against Discrimination

FGC is one among the many manifestations of gender discrimination in Africa.⁹⁰ Change will require a holistic approach — one that aims to raise awareness among women and girls about their right to protection against all forms of discrimination. For example, girls are expected to remain virgins, and are subjected to infibulation, to guarantee marriageability. Women's sexual activities, either before or outside of marriage, are not tolerated in the name of family honour — norms which are not equally imposed on men.

⁸⁷ Other relevant human rights instruments include Article 5 of the Universal Declaration of Human Rights and Article 5 of the African Charter on Human and People's Rights.

⁸⁸ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 art 12(1).

⁸⁹ Convention on the Rights of the Child (n 85) art 24.

⁹⁰ Other manifestations of gender discrimination may include issues such as child marriage, economic rights, lack of access to education for the girl child, and preferential treatment of boys to the detriment of their girls counterparts.

FGC runs counter to various international human rights standards that prohibit discrimination based on any ground, including sex. The African Charter on Human and People's Rights (ACHPR) requires States Parties to 'ensure elimination of every discrimination against women and children and to ensure their rights in accordance with international declarations and conventions'.⁹¹ Furthermore, the International Covenant on Civil and Political Rights (ICCPR) prohibits discrimination based on any ground, including sex.⁹² The Committee on the Elimination of Discrimination Against Women (CEDAW) also condemns all forms of discrimination against women and requires States to 'take appropriate measures to eliminate discrimination against women by any person, organization, or enterprise'.⁹³

The above-mentioned international regulations stress punishment as a response to FGC. Nevertheless, in my view, the human rights approach for FGC abandonment must be undertaken differently from punishment. Such an approach should not use confrontation against those who bear responsibility for the practice. Rather, it should elicit debate — grounded on women and children's rights — about any practices that hinder women's and girls' ability to enjoy their basic rights as equal members of society. This will necessitate collaboration with local stakeholders, keeping in mind their interests, in order to negotiate better ways to enable women to fully enjoy their rights.

Indeed, a better understanding of and respect for local peoples' cultural values will be necessary to co-opt influential community members who can use their influence to elicit large-scale behavioural change. This will also be necessary in order to lend legitimacy to the campaign and to generate trust among community members, who will be the primary architects of change, as will be demonstrated later in this Article. However, as the next Section will show, this has not been the approach taken by African states when intervening to end FGC.

V. ELIMINATING FGC – CURRENT APPROACHES

5.1 How the Issues Are Currently Framed

Efforts by international bodies to end FGC, although noble endeavours, have been neither successful nor mindful of practicing communities' values and

⁹¹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) (African Charter) 21 ILM 58 art 18(3).

⁹² ICCPR (n 15) art 26.

⁹³ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) (CEDAW) 1249 UNTS 13 art 2(e).

beliefs. This can be seen, for example, in the way international bodies describe FGC. Labels such as ‘harmful traditional practices’⁹⁴ are scientifically correct in that they capture the extent of the harm inherent in FGC. Yet, they may be perceived as both accusatory and judgmental. They underscore a knowledge gap at the top-level of international bodies about the complex socioeconomic forces surrounding FGC in practicing communities.

Neil Ford captures the extent of said knowledge gap when he argues that all of the approaches have been designed by experts from outside the communities affected, with ‘little input or support’ from locals. He goes on to acknowledge that ‘[a] new way to communicate with locals is necessary if large-scale change is to occur’.⁹⁵ I share Ford’s concern in the sense that while ‘outsiders’ may be vested with the power to decide what course of action to pursue on important issues of international concern, consensus reached through genuine dialogue with all stakeholders, rather than coercion, is necessary for any change in norms to come about or a change in practice to be implemented in an efficient way.

This does not mean that every decision imposed at the community level by high-level international bodies is necessarily bad or poised to arouse resistance. No matter how important intervention on an issue might be, if it is not properly perceived in the context where the change is desired, it can arouse suspicions of ‘cultural imperialism’⁹⁶ among the intended beneficiaries. This could in turn lead to stiff resistance and it could damage an otherwise well-intended initiative.

Over-emphasis of health issues is another unproductive tactic adopted by international bodies.⁹⁷ Linda Morison and her colleagues argue that:

Advocacy against female genital cutting based on damaging health consequences is less controversial in most practicing communities than an approach based on human rights.⁹⁸

This assertion gives a wrong impression that health and human rights are not related, but its meaning is important for our purpose. The authors suggest

⁹⁴ Neil Ford, ‘Communication for Abandonment of Female Genital Cutting: An Approach Based on Human Rights Principles’ (2005) 13(1) *The International Journal of Children’s Rights* 184.

⁹⁵ *ibid* 183.

⁹⁶ Amos Idowu, ‘Effects of Forced Genital Cutting on Human Rights of Women and Female Children: the Nigerian Situation’ (2008) 12(2) *Law Democracy and Development* 117.

⁹⁷ Isabelle R Gunning, ‘Arrogant Perception, World-Travelling and Multicultural Feminism: the Case of Female Genital Surgeries’ (1992) 23 *Columbia Human Rights Law Review* 196.

⁹⁸ Morison and others (n 65) 651.

using health messages in a tone that does not undermine practicing communities' cultural values but instead in one that simply helps them to become aware of the facts about FGC in relation to long-term health.

Writing from the point of view of the Sudanese anti-FGC experience, El-Tom warns that over-emphasis on health messages may reduce FGC to a 'mere set of negative health-related outcomes'.⁹⁹ This is a thought-provoking argument in that although '[o]ne case of health complications resulting from FGC is enough to justify advocacy to end the practice', health concerns should not be at the core of the campaign. Emphasis on health messages may obscure the real issues — factors which drive FGC — mainly discrimination against women in all spheres of life.

Women must be empowered to understand that FGC is part and parcel of a discriminatory system. Without such an empowerment, they will continue to balance the negative consequences of FGC against the sociocultural benefits they mistakenly perceive themselves to be gaining from it.¹⁰⁰ Framing anti-FGC efforts in terms of health issues may not convince mothers — who have themselves undergone FGC — to abandon a cultural practice that has survived for generations. I do not mean to minimise the importance of raising awareness about the potential health dangers of FGC. However, that tactic could work better when women are able to make a connection between FGC and their human rights.

5.2 States' Responses: Legislation

In 2003 the Inter-African Committee (IAC) declared the 6th of February 'Zero Tolerance Day' on FGC. After a conference in Addis Ababa, it appealed to heads of state and their wives to 'eradicate all forms of harmful traditional practices and adopt a zero tolerance policy on FGM'.¹⁰¹ This kind of rhetoric is not only confrontational, but may be seen as insensitive to practicing communities' cultural beliefs.

Unlike other human rights violations, FGC is widely accepted and supported by practicing communities. Laws that seek to criminalise its practice run the risk of producing unintended results. Such laws are prone to being perceived as

⁹⁹ El-Tom (n 22) 169.

¹⁰⁰ Bettina Shell-Duncan, 'From Health to Human Rights: Female Genital Cutting and the Politics of Intervention' (2008) 110(2) *American Anthropologist* 226.

¹⁰¹ Ylva Hernlund and Bettina Shell-Duncan, 'Transcultural Positions: Negotiating Rights and Culture' in Ylva Hernlund and Bettina Shell-Duncan (eds), *Transcultural Bodies: Female Genital Cutting in Global Context* (Rutgers University Press 2007) 24.

attacks on cultural values, which can in turn arouse feelings of resentment. Furthermore, as some commentators in Ghana and Senegal have argued, such laws may force the practice 'underground',¹⁰² meaning that mothers may resort to procuring the cuttings on their infant babies, rather than waiting until early puberty, as is often the case.¹⁰³ Gerry Mackie argues that:

[C]riminal law works because thieves and murderers are a minority of the population that the state can afford to pursue with the cooperation of the majority of the population. It is not possible to criminalise an entire population without the methods of mass terror.¹⁰⁴

African states will face difficulties in enforcing anti-FGC laws, due to the wide support that the practice still commands. Furthermore, anti-FGC laws will also fail to achieve their intended goal of abandonment. Criminal laws are not meant to end crime, although this is the wish of many people in society. They may only serve the purpose of deterrence by holding perpetrators to account for their unlawful actions. Conversely, anti-FGC laws are enacted with the intended goal of abandoning the practice altogether. So long as the practice is still widely supported within communities, all that law can achieve is criminalisation without reaching full abandonment.

Gunning has expressed concern about the legitimacy of anti-FGC laws. She inquired whether 'They are representative of multicultural views or shared values, such that right and wrong assessments are not externally imposed'. Additionally, she goes on to question whether 'The traditional weapon of law, punishment and forced change, can be consistent with mutual respect'.¹⁰⁵ Governments must adopt culturally sensitive approaches when engaging practicing communities. Otherwise, anti-FGC laws will be perceived as 'imposed law', not enacted for the benefit of society, as is the case with other criminal laws. Insensitive laws will be seen as 'violence to existing systems of beliefs, cultural norms, or established modes of behavior'.¹⁰⁶

¹⁰² 'Laws/Enforcement in Countries Where FGM is Commonly Practiced' (*US Department of State*, 2001) <<http://2001-2009.state.gov/g/wi/rls/rep/9303.htm>> accessed 21 January 2016.

¹⁰³ Rosemarie Skaine, *Female Genital Mutilation: Legal, Cultural, and Medical Issues* (McFarland 2005) 62.

¹⁰⁴ Gerry Mackie, 'Female Genital Cutting: The Beginning of the End' in Bettina Shell-Duncan and Ylva Hernlund (eds), *Female 'Circumcision' in Africa: Culture, Controversy, and Change* (Lynne Rienner Publishers 2000) 278.

¹⁰⁵ Gunning (n 97) 227.

¹⁰⁶ Sally MA Lloyd-Bostock, 'Explaining Compliance With Imposed Law' in Sandra B Burman and Barbara E Harrell-Bond (eds), *The Imposition of Law* (Academic Press 1979) 10.

International law and state legislation banning FGC may lend legitimacy to the work of anti-FGC campaigners at the community level.¹⁰⁷ Nonetheless, criminal law, with its traditional purpose of punishing undesired behaviour, is not an appropriate way to end FGC. Sensitising communities using human rights claims crafted in a culturally sensitive language, along with highlighting FGC's long-term health consequences, will yield better results. As we have seen earlier, criminalisation may drive the practice underground; and, as the next Section will reveal, enforcing anti-FGC laws could prove challenging.

5.3 Challenges with Anti-FGC Laws

Most, if not all, of the African countries where FGC is prevalent may have human rights records that are less desirable. Hence, imposing criminal sanctions on FGC practitioners could exacerbate abuses by state actors against the women who are already victims. If anything, the role of states should be to accompany the efforts of the various non-profit organisations, not only with funds, but most importantly by setting the agenda — bringing the anti-FGC campaign to the public, so as to give it visibility.

Anti-FGC laws in many African states are not only ill-suited for their purpose, they are also weak in many respects. Firstly, they are not uniform. Countries differ in the way their laws ban the practice, or, in some situations, there are simply no such laws. For example, although in many countries the practice is illegal under any circumstances (whether performed on minors or adults, by medical personnel or not), in Mauritania, the practice is illegal only when performed outside government health facilities.¹⁰⁸ Kenya and Tanzania prohibit FGC only when performed on minors,¹⁰⁹ and The Gambia has no anti-FGC laws at all,¹¹⁰ although President Yahya Jammeh recently announced in November 2015 that he would ban the practice.¹¹¹

The difference in laws between countries is an issue of concern given the fact that most of the countries with reported FGC prevalence are bound geographically. Consequently, people might simply take advantage of the ease

¹⁰⁷ The Tostan model, as will be shown later in this Article, provides an example of anti-FGC campaign at community level.

¹⁰⁸ Hernlund and Shell-Duncan (n 101) 40.

¹⁰⁹ *ibid.*

¹¹⁰ Bettina Shell-Duncan and others, 'Legislating Change? Response to Criminalizing Female Genital Cutting in Senegal' (2013) 47(4) *Law & Society Review* 803, 816.

¹¹¹ Kate Lyons, 'The Gambia Bans Female Genital Mutilation' (*The Guardian*, 24 November 2015) <<http://www.theguardian.com/society/2015/nov/24/the-gambia-bans-female-genital-mutilation>> accessed 28 January 2016.

or absence of anti-FGC laws in neighbouring countries and cross borders to have the procedure performed without worrying about breaking the law.¹¹² States within the same region should thus harmonise their laws so as to avoid cross-border practice.

Secondly, lack of infrastructure to implement laws, coupled with the failure of African governments to devote resources towards FGC abandonment, is another issue of concern. For example, it is reported that Tanzanian law enforcement agents lack the necessary mechanisms to deal with victims seeking protection. As a result, they simply return the victims to their families, where they face increased risks of reprisals, including early, forced marriage.¹¹³ Consequently, victims are reluctant to report violations to the relevant authorities.¹¹⁴ The problem could be worse considering the fact that the vast majority of FGC cases occur in rural areas, where many African states lack the ability to penetrate and exert their traditional role of maintaining law and order. This may be due to many factors, including inaccessibility caused by lack of adequate roads, instability or even lack of resources. Furthermore, with no proper sensitisation, anti-FGC laws might lack the support of law enforcement officers in rural areas, when they themselves belong to FGC practicing cultures.¹¹⁵

In light of these discussions, the case for invoking human rights law, not with the usual aim of holding perpetrators to account, but for advocacy that takes into consideration the cultural sensitivities around FGC, becomes stronger. The next Section explores possible alternatives to the criminal law model, making a case for a change of approach in all African countries with anti-FGC laws.

VI. ALTERNATIVE APPROACHES TO ELIMINATING FGC

6.1 The Tostan Model

The approach developed by Tostan, an international non-profit organisation based in Senegal, should be considered as an alternative to criminalisation in efforts to end FGC in Africa, even in countries with no reported cases. Tostan's approach is based on education as a tool to enable participants to become aware

¹¹² In 2011, Kenya enacted an anti-female genital cutting law with the effect of punishing procedures performed extra-territorially. See Bettina Shell-Duncan and others (n 110) 812.

¹¹³ Winterbottom and others (n 67) 56.

¹¹⁴ Marie H el ene Mottin-Sylla and Joelle Palmieri, *Confronting Female Genital Mutilation: The Role of Youth ICTs in Changing Africa* (Pambazuka Press 2011) 24.

¹¹⁵ Mottin-Sylla and Palmieri (n 114).

of their human rights.¹¹⁶ Said education does not focus solely on ending FGC but takes a holistic approach that seeks to empower women to reflect on various pressing socioeconomic issues. Tostan's Community Empowerment Program (CEP) holds classes, where information is shared in a 'non-judgmental, inclusive' way in order to stimulate dialogue among participants, who in turn draw their own conclusions about FGC and assume leading roles in their movements for change. Tostan's CEP encourages participants to speak with friends and family and to travel to other communities to raise awareness using their newly-acquired knowledge. This results in communities making collective decisions to end FGC, some without having directly participated in Tostan's classes.¹¹⁷

Empowering victims to become aware of their human rights will enable them to adopt measures that promote their social well-being and discard or resist practices that they deem oppressive.¹¹⁸ An FGC campaign which does not address other equally important, pressing social issues of interest to African women, like those I have highlighted earlier, will be less efficient. It is my firm view that African women, especially those in rural areas who may also be the most underprivileged, do not need laws that criminalise a practice that they embrace out of coercion. Rather, as with the Tostan program, they must be given tools, such as an education that enables them to understand FGC as an affront to their human rights, to liberate themselves and others, and realise their full potential.

A study conducted in Senegal in communities where the Tostan education program has been implemented has revealed progress in the reduction of child marriages, arranged marriages and domestic violence, as well as an improvement in health and the adoption of family planning.¹¹⁹ Progress in FGC abandonment has also been observed,¹²⁰ after participants were encouraged to make public pledges to abandon the practice.¹²¹ The reported success can be attributed to the fact that participants are not coerced into abandoning the practice, but reach that decision on their own as a result of being made aware of

¹¹⁶ 'Tostan Community-led Development' (*Tostan*)

<<http://tostan.org/sites/default/files/resources/tostan%20brochure.pdf>> accessed 15 June 2015.

¹¹⁷ 'Cross-Cutting Issues' (*Tostan*) <<http://www.tostan.org/female-genital-cutting>> accessed 15 June 2015.

¹¹⁸ *ibid.*

¹¹⁹ Nafissatou J Diop and others, 'The TOSTAN Program: Evaluation of a Community Based Education Program in Senegal' (Population Council 2004) 11.

¹²⁰ Nafissatou J Diop, Amadou Moreau and H el ene Benga, 'Evaluation of the Long-Term Impact of the TOSTAN Program on the Abandonment of FGM/C and Early Marriage: Results from a qualitative study in Senegal' (Population Council 2008) 23.

¹²¹ 'Tostan Community-led Development' (n 116) 15.

their human rights through sensitisation. Cooperation on such a sensitive issue as FGC can only be achieved through strategies that are 'context-sensitive' and responsive to participants' own experiences.¹²² It is my view that criminal laws that seek to attack or shame FGC practitioners will only increase resentment and many do not yield their intended results.

In contrast, the Tostan model is context-sensitive and allows participants to take initiative. It should thus be explored elsewhere, as an alternative to criminalisation. Although cultures and communities differ in the types of and rationale behind FGC, the main reason behind the practice remains the same everywhere — structural oppression against women. Furthermore, FGC is only one of the many forms of abuses against women's human rights in all practicing communities. Therefore, a program such as Tostan's — one that has a broader impact on women's human rights — would be suitable for a campaign to end all practices that are discriminatory to women, including FGC.

It is important to note however, that there may be cases of failure that Tostan may not necessarily publicise, for fear of discouraging donors. In-depth research in this domain is therefore warranted in order to enrich the literature on the topic. Nonetheless, the Tostan approach appears plausible and should thus be implemented elsewhere.

The now extinct Chinese custom of foot binding had parallels with FGC. As the next Section will show, it was also part of a system of structural discrimination against girls. A look at the strategies employed to end it may give anti-FGC advocates more tools for their campaign.

6.2 The Campaign Against Foot Binding

Foot binding was performed on girls aged between six and eight years old and consisted of bending the four smaller toes under the foot, forcing the sole to the heel and wrapping the foot in a bandage in 'order to mold a bowed and pointed four-inch-long appendage'.¹²³ Like FGC, foot binding underscored structural discrimination and violence against women. Bound feet is said to have been painful and malodorous and resulted in health complications. Yet, they ensured a woman's virtue and family honour, and were a pre-requisite for marriage.¹²⁴

¹²² *ibid* 16.

¹²³ Gerry Mackie, 'Ending Footbinding and Infibulation: A Convention Account' (1996) 61(6) *American Sociological Review* 999, 1000.

¹²⁴ Mackie, 'Female Genital Cutting: The Beginning of the End' (n 104) 255.

Communities gradually abandoned this deeply entrenched custom, thanks to a campaign that originated from outside China in the 1800s.¹²⁵ It is reported that raising awareness about the existence of other cultures that did not bind feet, and the advantages of unaltered feet compared to the disadvantages of bound ones, was key to ending foot binding.¹²⁶ Mackie's research shows that these messages were designed in Chinese cultural terms. This allowed for a necessary level of support amongst local peoples, who in turn were encouraged to make collective pledges not to bind their daughters' feet and not to allow their sons to marry girls with bound feet.¹²⁷

As the experience of anti-foot binding campaign shows, sensitivity to the intended audience's cultural values is essential to elicit cooperation to end an entrenched yet abusive cultural practice. Chinese women bound their daughters' feet with the mistaken belief that the latter would enjoy the rewards associated with the practice (beauty and marriage) and avoid the 'punishments' that would result from having unbound feet (lack of marriageability and family dishonour). However, once said rewards and punishments were no longer relevant as a result of awareness and collective pledges, the practice was eventually abandoned. This shows that rather than criminalising women for procuring genital cutting for their daughters, the anti-FGC campaign will likely have greater effect if it focuses on eliminating the underlying socioeconomic forces that perpetuate the practice.

Most importantly, as was the case with the anti-foot binding campaign, cooperation of all community members will be key to ensuring that uncut women do not face stigma and marginalisation. As Mackie argues 'Female genital cutting must be abandoned by enough families at once so that their daughters' futures are secured'.¹²⁸ Once the perceived rewards and punishments associated with FGC (marriageability and stigma, for example) are no longer applicable, mothers will have no incentive to risk their daughters' health by subjecting them to the practice. However, this can only be possible if, through sensitisation, men are also taught that uncut women are 'normal' and encouraged to marry uncut girls.

Another important lesson that can be derived from the anti-foot binding campaign is that the movement to end FGC in Africa does not necessarily have to exclude outsiders, be they westerners or other non-practicing Africans.

¹²⁵ Ann-Marie Wilson, 'How the Methods Used to Eliminate Footbinding in China can be Employed to Eradicate Female Genital Mutilation' (2013) 22(1) *Journal of Gender Studies* 17, 23.

¹²⁶ *ibid.*

¹²⁷ Mackie, 'Ending Footbinding and Infibulation: A Convention Account' (n 123) 1002.

¹²⁸ Mackie, 'Female Genital Cutting: The Beginning of the End' (n 104) 255.

Rather, the campaign should encourage knowledge sharing in ways that are respectful and mindful of cultural sensitivities — a factor which will likely attract the cooperation of influential members of communities. As the next Section will show, support from such influential people will be key to ensure FGC abandonment.

6.3 The Way Forward

Intervention to end FGC represents a dilemma, especially when such intervention comes from people outside practicing communities. Given the sensitivity around it, FGC remains an issue that will be better dealt with if those involved in advocacy were respectful and considerate of practicing communities' cultural values. One way to achieve this would be to identify the right people, among local communities, who could help to bridge the gap between campaigners and their target audience.

I have mentioned earlier that most African states may lack the ability to penetrate rural areas to enforce laws or to exercise other state functions. Consequently, a few personalities, such as tribal and religious leaders, may exert a substantial amount of authority and influence within remote communities. This gives such personalities the ability, and to some extent the authority, to influence behaviour regarding cultural practices within their respective communities. They should thus be the first targets for alliances in the campaign to sensitise community members on abandoning FGC. The influence of Demba Diawara, a Senegalese imam and village chief, on members of his community has been instrumental for Tostan's success and provides an illustration to this proposition.¹²⁹

Furthermore, women, especially the elders (including those who perform the cuttings), can be powerful allies in a campaign to end a practice they consider their private domain. They too, must be among the first people to be consulted for any sensitisation campaign to have prospects of success. Nevertheless, for some of the cutters, FGC could be a substantial source of power and income.¹³⁰ They should thus be allowed to retain similar powers during the campaign, for example, by occupying leading roles, and being trained for alternative income-generating activities. In the African context, especially in rural communities,

¹²⁹ Gannon Gillespie, 'Ending Female Genital Cutting, One Household at a Time' (*The Guardian*, 22 August 2013)

<<http://www.theguardian.com/global-development-professionals-network/2013/aug/22/social-network-fmg-senegal>> accessed 15 June 2015.

¹³⁰ Ashenafi Moges, 'What is behind the tradition of FGM?' (*African Women Organization*) <<http://www.african-women.org/documents/behind-FGM-tradition.pdf>> accessed 15 June 2015.

consulting with influential people will be key in eliciting trust and lending a degree of legitimacy to the campaign. Legitimacy will come if such consultations, and the human rights claims around which they are formulated, adopt a language that is respectful of practicing communities' cultural values.

VII. CONCLUSION

FGC constitutes a violation of women's human rights and continues to be an issue of concern in some parts of Africa. It is a cruel, inhuman and degrading treatment and a potential cause for serious health complications. The practice plays a role in perpetuating a discriminatory system — one which has deprived girls and women of their rights to health, dignity and equal treatment.

Yet, unlike other forms of human rights abuses, which require holding the perpetrators to account, FGC would be better dealt with if treated as a special case. By this, however, I do not mean to adopt the cultural relativism argument to justify its practice. Rather, I have made the case that an effective campaign to end FGC in Africa must be wary of the fact that mothers who procure the cuttings for their daughters, and the women who perform such cuttings, are victims in their own right.

An efficient campaign to end FGC need therefore not invoke international law with the aim of further victimising the women concerned. Rather, it should seek to engage them and all other stakeholders — men, government officials and human rights advocates — in ways that are considerate of their cultural values. Inspired by the Tostan model, such a campaign would be more effective if it takes a holistic approach to women's human rights — one which does not approach FGC as an isolated case but places it within the context of a broader systemic discrimination against women.

As with the case of the now extinct Chinese foot binding, change is possible if the campaign sensitises the majority of community members into making collective pledges to abandon FGC. Most importantly, with men's cooperation, the perceived rewards (marriageability) and punishments (stigma and rejection) associated with FGC could be rendered irrelevant — a situation which will eventually lead to FGC abandonment. This is a process that could take up to a generation. Nevertheless, in order to set such a process in motion, African governments should start channelling their efforts away from criminalising FGC, and instead, commit to supporting those groups (such as Tostan) working towards its abandonment.

BIBLIOGRAPHY**BOOKS**

- Hernlund YK and Shell-Duncan BK, 'Transcultural Positions: Negotiating Rights and Culture' in YK Hernlund and Shell-Duncan BK (eds), *Transcultural Bodies: Female Genital Cutting in Global Context* (Rutgers University Press 2007)
- Lloyd-Bostock SMA, 'Explaining Compliance With Imposed Law' in Burman SB and Harrell-Bond BE (eds), *The Imposition of Law* (Academic Press 1979)
- Mackie G, 'Female Genital Cutting: The Beginning of the End' in Shell-Duncan B and Hernlund Y (eds), *Female 'Circumcision' in Africa: Culture, Controversy, and Change* (Lynne Rienner Publishers 2000)
- Mottin-Sylla MH and Palmieri J, *Confronting Female Genital Mutilation: The Role of Youth ICTs in Changing Africa* (Pambazuka Press 2011)
- Skaine R, *Female Genital Mutilation: Legal, Cultural and Medical Issues* (McFarland 2005)

JOURNAL ARTICLES

- Almroth L and others, 'Urogenital Complications Among Girls with Genital Mutilation: A Hospital-Based Study in Khartoum' (2005) 9(2) *African Journal of Reproductive Health* 118
- Behrendt A and Moritz S, 'Posttraumatic Stress Disorder and Memory Problems after Female Genital Mutilation' (2005) 162(5) *American Journal of Psychiatry* 1000
- Berggren V and others, 'Being Victims or Beneficiaries? Perspectives on Female Genital Cutting and Reinfibulation in Sudan' (2006) 10(2) *African Journal of Reproductive Health* 24
- Cobbah JAM, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9(3) *Human Rights Quarterly* 309
- Cook RJ, 'Ethical Concerns in Female Genital Cutting' (2008) 12(1) *African Journal of Reproductive Health* 7
- Donnelly J, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) *Human Rights Quarterly* 400
- Elnashar A and Abdelhady R, 'The Impact of Female Genital Cutting on Health of Newly Married Women' (2007) 97(3) *International Journal of Gynecology and Obstetrics* 238
- El-Tom AO, 'Female Circumcision and Ethnic Identification in Sudan with Special Reference to the Berti of Darfur' (1998) 46(2) *GeoJournal* 163
- Ford N, 'Communication for Abandonment of Female Genital Cutting: An Approach Based on Human Rights Principles' (2005) 13(1) *International Journal of Children's Rights* 183
- Gifford EA, "'The Courage to Blaspheme": Confronting Barriers to Resisting Female Genital Mutilation' (1994) 4(2) *UCLA Women's Law Journal* 329
- Gruenbaum E, 'The Cultural Debate over Female Circumcision: The Sudanese Are Arguing This One Out for Themselves' (1996) 10(4) *Medical Anthropology Quarterly* 455
- — 'Socio-Cultural Dynamics of Female Genital Cutting: Research Findings, Gaps, and Directions' (2005) 7(5) *Culture, Health & Sexuality* 429

- Gunning IR, 'Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries' (1992) 23 *Columbia Human Rights Law Review* 189
- Idowu A, 'Effects of Forced Genital Cutting on Human Rights of Women and Female Children: the Nigerian Situation' (2008) 12(2) *Law Democracy and Development* 111
- Imoh ATD, 'Rites vs Rights: Female Genital Cutting at the Crossroads of Local Values and Global Norms' (2013) 56(1) *International Social Work* 37
- Johnsdotter S and Essén B, 'Genitals and Ethnicity: the Politics of Genital Modifications' (2010) 18(35) *Reproductive Health Matters* 29
- Lane SD and Rubinstein RA, 'Judging the Other: Responding to Traditional Female Genital Surgeries' (1996) 26(3) *The Hastings Center Report* 31
- Mackie G, 'Ending Footbinding and Infibulation: A Convention Account' (1996) 61(6) *American Sociological Review* 999
- Monjok E, Essien EJ and Holmes Jr L, 'Female Genital Mutilation: Potential for HIV Transmission in Sub-Saharan Africa and Prospect for Epidemiologic Investigation and Intervention' (2007) 11(1) *African Journal of Reproductive Health* 33
- Melhado L, 'Risks of Adverse Obstetric and Perinatal Outcomes Increase with Severity of Female Genital Mutilation' (2006) 32(3) *International Family Planning Perspectives* 154
- Morison L and others, 'The Long-term Reproductive Health Consequences of Female Genital Cutting in Rural Gambia: a Community-Based Survey' (2001) 6(8) *Tropical Medicine and International Health* 643
- Obermeyer CM, 'Female Genital Surgeries: The Known, the Unknown, and the Unknowable' (1999) 13(1) *Medical Anthropology Quarterly* 79
- Obiora LA, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' (1997) 47 *Case Western Reserve Law Review* 275
- Okonofua F, 'Female Genital Mutilation and Reproductive Health in Africa' (2006) 10(2) *African Journal of Reproductive Health* 10
- Preis AS, 'Human Rights as Cultural Practice: An Anthropological Critique' (1996) 18(2) *Human Rights Quarterly* 286
- Shell-Duncan B, 'From Health to Human Rights: Female Genital Cutting and the Politics of Intervention' (2008) 110(2) *American Anthropologist* 225
- — and others, 'Legislating Change? Response to Criminalizing Female Genital Cutting in Senegal' (2013) 47(4) *Law & Society Review* 803
- Shweder RA, 'What About "Female Genital Mutilation"? And Why Understanding Culture Matters in the First Place' (2000) 129(4) *Daedalus* 209
- Slack AT, 'Female Circumcision: A Critical Appraisal' (1988) 10(4) *Human Rights Quarterly* 437
- Sulkin CDL, 'Anthropology, Liberalism and Female Genital Cutting' (2009) 25(6) *Anthropology Today* 17
- Walley CJ, 'Searching for "Voices": Feminism, Anthropology, and the Global Debate Over Female Genital Operations' (1997) 12(3) *Cultural Anthropology* 405

- Simms S, 'What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision' (1993) 106(8) *Harvard Law Review* 1944
- The Public Policy Advisory Network on Female Genital Surgeries in Africa, 'Seven Things to Know About Female Genital Surgeries in Africa' (2012) 42(6) *The Hastings Center Report* 19
- Wilson AM, 'How the Methods Used to Eliminate Foot Binding in China can be Employed to Eradicate Female Genital Mutilation' (2013) 22(1) *Journal of Gender Studies* 17
- Winterbottom A, Koomen J and Burford G, 'Female Genital Cutting: Cultural Rights and Rites of Defiance in Northern Tanzania' (2009) 52(1) *African Studies Review* 47

INTERNATIONAL LAW SOURCES AND TREATIES

- African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter)
- Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW)
- Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3
- Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR)

REPORTS

- Diop NJ, Moreau A and Benga H, 'Evaluation of the Long-Term Impact of the TOSTAN Program on the Abandonment of FGM/C and Early Marriage: Results from a qualitative study in Senegal' (Population Council 2008)
- Diop NJ and others, 'The TOSTAN Program: Evaluation of a Community Based Education Program in Senegal' (Population Council 2004)
- Kiragu K, 'Female Genital Mutilation: A Reproductive Health Concern' (Population Reports, Meeting the Needs of Young Adults, Series J, No 41, Vol XXIII, No 3, 1995)
- UNICEF, *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change* (UNICEF 2013)

WEBSITES AND OTHER SOURCES

- 'Cross-Cutting Issues' (*Tostan*)
<<http://www.tostan.org/female-genital-cutting>> accessed 15 June 2015
- 'Cultural Relativism' (*All About Philosophy*)
<<http://www.cultural-relativism.com>> accessed 15 June 2015
- 'Female Genital Mutilation' (*World Health Organization*)
<<http://www.who.int/mediacentre/factsheets/fs241/en/>> accessed 15 June 2015

- 'Female Genital Mutilation and Other Harmful Practices' (*World Health Organization*)
<http://www.who.int/reproductivehealth/topics/fgm/fgm_trends/en/> accessed 22 January 2016
- 'Female Genital Mutilation: Grounds for Seeking Asylum' (*International Refugee Rights Initiative*)
<<http://www.refugeelaidinformation.org/female-genital-mutilation-grounds-seeking-asylum>> accessed 22 January 2016
- Gillespie G, 'Ending Female Genital Cutting, One Household at a Time' (*The Guardian*, 22 August 2013)
<<http://www.theguardian.com/global-development-professionals-network/2013/aug/22/social-network-fgm-senegal>> accessed 15 June 2015
- 'Laws/Enforcement in Countries Where FGM is Commonly Practiced' (*US Department of State*, 2001)
<<http://2001-2009.state.gov/g/wi/rls/rep/9303.htm>> accessed 21 January 2016
accessed 15 June 2015
- Lyons K, 'The Gambia Bans Female Genital Mutilation' (*The Guardian*, 24 November 2015)
<<http://www.theguardian.com/society/2015/nov/24/the-gambia-bans-female-genital-mutilation>> accessed 28 January 2016
- Moges A, 'What is behind the tradition of FGM?' (*African Women Organization*)
<<http://www.african-women.org/documents/behind-FGM-tradition.pdf>>
accessed 15 June 2015
- 'Tostan Community-led Development' (*Tostan*)
<<http://tostan.org/sites/default/files/resources/tostan%20brochure.pdf>> accessed 15 June 2015
- 'Where We Work' (*Tostan*)
<<http://www.tostan.org/where-we-work>> accessed 15 June 2015

The Mediterranean Sea and the Right to Know About the Fate of Missing Relatives: Access to Justice for Families of Missing Migrants

Sara Lodi*

Irregular migration by sea is not a new phenomenon. In recent times, however, numbers have grown, border controls have tightened and migrants' routes have become longer and more dangerous. This combination of factors has resulted in a significant known loss of life, as well as unknown numbers of missing migrants. In this Article, the main argument is that modern technology could allow for the creation of an international database of missing migrants, permitting their families to determine their whereabouts. The Article also argues that the use of biometric technology is restricted for security purposes and border control. This partial use of biometric data completely curtails the rights of the family and their access to justice, understood as their right to information regarding the whereabouts of missing relatives. The right of the family to know the fate of missing relatives has been largely recognised in situations of emergency and in times of war. Unfortunately, the same consideration has not been accorded to missing migrants, despite the frequency and magnitude of the tragedies in the Mediterranean Sea.

I. INTRODUCTION

This Article addresses the issues of unknown deaths in the Mediterranean Sea, the right to an identity and the right of the family to know the whereabouts of missing relatives. It is argued that Europe, through its current use of biometric data for security purposes and border controls, could extend this capability to the documentation of missing migrants, thereby providing improved information to the families of the missing. Moreover, the Article argues that despite the systematic verification of deaths in armed conflicts and humanitarian disasters, European states do not attribute the same importance to the loss of life of migrants.

* Sara completed her MA in Human Rights Law at SOAS, University of London in 2015. She graduated with a BA in Interpretation and Translation (Hons) from CIELS University, Padua in 2010. The author would like to thank Professor Maria Moscati for her help and support throughout the academic year and during the drafting of this Article.

Section I analyses the phenomena of both causes of migration and border control policies, and the problems that the latter are causing to migrants' entitlement to fundamental human rights. Moreover, it explores the specific condition of illegal migrants who are legally 'invisible', underlining that the invisibility that characterises these persons is one of the main challenges in tracing, acknowledging, and accounting for their deaths. It further explains all the other reasons behind the substantial amount of missing and lost persons as a result of the migration phenomenon and border control policies.

Section II analyses the 'right to identity' and the 'right to know' and the links that both of these rights have with customary International Humanitarian Law (IHL) and International Human Rights Law (IHRL). It examines international jurisprudence in different cases of missing persons and the right of the family to know their fate. The jurisprudence is taken from cases of enforced disappearance, both in the European Court of Human Rights (ECtHR) and in the Inter-American Court of Human Rights (IACtHR), drawing comparisons between the two procedural approaches. The fact that the same rights have no legal enforceability in situations of missing migrants, despite the similarities of the situations, is highlighted.

The last Section deals with biometric data, its nature, and its use in the European context. The argument is that the European Union does not use the same data in order to guarantee the right to an identity of missing migrants and the right of the family to know the whereabouts of the missing, instead implementing biometrics largely for security purposes. The section continues with examples taken from the work conducted by the International Committee of the Red Cross (ICRC) and the International Commission on Missing Persons (ICMP). It concludes with recommendations on how to optimally implement an international database which could provide all the necessary information to families in order to promote their right to know.

By way of illustration, the ICRC defines a missing person as:

an individual of whom their families have no news and/or who, on the basis of reliable information, have been reported missing as a result of armed conflict, whether international or non-international, internal violence, natural disaster or other humanitarian crises.¹

More broadly, the International Commission on Missing Persons adds that a missing person is also someone who went missing because of human rights

¹ International Committee of Red Cross (ICRC), 'Living with Absence: Helping the Families of the Missing' (Publication Ref 4152, ICRC 2014).

abuses, such as in the case of enforced disappearance, or ‘as a result of trafficking, drug related violence and migration.’²

The disappearance of a close relative, and the uncertainty of identifying whether this person is still alive, causes different trauma within the family, both psychological and legal. People can react in a number of different ways: they struggle within the limbo of puzzlement, they suffer from depression or a sense of guilt; they might curtail social relations in order to dedicate their time and energy to childcare, or they may be compelled to take up new responsibilities within the family.³ The family of a missing person can also be stigmatised within the community because of a lack of ‘recognised social identity’ within the community itself: this can happen, for example, to the wives of missing men who have to take up traditionally masculine roles. Stigmatisation can also occur in communities where religion plays a major role, the lack of a specific missing person’s status leads the family to struggle in feeling part of a specific group because they are not formally recognised. An example is that of a family that cannot properly mourn and grieve as they are unable to properly undertake rituals such as funeral commemorations or visiting the burial site of the deceased family member. The lack of legal recognition for the missing places families in uncertain legal situations concerning their rights to property, inheritance, guardianship of children and remarriage.⁴ As aforementioned, the ambivalence in the situations that these families face can have different consequences. They are definitely as much victims as their missing relatives are, and are therefore entitled to the right to know the whereabouts of the missing in order to try to obtain closure from a clarified situation and to move on from the limbo of ambiguity.

This Article will examine the loss of identity produced by irregular migration and tightened border controls in the Mediterranean Sea; the effect of the consequences of this human rights issue on the families and their right to know the whereabouts of the missing; and a proposed solution for addressing this situation through the use of biometric data.

II. SECTION ONE

Migrant frontier deaths and violations of migrants’ rights at frontiers have tended to be seen as a “tragic by-product” and as “unintended side

² International Commission on Missing Persons (ICMP), ‘The Missing’ (ICMP, 22 May 2014) <<http://www.icmp.int/the-missing/>> accessed 8 August 2015.

³ ICRC (n 1) 8.

⁴ *ibid* 11.

*effects” of state action to control national borders, prevent irregular migration, and combat international crime.*⁵

2.1 The Phenomenon of Irregular Migration

The 2008 memorial built on the Island of Lampedusa, Italy, was dedicated to all those migrants who went missing or lost their lives trying to reach Italian soil. The memorial, which has the shape of a door facing the Mediterranean Sea, represents the ‘gateway to Europe’. It lists neither their names nor their nationalities, symbolising both the unknown identity of these people and the State’s lack of will to identify them.⁶ Additionally, all the burial places of dead migrants in southern European countries consist of unmarked graves, another symbol of their loss of identity.⁷ The specific status of migrants, whether they be asylum seekers, refugees or economic migrants, is beyond the remit of this Article; the aim is to take into consideration irregular migrants who cross the Mediterranean Sea at a broader level, underlying the specific status of vulnerability and invisibility of this category.⁸ Despite the aforementioned point, the UN High Commissioner for Refugees (UNHCR) has stated that ‘most of the people arriving by sea in Europe are refugees, seeking protection from war and persecution.’⁹

Irregular migrants are those who have no valid permit to enter a state, or to remain in the territory of the state; the majority of those who enter the borders of the state in question will have had no choice but to leave their own countries. Host states often regard their presence as illegal and require their removal as soon as possible. Despite this dichotomy, it is important to underline that, under international law, migrants are entitled to protection regardless of their status under national law. The irregularity of the status of migrants depends on national jurisdiction and irregularities emerge for different reasons: the lack of a valid visa or passport, overstaying in a country, or an entry effected through

⁵ Stefanie Grant, ‘Recording and Identifying European Frontier Deaths’ (2011) 13 *European Journal of Migration and Law* 135.

⁶ Stefanie Grant, ‘Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity’ in Marie-Benedicte Dembour and Tobias Kelly (eds), *Are Human Rights for Migrants?* (Routledge 2011) 48.

⁷ *ibid.*

⁸ Stefanie Grant, ‘The Legal Protection of Stranded Migrants’ in Ryszard Cholewinski, Richard Perruchoud, and Euan MacDonalds (eds), *International Migration Law: Developing Paradigms and Key Challenges* (The Hague 2007).

⁹ UNHCR, ‘Mediterranean Crisis 2015 at Six Months: Refugee and Migrant Numbers Highest on Record’ (2015) <<http://www.unhcr.org/5592b9b36.html>> accessed 24 August 2015.

trafficking.¹⁰ The most accurate data in Europe is provided by UNITED, an international non-governmental organisation (NGO) based in Amsterdam.¹¹ Work began in 1993 in order to record the deaths of migrants and refugees as a result of the so-called 'Fortress Europe'. The latest publication lists 22,396 frontier deaths since 1993.¹² It is worth noting that UNITED adopt a broad definition of 'frontier-deaths', which includes people who die in detention centres, victims of racially-motivated attacks, and those who die attempting to cross borders within the EU; it is the most reliable source of data on border-related deaths.¹³

In recent years, there has been a significant increase in the number of such deaths; the figures from Human Rights Watch estimate that 3,500 people died in 2014, with 479 refugees having drowned or gone missing between January and March 2015. In April 2015 the situation worsened: 1,308 migrants died in shipwrecks, representing an unprecedented tragic loss of lives. Although these events are alarming, they are not isolated incidents. Moreover, these figures fail to represent the true number of fatalities because of the uncertain nature of frontier-deaths, especially in cases where bodies are never found.

2.1.1 Migration Flows: Push Factors

Over the past two decades immigration has increased enormously. It is a general phenomenon that arises from migratory 'fault-lines' between wealthier, more secure states and poorer, more unstable states.¹⁴ In summary, 'increased emigration is 'pushed' across these fault-lines by poverty, persecution, insecurity and conflict, and immigration is 'pulled' by labour demand, economic opportunity, and the need for protection and personal security.'¹⁵

¹⁰ Commissioner for Human Rights, 'The Human Rights of Irregular Migrants in Europe' (17 December 2007) CommDH/IssuePaper(2007)1.

¹¹ Tamara Last and Thomas Spijkerboer, 'Tracking Deaths in the Mediterranean Sea', in Brian T and Laczko F (eds) *Fatal Journeys: Tracking Lives Lost during Migration* (International Organization for Migration 2014) 92.

¹² UNITED, 'List of 22,349 Documented Deaths of Asylum Seekers, Refugees and Migrants Due to the Restrictive Policies of Fortress Europe' (UNITED, 19 June 2015)

<<http://www.unitedagainstracism.org/wp-content/uploads/2015/06/Listofdeaths22394June15.pdf>>

accessed 11 August 2015.

¹³ Last and Spijkerboer (n 11) 96.

¹⁴ Human Rights Council, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*' (25 February 2008) A/HRC/7/12 para 7.

¹⁵ Grant 'Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity' (n 6) 137.

Migrants often have strong legitimate reasons for undertaking their desperate journeys. According to the UNCHR, the latest wave of migration to Europe comes from Syria, Somalia, Afghanistan, Eritrea, and Libya: countries plagued by war and human rights violations.¹⁶ In Syria, government forces and pro-government militias continue to carry out indiscriminate attacks on civilian areas, enforced disappearances, arbitrary arrests, and torture. Non-state armed groups working with the terrorist organisation ISIS continue claiming responsibility for a multitude of crimes and human rights abuses. In Afghanistan, the Taliban and other insurgent groups have frequently perpetrated attacks on civilians causing massive displacement within the state. In Eritrea, the majority of the violence is carried out by military forces using conscription, forced labour, arbitrary arrests, detention, and restrictions on the freedom of expression and religion. In Somalia's longstanding conflict, military groups continue to carry out public executions and beatings, sexual abuse, and indiscriminate attacks. Finally, in Libya, a state of political turmoil has existed since the 2011 overthrow of Muammar Gaddafi, and a new outbreak of disorder between the two major political alliances has brought a new wave of violence, abuse and lawlessness.¹⁷

These situations of continuing human rights abuses and insecurity, coupled with economic globalisation – one of the major pull factors – are driving factors for people to leave their countries. Even when freedom of movement is obstructed by border policies, people are still willing to take the risk and leave because any situation is sure to be an improvement compared to the turmoil in their home country.

2.2 Consequences of Tightened Border Controls

According to Jorje Bustamante, the increased number of border-related deaths is a consequence of tightened border controls.¹⁸ As can be demonstrated by the number of irregular migrants who leave their home countries, tightened border-controls do not function as an effective deterrent for these persons to prevent them from leaving. Causes of migration, as outlined *supra*, do not disappear with border closures; consequently, migrants face longer and more dangerous routes in order to reach Europe.

For irregular migrants, sea borders are still the only viable means of entering

¹⁶ 'The Mediterranean Migration Crisis' (HRW, 19 June 2015)

<<https://www.hrw.org/report/2015/06/19/mediterranean-migration-crisis/why-people-flee-what-eu-should-do>> accessed 24 August 2015.

¹⁷ *ibid.*

¹⁸ UNHRC (n 14).

Europe; however, the high seas represent a potentially fatal barrier to overcome. 'Hence, the specific nature of the (sea) border, coupled with the fact that irregular migrants follow illegal and non-conventional channels, increases the risk of deadly incidents.'¹⁹ Securitisation of borders and enforcement of border control policies through coastguard patrols are arguably responsible for the increase in the number of fatalities, especially because their mandates do not cover the rescuing of migrants in danger.²⁰ More funds are now allocated for border controls and 'the intended and unintended effects of such activities should be publicly known if these activities are to maintain democratic legitimacy.'²¹ It is believed that in not doing so, civil society and policymakers' lack of engagement with these deaths results in the normalisation of the issue; and Europe seems to have turned a blind eye to the problem.²²

Border-related deaths are often seen as a side-effect of tightened border controls and states fail to account for these deaths.²³ A related issue is the lack of an international definition of border-related deaths; therefore, a problem arises as to how to, or who to, include in the definition of border-related deaths. De-territorialisation of borders for security reasons subsequently implies that national borders are increasingly being detached from sovereign territory; taking the name of 'functional-borders', which include every space where a State performs functions.²⁴ This raises some legitimate questions: if every state has a positive obligation to prevent deaths on its territory, why are states not taking action within their functional borders, where they should have an indirect jurisdiction, as a consequence of restricted border policies? Moreover, what are the implications of tightened border controls? If the majority of migrants are refugees,²⁵ why are European states unable to grant them protection?

The EU's response to the recent increased migration phenomenon has been a primary focus on departure prevention. However, this approach is likely to fail because it 'overlooks the reasons people are willing to risk their lives to attempt such deadly sea-passage.'²⁶ As a matter of fact:

¹⁹ Simon Robins, Iosif Kovras, and Anna Vallianatou, 'Addressing Migrant Bodies on Europe's Southern Frontier' (Queen's University Belfast and The University of York Centre for Applied Human Rights 2014).

²⁰ Thomas Spijkerboer, 'The Human Costs of Border Control' (2007) 9 *European Journal of Migration and Law* 127.

²¹ Last and Spijkerboer (n 11) 86.

²² *ibid.*

²³ Grant (n 5).

²⁴ Last and Spijkerboer (n 11) 31.

²⁵ UNHCR (n 9).

²⁶ *ibid.* 15.

'States' policies in promoting immigration restrictions and reducing opportunities for regular migration have not been effective in preventing migration. Rather, they have created a market of irregular migration, through trafficking and smuggling of people.'²⁷

Furthermore, the enforcement of these policies is expected to violate migrants' human rights, forcing many asylum seekers to take dangerous routes in the absence of legal alternatives, often at the mercy of smugglers and traffickers. Smugglers take the most dangerous routes to avoid detection by patrols, people have to disembark during the night and they are forced to swim ashore. Smugglers are notorious for their brutality towards migrants: migrants are forced to remain still in the same position, boats are overcrowded, and people have to sit on top of each other. Migrants have little or no water, no food, and deaths during boat journeys are common because of the extreme conditions. People are brutally beaten and thrown overboard alive – those who do not know how to swim die.²⁸ A recently reported case that attests to the brutality of smugglers concerns the death of a diabetic girl, who died because a smuggler threw her insulin syringe into the sea.²⁹ Finally, trafficking and smuggling increase the difficulty of obtaining accurate data on migration and deaths: some migrants disappear during their journeys under assumed names, nationalities, and crossing dangerous borders. 'There is a humanitarian imperative and a moral and legal responsibility to attempt to identify the dead and inform relatives.'³⁰

There are a number of reasons why it is important to account for and identify the missing. First of all, to resolve the tension between preventing the arrival of new migrants and protecting them from violations of their human rights, such as their right to life and freedom from inhuman and degrading treatment. Both are essential in order to prevent new tragedies from occurring and to protect migrants from smugglers and traffickers.³¹ Secondly, states have to fulfil their

²⁷ Directorate-General Justice, Freedom and Security, 'Report of Experts Group on Trafficking in Human Beings' (European Commission, 22 December 2004).

²⁸ Medecins Sans Frontieres, 'No choice: Somali and Ethiopian Refugees, Asylum Seekers and Migrants Crossing The Gulf of Aden' (MSF 2008) 3.

²⁹ ANSA, 'Bimba Diabetica Morta Sul Barcone, Arrestati Gli Scafisti - Cronaca' (*ANSA.it*, 18 July 2015)

<http://www.ansa.it/sito/notizie/cronaca/2015/07/17/migranti-zainetto-con-insulina-finisce-in-mare-bimba-morta-su-barcone_53bde97c-39d8-4b66-9093-e82c13713c52.html> accessed 12 August 2015.

³⁰ Robins, Kovras, and Vallianatou (n 19) 2.

³¹ Stefanie Grant, 'International Migration and Human Rights' (Global Commission on International Migration 2005).

positive obligation in protecting everyone within their jurisdiction; therefore, European states should account for the number of deaths as a consequence of tightened border control policies.³² Thirdly, establishing a relationship between mortality and security frontier policies and practices would at least assist in alleviating human rights concerns. Finally, it is imperative to grant families the right to know the whereabouts of missing relatives, and in order to do so it is necessary to restore their right to an identity.

In order to reduce the number of deaths, the EU should start providing safe and legal channels of migration, increase the number of refugee resettlements — as repeatedly called for by the UNHCR³³ — as well as adopt broader usage of humanitarian visas for the purposes of family reunification. This should be implemented in order to give those entitled to international protection the possibility of travelling lawfully within EU borders.

Despite the frequency and magnitude of these tragedies, European states do not regard migrant death and loss in the same way as deaths in armed conflict and humanitarian disaster which require systematic identification, nor do they recognise that migrants' families have a right to know the fate of missing relatives.³⁴

The next section analyses the international jurisprudence in situations of human rights violations and in times of war related to missing people. Although cases are different, one point of commonality remains: the disappearance of a relative, unresolved situations, and unknown whereabouts are likely to be very similar.

III. SECTION TWO

International law provides a broad jurisprudence and set of principles that states should take into consideration as the foundation their responses to migrant frontier deaths. This section will analyse both the right to an identity and the right to truth as a basis for demonstrating the fundamental importance of restoring the identities of missing or dead migrants, and the implications of the violations of both of these rights on the surviving family of the deceased.

³² Grant 'Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity' (n 6).

³³ UNHCR, 'UNHCR Projected Global Resettlement Needs' (UNHCR 2016).

³⁴ Stefanie Grant, 'Lampedusa Deaths: Identification and Families' Right to Know' (*OpenDemocracy*, 20 December 2013)

<<https://www.opendemocracy.net/stefanie-grant/lampedusa-deaths-identification-and-families%E2%80%99-right-to-know>> accessed 5 August 2015.

Neither of these rights are found in either of the examined Conventions (ECHR/IACHR) as 'stand-alone rights', but they have been created through the elaboration of jurisprudence, thus giving rise to legally enforceable rights. Both violations are examined in light of enforced disappearance as a means of demonstrating that, if in these cases family rights are violated, the same principles should apply in situations of missing migrants.

3.1. Right to an Identity

*If identity is seen as a right and migrants and their families are seen as right holders, the points of departure for an informed discussion are more easily defined.*³⁵

3.1.1 International Law

The right to an identity is not a new concept, although it still lacks a comprehensive definition. Under International Law the right to an identity appears both explicitly and implicitly in several international instruments: the most relevant being the Convention on the Right of the Child (CRC). Article 8(1) imposes the responsibility on:

states... to undertake to respect the right of the child to preserve his or her identity, including nationality, name, and family relations as recognised by law without unlawful interference.³⁶

The term 'including' implies that the identity goes beyond the three factors enumerated, and article 8(2) adds an obligation to rapidly restore the identity of those deprived of their identity illegally. The drafting history of Article 8 suggests a multi-dimensional concept of identity – personal, legal, and familial – and its *travaux préparatoires* were born out of the Argentinean delegation's response to the country's experience with the children of disappeared persons.³⁷ The International Covenant on Civil and Political Rights, the CRC, and the Hague Convention on Intercountry Adoption require the collection of vital information; and several anti-trafficking conventions impose a duty on states to take positive steps, as well as negative restraints, in order to restore, promote and develop identities.³⁸

³⁵ Grant 'Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity' (n 6).

³⁶ United Nations Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3 (CRC).

³⁷ 'Right to Identity' (International Human Rights Law Clinic, University of California, Berkeley School of Law 2007).

³⁸ *ibid.*

3.1.2 The Concept of Identity and the Right to an Identity

The aim of this discussion is not to create a new right, but rather to (re)interpret an existing right. On one hand, the 'cultural dimension' of the right to an identity protects language, property, and other specific rights related to 'cultural identity'; on the other, this right relates to name, nationality, and family, which can be defined as the 'identity dimension.' While there is no clear interpretation, legal scholars and those of other related subjects interpret the right in a dynamic manner, relating it to both social and personal realities. 'This "social context" understanding defines identity in terms of the individual's uniqueness vis-à-vis others'.³⁹ Having explored the various dimensions of the right to an identity, we must now examine if it is an independent right, or if it exists only in relation to other existing rights?

The Inter-American Committee of Jurists states that the right to an identity is autonomous, non-derogable, fundamental, and part of human dignity. States have the obligation to respect an individual's identity and to refrain from actively interfering with it. This obligation to protect means that states have to also prevent others from interfering with a person's identity. The purpose of this analysis of the right to an identity is to underline the fact that, although it is considered an independent right, one of its many facets relates to the right to family life, a component of the former. If an individual's right to an identity protects both the individual's personal attributes, as well as their social ties, families are therefore entitled to know the whereabouts of missing relatives due to this symbiotic relationship.

3.2. The Right to Truth

3.2.1 Origins

The Preamble of the Inter-American Charter asserts that 'the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society,'⁴⁰ establishing a link between democracy and human rights. Unfortunately, the history of South American countries is representative of the repeated breakdown of democracy in favour of totalitarian regimes, internal armed conflicts, and civil war. Within these scenarios, massive human rights violations have been perpetrated, *inter alia*, and enforced disappearances have been carried out as a tactic of war. Thus, the Organisation of American States (OAS) has recognised the importance to respect and guarantee the right to

³⁹ *ibid* 13.

⁴⁰ Inter-American Democratic Charter (entered into force September 2001) OAS OEA/SerP/AG/Res1.

truth:

the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations to the fullest extent practicable, in particular the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred.⁴¹

The right to truth is a new right that emerged out of the systematic violation of human rights and the failure of states to investigate, prosecute and punish the perpetrators.⁴² Moreover, it is a legally enforceable right in that it provides for the ability to obtain reparations for the families of the victims. The right to truth is a form of public acknowledgment of the facts and a way to recognise the value of a person as an individual and a right holder.⁴³

3.2.2 Development

The right to truth within the Inter-American system was initially established in response to the phenomenon of enforced disappearance; it has been recently adopted by the ECtHR in the *El-Masri* judgment.⁴⁴ The right to truth is also recognised in the Preamble of the International Convention for the Protection of All Persons from Enforced Disappearance (2006),⁴⁵ by the General Assembly, Right to Truth (2014),⁴⁶ and the reports of the Advisory Committee of the Human Rights Council on Best Practices and Missing Persons (2010). Further, it is now commemorated on 24 March on the occasion of the International Day for the Right to the Truth of Victims of Gross Human Rights Violations and for the Dignity of Victims.

Yet, the right to truth can be traced back to IHL.⁴⁷ During armed conflicts, whether they are international or civil, each state party to a conflict needs to take 'all feasible measures to account for persons reported missing' and to

⁴¹ OAS General Assembly, 'The Right to the Truth' (adopted at the fourth plenary session, held on June 6 2006) AG/RES 2175 (XXXVI-O/06).

⁴² Thomas M Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience' (2001) 23 Michigan Journal of International Law 977

⁴³ Inter-American Commission on Human Rights, 'The Right to Truth in the Americas' (2014) OEA/Ser.L/V/II.152.

⁴⁴ *El-Masri v the Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25.

⁴⁵ International Convention for the Protection of all Persons from Enforced Disappearance (entered into force 20 December 2010) 2716 UNTS 3.

⁴⁶ United Nations General Assembly, 'Right to the Truth' (21 January 2014) A/RES/68/165.

⁴⁷ IAC (n 43) 165.

provide to families with all relevant information.⁴⁸ Moreover, Article 32 of the First Protocol Additional to the Geneva Conventions grants the right to families to know the fate of missing relatives.⁴⁹ The right to family life is also established under IHL in that ‘family life must be respected as far as possible.’ Enshrined in this principle is a provision which establishes the right of the family to have information on the whereabouts of missing relatives.⁵⁰ Furthermore, there are impositions on states to collect, respect and identify bodies and belongings, and to return them to the family.⁵¹ These rules are also applicable in cases of enforced disappearance.⁵² As seen, the search for missing family members is a well-established principle in times of war or state-sponsored violence, and the persistent violation of this right has to be considered to amount to inhuman and degrading treatment of the families of victims.⁵³

Deaths in the course of irregular migration journeys share some characteristics with other large-scale and violent deaths – whether in major accidents, in armed violence, in violent displacement, in conflict or in humanitarian disasters – and give rise to some broadly equivalent protection issues.⁵⁴

3.3. Enforced Disappearance

Enforced disappearance is used as a tool for political repression and the terrorisation of the opposition. People are kidnapped, transferred to secret locations, held *incommunicado*, interrogated, tortured and, in many cases, thrown into the ocean or buried in mass graves. It is a multiple and continuous violation of different human rights, such as the right to life, the right to liberty, and the right to humane treatment;⁵⁵ it is also a violation of the right to an identity for the victims and their next of kin. In fact, the act of kidnapping disrupts an individual’s social identity, especially with regard to family ties.⁵⁶ When held in secret prisons, the interrogation techniques used are aimed at

⁴⁸ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005) 27; Rule 117.

⁴⁹ Additional Protocol I Geneva Convention (entered into force 8 June 1977) 1125 UNTS 3.

⁵⁰ Henckaerts and Doswald-Beck (n 48).

⁵¹ *ibid*; Rules 112, 113, 114, 115, and 116.

⁵² *ibid*; Rule 98.

⁵³ International Committee of Red Cross, ‘Report: The Missing and Their Families’ (ICRC/TheMissing/01.2003/EN/10, ICRC 2003).

⁵⁴ Grant (n 5) 142.

⁵⁵ *Velazquez Rodríguez v Honduras* (1988) IACHR Series App No 792.

⁵⁶ *María del Carmen Almeida de Quinteros et al v Uruguay* (1990) IACHR Communication No 107/1981, UN Doc CCPR/C/OP/2.

disrupting the psychological identity of the individual,⁵⁷ while executions and the subsequent disposal of the remains work to completely destroy the identity of disappeared persons.⁵⁸

In the case of *Velásquez Rodríguez v Honduras*, one of the first judgments of the IACtHR, it was held that:

The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared... The State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains [in order to bury the victim in accordance with their customs and beliefs].⁵⁹

The right to truth also applies to the relatives of victims of enforced disappearance. In *Bámaca Velásquez v Guatemala*, the Court recognised that State organs have an obligation to clarify the events involved in the investigation and prosecution which give rise to the right to truth. Moreover, IACtHR jurisprudence has recognised that the right to truth encompasses the right to judicial guarantees and judicial protection. Furthermore, determining the truth in the event of cases of enforced disappearance will ease the pain of missing relatives,⁶⁰ and the denial of truth amounts to the inhuman and degrading treatment of close family members.⁶¹ In 1990, the United Nations Human Rights Committee (UNHRC) established that the relatives of a victim of forced disappearance fall into the category of victims of human rights violations.⁶² 'Determining that the relatives of the disappeared may be indirect victims of an enforced disappearance recognises the universal nature of human rights and the effect that disappearances have on relatives.'⁶³ Lastly, the IACtHR held that having access to information about the location and identification of the victim honours both their dignity and that of the family, and will ultimately reconstruct the cultural identity of disappeared persons.⁶⁴

Although our focus is Europe, the reason for examining IACtHR jurisprudence

⁵⁷ McCombs and Gonzalez (n 37) 3.

⁵⁸ *ibid.*

⁵⁹ *Rodriguez* (n 52) [181].

⁶⁰ *Ticona Estrada et al v Bolivia* (2008) IACHR Series C No 191 [155].

⁶¹ *Trujillo Oroza v Bolivia* (2000) IACHR Series C No 64 [114].

⁶² *María del Carmen Almeida de Quinteros et al v Uruguay* (1990) IACHR Communication No 107/1981, UN Doc CCPR/C/OP/2 [138].

⁶³ Alex Murray, 'Enforced Disappearance and Relatives' Rights before the Inter-American and European Human Rights Courts' (2013) 2 International Human Rights Law Review 57.

⁶⁴ *Río Negro Massacres v Guatemala* IACHR (2012) Series C No 250 [265].

relates to the fact that its jurisprudence on enforced disappearance is particularly developed, and therefore could not be left out of the discussion. The ECtHR has relied upon the IACtHR's jurisprudence in a number of judgments on enforced disappearance.⁶⁵ Moreover, IACtHR jurisprudence is supported by various reports and instruments developed by the United Nations. In order to conclude the section, a comparison of the approaches of the two courts in considering the family as a victim in cases of enforced disappearance is presented.

3.3.1 The Different Approaches of the IACtHR and ECtHR

Both the IACtHR and the ECtHR have established that the family of the victim can be considered a victim of inhuman and degrading treatment, although both courts, under their respective conventions, have developed criteria, through which cases are examined and judged, that have varying degrees of importance.

There are three elements taken into account by the two Courts: the relationship status between the victim and the relative, the relative's efforts to find the victim, and the State's response to the relative's efforts.⁶⁶ The IACtHR has accorded greater importance to the relationship status criteria because of the impact that a case of enforced disappearance can have on relatives due to the nature of the relationship.⁶⁷ In contrast, the ECtHR differentiates between the level of proximity between the victim and the relative. A significant ECtHR example is the *Kotu* case, where, although the applicant was the brother of the disappeared person, they were living in two different countries, and therefore he could not be considered a victim just because he was the victim's next of kin.⁶⁸ The second element to take into account is the effort made by relatives. This means that the applicant has to demonstrate that they brought the case before the attention of a state authority and waited for a response. Nevertheless, in many cases the family's efforts to locate their relatives can be obstructed by the corruption of state officials. Both the Inter-American Court and the European Court have frequently highlighted the efforts made by victims' relatives.^{69,70} However, the ECtHR, in a number of cases, has highlighted that there was no violation of Article 3 of the Convention because the relatives did not 'bear the brunt' of the search.⁷¹ In summary, in order to find a violation of

⁶⁵ *Kurt v Turkey* (1998) App Number 24276/94 [68]–[71].

⁶⁶ *Murray* (n 63).

⁶⁷ *Blake v Guatemala* (1999) IACHR Series C No. 48, [57].

⁶⁸ *Koku v Turkey* (2005) ECHR App No 27305/95 [171].

⁶⁹ *Pueblo Bello Massacre v Colombia* (2006) IACHR Series C No 140 [156].

⁷⁰ *Baysayeva v Russia* (2007) ECHR App No 74237/01 [141].

⁷¹ *ibid.*

Article 3 rights, the applicant needs to have shown that they have actively taken steps prior to seeking the assistance of state authorities.

The third and most controversial element regarding the respective approaches of the courts concerns the state's response. Both courts recognise that state officials can actively or passively obstruct the search efforts of relatives. However, for the ECtHR, the state's response is the crucial aspect, while for the IACtHR, it is secondary. In the Inter-American system, a state's actively impeding or passively obstructing the investigation constitutes a violation of the relatives' rights.⁷² At the European level, as the state's response is a key factor, it appears to be very restrictive inasmuch as it fails to take into account the family's suffering.⁷³

As elaborated *supra*, the jurisprudence on which to rely upon to start building a common practice to investigate cases of missing migrants is broad and consistent. The right to family life, the right to (know the) truth, and the right to an identity are largely recognised under IHL and IHRL, whether the 'victim' is the missing person or their family, who are entitled to know the whereabouts of their relatives. These same rights should also be legal enforceability in situations concerning missing migrants. Thus, it is imperative to realise the creation of a database through which families can access information about their relatives. The next section will explain how this can be achieved with modern technology.

IV. SECTION THREE

*The issue of missing persons is as old as mankind itself. Yet there is virtually no understanding of the global dimension or the true scale of the problem. There are no guidelines regarding the responsibility of states to address this problem in all its facets.*⁷⁴

The previous section explored both the right to an identity and the right to truth in cases of serious human rights violations, or in times of war. This section will now draw a connection between the right to an identity, biometric data (an essential part of personal identity), and the use of biometrics in a European context for security purposes. The main argument is that biometric data should

⁷² *Pueblo Bello Massacre v Colombia* (2006) IACHR Series C No. 140 [160].

⁷³ Ophelia Claude, 'A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence' (2010) 5 *Intercultural Human Rights Law Review* 407, 445.

⁷⁴ International Commission on Missing Persons (ICMP), 'The Missing: An Agenda for the Future, Conference Report' (ICMP 2014).

also be used for humanitarian purposes in order to guarantee and respect the right to truth of families, and to enable them to know the whereabouts of missing relatives.

4.1 Biometric Data and the European Context

Biometric data is defined as an 'automated means of identifying an individual through the measurement of distinguishing physiological or behavioural traits.'⁷⁵ Biometric data is either used to verify a person's identity or to search for one's identity. The main techniques for identification or verifications are: fingerprints, iris scanning, hand geometry, voice recognition, signature verification, and DNA samples.⁷⁶

After the 9/11 attacks, states' approach towards border security has changed completely; affecting both the perspective from which they approach it and the management of international migration. On one hand, information systems and technology have been used by migrants to maintain contact with their families and to reduce social isolation. On the other hand, governments have progressively used them for managing and controlling illegal entry and asylum seekers.⁷⁷ Though arguably the use of biometrics was exceptional some years ago, it has now become common practice. It is used as a tool for control and security purposes. In Europe, there are three migration databases used for border security and illegal migration control: the Schengen Information System (SIS), the European Dactyloscopy of Fingerprint Identification (Eurodac), and the Visa Information System (VIS). Some argue that the aim of the database can be compared to that of Foucault's Panopticon, an image that validates the main argument of this work. Foucault imagined the Panopticon as a building with a tower at the centre from which it was possible to see every cell in which prisoners was incarcerated, without the prisoners being able to tell if they were being observed at that particular moment. The Panopticon produces a sense of permanent visibility that ensures the functioning of power. Foucault describes the Panopticon as a repressive tool used in order to establish discipline and security.

⁷⁵ Jillyanne Redpath, 'Biometrics and International Migration' in Cholewinski R, Perruchoud R, and MacDonalds E (eds), *International Migration Law: Developing Paradigms and Key Challenges* (Asser Press 2007) 27.

⁷⁶ 'Fingerprints & Other Biometrics' (*The Federal Bureau of Investigation*) <https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/fingerprint_biometrics> accessed 25 August 2015.

⁷⁷ Redpath (n 75).

'Panopticon Europe' has lost its implications regarding Foucauldian security, focusing instead on the exclusionary element. Since Panopticon Europe's ultimate aim is to habituate migrants to their status of exclusion, it has been used as an instrument of isolation. Yet, the elements of correction and discipline are now found within the social network and institutional surroundings of migrants. Indeed, they are taught to perceive irregular migration as a threat to national security, and thus migrants are seen as people to be excluded.⁷⁸

Our focus is on irregular immigration via dangerous routes such as the Mediterranean Sea and, consequently, on the Eurodac System because it incorporates both irregular migrants and asylum seekers.⁷⁹ Nevertheless, the two other systems will be briefly discussed. The SIS database was introduced in the Treaty of Amsterdam, which entered into force in 1999, with the purpose of maintaining order and security. The SIS database works in cooperation with the Supplementary Information Request at the National Entries (SIRENE), which supplements its functions; other than the storage of data, SIRENE can exchange complementary information, such as fingerprints or 'softer' data, for criminal intelligence with Europol or other organisations.⁸⁰ While the SIS database stores data on migrants found irregularly in participating territories, VIS instead registers people illegally present in territories as a consequence of expired visas. The Eurodac database was created in order to assist the application of the 1990 Dublin Convention (the Dublin Regulations) in deciding which state has the responsibility of examining asylum applications. The convention was established in order to harmonise the European asylum-seeking system and prevent 'asylum shopping' – the practice of claiming asylum in more than one European state – and 'orbit situations', in which states would repeatedly pass on applications to other member states; precluding proper examination of asylum claims in doing so. Moreover, asylum seekers who have their application refused in one member state are not permitted to apply in any other state due to the Eurodac system.⁸¹ It stores fingerprints for anyone over 14 years of age claiming asylum in Europe; these fingerprints are then stored and matched in the Central Unit Database.⁸² The practice of recording fingerprints has been extended to illegal migrants through an additional Protocol, which

⁷⁸ Dennis Broeders, 'The New Digital Borders of Europe EU Databases and the Surveillance of Irregular Migrants' (2007) 22 *International Sociology* 71, 74.

⁷⁹ Btihaj Ajana, 'Asylum, Identity Management and Biometric Control' [2013] *Journal of Refugee Studies* 576.

⁸⁰ Broeders (n 78).

⁸¹ Ajana (n 79).

⁸² Directorate-General Migration and Home Affairs, 'Identification of Applicants (EURODAC)' (European Commission, 23 June 2015) <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/identification-of-applicants/index_en.htm> accessed 26 August 2015.

was later incorporated into the main Eurodac Regulations. In 1997, the Schengen Executive Committee concluded that states could record, transfer, and match the fingerprints of irregular border-crossers whose identity had not been established.⁸³ The impetus on securitisation and the 'fight against illegal immigration' is explicit, and biometric data is used for these purposes.

4.2 Biometrics and Humanitarian Goals

Given the current situation of missing migrants, the state should have a dual objective: to ensure that tightened border controls do not produce more deaths, and to restore the right to an identity to those who have died through the creation of an international database for families to access when searching for a family member.⁸⁴ In 2007, the Council of Europe's Commissioner for Human Rights stated that it is imperative to account for those deaths; this statement was supported by the Stockholm Declaration, stressing the importance of better recording and identification of migrants.⁸⁵ The 2010 annual report of the UNHCR concerning human rights and biometrics storage also recognised the importance of promoting forensic genetics, given the massive human rights violations present, and recommended cooperation between states and organisations on the matter. Moreover, it established that international standards on the use of forensic genetics are crucial in order to:

ensure that national genetic databanks apply methodologies that are accepted by the scientific community and that they abide by those legal principles... for the protection and confidentiality of the data and outcome information, and for restricting access thereto.⁸⁶

The 2012 Council of Europe Parliamentary Assembly, after systematically failing to save lives in the Mediterranean, declared that it is imperative to:

respect the families' right to know the fate of those who lose their lives at sea by improving identity-data collection and sharing. This could include the setting-up of a DNA file of the remains of those retrieved from the Mediterranean Sea.⁸⁷

⁸³ Broeders (n 78).

⁸⁴ Grant 'Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity' (n 6).

⁸⁵ Grant 'Lampedusa Deaths: Identification and Families' Right to Know' (n 34).

⁸⁶ United Nations Human Rights Council, 'Report of the UNHCR on the Right to Truth and on Forensic Genetics and Human Rights' (2010) A/HRC/15/26.

⁸⁷ Tineke Strik, 'Lives Lost in the Mediterranean Sea: Who Is Responsible?' (Council of Europe Parliamentary Assembly 2012).

Both the ICRC and the ICMP have extensive experience in identifying missing people on the basis of international humanitarian law. In the 2003 report 'The Missing and Their Families', the ICRC elaborated the general principle on biometric data in situations of armed conflict or humanitarian crisis. Information needs to be systematically collected when events result in deaths, all human remains have to be preserved and – whenever possible – returned to families; families have the right to be informed of the death of a relative, and personal effects need to be collected. Methods of identification through genetic data include DNA samples: families have to be informed and involved during the identification process, whilst preserving the cultural identity of the dead through funeral and mourning rites according to tradition.⁸⁸ The ICRC has developed an advanced ante- and post-mortem database where samples of families' DNA are crossed-identified and matched with samples of DNA from human remains, which is now also used in situations of irregular migration.⁸⁹ The ICRC Central Tracing Agency is a Geneva-based division which acts as an intermediary between separated people in order to renew or maintain contact in situations of war or natural disaster.⁹⁰ The ICMP started its work in Bosnia identifying the missing during the Balkans War in the 1990s. Families were asked to provide DNA samples which were later stored in a genetic database which they could access to check for matches. They were able to identify 70 per cent of 40,000 missing persons. This type of testing is very cheap and effective, and could be suitable in cases of missing migrants. In 2013, the ICMP also signed a cooperation agreement with the International Organisation for Migration in order to cooperate on cases of missing migrants and human trafficking.⁹¹ Italy has set an important precedent regarding the use of DNA samples (ante-mortem data). In 2013, the Italian government established a special inquiry commission to identify bodies in the aftermath of two ships sunk in Lampedusa. The work was carried out by Laboratorio di Antropologia e Odontologia Forense (LABANOF), the Forensic and Odontology Laboratory and with the cooperation of families, who were asked to provide ante-mortem data. This kind of investigation was a first amongst European states.

⁸⁸ ICMP (n 74).

⁸⁹ International Committee of the Red Cross, 'Ante and Post Mortem Data Database' (Publication Ref 4155, ICRC 2014).

⁹⁰ Henckaerts and Doswald-Beck (n 48).

⁹¹ Bomberger K and Swing W L, 'Cooperation Agreement between the International Commission on Missing Persons and the International Organization for Migration' (signed 8 March 2013).

4.3 Family's Access to Justice: Barriers to Identifying Missing Migrants

4.3.1 Unknown Identities

Irregular migration is by nature clandestine, and this factor represents a dual problem: on one hand, this 'invisibility' increases vulnerability because migrants may not be able to fully exercise their rights and are consequently exploited. On the other hand, it becomes more difficult to collect reliable data on their numbers, to identify fatalities, and to implement a database where families may access information regarding missing persons.⁹²

The main reason behind the difficulty of obtaining exact numbers of deaths is because illegal migrants want to avoid detection, especially in Europe, largely due to the Dublin Regulations. Yet, their desire to enter undetected does not reflect a wish for the total breakdown of family ties. Interviews with survivors showed how important it was to 'leave words behind'. Indeed, it is perceived as comforting, hoping that, should they die, their relatives would eventually be informed. Secondly, for the majority of asylum seekers, the only way to reach another country is through the use of false documentation and with the help of smugglers. Some do not have valid passports, while the passports of others are either stolen or destroyed by the smugglers themselves. Moreover, if illegal migrants are smuggled on boats – as a consequence of the illegality of transportation – there are no passenger logbooks; therefore, should a boat sink, then details of the exact number of people on board and their nationalities will remain largely unknown. In most cases the majority of information is given by survivors, when not afraid of apprehension by the authorities.⁹³ A further problem is presented by the fact that the deaths of missing migrants are transnational: journeys involve different countries and there is often no link with their country of origin. Migrants who die outside of the jurisdiction of the state that finds them often have no relation to the shores where they are found; and depending on the provisions of national law, their deaths will be either investigated or ultimately buried with the anonymous 'NN' – no name.⁹⁴ Many deaths occur in remote areas – these are likely to remain unknown.⁹⁵ Furthermore, because of the different quality and comprehensiveness of data-collection between states, it is reasonable to conclude that, at a global level,

⁹² Grant 'Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity' (n 6).

⁹³ Tara Brian and Frank Laczko, 'Migrant Deaths: an International Overview' in Brian T and Laczko F (eds) *Fatal Journeys: Tracking Lives Lost during Migration* (International Organization for Migration 2014) 15.

⁹⁴ Grant 'Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity' (n 6).

⁹⁵ Brian and Laczko (n 93).

deaths are likely underestimated.⁹⁶

4.3.2 Lack of Tools

A number of problems were identified during a conference held at the University of Milan (under the auspices of the ICRC) regarding the information deficit on missing migrants. Information deficit has been related specifically to biometric data: variable forensic capacity in different areas, lack of ante-mortem data to compare against samples from corpses, lack of data collected from non-identified bodies, or inaccessibility of existing databases. 'These findings reflect general shortcomings in national forensic procedures, death management and death registration, both inside and outside Europe.'⁹⁷

The same problem arises when collecting data: what sources are to be used for data collection, and (as previously discussed) who qualifies for border-related deaths? National statistics are based on the reports of media, the authorities, or international organisations; and therefore include only those cases that are publicly reported. Others are based on anecdotal evidence from survivors, bodies found in the proximity of a border, and missing persons or presumed deaths.⁹⁸

4.3.3 Lack of Standard Procedure and International Regulations

*States, international organisations and civil society do understand that the scale of deaths has enormously increased however, remains the fact that there is scarce information on the actual number of loss of lives.*⁹⁹

Over the last two decades there have been significant developments as to how best to address the issue of missing persons. The problem has become better known and more widely discussed, new policies and guidelines have been advanced and implemented, and scientific developments and the availability of information now make it possible to locate a missing person. Unfortunately, these developments have been generally confined to the domains of armed conflict and natural disasters, excluding one major phenomenon: migration. The major problem in tracing deaths is in no small part due to the lack of

⁹⁶ *ibid.*

⁹⁷ Stefanie Grant, 'Migrant Deaths at Sea: Addressing the Information Deficit' (*Global Diversity Exchange*, 9 June 2015) <<http://www.globaldiversityexchange.ca/migrant-deaths-at-sea-addressing-the-information-deficit/>> accessed 5 August 2015.

⁹⁸ Brian and Laczko (n 93).

⁹⁹ Grant 'International Migration and Human Rights' (n 31).

protocols setting out international standards. Indeed, each state has its own practice of investigation and recording fatalities. As a result, within EU borders, dead migrants' bodies are sometimes not handled with the obligations that state law requires for its dead citizens. Moreover, every southern EU country (Spain, Greece, Italy and Malta) independently decides on the procedure to follow in order to account for these deaths and the initiation of investigations upon the finding of a dead body. When an investigation is opened, the Court of Instruction (Spain), public prosecutors (Italy and Greece), or magistrates (Malta), have access to police reports, coroners reports and orders or registers of burial; these can be important resources for investigating border-related deaths. However, two major problems exist. Firstly, these files are not properly archived in a special category and are destroyed after the passage of 5-15 years. Secondly, these documents are confidential and require special permission in order to access them, and in their present form they cannot be used to obtain information on migrants' bodies. DNA samples are now compulsory in all four countries, but the comparatively small number of samples raises questions regarding the efficacy with which this procedure is followed. All dead bodies found on the shores of national territories must be entered into civil registries, but this data cannot be used for acquiring information on dead migrants. Furthermore, there are no specific laws dealing with the burial of dead migrants: even though tracing all of the cemeteries would be a possible and workable approach, the fact-finding involved in investigating negotiations between local authorities and communities, and the occasional interference from national and regional authorities, make the task more difficult.¹⁰⁰ A common practice in many burial places is to create more space without documenting whose remains have been removed. Moreover, there is no obligation to keep records on causes or locations of death. The major problem appears to be, firstly, the lack of national or European legislation on how to systematically record deaths; and secondly, if deaths are considered a non-public issue, privacy and data protection impede the collection of information by NGOs and humanitarian organisations. Also, if missing migrants are irregularly present in a country, their family may be unwilling to resort to state authorities for forensic assistance because in fear of the problems that their relatives will incur if they are still alive.¹⁰¹ Finally, at a European level, the border agency Frontex is not tasked with the systematic verification of dead migrants' bodies; on the contrary, its main goal is to secure borders.¹⁰²

¹⁰⁰ Last and Spijkerboer (n 11) 8.

¹⁰¹ *ibid* 8.

¹⁰² UNHCR, 'The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees' (UNHCR 2015).

As demonstrated, there is a lack of an international – or even regional – common practice or databases to store biometric data in order to make information accessible to the families of the missing. Moreover, the lack of tools and the problem of clandestinity further complicate the issue of tracking deaths. These three aspects, coupled with lack of political will, represent barriers in the access to justice of the families of missing migrants, particularly obstructing the family's right to know the whereabouts of their next of kin.

V. CONCLUSION

This Article has explored a major human rights concern: the loss of identity and the disappearance of migrants whilst undertaking dangerous voyages in order to escape politically unstable countries due to war, violence and systemic human rights violations. These situations are enough to drive people to undertake potentially life-threatening journeys; therefore, the response of tightened border-controls cannot constitute a powerful enough deterrent to stop migration. On the contrary, this approach leads to the negotiation of more dangerous routes, resulting in even more deaths, trafficking, smuggling and to an alarming number of people going missing during multi-state journeys. It has been clearly demonstrated that in situations of war, or major human rights violations, IHL and IHRL grant the right to know to families with missing relatives, and the missing are entitled to the restoration of their right to an identity in all respects. As a consequence, it has been argued that, in the European context, migrants' deaths are not treated with the same importance, and are not properly or systematically investigated. It has also been argued that technological developments with regards to biometric data would allow states – in this context, the states of the European Union – to create an international database for the families of the missing; unfortunately, however, the use of such data is channelled for security purposes and border control instead. Moreover, the lack of an international framework establishing procedures for the information that should be shared and collected – such as fingerprints and DNA samples for example – makes it even more difficult to account for these deaths.

In order to minimise the number of migrants who go missing, a practical approach should entail the retrieval of bodies whenever found, the matching and collection of ante and post-mortem data, and the creation of an international biometric database. This approach needs an international standard of procedure and protocols which could be built on the work and experiences of the ICRC and the ICMP. Moreover, in order to ensure correlation between ante- and post-mortem data, it is necessary to work towards greater cooperation and outreach with both communities within the European Union but also to

communities in Africa and in the Middle East. This can be done through cooperation with agencies already present on the concerned territories, such as the ICRC.¹⁰³ Furthermore, humanitarian visas are also an important step for enabling identification: this type of 'emergency visa' would enable the families of missing migrants to travel for a limited period of time in order to provide ante-mortem data, facilitating the identification process and the mourning of the deceased.¹⁰⁴

Ultimately, the creation of an international database would facilitate the creation of a system to centralise and record all data, to which families could have easy and protected access. This database would accord the families their right to know the whereabouts of missing relatives, and could also be used for the restoration of their right to an identity in all respects. The database should also be administered by an impartial human rights international body, which would guarantee the right to privacy of all persons entered into the registry, respecting the purpose of the database itself. The privacy aspect goes beyond the remit of this work, although it is very much a hotly debated aspect as it could potentially create complications for already vulnerable people.¹⁰⁵ For this reason it is imperative to maintain a strict division between records for border control and the information provided to the families of the deceased in order to protect their right to know.

'The families have a right to know. The principles and technology for identification exist. The need is for resources and political will'¹⁰⁶ in order to create a reliable, accessible and sustainable database that protects privacy rights and familial rights to know. It is incomprehensible how the European Union – which already stores extensive biometric data – does not make migrant deaths public, and does not use the same data collected through Eurodac, SIS and VIS for purposes beyond security.¹⁰⁷ It is therefore imperative to start looking at the issue from a human rights perspective in order to expand access to justice to the families of migrants, and to enhance political participation in a global effort to reduce human vulnerability and violations of human rights; guaranteeing the right to an identity and the right to family life.

¹⁰³ ICMP (n 74).

¹⁰⁴ Robins, Kovras and Vallianatou (n 19) 12.

¹⁰⁵ Rebekah Thomas, 'Biometrics, International Migrants and Human Rights' (2005) 7 *European Journal of Migration and Law* 377.

¹⁰⁶ Grant 'Lampedusa Deaths: Identification and Families' Right to Know' (n 34).

¹⁰⁷ *ibid.*

BIBLIOGRAPHY

BOOKS

- Brian T and Laczko F (eds) *Fatal Journeys: Tracking Lives Lost during Migration* (International Organization for Migration 2014)
- Grant S, 'Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity' in Dembour M-B and Kelly T (eds), *Are Human Rights for Migrants?* (Routledge 2011)
- — 'The Legal Protection of Stranded Migrants' in Cholewinski R, Perruchoud R, and MacDonalds E (eds), *International Migration Law: Developing Paradigms and Key Challenges* (Asser Press 2007)
- Henckaerts J-M and Doswald-Beck L, *Customary International Humanitarian Law* (CUP 2005)
- Redpath J, 'Biometrics and International Migration' in Cholewinski R, Perruchoud R, and MacDonalds E (eds), *International Migration Law: Developing Paradigms and Key Challenges* (Asser Press 2007)

JOURNAL ARTICLES

- Ajana B, 'Asylum, Identity Management and Biometric Control' [2013] *Journal of Refugee Studies* 576
- Antkowiak T M, 'Truth as Right and Remedy in International Human Rights Experience' (2001) 23 *Michigan Journal of International Law* 977
- Broeders D, 'The New Digital Borders of Europe EU Databases and the Surveillance of Irregular Migrants' (2007) 22 *International Sociology* 71
- Claude O, 'A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence' (2010) 5 *Intercultural Human Rights Law Review* 407
- Grant S, 'Recording and Identifying European Frontier Deaths' (2011) 13 *European Journal of Migration and Law* 135
- Murray A, 'Enforced Disappearance and Relatives' Rights before the Inter-American and European Human Rights Courts' (2013) 2 *International Human Rights Law Review* 57
- Spijkerboer T, 'The Human Costs of Border Control (2007) 9 *European Journal of Migration and Law* 127
- Thomas R, 'Biometrics, International Migrants and Human Rights' (2005) 7 *European Journal of Migration and Law* 377

INTERNATIONAL LAW SOURCES AND TREATIES

- Additional Protocol I Geneva Convention (entered into force 8 June 1977) 1125 UNTS 3
United Nations Human Rights Council, 'Report of the UNHCR on the Right to Truth and on Forensic Genetics and Human Rights' (2010) A/HRC/15/26
- Inter-American Democratic Charter (entered into force September 2001) OAS OEA/SerP/AG/Res1
- International Convention for the Protection of all Persons from Enforced Disappearance (entered into force 20 December 2010) 2716 UNTS 3

OAS General Assembly, 'Right to the Truth' (adopted at the fourth plenary session, held on 6 June 2006) AG/RES 2175 (XXXVI-O/06)
 United Nations Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3

CASES

Blake v Guatemala (1999) IACHR Series C No 48
El-Masri v the Former Yugoslav Republic of Macedonia (2013) 57 EHRR 25
Koku v Turkey (2005) ECHR App no 27305/95
Kurt v Turkey (1998) ECHR App no 24276/94
María del Carmen Almeida de Quinteros et al v Uruguay (1990) IACHR Communication No 107/1981, UN Doc CCPR/C/OP/2
Río Negro Massacres v Guatemala IACHR (2012) Series C no 250
Ticona Estrada et al. V Bolivia (2008) IACHR Series C no 191
Trujillo Oroza v Bolivia (2000) IACHR Series C no 64
Velasquez Rodriguez v Honduras (1988) IACHR App no 792

REPORTS

Bomberger K and Swing W L, 'Cooperation Agreement between the International Commission on Missing Persons and the International Organization for Migration' (signed 8 March 2013)
 Commissioner for Human Rights, 'The Human Rights of Irregular Migrants in Europe' (17 December 2007) CommDH/IssuePaper(2007)1
 Grant S, 'International Migration and Human Rights' (Global Commission on International Migration 2005)
 Human Rights Council, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*' (25 February 2008) A/HRC/7/12
 International Commission on Missing Persons, 'The Missing: An Agenda for the Future, Conference Report' (ICMP 2014)
 International Committee of the Red Cross, 'Ante and Post Mortem Data Database' (Publication Ref 4155, ICRC 2014)
 — — 'Living with Absence: Helping the Families of the Missing' (Publication Ref 4152, ICRC 2014)
 — — 'Report: The Missing and Their Families' (ICRC/TheMissing/01.2003/EN/10, ICRC 2003)
 Inter-American Commission on Human Rights, 'The Right to Truth in the Americas' (13 August 2014) OEA/Ser.L/V/II.152
 McCombs T and González J S, 'Right to Identity' (International Human Rights Law Clinic, University of California, Berkeley School of Law 2007)
 Medecins Sans Frontieres, 'No choice: Somali and Ethiopian Refugees, Asylum Seekers and Migrants Crossing The Gulf of Aden' (MSF 2008)
 Robins S, Kovras I, and Vallianatou A, 'Addressing Migrant Bodies on Europe's Southern Frontier' (Queen's University Belfast and The University of York Centre for Applied Human Rights 2014)

Strik T, 'Lives Lost in the Mediterranean Sea: Who Is Responsible?' (Council of Europe Parliamentary Assembly 2012)

United Nations General Assembly, 'Right to the Truth' (A/RES/68/165, UNGA 2014)

United Nations High Commissioner for Refugees, 'UNHCR Projected Global Resettlement Needs' (UNHCR 2016)

— — 'The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees' (UNHCR 2015)

WEBSITES AND OTHER SOURCES

Ansa, 'Bimba Diabetica Morta Sul Barcone, Arrestati Gli Scafisti - Cronaca' (*ANSA.it*, 18 July 2015)

<http://www.ansa.it/sito/notizie/cronaca/2015/07/17/migranti-zainetto-con-insulina-finisce-in-mare-bimba-morta-su-barcone_53bde97c-39d8-4b66-9093-e82c13713c52.html> accessed 12 August 2015

Directorate-General Justice, Freedom and Security, 'Report of Experts Group on Trafficking in Human Beings' (European Commission, 22 December 2004)

<http://www.diversiteit.be/diversiteit/files/File/MH_TEH/documentatie/Report%20Experts%20Group%20THB%20-%20Final.pdf> accessed 27 June 2015

Directorate-General Migration and Home Affairs, 'Identification of Applicants (EURODAC)' (European Commission, 23 June 2015)

<http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/identification-of-applicants/index_en.htm> accessed 26 August 2015

'Fingerprints & Other Biometrics' (*The Federal Bureau of Investigation*)

<https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/fingerprint_biometrics> accessed 25 August 2015

Grant S, 'Lampedusa Deaths: Identification and Families' Right to Know' (*OpenDemocracy*, 20 December 2013)

<<https://www.opendemocracy.net/stefanie-grant/lampedusa-deaths-identification-and-families%E2%80%99-right-to-know>> accessed 5 August 2015

— — 'Migrant Deaths at Sea: Addressing the Information Deficit' (*Global Diversity Exchange*, 9 June 2015)

<<http://www.globaldiversityexchange.ca/migrant-deaths-at-sea-addressing-the-information-deficit/>> accessed 5 August 2015

'The Mediterranean Migration Crisis' (*HRW*, 19 June 2015)

<<https://www.hrw.org/report/2015/06/19/mediterranean-migration-crisis/why-people-flee-what-eu-should-do>> accessed 24 August 2015

International Commission on Missing Persons, 'The Missing' (*ICMP*, 22 May 2014)

<<http://www.icmp.int/the-missing/>> accessed 8 August 2015

UNITED, 'List of 22,349 Documented Deaths of Asylum Seekers, Refugees and Migrants Due to the Restrictive Policies of Fortress Europe' (*UNITED*, 19 June 2015)

<<http://www.unitedagainstracism.org/wp-content/uploads/2015/06/Listofdeaths22394June15.pdf>> accessed 11 August 2015

United Nations High Commissioner for Refugees, 'Mediterranean Crisis 2015 at Six Months: Refugee and Migrant Numbers Highest on Record' (UNHCR, 1 July 2015)

<<http://www.unhcr.org/5592b9b36.html>> accessed 24 August 2015

'Equality Can't Wait': Challenging Inequality in and through the International Human Rights System

Lizzy Willmington*

This Article will explore the structural inequality between civil and political rights and economic, social and cultural rights. It will explore the asymmetry that stifles the radical origins and potential of international human rights laws, particularly with regard to access to civil society actors. With investigation into austerity measures and increasing poverty in the UK, this Article demonstrates examples of civil society actors countervailing institutional power. Participation and Practice in Rights (PPR) supports people who have had their human rights violated to can hold the Northern Irish and British government accountable to their international human rights obligations by using the international human rights mechanisms.

*'We speak of people possessing "universal human rights" usually in those contexts where the people have, in fact, no rights and no way to assert rights.'*¹

*'There's really no such thing as the "voiceless". There are only the deliberately silenced, or the preferably unheard.'*²

I. INTRODUCTION

Article 1 of the Universal Declaration of Human Rights (UDHR) states: 'All human beings are born free and equal in dignity and rights.'³ All subsequent

* Lizzy Willmington received an MA in International and Comparative Legal Studies at SOAS, University of London and a BA (Hons) in History of Art from the University of Leeds. She would like to thank Professor Lynn Welchman, as well as Isabella Mighetto and Rosy Mack from the Feminist Theory Writing Group for their valuable discussions and insights. Lizzy has since sought to build on the themes elucidated in this Article. She is currently working with the London Fairness Commission, which aims to develop and recommend policies for a fairer and more equal London.

¹ Gil Gott, 'Race, Rights and Reterritorialization' (2011) 1(3) Columbia Journal of Race & Law 302, 306.

² Arundhati Roy, 'Peace & The New Corporate Liberation Theology' (*The Sydney Morning Herald*, 4 November 2004)

<<http://www.smh.com.au/news/Opinion/Roys-full-speech/2004/11/04/1099362264349.html>> accessed 17 April 2015.

instruments of international human rights law enshrine equality and dignity as their premise.⁴ This foundational document was drawn up in the wake of two world wars, asserting its primary aim as the ‘creation of a harmonious and just society’.⁵ However, following the release of Oxfam’s 2015 Extreme Inequality Report, it is clear that this objective remains elusive. The richest one per cent of people in the world own 48 per cent of global wealth, whilst the remaining 52 per cent is dominated by the next richest 20 per cent. This means that 80 per cent of the world’s population owns only 5.5 per cent of global wealth.⁶ This rate of increasing inequality will see the richest one per cent and the remaining 99 per cent hold equal shares of global wealth distribution in 2015. Similarly as staggering have been the changes in the size and composition of this one per cent; between 2010 and 2014, the proprietors of the said one per cent have reduced in number from 388 to 80 individuals.⁷ As Costas Douzinas stated in 2000, ‘[a]t no point in history has there been a greater gap between the poor and the rich in the Western world and between the north and the south globally’.⁸ After a temporary interruption of this inequality, largely due to the 2008 global financial crisis,⁹ it is clear that we have returned to this situation of gross inequality in wealth distribution. Almost 70 years after the adoption of the UDHR, global inequality has reached its highest rate yet, notwithstanding that we are in a position where we have the resources to eradicate world poverty. As Pogge observes, ‘[n]ever has poverty been so easily avoidable’.¹⁰ Yet the goal of poverty eradication is nowhere near being realised. Faced with this stark reality, we really need to ask ourselves some important – and uncomfortable – questions. Is the current international human rights system working? Or rather, who is the system working for?

II. REFRAMING THE DEBATE

Drawing on the work of critical legal scholars, I will analyse how the development of the international human rights system has stifled the radical

³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 1.

⁴ For a list of treaties, see ‘The Core International Human Rights Instruments and Their Monitoring Bodies’ (*United Nations Human Rights Office of the High Commissioner*) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>> accessed 17 April 2015.

⁵ Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP 2013) 12.

⁶ Oxfam, *Wealth: Having It All and Wanting More* (Oxfam Issue Briefing, January 2015) 2.

⁷ *ibid* 3.

⁸ Costas Douzinas, *The End of Human Rights* (Hart Publishing 2000) 2.

⁹ Oxfam (n 3).

¹⁰ Thomas Pogge, ‘Poverty and Human Rights’ in Rhona KM Smith and Christian Van den Anker (eds), *The Essentials of Human Rights* (Hodder Arnold 2005).

potential of human rights law. By returning to the foundational questions relating to the international human rights system, namely the horizontal claims of international and human rights law, I will address the hierarchy of civil and political (CP) rights over economic, social and cultural (ESC) rights.¹¹ My argument is that this hierarchy has created a paradoxical structure. How can human rights claim equality for all peoples when the implementation of those rights is itself unequal? While there is no formal hierarchy between CP and ESC rights, Theodor Meron wrote in 1986 that:

The increasing use of hierarchical terminology in international human rights merits attention. In addition to its conceptual interest, this development is of practical importance in resolving conflicts between norms... [as well as] the significance and implications of the trend towards a graduated normativity in international human rights.¹²

My approach will not be to formulate an idealised structure of institutional justice, but rather to consider possible changes to the current system. This Article will examine examples of such changes both from within and outside of the United Nations (UN) which have challenged, and demonstrated improvements to, the ways in which the international human rights system is utilised. This approach is supported by Amartya Sen's work on the 'dual role of the institutions and behaviour',¹³ where he explores why 'a realistic reading of behavioural norms and regularities becomes important for the choice of institutions and the pursuit of justice'.¹⁴ By looking to the institution itself, as well as the outcomes of its operation, we can assess its level of success in the promotion of justice and human rights. As Sen argues, setting up an institution in the pursuit of justice is not enough; the methods employed by the institution in its attempt to achieve this objective, as well as the improvements that it has developed in conjunction with the changing realities of the world it services, are equally important.¹⁵

There are increasing efforts to diminish the domination that CP rights exert over ESC rights through challenges from within the international human rights system and grassroots movements. To use Sen's words, this Article is an assessment of and contribution to the democratic countervailing of institutional

¹¹ Collective rights are outside the scope of this Article.

¹² Theodor Meron, 'On a Hierarchy of International Human Rights' (1986) 80 *American Journal of International Law* 1, 3.

¹³ Amartya Sen, *The Idea of Justice* (Belknap Press of Harvard University Press 2009) 80.

¹⁴ *ibid* 81.

¹⁵ *ibid* 80.

power.¹⁶ I seek to do this by exploring examples and potential means of challenging inequality within the current international human rights structure. I explore the extent to which this structure has been effective in the context of the United Kingdom through a case study of Participation and the Practice of Rights (PPR), a non-governmental organisation (NGO) based in Northern Ireland which tackles inequality, dignity and discrimination through the championing of ESC rights. I shall highlight how the strengthening of human rights and inequality discourses has been reflected in a reassertion of state responsibility in the eradication of inequality under international human rights law. This duality of human rights protection and inequality eradication has been developed through improvements in the understanding of poverty. Moreover, although the link between the two is often obscured, both have been interconnected since the inception of international human rights. 'Freedom from want' – as articulated in the preamble of the UDHR, the International Covenant of Political and Civil Rights (ICCPR), and the International Covenant of Economic, Social and Cultural Rights (ICESCR) and its Optional Protocols – essentially correlates to freedom from poverty.¹⁷ Much work is being done to strengthen this partnership. The publication of the 'Poverty, Inequality and Human Rights: Do Human Rights Make a Difference?' report was a step taken to clarify understandings of inequality and poverty through a human rights lens within the UK. As explained in the report's methodology:

Using human rights entails a shift from needs to socially and legally guaranteed entitlements and from charity to duty. Human rights invite analysis of the structural causes of poverty, rather than only its symptoms, and of the impact of governmental action or inaction on communities experiencing poverty.¹⁸

The reassertion of equality and freedom from poverty as human rights draws attention to the state's legal responsibilities and obligations, as the bearer of the duty to respect (refrain from interference), protect (prevent third parties from interfering), and fulfil (facilitate access through domestic governance, or a direct

¹⁶ *ibid* 81.

¹⁷ Committee on Economic and Social Council, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' (10 May 2001) UN Doc E/C.12/2001/10.

¹⁸ Alice Donald and Elizabeth Mottershaw, *Poverty, Inequality and Human Rights: Do Human Rights Make a Difference?* (Joseph Rowntree Foundation 2009) 5.

duty to provide if person is unable to themselves)¹⁹ the human rights of its citizens as rights-holders. It also allows for investigations into the structural violence that causes human rights abuses; 'as the cause of the difference between the potential and the actual, between what could have been and what is.'²⁰ Sen's approach lends itself well to understanding inequality and poverty in terms of opportunities and choices, or 'freedom to achieve... rather than actual achievements', much like human rights.²¹ The discussion around poverty and inequality is often placed within the political and moral spheres. In such discussions, the paternalistic language of helping those less fortunate is employed, as opposed to that of how and why some people are more or less fortunate – namely, the discriminatory and unequal distribution of and access to resources. This rhetoric of bestowing charity upon the deserving – or, conversely, denying it to the undeserving – strips away the universality of human rights and constitutes an obstacle to states acknowledging their international legal obligations in the realisation of economic, social and cultural rights for all.

III. BREAKING DOWN DIFFERENCES

The UDHR crystallised into binding international law in the form of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), over a decade after its inception. By 1966, the universalistic and egalitarian approach to human rights was undermined. A hierarchy between the two Covenants had developed, with each imposing a different set of immediate obligations upon states. This hierarchy is evident both linguistically and interpretatively. While states must 'respect and... ensure'²² the rights within the ICCPR, the ICESCR requires a state to:

take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.²³

¹⁹ Bantekas and Oette (n 5) 371; Salil Shetty, 'Putting Rights Back Together Again' (6 December 2012)

<<http://www.lse.ac.uk/newsAndMedia/videoAndAudio/channels/publicLecturesAndEvents/player.aspx?id=1681>> accessed 15 April 2015.

²⁰ Johan Galtung, 'Violence, Peace and Peace Research' (1969) 6 *Journal of Peace Research* 167, 168.

²¹ Sen (n 13) 238.

²² International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2.

²³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2.

The presence of the words 'maximum of its available resources' requires full effort from states, yet also acknowledges the reality that resources and capacity vary amongst them. In practice, it exonerates a state from its inability to fulfil its responsibilities under the ICESCR. However, there has been further clarification of this provision by the Committee on Economic, Social and Cultural Rights (CESCR), which has, in particular, addressed states' obligation to ensure indiscriminate access to ESC rights under Article 2(2) by taking immediate legislative action as this does not 'require significant resource allocation'.²⁴ Therefore, the duty to legally protect the most disadvantaged is an immediate obligation of states.

There are real discrepancies between the two covenants in terms of resources, monitoring bodies, involvement of civil society organisations (CSOs), the jurisprudence based on both covenants, and conceptual and methodological approaches to monitoring. From within the UN there have been some calls for greater internal acknowledgement of ESC rights beyond their indivisibility from and interdependency with CP rights. Audrey Chapman, who served as the Special Rapporteur for the UN Seminar for Appropriate Indicators to Measure Achievements in the Progressive Realisation of Economic, Social, and Cultural Rights in 1993, identified key approaches for ESC rights to 'be taken seriously'.²⁵ She advocates the adoption of the 'violations approach' to CP rights, monitoring norms compliance, rather than the current 'progressive realisation' approach of ESC rights, as the former would be much more effective. This approach is both useful for states' self-assessment and the CESCR's role to monitor states' norm compliance.²⁶ A progressive step in the capacity for individuals and CSOs to engage with the CESCR and the ICESCR in order to hold governments to account was taken in 2008 with the promulgation of the Optional Protocol. If ratified, the Optional Protocol would allow the petition mechanism of the Covenant – which had been crucially missing – to fulfil the right to remedy for state violations of ESC rights. The promulgation of the Optional Protocol demonstrated further validation of the legal character of ESC rights and the securing of parity for such rights with CP rights in terms of a violations approach, as advocated for by Chapman. It also demonstrated jurisprudential development by the CESCR, and therefore progression in conceptual and philosophical validity, to aid in the

²⁴ Committee on Economic Social and Cultural Rights, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (10 May 2007) UN Doc E/C.12/2007/1 7.

²⁵ Audrey R Chapman, "'Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 Human Rights Quarterly 23.

²⁶ *ibid.*

understanding and realisation of these rights and states' obligations to uphold them.

Shortly after Chapman's appeal, the introduction of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights reinforced the need for a violations approach. While claiming the balance between CP and ESC rights as 'undisputed', the violations approach must be used to effect state accountability.²⁷

In demanding the legal development of ESC rights, and thus authenticating these rights, ESC rights have become institutionalised and therefore constitute legal duties.²⁸ However, the feasibility of realising some ESC rights may be low in comparison to CP rights due to perceived resource differences (as will be discussed below). As such, it can be perceived that ESC rights fall short of attaining fulfilment, and thus the status of 'full' rights.²⁹ Following on with this argument however, Sen asserts that if the full realisation of ESC rights is not feasible, and they therefore cease to possess rights status when the objective is to work towards realisation, then this becomes in itself a paradoxical argument.³⁰ Sen therefore collapses the argument most commonly used to sideline states' responsibility to fulfil ESC rights. In fact, 'the characterization of some rights as fundamental results largely from our own subjective perceptions of their importance.'³¹ What is called for, then, is the changing of circumstances to such that rights can be fully, or progressively, realised. As such, the mechanisms for the realisation of ESC rights require a broader, more radical transformation in order to adapt to current modes of governance and politics. This need for a more concrete change in the distribution of, and access to, services is the reason why ESC rights have largely remained side-lined by the states that hold the greatest financial resources.

Another fundamental difference between the two covenants concerns states' approaches to their responsibilities. To uphold the rights enshrined in the ICCPR, states must refrain from violating individuals' rights; whereas to achieve the rights enshrined in the ICESCR, states must make an active

²⁷ 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1997) E/C.12/2000/13 in Committee on Economic and Social Council, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' (2 October 2000) E/C.12/2000/13.

²⁸ Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy & Public Affairs* 315, 346.

²⁹ *ibid* 347.

³⁰ *ibid* 348.

³¹ Meron (n 12) 8.

commitment to their realisation. This dichotomy between negative and positive obligations emanating from the two covenants further demonstrates the conceptual divide between the two.³² It is commonly argued that positive obligations require greater financial and human resources, whereas negative obligations are less onerous in this regard. As such, the latter are easier to implement, particularly in resource-poor states and in times of austerity. However, this is not necessarily always the case. The infrastructure for protecting CP rights, such as the establishment of effective justice systems, for example, requires the allocation of a significant proportion of state resources. Furthermore, such an argument should not be used by way of an excuse for failures to protect, respect and realise human rights.

Feminist critiques of human rights could help to provide a more progressive understanding and radical realisation of human rights in everyday life. International human rights law 'operates within the narrow referential universe of the international legal order'.³³ However, it is possible to challenge the increasingly pervasive neoliberal and profiteering influences on human rights in terms of a public/private binary. The function of the international private sphere, consisting of commodities and consumers, is considered to be that of financial growth. However, the private sphere also largely incorporates the means to achieve the realisation of ESC rights. The Maastricht Guidelines state that 'the state remains ultimately responsible for guaranteeing the realization of these rights'.³⁴ The argument that the progressive realisation of ESC rights is harder to regulate is also influenced by the means to their achievement falling into the private open market as commodities. As such, the complaint that ESC rights cost too much and that realising rights drains states' resources can be understood to mean that the achievement of these rights stands in the way of private profit.³⁵ While norm development in terms of the responsibilities of non-state actors is emerging, it is contentious and slow. A feminist perspective on security, a key arm of neoliberalism, can highlight how human rights are often obscured within the dominant understanding, such as in securing access to water, food and education.³⁶ Additionally, with increased awareness of climate change and inequality – which disproportionately impact already vulnerable

³² Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156.

³³ Christine Chinkin and Hilary Charlesworth, *The Boundaries of International Law: A Feminist Analysis* (Manchester United Press 2000) 211.

³⁴ 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (n 27).

³⁵ For a list of how neoliberal market policies impede development and human rights initiatives, see Arthur MacEwan, *Neo-Liberalism or Democracy?* (2nd edn, Zed Books 2001) 5.

³⁶ War on Want, 'Angela Davis On Palestine, G4S and the Prison Industrial Complex' (20 December 2013) <<https://www.youtube.com/watch?v=W9KxslVHRs8>> accessed 15 April 2015.

and marginalised groups, as articulated in Article 2.2 ICESCR, particularly financially insecure female-headed households³⁷ – the considerable uncertainties of realising economic, social and cultural rights are increasingly prominent.³⁸

IV. POVERTY AS A CAUSE AND CONSEQUENCE

Poverty is a highly stigmatised issue, which disproportionately impacts already vulnerable groups, perpetuating and entrenching inequality. Its causes and consequences are manifold; as such, people who experience poverty also experience prejudice and discrimination. In order to understand the complexity of this situation it is useful to recall the words of Frantz Fanon: 'The cause is the consequence; you are rich because you are white, you are white because you are rich.'³⁹ In this statement Fanon extends Marxist theory to the colonial context and understanding of the constituted 'Other'. In doing so he further develops the relationship between inequality, economics and race. This formulation can be adapted to help us understand the complexity of prejudice and marginalisation: *you are poor because you are discriminated against, and you are discriminated against because you are poor*. In terms of international human rights law, equality is understood as the guarantee of rights 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'⁴⁰ While this is not an exhaustive list, the wide scope of protected identities is radically inclusive and could be understood as encompassing those identities not considered to be 'neutral' or 'the norm' – namely white, rich, straight, able-bodied men. However, this does 'evoke an "equality as sameness" approach' which illuminates the desire for everyone to 'perform exactly like [white, rich, straight, able-bodied] men'.⁴¹

States have an obligation to take 'special and positive measures to reduce or eliminate conditions that cause or help to perpetuate discrimination', as well as 'all appropriate measures to modify sociocultural patterns with a view to

³⁷ Intergovernmental Panel on Climate Change, 'Climate Change 2014: Impacts, Adaptation, and Vulnerability. Working Group II Contribution to the IPCC 5th Assessment Report – Changes to the Underlying Scientific/Technical Assessment' (31 March 2014) IPCC-XXXVIII/DOC.4 6.

³⁸ Mary Robinson, 'Public Affairs: Everybody Matters: My Life Giving Voice' <http://www.podcasts.com/carnegie_council_audio_podcast/episode/public-affairs-everybody-matters-my-life-giving-voice> accessed 15 April 2015.

³⁹ Frantz Fanon, *The Wretched of the Earth* (Grove Press 1961) 40.

⁴⁰ ICESCR (n 23) art 2(2).

⁴¹ Chinkin and Charlesworth (n 33) 230.

eliminating prejudices and stereotypes' related to poverty.⁴² These affirmative approaches are, however, seen as temporary measures, until a more objective measure of equality is attained, without consideration for the appropriateness of this objective position. Charlesworth and Chinkin state that '[i]f these rights and freedoms are defined in a gendered way, access to them will be unlikely to promote any real form of equality',⁴³ much like the structural perpetuation of inequality.

Only in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) is 'economic position'⁴⁴ listed as a protected identity in-and-of-itself, rather than through rights to economic fulfilment. The Maastricht Guidelines acknowledge low income as a cause for disproportionate human rights violations,⁴⁵ as well as the low-income status becoming 'increasingly recognised' as an equality strand within the UK, for instance.⁴⁶ It may be the case that class inequality is more historically entrenched and therefore prominent, but it is by no means exclusive to the UK. With wealth inequality growing globally, it is becoming a proliferating cause for social division. Another instance of the legal recognition of economic status as a protected identity characteristic in the UK can be found in the Good Friday Agreement: 'the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity'.⁴⁷ However, this was not reflected in the Northern Ireland Act 1998.⁴⁸ It would be interesting to research the potential impact of 'economic status' as a protected identity and an emerging norm, considering the increased focus on poverty and its recognition as discussed above.

V. THE ROLE OF CIVIL SOCIETY IN COUNTERVAILING INSTITUTIONAL POWER

The implementation and enforcement of international law have always been a concern. Louis Henkin wrote in 1979 that '[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all

⁴² Human Rights Council, 'Final draft of the guiding principles on extreme poverty and human rights submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona' (18 July 2012) A/HRC/21/39 paras 20 and 21.

⁴³ Chinkin and Charlesworth (n 33) 230.

⁴⁴ International Convention on the Protection of the Rights of All Migrant Workers (adopted 18 December 1990 UNGA Res 45/158) art 1.

⁴⁵ 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (n 27).

⁴⁶ Andrea Wigfield and Royce Turner, *Good Relations Measurement Framework* (Equality and Human Rights Commission 2010).

⁴⁷ Good Friday Agreement 1998.

⁴⁸ Northern Ireland Act 1998, s 75.

the time.⁴⁹ This was a depiction of the level of state compliance with international law almost 40 years ago, and compliance has not improved since then. If anything, states have failed to uphold the standards of human rights and exercised double standards that contradict their foundational, universal character. One of the most effective methods of enforcing the accountability of states with regard to their human rights commitments is through civil society.

In addition to efforts within UN bodies as described above, NGOs and CSOs are also the driving force in promoting the unity of civil, cultural, economic, political and social rights to once more be properly understood as indivisible, interrelated and interdependent.

The view that economic, social and cultural rights are mere aspirations of development is legally incorrect and draws attention away from violations of those rights in both poor and wealthy states. A key challenge for human rights activists is to reclaim the universality of rights by spotlighting abuses and campaigning for better enforcement of economic, social and cultural rights around the world.⁵⁰

From this statement it would appear that the NGO community heard Chapman's calls for a 'violations approach', at the very least. Both Human Rights Watch and Amnesty International (AI) have, for instance, broadened their mandates to include advocacy for the protection of economic, social and cultural rights. As Salil Shetty, the Secretary General of AI, asserts, no one should have to choose between living in fear and living in want.⁵¹ While the turn of the century brought about a reinstatement of states' commitment to international human rights law,⁵² and the Millennium Development Goals (MDGs) were a clear undertaking to address the causes and consequences of poverty, critics have expressed frustration that even in their aspirations, states did not build on their current obligations under international law.⁵³ Neither have states elucidated on the principles of equality and non-discrimination,⁵⁴

⁴⁹ Louis Henkin, *How Nations Behave* (2nd edn, Columbia University Press 1979) 47.

⁵⁰ Amnesty International, 'Human Rights for Human Dignity: A Primer on Economic, Social and Cultural Rights' (2014) 2 Amnesty International Publications 1, 32.

⁵¹ Shetty (n 19).

⁵² Robinson (n 38) 24:00.

⁵³ Amnesty International (n 50) 74.

⁵⁴ Human Rights Watch, 'Discrimination, Inequalities, and Poverty: A Human Rights Perspective' (Human Rights Watch 2012) 21.

nor used the language of human rights in framing these goals.⁵⁵ In their final year, 2015, the MDGs have not yet been achieved.

While the Optional Protocol to the ICESCR was a major attempt to eradicate systemic inequalities and encourage accountability and redress for individuals and CSOs, only 46 states have signed it until now, with 20 more ratifying or assenting. The UK has not signed the Optional Protocol. This highlights the resistance of individual states to domestic and international scrutiny and the challenges that CSOs face in holding governments accountable.

Interviewees for the 'Poverty, Inequality and Human Rights: Do Human Rights Make a Difference?' report articulated the potential for human rights to unite disparate groups who identify under different identities but experience similar rights violations through the perpetuation of inequality and poverty.⁵⁶ Campaigns, collectives and activists are increasingly undertaking multi-issue approaches to structural violence and injustice. However, when engaging with governments, some NGOs have found that using a human rights approach in a time of austerity and cuts to welfare in the UK was unhelpful;⁵⁷ particularly given the current UK government's attitude to human rights, evidenced by its plans to scrap the Human Rights Act 1998 and to replace it with a British Human Rights Bill.⁵⁸ I would argue that the use of international human rights law during a time of austerity and increased inequality would counter the belief that the unjust consequences of austerity are inevitable. Also, those who were impacted by, and opposed to, the discriminatory and unequal distribution of welfare cuts affecting the already marginalised, could use the international human rights system to challenge the legality of such cuts. If it is not useful to engage with the government on the basis of human rights, it will be empowering for civil society in reclaiming some agency in this regard.

The Northern Ireland Good Friday Agreement crystallised democratic participation in decision-making.⁵⁹ The UN Guiding Principles on Extreme Poverty articulate the necessity of women's participation and equal access to decision-making power and that states must develop mechanisms to enhance the involvement of women in political life and decision-making bodies at all levels, including those living in poverty.⁶⁰ The right to participate is also found in ICCPR (Article 25), ICESCR (Articles 13.1 and 15.1), the Convention on the

⁵⁵ Chapman (n 25) 27.

⁵⁶ Donald and Mottershaw (n 18).

⁵⁷ *ibid* 39.

⁵⁸ Conservatives, 'The Conservative Party Manifesto 2015' 60.

⁵⁹ Good Friday Agreement (n 47).

⁶⁰ Human Rights Council (n 42) para 28.

Elimination of All Forms of Discrimination Against Women (Article 7), the Convention on the Rights of the Child (Article 12), the Declaration on the Right to Development (Articles 1.1, 2 and 8.2), the Declaration on the Rights of Indigenous Peoples (Articles 5, 18, 19 and 41), and the Millennium Declaration (paragraph 25).⁶¹ In her article, Chapman ends with an invitation to CSOs and other human rights monitors and researchers to join in developing an inventory of rights violations, which will create a 'bottom-up' approach to human rights monitoring, demonstrating the vital role CSOs have in the realisation of human rights.⁶² My argument is that there are continuous calls for the participation of civil society to engage with national and international legal institutions, to ensure 'policies are more likely to be effective, sustainable, inclusive and equitable if they are the result of participatory processes'.⁶³ However, there is also continuous resistance both structurally and politically.

VII. UNDERSTANDING INTERNATIONAL HUMAN RIGHTS AT HOME

With the UK foreign aid budget recently legislated at 0.7 per cent of gross national income,⁶⁴ with a view to tackling global poverty, and as at the sixth largest economy in the world, one would equally expect poverty within the UK to be seen as a priority. However, in terms of wealth distribution, the UK is the most unequal state in Europe and the fourth most unequal amongst the Organisation for Economic Co-operation and Development (OECD) countries.⁶⁵ The UK is home to nine out of the 10 of the poorest regions in northern Europe, as well as the richest one.⁶⁶ When juxtaposed against the findings from Oxfam's

⁶¹ 'Participation of Persons Living in Poverty' (*United Nations Human Rights Office of the High Commissioner*)

<<http://www.ohchr.org/EN/Issues/Poverty/Pages/ParticipationOfPersonsLivingInPoverty.aspx>> accessed 13 April 2015.

⁶² Chapman (n 25) 66.

⁶³ 'Participation of Persons Living in Poverty' (n 61).

⁶⁴ UK Parliament, '0.7% of National Income as International Aid' (2010)

<<http://www.parliament.uk/business/publications/research/key-issues-for-the-new-parliament/britain-in-the-world/07-of-national-income-as-international-aid/>> accessed 22 April 2015.

⁶⁵ 'The Scale of Economic Inequality in the UK' (*The Equality Trust*)

<<http://www.equalitytrust.org.uk/about-inequality/scale-and-trends/scale-economic-inequality-uk>> accessed 19 April 2015; 'Briefing 56: The Gap between the Richest and Poorest Region in the UK Is the Biggest in Europe' (*Inequality Briefing*, 10 April 2015)

<<http://inequalitybriefing.org/brief/briefing-56-the-gap-between-the-richest-and-poorest-region-in-the-uk-is-the>> accessed 19 April 2015.

⁶⁶ Inequality Briefing, 'Briefing 43: The Poorest Regions in the UK Are the Poorest in Northern Europe'

report we can see that Costas Douzinas was right; that vast global inequalities are not limited to inequalities between states, but also inequalities within states. In addition, there is much evidence to show that equality promotes a happier, healthier and more trusting society, with reduced rates of crime, mental and physical health issues and higher rates of social mobility.⁶⁷ This is vitally important to emphasise during a period of austerity that has seen huge increase in inequality, both globally and within the UK. Aside from the increasing inequality perpetuating and being caused by breaches of states' obligations under the ICESCR, states still have a duty to ensure the progressive realisation of such rights during periods of austerity.⁶⁸ Using a framework in line with human rights obligations would necessitate a more creative and critical way of approaching the distribution of resources, particularly in times of austerity.

Historically, the focus has long been on international human rights violations taking place overseas. It is thus easy for the UK to be less self-reflective when considering inequalities at home within the human rights context. Eleanor Roosevelt stated:

Where, after all, do universal human rights begin? In small places, close to home... they are the world of the individual person; the neighbourhood [s]he lives in; the school or college [s]he attends; the factory, farm or office where [s]he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.⁶⁹

PPR's foundations lay in both the theory and the practice of international human rights. Through participation, empowerment and accountability,

<http://inequalitybriefing.org/graphics/briefing_43_UK_regions_poorest_North_Europe.pdf> accessed 16 April 2015.

⁶⁷ See Kate Pickett and Richard Wilkinson, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (Penguin Books Ltd 2009).

⁶⁸ Committee on Economic, Social and Cultural Rights, 'Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights' (16 May 2012) INT/CESCR/SUS/6395.

⁶⁹ 'Human Rights for All: Quotations' (*United Nations*)

<<http://www.un.org/en/globalissues/briefingpapers/humanrights/quotes.shtml>> accessed 22 April 2015 citing Eleanor Roosevelt, "'In Our Hands'" (speech delivered on the tenth anniversary of the Universal Declaration of Human Rights)'.

equality and dignity for the most marginalised are safeguarded.⁷⁰ Located in Belfast, PPR work within a unique legal and political setting; as a post-conflict, devolved nation of the UK, Northern Ireland is still grappling with historical inequalities.⁷¹ Established in 2001, the work of PPR is entwined with the identity of Northern Ireland, the peace process,⁷² and its founder, Inez McCormack. Internationally recognised for her human rights and peace activism, leadership in the trade union movement and role in the Good Friday Agreement, McCormack has always focused on women and the most marginalised groups of society in her work. Tackling daily indignities, recognition of inequalities and redress were essential to the peace process in Northern Ireland for McCormack. As such, PPR supports community working groups who identify real issues in their lives and engage human rights standards and mechanisms in order to hold the government accountable and bring about discernible improvements. In other words, championing the 'deliberately silenced, or the preferably unheard',⁷³ to set the agenda which 'disrupts traditional power relationships'.⁷⁴ Through a modular development programme,⁷⁵ campaign working groups are armed with the tools to hold governments accountable and develop their own measurable indicators and benchmarks. These Northern Irish communities are breaking down the barriers rights-holders frequently face when trying to assert their rights. The campaign working groups, with support from PPR, are the instigators of, and driving forces behind, human rights based policy change, rather than policy-makers. This is a point of departure from traditional NGO and government based policy-making and development.⁷⁶ By focusing on those who are most affected in every stage of the process, this approach ensures that language, policy development and impacts are understood and felt by those who are supposed to benefit, guaranteeing genuine and positive change.

The use of human rights to reframe the discourse of inequality and poverty in Northern Ireland has asserted the legal obligations of the devolved and central government since the peace process, as well as the entitlements of rights-

⁷⁰ 'Vision, Mission & Values' (*Participation and the Practice of Rights*)

<<http://www.pprproject.org/vision-mission-values>> accessed 18 April 2015.

⁷¹ For an overview, see *The Good Friday Agreement: An Overview* (Democratic Progress Institute 2013).

⁷² The Good Friday Agreement was signed in 1998.

⁷³ Roy (n 2).

⁷⁴ Chelsea Marshall, Kate Ward and Nicola Browne, 'Reimagining Rights-Based Accountability: Community Use of Economic and Social Rights' (2014) 3 *The Irish Community Development Law Journal* 65, 69.

⁷⁵ Such as 'confidence building; international human rights standards; identification of issues; action research; setting benchmarks and indicators; developing tactics and strategies; understanding power; and preparing for engagement with government'; *ibid* 67.

⁷⁶ *ibid*.

holders regarding civil, cultural, economic, political and social rights. This challenges the 'infantilisation' of certain groups who lay claim to specific human rights or those groups that proclaim that human rights are for the benefit of the few rather than for all.⁷⁷

VIII. USING INTERNATIONAL RIGHTS AT HOME

The use of international human rights tools does not stop with language and education. The campaigns PPR have supported largely fall within the ICESCR. These campaigns include 'Equality Can't Wait', which addresses the disproportionate waiting time for Catholics in accessing services and inadequate living conditions in social housing (right to housing, Article 11 ICESCR); 'Card Before You Leave', which successfully ensured that people who present themselves at accident and emergency with a mental health crisis receive an appointment within the next 24 hours before they leave (right to highest standard of mental health, Article 12 ICESCR); 'Right to Work: Right to Welfare', which challenges welfare cuts and unemployment through evidence proving the government has fallen short in meeting their international obligations, particularly through austerity cuts (right to work, Article 6 and right to social security, Article 9 ICESCR).

The approaches developed by PPR and working group committees demonstrate how normative understandings of economic, social and cultural rights can be developed and realised. As such, the Right to Work: Right to Welfare campaign was recognised by the UN Special Rapporteur on extreme poverty and human rights as a 'promising practice to be followed'.⁷⁸ The working groups submitted a joint shadow report to the CESCR as part of a review of the UK government's record on inequality and poverty in 2009. A representative from the mental health, urban regeneration, right to play and housing working groups attended the examination of the UK report, with a question proposed by the housing group being asked by a Committee member.⁷⁹ Upon closer examination of the UK report, it included three recommendations for the devolved and central government with regard to inequalities in Northern Ireland, each relating to a PPR working group campaign. The concerns addressed were the disproportionate impact of housing shortages to Catholic families in north Belfast;⁸⁰ persistent inequalities despite the Equalities Act Impact Assessment;⁸¹

⁷⁷ Donald and Mottershaw (n 18) 46.

⁷⁸ Marshall, Ward and Browne (n 74) 74 fn 12.

⁷⁹ *ibid* 76.

⁸⁰ Committee on Economic, Social and Cultural Rights, 'Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and

barriers to complaints mechanisms and increasing suicide rates.⁸² The Committee recommended an intensification of efforts, provisions and access, particularly for the most marginalised. PPR also contributed to the NGO Consultation on Participation of Persons Living in Poverty in Decisions Affecting Their Lives, which was submitted by the Special Rapporteur on extreme poverty and human rights to the UN Human Rights Council in June 2013. The report highlights barriers faced by people living in poverty that impacts 'their participation in decision-making that affects them'.⁸³ The UN Special Rapporteur noted the need for meaningful participation in North Belfast in their country visit report on adequate housing and recommended to:

[p]ut in place additional efforts to address challenges to overcome persistent inequalities in housing in North Belfast. For this purpose, active, free and meaningful participation of all in decisions made about housing should be promoted, including in relation to the collection of official data, that should be disaggregated, open and accessible to all.⁸⁴

The success of the working groups' engagement with the CESCR and Special Rapporteurs demonstrates how CSOs can engage with international human rights frameworks. The dedication, education and work necessary to be able to participate within both national and international governance and legal structures are immense. For the most marginalised of society to translate their daily indignities into the language and understanding of these frameworks is beyond commendable.

Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories' (22 May 2009) E/C.12/GBR/CO/5 para 29.

⁸¹ *ibid* para 31.

⁸² *ibid* para 35.

⁸³ NGO Sub-Committee on the Eradication of Poverty, 'NGO Consultation on Participation of Persons Living in Poverty in Decisions Affecting Their Lives' (December 13 2012) 2.

⁸⁴ Human Rights Council, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik' (30 December 2013) UN Doc A/HRC/25/54/Add2 80(i). The UK subsequently commented that this was the responsibility of the devolved Northern Irish administration. This diversion of responsibility between the Westminster government and devolved governments highlights further complexities for CSOs when trying to hold duty-bearers accountable within the UK. See 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik: Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland: comments by the State on the report of the Special Rapporteur' (5 March 2014) A/HRC/25/54/Add.4.

The Office of the High Commissioner for Human Rights (OHCHR) report, 'Human Rights Indicators: A Guide to Measurement' was produced in 2012 to improve the understanding of indicators as a tool to cross-reference government and CSO accounts of human rights situations. PPR's development and utilisation of international human rights indicators and benchmarks within their Equality Can't Wait campaign on social housing has been highlighted in the report as best practice for civil society participation, advocacy and empowerment. The campaign called for 'a resourced strategy for North Belfast outlining time-bound commitments with targets to eradicate religious inequality on the social housing waiting list.'⁸⁵ The campaign working group and PPR identified and collected evidence around six indicators of the 'right to housing' which demonstrated that improvements in the realisation of this right could be measured.⁸⁶ The indicators were developed and informed by knowledge of ESC rights literature, such as the first indicator, percentage of landings cleaned of pigeon waste, referring to General Comment No. 4 (1991) on the right to adequate housing of the Committee on Economic, Social and Cultural Rights.⁸⁷ The second indicator, establishing the number of families with children living in the Seven Towers, refers to Article 27 of the Convention on the Rights of the Child.⁸⁸

PPR utilise the Good Friday Agreement, the Human Rights Act, the European Convention on Human Rights, and international human rights law and bodies as mechanisms to realise the rights of marginalised people in Northern Ireland. Within the Good Friday Agreement, PPR and the working groups draw on

⁸⁵ 'Equality Can't Wait: The Right to Housing' (Participation and the Practice of Rights 2013) 62.

⁸⁶ The six 'right to adequate housing' indicators were: 'Percentage of landings cleaned of pigeon waste; Number of families with children living in the Seven Towers; Percentage of residents reporting drainage and sewage problems; Percentage of residents reporting dampness and mould in their flats; Percentage of residents happy with the response they received from the housing executive to their reported problems (perception and opinion survey); and Percentage of residents dissatisfied with how involved they felt in decisions by the housing executive (perception and opinion survey).' See 'Human Rights Indicators: A Guide to Measurement and implementation' (United Nations 2012) HR/PUB/12/5 <http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf> accessed 15 April 2015, 61.

⁸⁷ 'Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors'; *ibid* para 8(d).

⁸⁸ 'States parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.' Though the 'parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development', there are aspects that are mainly in the domain of the community or the local authorities and have to be addressed at that level'; *ibid*.

Article 5, which ensures community participation in the operation of all democratic institutions. Additionally, rights safeguards and equality opportunities, including victim redress, human rights, and economic, social and cultural issues provisions, are implemented to ensure the 'promote equality and prevent discrimination'.⁸⁹ McCormack was instrumental in the parallel peace process, an alliance of human rights and feminist activists, public sector workers and academics,⁹⁰ which secured the radical inclusion of these rights as well as a condition to the fulfilment of the peace process. Securing these rights as fundamental to the success of the peace process offers a radically alternative interpretation of security than would otherwise be implemented.

The current UK government's characterisation of human rights as 'infantilising'⁹¹ betrays their paternalistic approach and fundamentally misinterprets the right-bearer/duty-bearer relationship. This highlights the challenges for CSOs when trying to engage with the state using a human rights approach. PPR continue to meet resistance from state officials, particularly when the groups set the government benchmarks and indicators, or wish to exercise their right to participate.⁹² Utilising the international human rights framework holds the UK and devolved governments to account. As Chapman notes, 'the stigma of being labelled a human rights violator is one of the few "weapons" available to human rights monitors.'⁹³

IX. CONCLUSION

In this Article, I have provided a modest exposition of the nexus between inequality, discrimination and poverty. By highlighting resistance to the structural inequalities and violations within the international human rights system, I aim to give space and hope to the democratic countervailing of institutional power. Through creative and defiant means, the radical origins of international human rights can be realised. The good practice carried out by communities in Belfast, with the support of PPR, demonstrates a different way of working together that is desperately needed, both in terms of collective community engagement and negotiation between right-holders and duty-bearers. By ensuring that the most marginalised are at the negotiating table, the

⁸⁹ Good Friday Agreement (n 47).

⁹⁰ Beatrix Campbell, "'None of Us Have the Right to Be Who We Were': A Tribute to a Peacebuilder" (*openDemocracy*, 16 June 2014) <<https://www.opendemocracy.net/5050/beatrix-campbell/%27none-of-us-have-right-to-be-who-we-were%27-tribute-to-peacebuilder>> accessed 22 April 2015.

⁹¹ Donald and Mottershaw (n 18) 39.

⁹² Marshall, Ward and Browne (n 74) 74.

⁹³ Chapman (n 25) 38.

whole pace and direction of the agenda will change. ‘Those who “have” can always argue that tomorrow is the right time for change. For the “have-nots” today is not soon enough.’⁹⁴

A common criticism of or complaint against challenging state non-compliance with their obligations to safeguard ESC rights is the under-utilisation of non-legal approaches in the mounting of such challenges. PPR demonstrates the importance of using non-legal, community engagement and advocacy, as well as highlights potential avenues to engage in international human rights law mechanisms.

The supportive approach of PPR allows rights-holders to realise that they are rights-holders. Even though there is an ever-growing human rights system in place to work towards the realisation of Article 1 UDHR, people who are continually and consistently marginalised often do not realise that human rights are inalienable to them. McCormack recollects a reading of the UDHR with a group of women in social housing in North Belfast, one woman wanted to know how they could get human rights, because they sounded pretty good. When McCormack explained that all human beings were born with human rights, and that they could not be taken away, the woman responded, ‘Well that’s the best fucking kept secret in the whole world’.⁹⁵ What is the point of the international human rights system if the people who need it most do not know how to use it to make their voices heard? ‘We speak of people possessing “universal human rights” usually in those contexts where the people have, in fact, no rights and no way to assert rights.’⁹⁶ In order to avoid human rights being self-serving to a system and to people who are already exceedingly privileged, they need to be at the heart of communities, state governance and law. It should be remembered that ‘[t]here’s really no such thing as the ‘voiceless’. There are only the deliberately silenced, or the preferably unheard.’⁹⁷ Organisations like PPR equip the most marginalised communities with the skills and tools necessary to ‘break vicious cycles of powerlessness, stigmatization, discrimination, exclusion and material deprivation’⁹⁸ by claiming the rights that are theirs, on account of them being human.

⁹⁴ Mary Robinson, ‘Inez McCormack Obituary’ (*The Guardian*, 1 February 2013)

<<http://www.theguardian.com/law/2013/feb/01/inez-mccormack>> accessed 21 April 2015.

⁹⁵ The Meryl Street Forum, ‘Meryl Streep’s Tribute to Inez McCormack at the 2013 Women in the World Summit’ (4 April 2013) 5:00

<<https://www.youtube.com/watch?v=o2JxEE3EzI8>> accessed 22 April 2015.

⁹⁶ Gott (n 1) 306.

⁹⁷ Roy (n 2).

⁹⁸ Human Rights Council (n 42) 2.

BIBLIOGRAPHY

BOOKS

- Bantekas I and Oette L, *International Human Rights Law and Practice* (CUP 2013)
- Chinkin C and Charlesworth H, *The Boundaries of International Law: A Feminist Analysis* (Manchester United Press 2000)
- Douzinas C, *The End of Human Rights* (Hart Publishing 2000)
- Fanon F, *The Wretched of the Earth* (Grove Press 1961)
- Henkin L, *How Nations Behave* (2nd edn, Colombia University Press 1979)
- MacEwan A, *Neo-Liberalism or Democracy?* (2nd edn, Zed Books 2001)
- Pickett K and Wilkinson R, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (Penguin Books Ltd 2009)
- Pogge T, 'Poverty and Human Rights' in Smith RKM and Van den Anker C (eds), *The Essentials of Human Rights* (Hodder Arnold 2005)
- Sen A, *The Idea of Justice* (Belknap Press of Harvard University Press 2009)
- The Good Friday Agreement: An Overview* (Democratic Progress Institute 2013)

JOURNAL ARTICLES

- Alston P and Quinn G 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156
- Chapman AR, "'Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 Human Rights Quarterly 23
- Galtung J, 'Violence, Peace and Peace Research' (1969) 6 Journal of Peace Research 167
- Gott G, 'Race, Rights and Reterritorialization' (2011) 1 Columbia Journal of Race & Law 302
- Marshall C, Ward K and Browne N, 'Reimagining Rights-Based Accountability: Community Use of Economic and Social Rights' (2014) 3 The Irish Community Development Law Journal 65
- Meron T, 'On a Hierarchy of International Human Rights' (1986) 80 American Journal of International Law 1
- Sen A, 'Elements of a Theory of Human Rights' (2004) 32 Philosophy & Public Affairs 315

LEGISLATION AND AGREEMENTS

- Northern Ireland Act 1998
- The Good Friday Agreement 1998

INTERNATIONAL LAW SOURCES AND TREATIES

- International Convention on the Protection of the Rights of All Migrant Workers (adopted 18 December 1990 UNGA Res 45/158)
- International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR)

REPORTS

- Amnesty International, 'Human Rights for Human Dignity: A Primer on Economic, Social and Cultural Rights' (2014) 2 Amnesty International Publications 1
- Committee on Economic Social and Cultural Rights, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (10 May 2007) UN Doc E/C.12/2007/1 7
- — 'Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories' (22 May 2009) E/C.12/GBR/CO/5
- — 'Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights' (16 May 2012) INT/CESCR/SUS/6395
- — 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' (10 May 2001) UN Doc E/C.12/2001/10
- Conservatives, 'The Conservative Party Manifesto 2015'
- Donald A and Mottershaw E, *Poverty, Inequality and Human Rights: Do Human Rights Make a Difference?* (Joseph Rowntree Foundation 2009)
- 'Equality Can't Wait: The Right to Housing' (Participation and the Practice of Rights 2013)
- Human Rights Council, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik' (30 December 2013) UN Doc A/HRC/25/54/Add2
- Human Rights Watch, 'Discrimination, Inequalities, and Poverty: A Human Rights Perspective' (Human Rights Watch 2012)
- Intergovernmental Panel on Climate Change, 'Climate Change 2014: Impacts, Adaptation, and Vulnerability. Working Group II Contribution to the IPCC 5th Assessment Report — Changes to the Underlying Scientific/Technical Assessment' (31 March 2014) IPCC-XXXVIII/DOC.4
- 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1997) E/C.12/2000/13 in Committee on Economic and Social Council, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' (2 October 2000) E/C.12/2000/13
- NGO Sub-Committee on the Eradication of Poverty, 'NGO Consultation on Participation of Persons Living in Poverty in Decisions Affecting Their Lives' (December 13 2012) Human Rights Council (OHCHR), 'Final draft of the guiding principles on extreme poverty and human rights submitted by the

- Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona' (18 July 2012)' (OHCHR 2012) A/HRC/21/39 Principle Oxfam, *Wealth: Having It All and Wanting More* (Oxfam Issue Briefing, January 2015)
- 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik: Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland: comments by the State on the report of the Special Rapporteur' (5 March 2014) A/HRC/25/54/Add.4
- Wigfield A and Turner R, *Good Relations Measurement Framework* (Equality and Human Rights Commission 2010)

WEBSITES AND OTHER SOURCES

- 'Briefing 56: The Gap between the Richest and Poorest Region in the UK Is the Biggest in Europe' (*Inequality Briefing*, 10 April 2015)
<<http://inequalitybriefing.org/brief/briefing-56-the-gap-between-the-richest-and-poorest-region-in-the-uk-is-the>> accessed 19 April 2015
- Campbell B, "'None of Us Have the Right to Be Who We Were": A Tribute to a Peacebuilder' (*OpenDemocracy*, 16 June 2014)
<<https://www.opendemocracy.net/5050/beatrix-campbell/%27none-of-us-have-right-to-be-who-we-were%27-tribute-to-peacebuilder>> accessed 22 April 2015
- 'Human Rights for All: Quotations' (*United Nations*)
<<http://www.un.org/en/globalissues/briefingpapers/humanrights/quotes.shtml>> accessed 22 April 2015 citing Eleanor Roosevelt, "'In Our Hands" (speech delivered on the tenth anniversary of the Universal Declaration of Human Rights)
- 'Human Rights Indicators: A Guide to Measurement and implementation' (United Nations 2012) HR/PUB/12/5
<http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf> accessed 15 April 2015
- Inequality Briefing, 'Briefing 43: The Poorest Regions in the UK Are the Poorest in Northern Europe'
<http://inequalitybriefing.org/graphics/briefing_43_UK_regions_poorest_North_Europe.pdf> accessed 16 April 2015
- 'Participation of Persons Living in Poverty' (*United Nations Human Rights Office of the High Commissioner*)
<<http://www.ohchr.org/EN/Issues/Poverty/Pages/ParticipationOfPersonsLivingInPoverty.aspx>> accessed 13 April 2015
- Robinson M, 'Inez McCormack Obituary' (*The Guardian*, 1 February 2013)
<<http://www.theguardian.com/law/2013/feb/01/inez-mccormack>> accessed 21 April 2015
- Roy A, 'Peace & The New Corporate Liberation Theology' (*The Sydney Morning Herald*, 4 November 2004)
<<http://www.smh.com.au/news/Opinion/Roys-full-speech/2004/11/04/1099362264349.html>> accessed 17 April 2015

'The Core International Human Rights Instruments and Their Monitoring Bodies'
(*United Nations Human Rights Office of the High Commissioner*)
<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>>
accessed 17 April 2015

'The Scale of Economic Inequality in the UK' (*The Equality Trust*)
<<http://www.equalitytrust.org.uk/about-inequality/scale-and-trends/scale-economic-inequality-uk>> accessed 19 April 2015

UK Parliament, '0.7% of National Income as International Aid' (2010)
<<http://www.parliament.uk/business/publications/research/key-issues-for-the-new-parliament/britain-in-the-world/07-of-national-income-as-international-aid/>> accessed 22 April 2015

'Vision, Mission & Values' (*Participation and the Practice of Rights*)
<<http://www.pprproject.org/vision-mission-values>> accessed 18 April 2015

VIDEOS AND PODCASTS

Robinson M, 'Public Affairs: Everybody Matters: My Life Giving Voice'
<http://www.podcasts.com/carnegie_council_audio_podcast/episode/public-affairs-everybody-matters-my-life-giving-voice> accessed 15 April 2015

Shetty S, 'Putting Rights Back Together Again' (6 December 2012)
<<http://www.lse.ac.uk/newsAndMedia/videoAndAudio/channels/publicLecturesAndEvents/player.aspx?id=1681>> accessed 15 April 2015

The Meryl Street Forum, 'Meryl Streep's Tribute to Inez McCormack at the 2013 Women in the World Summit' (4 April 2013)
<<https://www.youtube.com/watch?v=o2JxEE3EzI8>> accessed 22 April 2015

War on Want, 'Angela Davis On Palestine, G4S and the Prison Industrial Complex' (20 December 2013)
<<https://www.youtube.com/watch?v=W9KxslVHRs8>> accessed 15 April 2015

Knowledge is Power

