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FOREWORD

Professor TT Arvind

Head of York Law School

I write this Foreword to the fourth edition of the York Law Review with pleasure and satisfaction. Pleasure, because to a teacher few things give more joy than the real and substantial achievements of one's students. Satisfaction, because in this year, when York Law School marks the fifteenth anniversary of its creation, the content of this Review stands as a token that we have achieved much of what we set to achieve when the department was created.

Our goal in setting York Law School was to create a department that gave students a very different way of studying law. Rather than have students sit in classrooms absorbing facts about law narrated to them by their lecturers, we sought to make the process of learning the law one of discovery. Our objective was to create a department in which students would study the law in a spirit of curiosity and open enquiry: learning actively through their own research and in a way that encouraged them to form their own ideas, perspectives, and understandings of law.

This Review is part of that broader project. It seeks to present to the wider world the very best work of our students, and to celebrate the insight into law that can emerge from students who have the tools they need to discover, analyse, and evaluate the law. It also seeks to give students a forum in which they can take their ideas and perspectives on the law beyond the confines of the university and put them on a more public stage.

There are five articles in this volume, four from our postgraduate students and one from an undergraduate student. The editor's introduction discusses the content of the articles in more detail, and I

do not propose to repeat her excellent summary of their contribution here. However, I would like to highlight two features that the articles share in common.

The first is they are all socially engaged and contextually aware. The articles do not discuss abstract issues of high theory. Rather, every one of them takes on an issue that is of pressing contemporary importance. And, crucially, each seeks to give a legal voice to the perspectives and experiences of people whose lives are far removed from the world of judges, lawyers, and jurists. Whether that be the impact of conflict on women and girls, or Syrian refugees compelled to return to the very regime they fled, or women suffering sexual harassment, or users of narcotic substances, these pieces share in common a commitment to studying and bringing to the fore the structure and logic of the experiences of people outside the elite circles that all too often dominate legal scholarship.

The second is the deeper commitment and intellectual passion for their subjects that each of the pieces evidence. Reading these essays makes it clear that for their authors, the process of writing them was not a dry or detached affair. Rather, these are issues about which the authors care. The effort the authors of each of these essays has put into writing them shines on every page. That passion and commitment are values which York Law School tries very hard to foster, and it is a pleasure and privilege – and, indeed, a matter of pride – to present this volume to the wider world.

TT Arvind
June 2023

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EDITORIAL

Shivangi Gangwar

It is my pleasure to introduce the fourth volume of the York Law Review. In keeping with tradition, this edition features outstanding dissertations crafted by the Law School's undergraduate and postgraduate students, just like the previous three volumes. This year's selection includes one undergraduate dissertation and three LL.M. dissertations on a variety of topical issues, nevertheless connected to each other in that they attempt to bring to our attention those narratives that often go unheard. Two of the articles focus on gender, two on refugees, and one on drug use; four of these are reaction pieces to contemporary policies, whether domestic or international, while one argues for the development of a new policy to address a longstanding problem. All provide a thorough theoretical examination of the legal issue at the heart of these policies and put forth a well-crafted analysis critiquing the weaknesses in the methods employed by the state in addressing them.

In the only undergraduate entry in this volume, Holly Robson directs her attention to the ubiquitous occurrence of sexual harassment in public places. Placing the tragic deaths of Sarah Everard, Ashling Murphy and Sabina Nessa as the backdrop, this article argues for the recognition of public sexual harassment (PSH) as a specific offence in England and Wales. Robson first highlights the importance of naming and defining the unwanted behaviour as the first step towards regulation. She then proceeds to show how PSH meets the standards of harm and wrongfulness, with specific reliance on Article 8 of the Human Rights Act 1998. The driving force behind the argument for criminalisation is the inability of the current framework to effectively regulate PSH. Robson's writing urges the reader to consider how the legal system can be utilised to battle the everyday sexism faced by several members of society even today.

The next article in the line-up also focuses on gender but on the larger, international stage. Brook Morrison's piece is auto-ethnographic and draws on her lived experiences as an Army Officer in the Canadian Armed Forces. She has first-hand experience of the resistance to gender mainstreaming as a NATO military officer and this gives her voice the credibility and positionality absent in several commentaries on the implementation of the Women, Peace, and Security Agenda in the NATO command structure. While considering NATO's evolving role in the global theatre, from a defence organisation to a security organisation engaged in crisis management, Morrison's piece highlights the disproportionate effect conflicts have on women and girls, as well as the need to include women in the peacebuilding process. Her main claim is that a human rights-based approach to development may be more successful in tackling the issue of gender inequality in the wider peace and security realm.

Seconding the discussion on the interrelationship between human rights and international law, Taran Cheema's piece analyses the 'normalisation' of the regime of Syrian President Bashar al-Assad. Despite the ongoing human rights violations in Syria, the international community is confident in its assessment that Syria is safe for the return of its refugees. Cheema showcases how this approach violates the principle of non-refoulement and places the lives and well-being of the refugees in serious jeopardy. She argues that the limitations of the criminal justice system in holding the Syrian regime accountable indicate the viability of transitional justice mechanisms as a means to achieve justice and reconciliation. Overall, this piece asks the reader to reflect on the effect of normalisation on the efficacy of the international refugee protection regime and the necessity of centring Syrian voices in the decision-making process.

Turning attention to the domestic front, Rhys Drakeley analyses the controversial Rwanda Plan through the lens of legal interpretivism. He first makes a case for the application of Dworkinian interpretivism to

the realm of international law before delving into a brief history of the UK's asylum policy. Drakeley's main argument is that the Rwanda Plan falls foul of the UK's obligations under the international refugee law regime as it violates the principles of non-refoulment and non-discrimination. To do so, he compares the Plan with the other asylum arrangements in place, namely the Ukraine Schemes, the Hong Kong British Nationals (Overseas) Route, and the Afghan Citizens Resettlement Scheme. Drakeley's intriguing argument is independent of the country of Rwanda being the host country of the asylum seekers who are turned away at UK borders; he posits that it is morally unacceptable for the UK to discriminate on the basis of nationality, regardless of whether the country chosen for relocation is Rwanda or possibly Sweden. Both Cheema's and Drakeley's articles broaden our understanding of obligations under international refugee law and provide a new understanding of highly controversial and deeply significant moments in our collective history.

In the last piece of this volume, Ed Clothier engages with another UK policy – From Harm to Hope – a decade-long drug policy that bifurcates drug users into recreational users and those with a drug dependency. It is this bifurcation, that results in a regime of part decriminalisation and part continued criminalisation, which is challenged by Clothier as being violative of the rule of law. Clothier uses a thick rule of law conception which he names Civic-Equality-Plus to gauge whether the three fair conditions of non-arbitrariness, full fidelity, and capacity are met by the policy in question. The answer is a qualified yes, dependent on key changes being made to the statutes relating to equality and mental health. In his writing, Clothier suggests that we should approach the issue of drug addiction as a mental health concern rather than just a criminal one. He believes that a public health approach would be more effective than a strict prohibitionist one.

Putting this volume together has certainly been a labour of love. I am grateful to the student editorial team for maintaining a positive outlook in the face of challenges and when things did not seem to go our way,

their deep engagement with the articles and the numerous back-and-forth exchanges they had with the authors and the copyeditor to get the final product looking as it does. My personal thanks to Sam Guy, the outgoing editor-in-chief, for helping me find my feet during my first year on the Review and patiently answering countless questions. Thanks are also due to Salwa Eweis, Louise Stokes, Helen Thornton, Fran Mclean and Phil Cole for the administrative support they have provided throughout the year, be it sharing recruitment calls among the student body or tracking down email addresses. Last, but certainly not least, many thanks to Martin Philip, the York Law School library liaison, and Dr Jed Meers and Dr Mattia Pinto, the academic liaisons, for their continued support, help and encouragement. In our own small ways, we all have contributed to creating this volume and we hope you enjoy reading it.

Walking the Streets Without Fear: Investigating a Specific Offence of Public Sexual Harassment

Holly Robson

Abstract

The events of 2021 sparked a socio-political awakening among our population. Public protests and social media campaigns intensified against the backdrop of recurring high-profile cases of violence against women such as the murders of Sarah Everard, Ashling Murphy and Sabina Nessa. As awareness, and fear, of sexual harassment in public places rises among women and girls in the United Kingdom, it must be investigated whether the law is being fully utilised to protect the female population. This article seeks to understand how we can employ the criminal law to respond to this problem. Through investigating what public sexual harassment is, why it possesses characteristics of criminality and how it engages with existing legal framework. This article argues that the English and Welsh criminal law systems should introduce a specific offence that outlaws public sexual harassment (PSH). At the time of writing, women can, legally, be subjected to public displays of unwanted sexual attention. Where behaviours can be shoehorned under an existing offence, complexities in the framework mean the law struggles to ever be enforced effectively. As such, this discourse will explore the opportunities that a specific office of public sexual harassment would create to address the shortcomings of current law and how such an offence could operate to provide the legal protection desired by so many in our society. It argues that by doing so, favourable social responses can be generated which will deter engagement with the conduct and decrease its prevalence by changing social perceptions of the act itself.

1 Introduction

Olivia is a 24-year-old female living and working in central London. While on her commute to work, Olivia alighted onto the familiar surroundings of the district line tube and held on to an elevated strap. A man stood directly behind her. As the tube departed, he began swaying against Olivia's body. Olivia presumed this was just the rhythm of the carriage until he leaned in closer, breathing directly, loudly and heavily into her ear. At this point, she realised that he was not swaying — he was rubbing up against her.[1] Traumatised by her encounter, Olivia disembarked the tube three stops early, opting to walk the remainder of her journey.

Olivia does not exist, but her story does.[2] However, it is by no means extraordinary. Olivia's experience is understood all too well by women.[3] Her story highlights how the ingrained normalisation of unwanted sexual attention has created an epidemic of willing perpetrators who, collectively, inhibit the progression of women's rights by maintaining a culture in which women are unable to enjoy the same freedoms in public spaces as men. Blinded by the orthodox conceptions of flirtatious and complimentary behaviour, most conduct is presently unaddressed by law, leaving victims, like Olivia, stuck with the reality of repeat victimisation. However, the likelihood of this reality persevering into the next decade is unlikely.

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[1] Imogen Groome, 'Sexual Assault on Public Transport Is an Increasing Problem: Here's Why We Need to Speak Out' (*Metro*, 30 April 2017) <https://metro.co.uk/2017/04/30/sexual-assault-on-public-transport-is-an-increasing-problem-heres-why-we-need-to-speak-out-6593306/> accessed 22 May 2023.

[2] Olivia's story is based on the real-life experiences cited in the above reference.

[3] All-Party Parliamentary Group (APPG) for UN Women, 'Prevalence and reporting of sexual harassment in UK public spaces' (UN Women UK, 2021) 6.

The tragic murder of Sarah Everard[4] sparked social upheaval in 2021. Sarah's death triggered the #shewaswalkinghome movement which saw women sharing stories of how they respond to unwanted displays of sexual attention. Women discussed behaviours like thrusting keys between their knuckles, adjusting outfits to cover up skin and calculating the best tone of voice to use when responding to a stranger's sexual greeting.[5] Accordingly, the conversation turned to how we prevent a need for this mitigation. Top of the agenda was to take the suggestion of criminalising the conduct instigating violent encounters more seriously. That conduct was public sexual harassment (PSH).

The debate of whether to criminalise PSH is not unfamiliar in the legal sphere. For over forty years, academics globally have argued for the right to walk the streets without fear. They propose that criminalising PSH is the best mechanism by which to achieve such an outcome. Indeed, some have succeeded, with PSH being made a specific offence in countries like France and Belgium but, England and Wales are yet to take a stance. This article will argue that the current social climate in this country is the opportune moment to capitalise on such a development.

To articulate this argument, the foundational groundwork that is required to justify this article's proposition will be investigated. An exhaustive analysis of law reform is a task far too great for this scope of this article but, what can be established is why such a suggestion is reasonable. Subsequently, across four sections, this article will demonstrate why we need a specific offence for PSH. The first section will identify the problem of PSH and contextualise the interpretational

[4] Lucy Gilder and Jennifer Clarke, 'Sarah Everard Murder' (*BBC News London*, 10 March 2021) <https://www.bbc.co.uk/news/topics/c8657zxk82wt> accessed 22 May 2023.
[5] Melissa Jeltsen, 'She Was Walking Home: How Sarah Everard's Murder Revealed Feminism's Fault Lines' (*Vanity Fair London*, 28 September 2021) <https://www.vanityfair.com/news/2021/09/how-sarah-everards-murder-revealed-feminisms-fault-lines> accessed 22 May 2023.

issues embedded in the dilemma itself. Section two utilises the principles of criminalisation to present a theoretical justification for criminalising PSH, based on the conclusion that it possesses key characteristics of a crime. The third section investigates why PSH is not adequately dealt with under existing law. The final section explores more specifically, why the best legal response is through a specific offence, rather than by amendments to existing law, finishing with the presentation of two recommendations that would allow this offence to punish offenders, remedy victims, and change societal norms.

2 The 'Harm That Has No Name'[6]

2.1 The Importance of Labelling

The term 'street harassment' first arrived in academic literature after the second-wave feminist movement of the 1970s. Sparked by social movements such as 'Take Back the Night'[7] and the 'Wall Street Ogle-in',[8] 'street harassment' became synonymous with behaviours like catcalling, groping and leering, while embedding itself comfortably in the wider discussion of violence against women and girls (VAWG). However, despite the public lexicon of 'street harassment' being coined in early deliberation of the phenomena, there is no consistent term or definition used across the literature.[9] Academics have pondered over

[6] Deirdre Davis, 'The Harm That Has No Name: Street Harassment, Embodiment, and African American Women' (1994) 4 UCLA Women's LJ 133, 135.

[7] Take Back the Night Foundation, 'What Is Take Back the Night?' (*Take Back the Night*, 2016) <https://takebackthenight.org/about-us/> accessed 22 May 2023.

[8] Nina Renata Aron, 'Sexually Charged "Ogle-Ins" Allowed 1970s Feminists to Humiliate Catcalling Men' (*Medium*, 6 April 2018) <https://timeline.com/ogle-ins-allowed-women-to-teach-catcallers-a-lesson-691a5eaa3a37> accessed 22 May 2023.

[9] Fiona Vera-Gray, 'Men's Stranger Intrusions: Rethinking Street Harassment' (2016) 58 Women's Stud Int Forum 9, 10.

what to call these public displays of unwanted sexual attention and many have endeavoured to capture the behaviours in a single definition. However, few have proposed a solution that reflects the complex and dynamic nature of this behaviour. This article argues that 'public sexual harassment' holds the most promise as functioning legal and academic terminology and proposes a unique definition of PSH to avoid definitional complexities infiltrating the argument presented.

The absence of an accepted term to describe public displays of unwanted sexual attention is problematic. The lack of consistent labelling forces the behaviour to become invisible, by increasing the difficulty associated with identifying and controlling it.[10] Spender states that this silence can be directly correlated to naming issues as when women's experiences remain unnamed, they become a dubious reality to others.[11] Consequently, the inability for victims to affiliate their experience to a well-known label will likely strengthen the normalisation of PSH. This will limit its transition into the legal sphere as the true extent of prevalence is lost in a sea of ambiguous legitimacy. Spender's 'dubious reality'[12] is reiterated by Tuerkheimer[13] and Davis[14] in what they refer to as the 'trivialisation' of PSH. Tuerkheimer argues the challenge for women to identify what they have experienced results in the denial of their suffering.[15] Therefore, naming the conduct allows it to be vocalised, changing the way women experience it.[16] Davis's

[10] Pamela Davies, Peter Francis and Tanya Wyatt, 'Taking Invisible Crimes and Social Harms Seriously' in Pamela Davies, Peter Francis and Tanya Wyatt (eds), *Invisible Crimes and Social Harms* (Palgrave Macmillian 2014) 5.
[11] Dale Spender, *Man Made Language* (2nd edn, Routledge and Kegan Paul 1998) 184.
[12] ibid.
[13] Deborah Tuerkheimer, 'Street Harassment as Sexual Subordination: The Phenomenology of Gender-Specific Harm' (1997) 12 Wis Women's LJ 167, 174.
[14] Davis (n 6).
[15] Tuerkheimer (n 13) 174.
[16] ibid.

perspective relates more strongly to patriarchy and gender-blind legal theory. Davis argues that because PSH is not experienced by most men, it is perceived to be invisible and subsequently, not something society, or the law, recognises.[17] Although an argument presented in 1994, Davis's point has clear applicability in our modern society as even a male Prime Minister has overlooked the essence of PSH believing its substance terminates with mere catcalling.[18] Therefore, finding an appropriate name and definition is vital to empowering the validity of PSH encounters in the eyes of society, and those controlling the law.

2.2 Selecting a Term

According to Kissling,[19] one of the first academic examinations of PSH came from sociologist Carol Gardner who defined the phenomenon as 'street remarks'[20] which has since been discarded for inferring interactions are only verbal 'remarks'.[21] Since Gardner's discussion, several academics have attempted to find and refine a term that captures the wide range of sexual behaviours experienced uniquely by women in public places. The table below presents three examples of labels currently being used across the literature. Each label has been accompanied by a supporting summary of its most significant strengths and drawbacks.

[17] Davis (n 6) 152.

[18] Mark Townsend, 'Priti Patel's fury as Johnson blocks public sexual harassment law' *The Guardian* (London, 9 October 2021) <https://www.theguardian.com/world/2021/oct/09/priti-patel-johnson-blocks-public-sexual-harassment-law-home-office-pm-offence?msclkid=818ea056b05111ec9d523ad1f8e5892a> accessed 23 May 2023.

[19] Elizabeth Kissling, 'Street Harassment: The Language of Sexual Terrorism' (1991) 2 Discourse Soc 451.

[20] Carol Brooks Gardner, 'Passing By: Street Remarks, Address Rights, and the Urban Female' (1980) 50 Sociol Inq 328.

[21] Kissling (n 19) 457.

Term	Strengths	Drawbacks
Street Harassment	• Powerful 'social currency'[22] as clearly understood by society — clarity may have rule of law advantages based on the principle of legality. • Dominant term used across academic work, for example, by feminists like Fileborn,[23] Bowman[24] and Kissling.[25] • Leaves the nature of the harassment open to interpretation by the victim — it is not confined by the explicit label of 'sexual'. • Wide understanding of what conduct would amount to 'harassing'.	• However, 'harassment' 'predefines the experience and narrows the range of possible responses'[26] due to its association with the existing harassment framework. • The term 'street' connotes a spatial boundary as to where this type of conduct is perpetrated. This risks excluding semi-public places, like bars and clubs. • 'Street' also 'marks a separation between physical and non-physical space'.[27] PSH can be perpetrated in an online environment and is not limited to physical locations.

[22] Bianca Fileborn, 'Mapping Activist Responses and Policy Advocacy for Street Harassment: Current Practice and Future Directions' (2021) 28 Eur J Crim Policy Res 99.
[23] ibid.
[24] Cynthia Grant Bowman, 'Street Harassment and the Informal Ghettoization of Women' (1993) 106 Harv L Rev 517.
[25] Kissling (n 19).
[26] Vera-Gray (n 9) 11.
[27] ibid.

Men's Stranger Intrusions	• Using the term 'intrusion' shifts attention from the substance of the act to the deliberateness of the practice[28] — this is advantageous as less value is ascribed to the subjective experience of the victim.	• 'Intrusion' infers a lesser degree of seriousness than 'harassment'.[29] • An inferred lower degree of seriousness may mean victims are less likely to report encounters. • Connotes the idea that it can only be perpetrated by a male — not always the case.
Public Sexual Harassment	• Depicts both the nature (public and sexual) and impact (harassment) of the conduct. • The term supporting the current social movement campaigning for criminalisation in England and Wales.[30] • Similar advantages with 'harassment' as the public are likely to know what behaviours amount to this standard.	• Similar difficulties with associating the harassment framework. • Inclusion of 'sexual' may present interpretational issues if behaviours are not explicitly sexual.

[28] ibid 15.
[29] ibid 11.
[30] 'Our Problem' (*Our Streets Now*, 2023) <https://www.ourstreetsnow.org/our-problem> accessed 23 May 2023.

There is strong evidence to support the argument that 'street harassment' should be the obvious choice of vocabulary. However, the existing wide use and understanding of 'street harassment' presents significant disadvantages. It may be difficult to refine the clarity of a widely used old term, rather than increasing the popularity of an existing term that functions effectively. As there is already a strong academic agreement[31] on drawbacks of 'street harassment', it seems challenges would lie with removing it from colloquial language. On the other hand, Vera-Gray's proposal of 'men's stranger intrusions'[32] is similarly problematic. Although 'intrusion' can lower the conduct threshold ('one does not necessarily have to experience the act as intrusive for it to be an intrusion'[33]) it fails to recognise the importance of experiencing the encounter as 'an intrusion' for the purposes of reporting. Consequently, this article argues that 'public sexual harassment' holds the most hope as legal terminology. By favouring 'public' as a spatial indicator, the term encompasses all shared spaces that can be accessed by the public. Additionally, it is significantly important to state the sexual nature of attacks in the label. If other motivating factors such as race, were captured under PSH it would take away from its core sexual principle.[34] It could also intersect with existing laws attempting to punish similar conduct of a separate nature, like hate crimes — although this would be something that could operate alongside a PSH law to combat attacks that occur at the intersection. Therefore, 'public sexual harassment' will be the only term used for the purposes of this article and the label recommended for a specific offence.

2.3 Formulating a Definition

PSH can be perpetrated verbally, non-verbally in the form of gestures,

[31] Vera-Gray (n 9) 10.
[32] ibid.
[33] ibid 12.
[34] Sonja Arndt, 'Street Harassment: The Need for Criminal Remedies' (2018) 29 Hastings Women's LJ 81.

or virtually, using online platforms as a forum of perpetration. The conduct can range from low-level degrading comments about, for example, a person's appearance, to sexual propositioning that, can amount to threats of sexual violence. However, such conduct also has different degrees of impact based on who is targeted and how they feel about the encounter. Consequently, PSH itself is very difficult to define and incorporate all women's experiences.[35]

As early as 1980, characteristics of PSH have circled the literature in search of finding commonality in an overarching definition. Bowman was one of the first to embark on this process. She identified six defining characteristics of PSH: the targets of street harassment are female, the harassers are male, the harassers are unacquainted with their targets, the encounter is face to face, the forum is a public one and the content of the speech is not intended as public discourse.[36] Bowman's characteristics have heavily influenced subsequent academic definitions; however, this article proposes that her defining characteristics are outdated and do not reflect the modern operation of PSH. Instead, favour is directed toward Ardnt's characteristics of PSH. She proposes that: all forms of PSH must occur in a public place, must not be limited by gender, be explicitly, or implicitly sexual and, be unwelcome.[37] Ardnt's characteristics of PSH operate better than Bowmans as first, they appropriately capture the importance of a *sexually* motivated attack (as previously discussed). They also reflect the importance of a non-gendered definition to avoid exclusionary applications as while this article focuses on women as the key vulnerable group, experiences that satisfy PSH's definition should not be undermined as a result of gender identity. The intersection of PSH and gender is a discussion beyond the scope of this article but is a point interesting to raise nonetheless. Additionally, Ardnt's characteristics

[35]Tiffanie Heben, 'A Radical Reshaping of the Law: Interpreting and Remedying Street Harassment' (1994) 4 S Cal Rev L & Women's Stud 183, 188.
[36] Bowman (n 24) 323.
[37]Ardnt (n 34) 92.

capture the unwanted nature of PSH which explicitly characterises it as sexual violence. According to Kelly, sexual violence exists as a continuum.[38] Consequently, Desborough emphasises how placing PSH on this continuum is important to embed its consciousness directly within the scope of other sexual crimes taken more seriously.[39] By utilising the characteristics proposed by Ardnt, this article suggests the following definition best captures the nature of PSH.

The definition of PSH is as follows:

> Unwanted and unconsented words or actions, that are explicitly or implicitly sexual[40] and directed at a specific person in a place accessible to the public. The words or actions displayed must create an "intimidating, hostile, degrading, or offensive environment[41] for the targeted person."

This definition addresses the issues of spatial boundaries and the subjectivity of impacts to propose a comprehensive explanation of what behaviours are intended to be covered by the label of PSH. By stating that the forum of perpetration must be one accessible to the public rather than public in nature, this definition captures behaviour committed in public, semi-public and online environments. Additionally, the inclusion of a necessary effect ensures that encounters are *not* captured by this definition if the victim does not perceive the behaviour to create the required environment. To conclude, although this section has identified what PSH is, it also emphasises the complex and dynamic nature of perpetration, reinforcing how this contributes to the problem itself.

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[38] Liz Kelly, *Surviving Sexual Violence* (Minneapolis University of Minnesota Press 1993).
[39] Karen Desborough, 'The Global Anti-Street Harassment Movement' (DPhil thesis, University of Bristol 2020) 51.
[40] Ardnt (n 34) 92.
[41] Equality Act 2010 (EA 2010), s 26(2)(a).

3 Crime, not Compliment: Justifying the use of Criminal Law

3.1 Theories of Crime

The rationale for the existence of criminal law is embedded in our moral conceptions of wrongdoings and the desire to regulate behaviour. By identifying the behaviours that society judges to seriously violate our social interests,[42] we deter engagement for fear of punishment and public condemnation. Subsequently, it can be argued that by attaching a criminal label to PSH, effective responses to the social epidemic will be generated. However, to uphold the integrity of criminal law, justification for such a label must be established. There is no 'test' to discover whether a behaviour should be criminalised. Consequently, we rely on numerous complex philosophical, criminological and sociological theories to identify what *should* amount to a crime.

To present a clear argument for such a complex and contested issue, this article focuses on the leading principles of harm and wrongfulness. This reflects the consensus among modern theorists of the importance of these two principles as the origin for making an activity criminal. Although accompanying principles have been debated, such as Joel Feinberg's offence principle,[43] a stronger argument is embedded in harm and wrongfulness due to a wider acceptance of their substance and less controversial critiques of their completeness.

3.2 Harm

For the law to be able to deter conduct and fulfil its regulatory function, strong social disapproval must be associated deeply with a behaviour.

[42] Nicola Lacey and Lucia Zedner, 'Criminalizaton: Historical, Legal, and Criminological Perspectives' in Alison Liebling, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (6th edn, OUP 2017) 64.
[43] Joel Feinberg, *The Moral Limits of the Criminal Law: Volume 2: Offense to Others* (OUP 1985).

Commonly, disapproval is intensified when an act has a clear victim, because society is sensitive to harm as a measure of seriousness. Using harm as an indicator for criminal behaviour was famously articulated by John Stuart Mill and deemed 'the harm principle'.[44] His principle argues that harm is a necessary characteristic of crime and that justification for limiting liberty, through criminal punishment, is embedded solely in preventing this harm.[45] This principle tells us that harm is a necessary characteristic of criminality. Therefore, by proving that PSH generates harm, and that the level of harm generated by PSH is to an extent that should engage criminal law, the proposal of PSH as a crime can be justified.

Mill's work paints an ambiguous picture of what constitutes harm under his principle, as such, this article looks further afield to define harm. In academia, Fienberg has argued that harm is a 'thwarting, setting back or defeating of an interest',[46] that has grave implications for our well-being and prospects. In the courts, Lynsky J defined the harm requirement for actual bodily harm[47] to incorporate 'hurt or injury calculated to interfere with the health or comfort of the victim'.[48] When reflecting on these perspectives, two key characteristics of harmful conduct can be identified. First, an interference with personal interests and second, an interference of such nature that has an adverse effect.

It is rational to assume that health, both physical and mental, are of significant interest to the average person. Therefore, this article submits that PSH satisfies the harm requirement of this principle because it interferes adversely with physical *and* mental health. From existing data on the effects of PSH, it is clear most harm manifests itself psychologically. For many women, experiences of PSH can be directly

[44] John Stuart Mill, *On Liberty* (Longmans, Green and Co 1859).
[45] ibid.
[46] Feinberg (n 43) 33.
[47] Offences Against the Person Act 1861, s 47.
[48] *R v Miller* [1954] 2 QB 282, 285.

related to PTSD symptoms along with depression and anxiety.[49] Carretta has identified a clear positive correlation between ongoing exposure to PSH and PTSD symptoms, brought on through a series of traumatic encounters throughout a woman's lifetime.[50] It can be deduced that psychological injury of this nature will be considered appropriate to constitute a legal response as it already exists as a standard of harm under existing offences, like assault. In *R v Ireland*,[51] the harm generated from repeated, silent phone calls amounted to assault because of psychological damage. Significantly, Lord Goff stated that the defendant's repetitive use of silence was used as 'a means of conveying a message to his victims'[52] and that it was the fear of immediate violence[53] which amplified the level of harm. If we apply this standard to instances of PSH, there are similarities in perpetration traits. Taking prolonged staring as an example; it is clear that the perpetrator is conveying a message to the victim, but it is unknown whether this message will amount to anything more serious. Thompson says that because women can't determine the motive behind each encounter, they often view *all* confrontations from men on the street as potential threats that could end dangerously.[54] Consequently, this ongoing fear of violence demonstrates one way in which harm manifests itself, psychologically, through PSH.

[49] Jenny Lincoln, 'What Works for Ending Public Sexual Harassment' (*Plan International*, 2021) 17 <https://plan-uk.org/file/what-works-for-ending-public-sexual-harassment-full-report/download?token=wtUTx1DM> accessed 22 May 2023.

[50] Rachel Carretta and Dawn Szymanski, 'Stranger Harassment and PTSD Symptoms: Roles of Self-Blame, Shame, Fear, Feminine Norms, and Feminism' (2019) 82 SR 525, 526.

[51] [1998] AC 147; *R v Burstow* [1997] UKHL 34.

[52] ibid.

[53] ibid.

[54] Deborah M Thompson, 'The Woman in the Street: Reclaiming the Public Space from Sexual Harassment' (1994) 6 Yale JL & Feminism 313, 321.

Fear of violence can diminish a person's ability to make free and unintimidated choices about their lifestyle. This undoubtedly encroaches into human rights territory and leads to the proposition that PSH also generates harm by interfering with personal interests that are protected by legally enforceable rights. This perspective was also taken by Hörnle who proposes a rights-centred extension of the harm principle.[55] This article's agreement with Hörnle's perspective is cut short when discussing *which* rights violations should justify criminalisation. Hörnle states that his notion of rights is intended to include rights justified in political philosophy, like freedom from humiliation, and not those granted in positive law.[56] However, this article agrees with Case's point that basing criminalisation on violations of philosophical rights may result in minor instances being criminalised.[57] Consequently, the following discussion will be curtailed to potential violations of legal rights.

The specific rights engaged by PSH are dependent on the context and extent of the intrusion. For the purposes of this chapter, focus will centre on potential rights interferences with Article 8 of the Human Rights Act 1998. Although this article acknowledges that potential rights violations do not end here, it proposes that the strongest case for interference can be made through exploring the operation of Article 8[58] in particular. Article 8's[59] engagement with PSH is grounded by the extension of 'private life'[60] protections into the 'psychological integrity of a person'.[61] As being in a *public* place does not diminish the

[55] Tatjana Hörnle, 'Theories of Criminalization' (2014) 10 Crim Law Philos 301.
[56] ibid.
[57] Steve Case and others, 'What is Crime?' in Steve Case and others (eds), *The Oxford Textbook on Criminology* (2nd edn, OUP 2021) 28.
[58] Human Rights Act (HRA) 1998, art 8.
[59] ibid.
[60] ibid, s 1.
[61] *Pretty* v *United Kingdom* (2002) 35 EHRR [61], [62].

operation of *private* life protections,[62], it follows that the 'psychological beating'[63] experienced through PSH should amount to an interference with personal integrity and subsequently, employ Article 8.[64] Although the essential purpose of this article[65] is negative and aims to prevent public authorities from interfering with private life, it may also 'require states to take positive steps'[66] in order to ensure that private life is respected, steps which extend to intrusions that come from individuals themselves.[67] Consequently, when instances of PSH impede Article 8,[68] the state should step in to provide legal remedies. If the law functions properly, these legal remedies could reduce PSH's associated harms by providing a greater range of protection for victims of these unjustified and malicious attacks.

3.3 Wrongfulness

Herring proposes that 'it is not the causing of the harm alone that justifies criminalisation, but the wrongfulness of causing the harm'.[69] Establishing wrongfulness is an important element to incorporate into the justifications for criminal labelling as it reflects the function of the criminal law as a moral regulator. In Simester and Von Hirsch's analysis of wrongfulness, they propose that the 'necessity thesis'[70] best captures the essence of wrongfulness. This states that 'prohibition can

[62] Howard Davis, 'Article 8: Right to Respect for Private and Family Life' in Howard Davis (eds), *Human Rights Law Directions* (5th edn, OUP 2021) 319.
[63] Bowman (n 24) 537.
[64] HRA 1998, art 8.
[65] HRA 1998, art 8.
[66]Davis (n 62) 313.
[67] *X and Y v The Netherlands* (1986) 8 EHRR 235 [23].
[68] HRA 1998, art 8.
[69] Jonathan Herring, 'Basic Concepts in Criminal Law' in Jonathan Herring (eds), *Criminal Law: The Basics* (Taylor & Francis 2009).
[70] AP Simester and Andreas Von Hirsch, 'Wrongfulness and Reasons' in AP Simester and Andreas Von Hirsch (eds), *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing Ltd 2011) 22.

be justified only when the action is morally wrongful'.[71] Following this proposition, this article argues that PSH is morally wrong and therefore, by virtue of the Necessity Thesis,[72] should be prohibited.

To investigate what amounts to morally wrong behaviour, this article will utilise the theory of legal moralism. This theory justifies the prohibition of certain behaviours based on the collective societal judgement that it is immoral.[73] Therefore, if it can be proved that the collective judgement of society is that PSH amounts to immoral behaviour, then we can deem it wrongful and more deserving of criminalisation. Devlin has proposed that the standard of the 'reasonable man' can be utilised to assess immorality.[74] When applying Devlin's proposition to the context of PSH, it becomes more suitable to follow Bowman's suggestion of the standard of the 'reasonable women'[75] to properly reflect how the act itself is experienced, but the premise of what both academics are saying remains the same.

PSH is immoral because the reasonable woman would perceive it to be more than deviance. Deviance can be defined as a behaviour which violates social norms but is not legally controlled. The key difference between crime and deviance is that while crime is defined and limited by law, deviance is in the eye of the beholder — what one person may see as deviance, another may not.[76] The #MeToo Movement was utilised by Case to highlight differences in what some of society deem acceptable sexual contact.[77].The 'reasonable women'[78] would not deem most of the conduct associated with #metoo as acceptable, reflecting the growing consensus that this behaviour is no longer

[71] ibid 23.
[72] ibid.
[73] Case and others (n 57) 38.
[74] Patrick Devlin, *Morals and the Criminal Law* (Jerusalem 1965) 185.
[75] Bowman (n 24) 554.
[76] Case and others (n 57) 35.
[77] ibid 33.
[78] Bowman (n 24) 554.

'complimentary'. Legal shifts to reflect social standards of wrongfulness can be observed in the past, for example when marital rape was criminalised. Therefore, if it now follows that society collectively judges PSH to extend beyond deviance it can be deemed morally wrongful and deserving of criminalisation.

3.4 Challenging Complimentary Connotations

The argument that PSH is no longer deviant and instead should be a crime, is an adjustment still likely to be met with hostility. PSH is interpreted differently by different women. Behaviours, such as catcalling, are not always perceived as negative, and as such, not considered harmful nor wrong. Oshynko highlights how some women have described PSH as 'flattering and empowering'.[79] Such an observation is supported by Heben who emphasises that women, who are often heterosexual, perceive PSH to be a response to their level of attractiveness.[80] Therefore, some believe that PSH is a 'linguistic inflation'[81] of flirtatious and playful behaviour. However, this article strongly sides with the belief of Bowman who emphasises that the harm experienced by some women, should outweigh the pleasure felt by others.[82] By doing so, the opinions of this contrasting category of women are not undervalued, but instead, considers the general utilitarianism perspective of harm and wrongfulness in this context. Criminalising PSH would benefit the greatest number of people positively.

[79] Norma Anne Oshynko, 'No Safe Place: The Legal Regulation of Street Harassment' (LLM thesis, University of Saskatchewan 2002) 42.
[80] Heben (n 35) 189.
[81] Celia Walden, 'In the Context of Violence against Women, Can Wolf-Whistling Be Called Evil?' *The Telegraph* (London, 23 May 2022) <https://www.telegraph.co.uk/columnists/2022/05/23/context-violence-against-women-can-wolf-whistling-called-evil/> accessed 23 May 2023.
[82] Bowman (n 24) 543.

4 Analysing the Effectiveness of the Current Legal Framework

4.1 Existing Laws and their Limits

Many have argued that current law is not fit to respond to all instances of PSH.[83] They identify that as a result, PSH often falls through the legislative cracks, essentially labelling these behaviours 'legal' and reinforcing their acceptability. The Government has repeatedly argued that there are several offences already in place which capture notions of PSH when circumstances allow — but should this be the case? How can we expect the criminal justice system to be functioning effectively when the only victims able to properly remedy their harms are those whose case fits the 'ideal' circumstances for a successful prosecution? Consequently, this section will focus on how we can or (as it will be concluded) cannot use existing laws to prosecute most instances of PSH. The value of this investigation is that by establishing that present laws are unfit to respond to certain instances of PSH, this discourse can confirm that reform is needed.

In June 2021, Victoria Atkins[84] made the following statement while addressing the House of Commons on the matter of introducing a specific offence of 'street sexual harassment'.[85]

> I wish to correct some impressions that might exist. While there is not an offence of street harassment — or, indeed, of sexual harassment — a number of

[83] Rubie Harrington, Interview with Dexter Dias QC and Dr Charlotte Proudman, (Plan International UK, 13 July 2021).
[84] HM Government, 'Victoria Atkins MP' (*GOV.UK*) <https://www.gov.uk/government/people/victoria-atkins> accessed 23 May 2023.
[85] PBC Deb (Bill 5) 22 June 2021, cols 648–54.

> existing laws make harassment illegal, including where such behaviour occurs in a public place.[86]

The laws referred to in this statement are the Protection from Harassment Act 1997 (PHA), the Public Order Act 1986 (POA) and the Sexual Offences Act 2003 (SOA). Following Atkins' declaration, the College of Policing produced a guidance document[87] outlining all the relevant offences for police officers to utilise when faced with instances of PSH. These ranged from the offences found in the legislation outlined above, to assault, outraging public decency and public nuisance.[88] If government is using these offences to justify that a specific offence is unnecessary, it should follow that these offences, in particular, would have the most potential for successful application. Therefore, attention will be directed to our ability to prosecute PSH under harassment and sexual offences frameworks.

4.2.1 PSH as Harassment

Harassment framework can be found under both the PHA[89] and the POA.[90] Both statutes contain several offences which make harassment in a public place, illegal.[91] Additionally, a proportion of these offences also prohibit higher level harassment conduct which causes, or is likely to cause, fear of violence.[92]

Offences contrary to the POA relate to 'threatening, abusive'[93] or

[86] ibid col 652.
[87] 'Street Harassment' (*College of Policing*, 15 December 2021) <https://www.college.police.uk/guidance/violence-against-women-and-girls-toolkit/street-harassment> accessed 23 May 2023.
[88] ibid.
[89] Protection from Harassment Act 1997 (PHA 1997).
[90] Public Order Act 1986 (POA 1986).
[91] PHA 1997, s 2; POA 1986, s 4A, s 5.
[92] PHA 1997, s 4; POA 1986, s 4.
[93] POA 1986, s 5(1)(a); s 4A(1)(a).

'insulting'[94] words or behaviour that intentionally causes harassment, alarm, or distress (section 4A[95]) or is likely to (section 5[96]) or, causes another to fear immediate violence (section 4[97]). These offences are rarely utilised in the context of one-on-one encounters as the act itself was designed to capture previous common law offences relating to protests and riots,[98] but nonetheless, what it prohibits is still applicable in this context.

Comparable conduct is caught by the PHA. The relevant offences found under this statute criminalise perpetrators who pursue a course of conduct amounting to harassment[99] or, pursue a course of conduct which puts the victim in fear of violence.[100] Consequently, when considering the basic substance of behaviours associated with PSH, it seems these offences *should* present a compelling argument for the utilisation of established laws. However, the extent to which they *can* be utilised, requires further evaluation.

There are two characteristics of harassment offences, shared with some instances of PSH, that make prosecutions possible. The first characteristic is the ability for conduct to be applicable when exhibited in public places. This contrasts with the sexual harassment framework found under the Equality Act 2010[101] which limits its scope to workplace environments. The second, is the comparable degrees of required harm for the satisfaction of certain *actus reus* elements across both legislations. The required impact of conduct ranges from causing

[94] ibid s 4(1)(a).
[95] ibid s 4a.
[96] ibid s 5.
[97] ibid s 4.
[98] David Ormerod and Karl Laird, 'Offences Against Public Order' (additional chapter) in David Ormerod and Karl Laird (eds), *Smith, Hogan and Ormerod's Criminal Law* (16th edn, Oxford University Press 2021) 2.
[99] PHA 1997, s 2(1).
[100] ibid s 4(1).
[101] Equality Act (EA) 2010, s 26(2)(a).

of 'alarm and distress'[102] to the fear, and belief of immediate violence[103] which reflects the spectrum of severity on which PSH operates. Therefore, the combined presence of these shared attributes places PSH well within the reach of these laws. However, difficulties begin to arise when attempting to harmonise PSH in line with the required modes of perpetration and their accompanying intent elements.

There are three general, substantive limitations that render existing harassment framework unable to fully address PSH. The first reason is that due to ingrained normalisation of the phenomena, it is more likely that police and prosecutors will not believe PSH achieves the level of severity needed to fulfil the conduct threshold required. This will be demonstrated by analysing the *actus reus* of section 4[104]and section 5[105] of the POA. For successful prosecution of these offences, conduct must be established as being 'threatening, abusive',[106] 'insulting'[107] or 'disorderly'.[108] While reaching this threshold should seem simple, the trivialisation of PSH will mean it is significantly difficult. Feminists often used critical legal studies (CLS) to explain this problem.[109] CLS theorises that legal thought originates with the dominant class (the heterosexual male) because it is in their interests to bring their opinions into being.[110] This results in the law possessing an inherent social bias

[102] Crown Prosecution Service, 'Stalking and Harassment' (*CPS*, 23 May 2018) <https://www.cps.gov.uk/legal-guidance/stalking-or-harassment> accessed 23 May 2023.
[103] POA 1986, s 4(1).
[104] ibid s 4
[105] ibis s 5.
[106] ibid s 4a(1)(a); s 5(1)(a).
[107] ibid s 4(1)(a).
[108] ibid s 4A(1)(a); s 5(1)(a).
[109] Denise Brunsdon, 'Legal Solutions to Street Sexual Harassment in the #MeToo Era' (2018) 39 Atlantis 40, 44 <https://www.erudit.org/en/journals/atlantis/2018-v39-n2-atlantis04853/1064071ar/> accessed 22 May 2023.
[110] Peter Gabel, 'Reification in Legal Reasoning' in James Boyle (eds), *Critical Legal Studies* (Dartmouth Publishing 1992).

as connectedness would otherwise afford less powerful communities, like women, influence over legal reasoning.[111] Through the lens of this theory, PSH will struggle to surpass this conduct threshold as a consequence of legal reasoning being dictated by the consciousness of the heterosexual male.[112] Lord Reid has stated that no further explanation of the terms 'threatening, abusive, disorderly'[113] or 'insulting'[114] is required as 'an ordinary, sensible *man* knows (threatening, abusive, insulting, or disorderly conduct) when he sees or hears it'.[115] Therefore, we are once again relying on the male perception of harm to judge an encounter that could rarely ever be experienced in a similar manner. This limitation is well reflected in the Canadian case of *R v Burns*[116] which captures the reality of most PSH prosecutions in western, common-law systems. In this case, a criminal harassment charge, relating to an incident of catcalling and sexual remarks, was successfully appealed. The court's reasoning for this decision was that 'although the complainant justifiably felt upset and scared by the appellant's conduct',[117] they did not see it as rising to a level of intimidation that should instil a sense of fear.[118] If we apply the premise of this reasoning to public order offences, it is likely that the male perception of frivolousness regarding PSH's associated conduct, will mean these behaviours will struggle to ever reach the threshold of severity required for a successful prosecution.

The second reason is that intent, beyond reasonable doubt, is extremely difficult to prove due to wider societal impressions of acceptability. This limitation is reflected across all the offences discussed because there is no offence with strict liability, however, this article suggests

[111] Brunsdon (n 109) 44.
[112] ibid.
[113] POA 1986, s 4A(1)(A); s 5(1)(a).
[114] ibid s 4(1)(a).
[115] *Brutus v Cozens* [1972] 2 All ER 1297, 1300.
[116] [2007] OJ 5117, 2007.
[117] ibid.
[118] ibid.

that the biggest challenge exists under section 5 POA.[119] The *mens rea* of section 5 is an intention for the conduct to be threatening or abusive[120] or an awareness that it may be.[121] Nonetheless, if the defendant can prove his conduct was reasonable,[122] he may have a defence against the victim's claims of harassment. This standard of reasonableness will be problematic for those attempting to bring legal action under section 5,[123] as PSH is often intended to be complimentary, which by current societal standards, will more than likely be deemed reasonable. In her investigation into why men engage with PSH, Kearl highlights that men often believe their actions are an appropriate way to greet a woman and cannot comprehend the bigotry of their claims that all women enjoy the attention.[124] She recalls the story of interviewing a man who only when pressed for deeper consideration of his actions, realised the realistic outcome of his past behaviours.[125] Therefore, it becomes very difficult to establish that conduct was intended to be 'threatening and abusive'[126] when the reality is that the normalisation of PSH is so ingrained in society that even an awareness of such an outcome is scarce among perpetrators.

The third reason is that the legislation is being 'shoehorned' into the rubric of PSH when they are designed for different purposes. Activist group, Plan Intentional, have openly condemned the forced injection of PSH into these frameworks stating it misses the crucial sexual element of PSH's definition, which distinguishes it significantly from existing

[119] POA 1986, s 5.
[120] ibid s 6(4)
[121] ibid.
[122] ibid s 5(3)
[123] ibid s 5
[124] Holly Kearl, 'Educating Men and Engaging Men Allies' in Holly Kearl (ed), *Stop Street Harassment Making Public Places Safe and Welcoming for Women.* (Createspace Independent Publisher 2012) 132.
[125] ibid 133.
[126] POA 1986, s 6(4).

offences covered by these acts.[127] Due to these differing purposes, PSH often does not fulfil the nature of required conduct. The main example of this can be seen in all relevant crimes found under the PHA. The 'course of conduct'[128] element of PHA offences requires the behaviours to be exhibited on at least two occasions.[129] Therefore, despite PSH being a repetitive phenomenon throughout a woman's life, this means most cases of PSH will not be covered by these offences as the act is perpetrated by different people in one-off encounters.

4.2.2 PSH as a Sexual Offence

The most relevant sexual offence when attempting to prosecute PSH is section 3 of the SOA — sexual assault.[130] Section 3[131] states that a person commits an offence if, they intentionally touch another person,[132] the touching is of an unconsented[133] sexual nature,[134] and they do not reasonably believe that the other person consents.[135] This offence can successfully capture, and respond to, behaviours like groping as it covers sexual and unconsented physical contact. Groping normally includes the touching of another's private bodily areas, such as the breasts or buttocks, without prior consent to doing so. Therefore, when instances of PSH are explicitly sexual and physical in nature, this law, generally, operates to an extent which is effective to deal with the problem.

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[127] 'Ending Public Sexual Harassment: The Case for Legislation' (*Plan International*, 2020) 13 <https://plan-uk.org/file/ending-public-sexual-harassment-the-case-for-legislationpdf/download?token=YINyy0fW> accessed 23 May 2023.
[128] PHA 1977, s 2(1); s 4(1).
[129] ibid s 7(3).
[130] Sexual Offences Act 2003 (SOA 2003), s 3.
[131] ibid.
[132] ibid s 3(1)(a).
[133] ibid s 3(1)(b).
[134] ibid s 3(1)(c).
[135] ibid s 3(1)(d).

Difficulties begin to arise when dealing with behaviours of an implicit sexual nature. If we define groping as a spectrum of unwanted physical contact,[136] ranging from a hand on a shoulder to the grabbing of breasts, there seems to be a discrepancy as to when groping crosses over into the sexual territory intended to be covered by section 3.[137] This boundary of 'sexual nature' is defined by a jury[138] and so dependent on public conceptions of sexuality. This article suggests that sexuality collides with publicly harassing behaviours, such as rubbing against someone, through its wider use as a form of sexual terrorism. Kissling argues that, explicitly sexual or not, PSH produces a 'sexually terroristic culture'[139] in which women are reminded of their subordinate sexual status. The act itself may not be explicitly sexual, but its mere existence constitutes sexual terrorism as the victim is subjected to decisions by a man, for their personal satisfaction, which dominates over a woman's decision to not be touched. If this relationship is not understood by a jury, some instances of PSH will fall through the cracks of section 3.[140]

Of the limited instances of PSH that are reported, nearly 70% result in inaction.[141] Without a significant number of successful prosecutions, the preventative, protective, and punishing functions of the criminal law will struggle to be upheld. Assuming a victim is able to report their experience, and identify their attackers, it is likely most experiences of PSH will not be investigated. Despite the damaging impact on mental health and dignity, the law is unable to confidently redress harm as gaps stretch across both the *actus reus* and *mens rea* requirements of all the

[136] Tom De Castella, 'The Difficulty of Dealing with Groping' (*BBC News*, 28 February 2013) <https://www.bbc.co.uk/news/magazine-21573043> accessed 23 May 2023.
[137] SOA 2003, s 3.
[138] Nicola Monaghan, 'Sexual Offences' in Nicola Monaghan (ed), *Criminal Law Directions* (6th edn, Oxford University Press 2020) 214.
[139] Kissling (n 19) 456.
[140] SOA 2003, s 3.
[141] Lincoln (n 49) 28.

discussed offences. As such, women cannot rely on the law to redress their harms as more often than not, their experiences cannot be legally translated into an applicable offence.

5 A Progressive Reshaping of the Law

5.1 A Significantly Different Offence

Based on the judgment that current law is failing victims of PSH, attention must now turn to what can be done to respond to this problem. As argued throughout this article, the most effective route of response is through the creation of a specific offence of PSH. However, this opinion is not unique. It is shared by 94% of women in the UK[142] along with politicians,[143] judges[144] and over 470,000 people who signed a petition to make PSH a criminal offence.[145] Consequently, as it is clear the public supports a progressive reshaping of the law, it must be investigated how such an offence may operate. This task is immense and not one able to be fully addressed in this discussion. However, what can be conveyed is why reform should be a specific offence and, based on the evaluation of existing PSH laws in other countries, what could be key to include *if* such an offence was implemented.

Although it has been demonstrated that existing law itself cannot address PSH, the question still pertains as to what makes PSH so

[142] 'Making Public Sexual Harassment Illegal' (*Our Streets Now*, 2023) <https://www.ourstreetsnow.org/crimenotcompliment> accessed 23 May 2023.
[143] Alexandra Topping, 'Public Street Harassment Could Be Made Illegal in England and Wales' *The Guardian* (London, 20 July 2021) <https://www.theguardian.com/world/2021/jul/20/public-street-harassment-to-be-made-in-england-and-wales> accessed 23 May 2023.
[144] Harrington (n 83).
[145] Gemma Tutton and Maya Tutton, 'Sign the Petition' (*Change.org*, 2021) <https://www.change.org/p/make-public-sexual-harassment-a-criminal-offence-in-the-uk> accessed 23 May 2023.

significantly different that it requires its own offence rather than being addressed through amendments to existing ones. Despite not dismissing the notion that existing offences *could* be amended to capture PSH in their framework, such a decision would fail to reflect the fact that PSH would be a significantly different type of crime. It is perpetrated, uniquely, through isolated attacks that occur for a variety of different reasons and produce a range of impacts on victims. Therefore, simply amending existing offences to ensure they capture *more* instances of PSH would be ineffective. Without being able to address *all* instances of PSH, which would require a radical reshaping of their offence structure, the problem will still prevail. Additionally, to capture PSH under the label of existing offences may be unfair to the defendant and victim by over, or, understating the seriousness of the act. Leverick argues that it can be unfair to label an offender in a particular way because the offence name symbolises the associated degree of condemnation, signalling to society how the offender should be regarded.[146] Therefore, amending existing offences may unfairly label perpetrators as a 'sexual assaulter', connoting an unreasonably larger degree of social disapproval compared to a 'public sexual harasser'. On the other hand, labelling a 'public sexual harasser' a 'public offender', may, as Horder puts it, give an anaemic conception of what the behaviour might have been.[147] To label a specific offence 'PSH' would ensure maximum certainty regarding proportional perceptions of the crime and its accompanying social condemnation. Society would be able to clearly identify what the behaviour is rather than inferring its substances under the ruse of a differently named offence. Heben argues that such awareness may alter public consciousness of the problem, altering what is expected of them as law-abiding citizens and allowing people to 'unlearn' their sexist behaviour[148] — an understanding vital

[146] James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217, 226.
[147] Jeremy Horder, 'Rethinking Non-Fatal Offences against the Person' (1994) 14 OJLS 335, 351.
[148] Heben (n 35) 206.

to reach the goal of changing the behaviour of the harasser.[149] Therefore, a specific offence should more suitably control the social epidemic because PSH is a significantly different type of behaviour compared with existing offences.

5.2 Learning from the French

In post #metoo France, the '*Outrage Sexiste*'[150] law was passed, criminalising conduct with a 'sexual or sexist connotation that either violates dignity because of its degrading or humiliating nature, or creates an intimidating, hostile or offensive situation'.[151] The law operates through a system of on-the-spot fines of up to €1500 and has been used over 700 times in its first year of operation.[152] Reflecting on this law's success, this article identifies several key reasons why the structure of *Outrage Sexiste*[153] is a prosperous way of addressing PSH. First, on-the-spot fines have the significant advantage of avoiding PSH's reporting problem.[154] By placing the burden of identification on police, the internal trivialisation of encounters, or fear of reporting, is prevented. Second, fines of such a significant financial value will likely decrease the frequency of perpetration as the potential cost will outweigh the benefits of engaging with PSH. Additionally, the use of fines, rather than any other means of punishment, is balanced proportionately to the level of harm experienced by the victim. Heben argues how legal action of this nature helps to relieve feelings of frustration for the victim by virtue of knowing some action is taking place,[155] rather than having to wait for lengthy prosecution processes.

[149] Bowman (n 24) 574.
[150] Loi Schippa 2018, art 14.
[151] ibid art 15.
[152] Lauren Chadwick, 'France Issues More than 700 Fines under New Street Harassment Law' (*euronews7*, August 2019) <https://www.euronews.com/2019/08/07/france-issues-more-than-700-fines-under-new-street-harassment-law> accessed 23 May 2023.
[153] Loi Schippa 2018, art 15.
[154] Lincoln (n 49) 26.
[155] Heben (n 35) 206.

However, Zadeyeh has identified the relative futility of this law when looking at wider VAWG policy in France. She argues that the wider social climate in France fosters a culture of forgiveness that reinforces notions of acceptability and repeat perpetration.[156] Therefore, what we can learn from '*Outrage Sexiste*'[157] is that fines as a mechanism of legal action work effectively if the implementation is supported by a wider network of educational policies to promote an understanding of intolerance.

5.3 Recommendations for a Specific Offence

In June 2021, Labour MP Alex Cunningham proposed the introduction of a 'street sexual harassment' offence under the new clause 23 of the Police, Crime Sentencing and Courts Bill.[158] Modelled on '*Outrage Sexiste*',[159] clause 23 possessed several features that would have made it successful. This includes, but is not limited to, affording police the power to give fixed penalty notice (FPN) of up to £1000 for detected instances,[160] the exclusion of behaviours that are physical in nature[161] (avoiding cross over with existing laws able to address these behaviours[162]) and the recognition of not forcing legal action on situations where the victim does not experience the conduct as harassing.[163] However, despite the prospects for functionality, clause 23 was rejected on the grounds that the Government required more time to review research findings to fully understand how the phenomena operates.[164] Although a disappointing outcome for campaign groups and victims alike, such a delay allows for a deeper investigation into the

[156] Sandra Zadeyeh, 'After #MeToo: France Ignites Its Combat against Sexual and Domestic Violence' (2021) 29 Tul J Int'l & Comp L 197, 210.
[157] Loi Schippa 2018, art 15.
[158] PBC Deb (Bill 5) 22 June 2021, cols 648–54.
[159] Loi Schippa 2018, art 15.
[160] PBC Deb (Bill 5) 22 June 2021, col 649.
[161] ibid col 649.
[162] SOA 2003, s 3.
[163] PBC Deb (Bill 5) 22 June 2021, col 649.
[164] ibid col 653.

best offence structure. Aside from a name change to 'public sexual harassment', there are two other recommendations this article proposes could add value to the offence outlined in clause 23. Both recommendations have the effect of generating further opportunities for the law to influence a shift in societal norms both through the deterrence imposed by strict liability and the educational element of restorative justice (RJ).

5.3.1 Recommendation 1: Liability Should be Strict

This article recommends that the offence of PSH should be one of strict liability — it should not require proof of *mens rea* in respect of at least one element of the offence.[165] An offence of PSH should have no intent requirement apart from intending to engage with the conduct itself. PSH operates in a very similar way to existing regulatory offences with a strict liability requirement, like road traffic offences. Isolated instances of varying levels of severity place it in a category of offences requiring regulation to diminish prevalence rather than serious criminal punishment. Although this may be deemed a controversial comparison, such a belief is in line with academic consensus regarding the potential structure of a PSH law. Those such as Bowman and Heben have argued that focus should be 'on the harasser's objective conduct rather than his intent or the reaction of the target, except to the extent that she must allege the conduct was not welcome'.[166] In Heben's supportive reasoning for such a decision, she identifies that the legal system often 'denies injury if the perpetrator did not *think* he was causing injury'.[167] Consequently, she concludes that we should not be diminishing liability based on the premise that the perpetrator did not intend to harm the victim as just because an action may have been intended to be

[165] David Ormerod and Karl Laird 'Strict Liability' in David Ormerod and Karl Laird (eds), *Smiths, Hogan and Ormerod's Text, Cases and Materials on Criminal Law* (13th edn, OUP 2020) 137.
[166] Bowman (n 24) 576.
[167] Heben (n 35) 215.

complementary does not *make* the behaviour a compliment.[168] Additionally, this recommendation is also likely to be accepted by the executive, legislative and judiciary as it follows current precedent. In *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong*,[169] it was emphasised that a presumption of *mens rea* can be dismissed if the law deals with an issue of social concern.[170] Gender equality and the safe protection of women and girls in public is clearly an issue of social concern, as emphasised by the commitment to sustainable development Goal 5 (gender equality).[171] Therefore, although a recommendation of strict liability can often be faced with hostility, utilising it for the offence of PSH is proportional to the nature of the behaviour itself and in line with academic and legal standards of justification.

Clause 23 recommends that the *mens rea* state of this offence should be one of knowledge — 'they know or ought to know it amounts to street sexual harassment'.[172] However, this does not address the problem that men, and often the reasonable person, do not consider the outcomes of their behaviour and therefore, would be unable to judge when it amounts to PSH. Consequently, we are drawn back to the intent issues previously discussed even when the offence is specifically tailored to PSH. Strict liability would address this problem as it would no longer be relevant what intention, or awareness, the perpetrator held with regard to his conduct and instead, focus is instead on the objective substance of the behaviour. By virtue of this standard, it would follow that, men who publicly, sexually, harass women would do so at their own risk.[173]

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[168] ibid.
[169] [1984] UKPC 17.
[170] *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1985] AC 1, 8.
[171] United Nations, 'The 17 Sustainable Development Goals' (2015) <https://sdgs.un.org/goals> accessed 23 May 2023.
[172] PBC Deb (Bill 5) 22 June 2021, col 649.
[173] Heben (n 35) 215.

There are two key advantages associated with this outcome for the purposes of regulating PSH.

1. Creating easily proven offence elements promotes more successful prosecutions which generate an effective deterrence mechanism.

Strict liability for PSH would ease the burden of proving intent, or awareness. Such a burden limits prosecution of PSH under existing offences and so by removing such a standard from a specific offence, we increase the likelihood of successful convictions. Consequently, if proving offence elements is easier through the existence of strict liability, perpetrators are more likely to be deterred from engaging with PSH on the grounds they are more likely to be convicted.

2. Encouraging greater vigilance makes women feel safer in public spaces.

Making PSH an offence of strict liability is advantageous because it affords maximum protection to victims by forcing potential perpetrators to have increased caution when attempting to engage with strangers in public. Levenson argues such a standard sends 'a powerful public statement of legislative intolerance'[174] and affirms 'society's interest in being protected from certain conduct'.[175] Consequently, such a standard will make women feel safer in public spaces as they know the law will have no leniency for the intent behind their attacker's conduct and will therefore, give them more power to hold their attackers accountable.

As a concluding remark, this article does not dismiss the opportunity for this strictness to be altered to that of negligence, or knowledge (as with clause 23[176]), in the future. Both standards of liability could be a

[174] Laurie Levenson, 'Good Faith Defenses: Reshaping Strict Liability Crimes' (1992–1993) 78 Cornell L Rev 401, 422.
[175] ibid.
[176] PBC Deb (Bill 5) 22 June 2021, cols 649–48.

good way to approach a specific offence of PSH but only if the reasonable person understands the operation and impacts of PSH. Therefore, if the implementation of strict liability is successful and a general understanding of PSH is improved, this could be something for the Law Commission to investigate, accordingly.

5.3.2 Recommendation 2: Including Restorative Justice Techniques

The cause and consequence relationship between the structure of society and PSH proposes the issue of whether conventional methods of punishment may work for such complex and dynamic behaviours. Fine systems, alone, may have regressive impacts, simply acting as 'the cost of catcalling' rather than as a system of social change. Therefore, the question is: can justice be served through a framework that deters conduct, but actually changes societal impressions of PSH? This article argues that restorative justice (RJ) is the answer. Marshall defines restorative justice as 'a process whereby all parties with a stake in a particular offence collectively, resolve how to deal with the aftermath of that offence and its implications for the future'.[177] Although more favoured[178] is to define such a process by its goal of 'cementing a common core of ethics and values'.[179] Therefore, this article's second recommendation is that a specific offence of PSH should be able to accommodate mechanisms of restorative justice, alongside the established system of fines. This could operate by preserving the FPN framework proposed in clause 23[180] but adding an additional requirement for an offender to engage with RJ processes.

[177] Tony Marshall, *Restorative Justice: An Overview* (Home Office Research Development and Statistics Directorate, 1999).
[178] Meredith Rossner, 'Restorative Justice in the Twenty-First Century: Making Emotions Mainstream' in Alison Liebling, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (OUP 2017) 969.
[179] Joanna Shapland, 'Implications of Growth' (2013) 20 IRV 111, 124.
[180] PBC Deb (Bill 5) 22 June 2021, cols 649–48.

The main problem with using fines alone is that it deters conduct for fear of punishment, rather than because the act itself is wrong. Consequently, the social circumstances that allow PSH to happen are not addressed and will continue to simmer in the background. As demonstrated in France, to avoid this outcome, supportive educational policy is required to ground laws in legal consciousness. A system of RJ could capture such a requirement from the outset. Fileborn and Vera-Gray have argued that using a traditional criminal justice approach to respond to PSH, is often incompatible with the desired outcome of justice for victims.[181] Within their research, they identify that many women feel that education, in particular the need for empathy,[182] is a key site for justice. By the standard of Braithwaite's 'reintegrative shame theory', RJ can contribute to a system in which emotions, such as guilt, remorse and empathy,[183] can strengthen social bonds and build an internal consciousness that prevents future wrongdoing.[184] Retzinger and Scheff identify that given the opportunity to discuss the conduct in question, acknowledgement of the emotions of both victim and offender can lead to symbolic repatriation and reintegration through an understanding of remorse and forgiveness.[185] Applying Fileborn and Vera-Gray's findings that women want men to understand how PSH makes them feel,[186] it is likely such a process will be of value when attempting to change public attitudes and appropriately remedy victims while remaining proportional to the harm they experience. This combined mechanism of legal response will ensure that offenders

[181] Bianca Fileborn and F Vera-Gray, '"I Want to Be Able to Walk the Street without Fear": Transforming Justice for Street Harassment' (2017) 25 Fem Leg Stud 203, 214.
[182] ibid 218.
[183] John Braithwaite, *Crime, Shame and Reintegration* (CUP 1989).
[184] Rossner (n 178) 976.
[185] Suzanne Retzinger and Thomas Scheff, 'Strategy for Community Conferences: Emotions and Social Bonds' in Burt Galaway and Joe Hudson (eds), *Restorative Justice: International Perspectives* (Criminal Justice Press 1996).
[186] Fileborn and Vera-Gray (n 181) 218.

actually empathise with their victims to catalyse social change and decrease prevalence.

6 Conclusion

The aim of this article was to establish the extent to which criminal law could be utilised to respond to PSH. Based on what has been presented, this article concludes that the criminal law can, and should, be utilised to respond to PSH in the form of introducing a specific offence. Such a response would allow the mechanism of our criminal justice system to flourish, generating favourable changes in attitude towards the behaviours ingrained into our perception of normal life and solving the problems created by this social epidemic.

The combined conclusions of the first two sections of this article demonstrated why criminal law is an appropriate mechanism of response. By examining the definitional complexities associated with PSH, this article highlighted why such difficulties in defining PSH can exacerbate the problem and identified the value of using cohesive language and definitions when responding to PSH. The utilisation of the principles of criminalisation uncovered that PSH possesses key characteristics of criminality and therefore, requires a response from criminal law. By emphasising how women cannot distinguish between encounters that could end up like Sarah Everard's and those which are purely derogatory, it was concluded that the behaviour causes psychological harm on a level that should be considered severe enough to justify criminal action.

The final two sections conclude that a specific offence of PSH presents the best option for reform on the basis that existing law allows PSH to fall through its legislative gaps. Existing law claimed to cover instances of sexual harassment in a public space possesses significant limitations that mean most instances of PSH cannot be captured within their scope. Through applying the discussed limitations to Olivia's story, this article verified that women cannot rely on existing frameworks to remedy their harm because PSH is a significantly different type of offence,

perpetrated in various ways and for different reasons. The final section explains why the best mechanism of response is through introducing a specific offence, rather than amending existing law, and what such an offence could look like. Reflecting on the operation of '*Outrage Sexiste*',[187] this article recommends that an offence of PSH should be one of strict liability and leave space for restorative justice techniques to work alongside a system of fines to encourage a *real* shift in societal norms rather than deterring PSH for fear of punishment.

Further research into the value of a specific offence of PSH should address how it will interact with existing VAWG policy and, understand its operation alongside hate crimes — particularly when the debate of misogyny becoming a hate crime that floats continuously in and out of legal discussion. If such an operation would be compatible, there is no doubt that the implementation of a specific offence of PSH would be a success.

[187] Loi Schippa 2018, art 15.

Beyond Gender Advice: NATO's Implementation of the Women Peace and Security Agenda

Brook Morrison

Abstract

Following the end of the Cold War, the North Atlantic Treaty Organization (NATO) was forced to reinvent itself from a defence organisation with a regional Euro-Atlantic focus to a security organisation with a global focus. The core task of crisis management and a changing strategic concept are the backdrop against which NATO implemented the Women, Peace, and Security (WPS) agenda through the Bi-Strategic Command Directive (Bi-SCD 40-001) Integrating United Nations Security Council Resolution (UNSCR) 1325 and Gender Perspectives into the NATO Command Structure. The sustained process for operationalising UNSCR 1325 and gender mainstreaming involved the creation of gender advisor positions as part of a commander's advisory staff. At the strategic level, NATO's most senior military officers were quick to recognise the potential of gender mainstreaming to positively influence the perception of civil society and other international security organisations. At the operational and tactical levels, the implementation of the WPS agenda and the acceptance of gender advisors continues to experience resistance. Using an analytical research method, this article critically examines the three versions of Bi-SCD 40-001, the progression of gender advisors from advisory staff to a military capability, and the potential for a human rights-based approach, common in the development sector, to be implemented across the NATO command structure.

1 Introduction

Bosnia (1992–2004), Kosovo (2001–2003), Afghanistan (2003–2021), and Iraq (2004–2011) are examples of post-Cold War conflicts highlighting the changing role of the North Atlantic Treaty Organization (NATO) and the shift from a regional Euro-Atlantic focus to a global focus.[1] The absence of a persistent existential threat, posed by the Soviet Union, the changing nature of conflict, and the emergence of new security risks, such as terrorism, have required NATO to reinvent itself.[2] No longer focused on collective defence, NATO evolved into a global security actor engaged across the spectrum of crisis management.[3] This article examines NATO's implementation of the United Nations Security Council Resolution (UNSCR) 1325 in the context of NATO's continuous process to reinvent itself.

The necessity to involve women in the peacebuilding process, and the need to address the fulfilment of rights during the stabilisation and peacebuilding process, are two principles the United Nations (UN) has identified as essential to achieving a sustainable peace agreement.[4] There is a growing body of literature on NATO's gender mainstreaming process and efforts to implement the WPS agenda. However, there is limited research available on NATO's efforts to mainstream human rights. Using an analytical research method, this article explores the relationships between NATO's core crisis management task, the WPS

[1] NATO, 'Operations and Missions: past and present' (14 June 2022) <https://www.nato.int/cps/en/natolive/topics_52060.htm> accessed 25 May 2023.

[2] Timo Noetzel and Benjamin Schreer, 'More Flexible, Less Coherent: NATO after Lisbon' (2012) 66 Aust J Int Aff 20.

[3] David Chandler, *From Kosovo to Kabul and Beyond Human Rights and International Intervention* (2nd edn, Pluto Press 2006).

[4] Mohammed Abu-Nimer and Edy Kaufman, 'Bridging Conflict Transformation and Human Rights: Lessons from the Israeli-Palestinian Peace Process' in Julie Mertus and Jeffrey Helsing (eds), *Human Rights and Conflict Exploring the Links between Rights, Law and Peacebuilding* (1st edn, United States Institute of Peace 2006).

agenda's implementation, and the human rights-based approach (HRBA) to development. By considering the nexus between NATO's place in modern conflicts, the implementation of the WPS agenda, and the use of HRBA in development, the desired operational effect of Gender Advisors (GENADs) in NATO and the possibility of creating HRBA Advisors (HRBA AD) are discussed.

The remainder of this article proceeds as follows. Section 2 provides an overview of the evolution of NATO, the operationalisation of the WPS agenda, and HRBA to development. The following section provides a thorough analysis of gender mainstreaming in NATO, whilst section 3 examines NATO's operationalisation of the WPS agenda. Section 4 delves into the human rights-based approach to development and considers the possibility of mainstreaming HRBA in NATO.

I have 30 years of military experience as an Army Officer in the Canadian Armed Forces (CAF) until 2021. My military career gives me a unique perspective on the changing nature of conflict and how the CAF, as a member of NATO, restructured its forces and training to fit NATO's evolving strategic concept and core task of crisis management. During my career, I worked in multinational military headquarters in various positions and deployed on numerous operations across the spectrum of crisis including the Stabilisation Force (SFOR) in Bosnia and Herzegovina, and the International Security Assistance Force (ISAF) in Afghanistan. In my final position in the army, I was tasked with establishing GENAD and gender focal point (GFP) positions across my unit. During this time, I personally experienced the resistance to implementing GENADs identified by Bastick and Duncanson in their research. My personal experience of resistance to gender mainstreaming within the CAF led me to consider whether there is another way to address the multitude of elements gender mainstreaming is attempting to cover within the armed forces. A human rights-based approach offers the potential to address the principles of the WPS agenda through a human rights framework. I think it is possible for NATO to use a HRBA during its operational planning process and that

doing so will produce plans that further WPS agenda principles and address rights violations. In the article's final section, I draw on my military experience working within a NATO force structure to discuss the potential to implement a HRBA AD in NATO.

2 NATO and Collective Defence vs Crisis Management

This section examines the evolving role of NATO and considers three changes to the security sector following the end of the Cold War. For forty years, NATO had a single task of defending Europe and North America from a defined known adversary. To remain relevant after the collapse of the Soviet Union, NATO adapted to the changing security environment, redefined the engagement strategy, and developed a new raison d'être.[5] Since 1989, NATO has transformed to remain relevant in the post-Cold War conflict environment. NATO calls this '…successfully adapting to changes in the strategic environment.'[6] In brief, NATO has evolved from a defence organisation into a security organisation.[7] As a defence organisation, NATO was concerned with direct threats at or near the borders of member states. As an International Security Organisation (ISO), NATO has an interest in global security concerns and has taken a lead role in crisis management.[8] NATO identifies crisis management as a fundamental security task, which involves military and non-military measures to address the full spectrum of crisis. Three relevant changes in the strategic environment are: first, the development of crisis management

[5] Jamie Shea, 'Keeping NATO Relevant' (*Carnegie Endowment for International* Peace, 2012) <https://www.jstor.org/stable/pdf/resrep26708.pdf> accessed 25 May 2022.

[6] John Tamnan, 'Anticipating the Changing Nature of War' (*NATO Review*, 2021) <https://www.nato.int/docu/review/articles/2021/07/09/natos-warfighting-capstone-concept-anticipating-the-changing-character-of-war/index.html> accessed 25 May 2023.

[7] Shea (n 5).

[8] Chandler (n 3) 1.

as a security concept; second, the increased complexity of the operating environment; and third, the Security Council's adoption of UNSCR 1325 and subsequent resolutions. Contemporary crisis management seeks to achieve sustainable conflict resolution through social, political, or economic transformation.[9]

Crisis management, one of NATO's core tasks, can involve military and non-military means to address an emerging military threat, civil and political unrest, or humanitarian concerns in each region or state.[10] Second, the operating environment has become highly complex with numerous non-military actors involved in crisis management. Non-military actors include international NGOs (INGOs), UN agencies, the European Union, development agencies such as the Foreign, Commonwealth and Development Office (FCDO) in the UK, the US Agency for International Development (USAID), and other humanitarian aid agencies such as Medicine Sans Frontier (MSF).[11] The operating environment is also made more complex because of the various humanitarian or development programmes each actor performs. For example, the FCDO builds shelters, and provides food, water, and sanitation services for those affected by natural disasters and conflict.[12] USAID provides assistance to internally displaced people forced to flee their homes and provides food assistance to refugees crossing the national border.[13]

[9] Claudia Major and Christian Mölling, 'More Than Wishful Thinking? The EU, UN, NATO and the Comprehensive Approach to Military Crisis Management' (2009) 62 Studia Diplomatica 21.

[10] NATO, 'Crisis Management' (7 July 2022) <https://www.nato.int/cps/en/natohq/topics_49192.htm> accessed 25 May 2023.

[11] M Williams, '(Un)Sustainable Peacebuilding: NATO's Suitability for Post conflict Reconstruction in Multiactor Environments' (2011) 17 Global Governance 115.

[12] DevTracker, <https://devtracker.fcdo.gov.uk/> accessed 29 March 2023.

[13] USAID, <https://www.usaid.gov/humanitarian-assistance/what-we-do> accessed 29 March 2023.

The third change to the strategic operating environment is the Security Council's adoption of UNSCR 1325 and the creation of the Women, Peace, and Security agenda. In 2007 NATO began to implement the WPS agenda. According to Hardt and Von Hlatky, a principal reason NATO operationalised UNSCR 1325 and instituted a gender mainstreaming process, was the desire to be perceived by other ISOs as following best practices.[14] Hardt and Von Hlatky's findings support those made by Gheciu who determined that NATO began its mainstreaming process because it needed to be seen as taking steps toward gender mainstreaming to improve the perception ISOs, INGOs, and other actors in the crisis area have of NATO.[15] Aid workers and UN staff tend to view NATO as a hyper-masculine, militaristic organisation whose involvement should be restricted to high-intensity conflict or combat operations, while the domain of peacebuilding and post-conflict reconstruction should be left to others.[16] The strategic advantage to NATO for implementing UNSCR 1325 was credibility with other key actors in crisis management.

2.1 Operationalising the Women, Peace, and Security Agenda

UNSCR 1325, unanimously adopted in October 2000, is the landmark "No Women, No Peace" resolution, associating the inclusion of women in conflict resolution with sustainable peace.[17] UNSCR 1325, and the subsequent nine security council resolutions, form the foundation of the Women, Peace, and Security (WPS) agenda. The WPS agenda draws attention to the disproportionate impacts of conflict on women and girls, calls for greater measures to protect women from the effects of conflict, whilst simultaneously acknowledging the important role of women

[14] Heidi Hardt and Stefanie Von Hlatky, 'NATO's About-Face: Adaptation to Gender Mainstreaming in an Alliance Setting' (2020) 5 J Glob Secur Stud 136.
[15] Alexandra Checiu, 'Divided Partners: The Challenges of NATO-NGO Cooperation in Peacebuilding Operations' (2011) 17 Global Governance 94.
[16] ibid 95.
[17] Marriet Schuurman, 'Time to Bring It Home' (2015) 14 Connections 1.

across the spectrum of crisis, and calls for the empowerment of all women in conflict prevention, peace talks and in post-conflict reconstruction.[18] The WPS agenda framework recognises the imperative for women's active involvement in all efforts to achieve international peace and security. The passing of UNSCR 1325 was a triumphant and historic moment for feminist antimilitarists.[19] The WPS agenda represents years of work by INGOs, UN departments and agencies, local NGOs, and an ad hoc transnational network of women's organisations and civil society groups to have the Security Council formally recognise the connection between the treatment of women and international peace and security.[20]

The resolutions comprising the WPS agenda are brief, however, the intentions are clear. The three themes of the WPS agenda are: protection, participation, and representation—protection of women's rights and bodies in conflict and post-conflict situations, including an end to impunity for crimes, particularly crimes of a sexual nature committed during conflict; the obligation to ensure the participation of women in peace and security governance; and the representation of women in decision-making at all levels of peace and security governance including in UN peacekeeping operations and in post-conflict reconstruction efforts such as disarmament, demobilisation and reintegration (DDR).[21] Importantly, UNSCR 1325 calls for more

[18] Nicola Pratt and Sophie Richter-Devroe, 'Critically Examining UNSCR 1325 on Women, Peace and Security' (2011) 13 IFJP 492.

[19] Elizabeth Griffiths, Sara Jarman and Eric Jensen, 'World Peace and Gender Equality: Addressing UN Security Council Resolution 1325's Weaknesses' (2021) 27 MJGL 269.

[20] Cynthia Cockburn, 'Snagged on the Contradiction: NATO, UNSC Resolution 1325, and Feminist Responses' (No to War—No to NATO, Annual Meeting 2011) <http://wloe.org/fileadmin/Files-EN/PDF/no_to_nato/women_nato_2011/NATO1325.pdf> accessed 25 May 2023.

[21] Laura Shepherd, 'Advancing the Women, Peace and Security Agenda: 2015 and beyond' (*NOREF*, 2014)

women in peacekeeping operations, not for UN member states to increase the number of women in armed forces, combat positions, or for war to become safer for women. NATO's operationalisation of UNSCR 1325 has focused on these three areas. In her recent book *Deploying Feminism: The Role of Gender in NATO Military Operations,* Von Hlatky identifies this as norm distortion and explains it as

> a process by which institutionalized norms adopted by a principle (like NATO) are redefined by one of its agents (the military) in a way that is in tension with its original purpose or more forcefully changes the original purpose of the introduced norm.[22]

UNSCR 1325, as a Security Council resolution, is legally binding on UN member states and UN entities. However, resolutions are considered soft law with no legal force or legally enforceable claims.[23] As such there was no legal imperative for NATO to implement UNSCR 1325 or any of the subsequent resolutions. However, in 2007, NATO began to engage with the WPS agenda. NATO's initial attempts to operationalise the WPS agenda through a process of gender mainstreaming were ineffectual in the early years. The first Bi-SCD 40-001 was complicated and confusing, often using terms like gender dimension, gender awareness, gender perspective, female perspective, and gender equality interchangeably.[24] Bi-SCD 40-001 (2009) formalised the vast array of roles and responsibilities of GENADs and GFPs positions. Initially, the direction of GENADs and GFPs was unclear, the positions had both inward and outward-looking

<http://www.peacewomen.org/system/files/global_study_submissions/Laura%20Shepherd_NOREF%20policy%20brief.pdf> accessed 25 May 2022.

[22] Stefanie Von Hlatky, *Deploying Feminism: The Role of Gender in NATO Military Operations,* (OUP 2023) 8.

[23] Griffiths, Jarman and Jensen (n 19) 299.

[24] Megan Bastick and Claire Duncanson, 'Agents of Change? Gender Advisors in NATO Militaries' (2018) 25 Int'l Peacekeeping 570.

responsibilities, the tasks were too broad for one position and led to confusion and organisational resistance.[25]

Despite these early growing pains to NATO's adoption of the WPS agenda, the highest levels of the military command structure in NATO grasped the strategic potential of gender mainstreaming. Since 2009, military officers at the highest levels have actively engaged in a sustained, systematic, and increasingly complex process of gender mainstreaming within NATO.[26] NATO's implementation strategy is one of positive progression.[27] First, use the military structure to implement the WPS agenda; second, link gender mainstreaming with operational success; then demonstrate how gender mainstreaming has improved human intelligence gathering capabilities, thus increasing situational awareness, improving force protection, and increasing mission success. Next, interpret the language of UNSCR 1325 to focus on all genders rather than women, and over time reframe GENADs from an advisory to an enabling capability, focusing only on successes and not on failures. Finally, link promotion and appointments to key positions to the successful incorporation of gender mainstreaming.[28]

2.2 Human Rights-Based Approach in Development

In the 1970s debates concerning a right to development saw rights language begin to seep into development work.[29] The development sector, including INGOs, NGOs, and the UN, recognised the significance of a human rights-based approach using international

[25] ibid 572.
[26] Matthew Hurley, 'The "Genderman": (re)negotiating Militarized Masculinities When "Doing Gender" at NATO' (2018) 4 Crit Mil Stud 72.
[27] Matthew Hurley, 'Watermelons and Weddings: Making Women, Peace and Security "Relevant" at NATO Through (Re)Telling Stories of Success' (2018) 32 Glob Soc 436.
[28] Hardt and Von Hlatky (n 14) 141.
[29] Peter Uvin, 'From the Right to Development to the Rights-Based Approach: How "Human Rights" Entered Development' (2007) 17 Dev Pract 598.

human rights law (IHRL) as a framework through which to plan and deliver development projects. The UN and development agencies were not alone in adopting HRBA for development assistance; international government aid agencies also employed HRBA for their development work.[30]

By 2003 many development agencies were using some form of a rights-based approach. To standardise a HRBA to development, the UN produced a document entitled 'Common Understanding of Human Rights-Based Approaches to Development Cooperation and Programming'.[31] This document had two objectives; to clearly outline the UN's desire to mainstream HR throughout the entire UN, including specialised agencies; and to ensure improved consistency in the application of HRBA across all UN agencies.[32] Although HRBA is now widely used, definitions vary. The UN development group defines HRBA as

> …a broader conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting HR. It seeks to analyse the inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.[33]

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[30] Morten Broberg and Hans-Otto Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 Int J Hum Rights 667.

[31] Uvin (n 29) 598.

[32] Hans P Schmitz, 'A Human Rights-Based Approach (HRBA) in Practice: Evaluating NGO Development Efforts' (2012) 44 Polity 524.

[33] Danish Institute for Human Rights,<https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach#:~:text=Universal%20Values,-

The definition includes two components common to most definitions. First, rights are part of a framework based in international law. Second, an acknowledgement of the unequal distribution of power or wealth which must be redistributed. Gauri and Gloppen define HRBA as 'principles that justify demands against privileged actors made by the poor or those speaking on their behalf, for using national and international resources and rules to protect the crucial human interests of the globally or locally disadvantaged.'[34] They further construct four modalities through which HRBA can be approached. These are: (i) a global compliance approach which relies on international and regional treaties to pressure states to fulfil their human rights obligations; (ii) a programming approach which relies on donor-related activities; (iii) rights-talk approach focused on awareness raising and changing normative beliefs; and (iv) legal mobilisation approach which centres on litigation and other forms of legal mobilisation.[35] For NATO, the first three approaches offer ways to engage with HRBA using existing operating structures. NATO can engage strategically using a global compliance strategy, operationally at the programming level, and tactically using a rights-talk approach.

The human rights framework ensures a systematic approach which is more transparent, orderly, and consistent. Good HRBA practice generally requires human rights to be considered during every phase of planning and implementation. Proponents of HRBA emphasise the universality and interdependence of the approach making it widely applicable. Additionally, the indivisible nature of human rights requires a mutually supportive approach to development which seeks to advance all rights and will not advance one right at the expense of another.[36]

Principle%20One%3A%20Human&text=The%20human%20rights%2Dbased%20approach,promoting%20and%20protecting%20human%20rights> accessed 14 June 2023.

[34] Varun Gauri and Siri Gloppen, 'Human Rights-Based Approaches to Development: Concepts, Evidence, and Policy' (2012) 44 Polity 486.

[35] ibid.

[36] Robert Archer, 'Linking Rights and Development: Some Critical

This aspect of HRBA also draws criticism, calling the approach too structured and constricting. However, what some consider a weakness, could become a strength when applied in NATO because the NATO planning process is highly structured and systematic. HRBA uses language such as mutually supportive, which military planners are comfortable and familiar with, as in a military context, mutual support is a firepower concept where units and weapons are positioned and employed to render assistance to each other.

HRBA is increasingly being used in health care, environmental protection, policy making, and disaster management. Hesselman and Lane examine the roles and responsibilities of non-state actors (NSAs) in disaster governance from the perspective of IHRL. They argue there is value in exploring the 'wider application of programmatic "Human Rights-Based Approaches" to disaster governance, and the engagement of NSAs.'[37] Historically NATO's operations occurred in the context of armed conflict, governed by the Law of Armed Conflict (LOAC); however, NATO's involvement across the spectrum of crisis, particularly in conflict prevention and post-conflict reconstruction when hostilities are not taking place, is causing interoperability challenges for NATO as some states operate under an international humanitarian law (IHL) framework and others work within the IHRL framework.[38] Using HRBA in planning NATO can, in the same way that NSAs in disaster governance have done, directly link tasks and activities to IHRL standards, whilst adhering to the principles of HRBA.

Challenges' in Sam Hickey and Diana Mitlin (eds), *Rights-Base Approaches to Development: Exploring the Potential and Pitfalls* (1st edn, Kumarian Press 2009) 23.

[37] Marlies Hesselman and Lottie Lane, 'Disasters and Non-State Actors – Human Rights-Based Approaches' (2017) 26 Disaster Prev Management 527.

[38] Kirby Abbott, 'A Brief Overview of Legal Interoperability Challenges for NATO Arising from the Interrelationship between IHL and IHRL in Light of the European Convention on Human Rights' (2014) 96 Int Rev Red Cross 109.

2.2.1 HRBA use by NATO

NATO's 2022 strategic concept emphasises the cross-cutting importance of the WPS agenda, ensuring the principles of human security are integrated into NATO's core tasks. This commitment lends well to adopting a human rights-based approach as part of the delivery of NATO's core tasks of crisis management and cooperative security. NATO, as part of its activities in an area of operations, may establish a task to eradicate poverty, linked to the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Using a HRBA to poverty eradication requires NATO to first acknowledge poverty as a denial or violation of the ICESCR right to a decent standard of living, food, clothing, medical care, and social care.

HRBA requires NATO to engage with the local population and the state. To do this, NATO must undertake its activities as part of the poverty eradication initiative using the principles of universality and non-discrimination, indivisibility, accountability, and participation. NATO could not simply deliver food, build wells, schools, or accommodations for the local population. HRBA requires NATO to engage in a consciousness raising and consultative process to ensure people understand their needs as rights they can claim and to ensure the local population is not made to feel like passive recipients of aid.

A NATO HRBA strategy to eradicate poverty must include working with state structures and public bodies to ensure platforms are developed to support the rights holder and the duty bearer. By paying attention to, and addressing power relationships, NATO would use its influence with those who hold the power to advocate for changes to the structures, social policies, legal instruments, and attitudes at the root of poverty. NATO could use its influence to ensure the state recognises its responsibilities as a primary duty-bearer responsible for respecting, protecting, promoting, and fulfilling human rights and strengthening the capacity of the state. Importantly, for NATO, a human-rights based approach must accept how the 'task to eradicate poverty' is achieved is as important as achieving it.

2.3 NATO: Remaining Relevant by Adapting

NATO's current strategic concept and crisis management as a core task legitimises NATO intervention across the spectrum of crisis. NATO's 2022 strategic concept was adopted at the Madrid Summit in June 2022. The document reaffirms the organisation's purpose, expresses the shared values, outlines strategic adaptations, and provides the framework for future operations.[39] The 2022 strategic concept replaced the previous strategic concept adopted at the Lisbon Summit in 2010. The 2010 strategic concept set out NATO's three essential core tasks as collective defence, crisis management, and cooperation, a departure from the 1999 strategic concept in which collective defence dominated NATO's fundamental tasks.[40] Crisis management, as a core task, establishes the imperative and sets the conditions for NATO to evolve from a regional organisation focused on territorial defence to an ISO with a mandate to engage before, during, and after the crisis.[41]

Under the rubric of crisis management, 'NATO announces a willingness to engage where possible and when necessary, to prevent crisis, manage crisis, stabilise post conflict situations and support reconstruction.'[42] To operate across the spectrum of crisis, NATO evolved by transforming into an ISO capable of conducting complex security operations with a multinational force trained and equipped to engage in low-intensity fighting, conduct humanitarian operations, train and equip host nation military and police forces, and provide support to government institutions all within the same mission environment.

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[39] NATO, 'Strategic Concept' (2022) <https://www.nato.int/strategic-concept/> accessed 25 May 2023.
[40] Sten Rynning, 'The Geography of the Atlantic Peace: NATO 25 Years after the Fall of the Berlin Wall' (2014) 90 Int Aff 1383.
[41] Shea (n 5).
[42] Noetzel and Schreer (n 2) 26.

2.3.1 Security Meets Development

Provincial reconstruction teams (PRTs) were developed in the early 2000s, to span the divide between NATO's traditional role in defence and the emerging role in crisis management. Responsible for the conduct of security tasks and development work,

> … PRTs are involved in a wide range of activities, many of which have traditionally been the responsibility of development and humanitarian organisations, including humanitarian relief; the identification and implementation of quick impact projects (QIP); the construction of large infrastructure projects such as roads and schools; the training of police; and the coordination of state donor funds for projects in the communities where PRTs operate.[43]

PRTs, developed for use in the International Security Force Assistance (ISAF) mission in Afghanistan, were NATO's response to the requirement for forces to be 'all singing, all dancing'.[44] Despite NATO's claims about the success of PRTs in Afghanistan, there is little empirical evidence of their effectiveness. PRTs faced strong criticism from NGOs for not following the tenets of traditional humanitarian or development efforts. A common criticism is that they were a public relations tool providing good news stories for the public back home with photos of soldiers doing humanitarian projects. PRTs were also criticised for conducting projects and activities, based on winning the 'hearts and minds' of the local population, to improve intelligence gathering rather than meeting community needs.[45] Feminists criticised

[43] Ryerson Christie, 'The Pacification of Soldiering, and the Militarization of Development: Contradictions Inherent in Provincial Reconstruction in Afghanistan' (2012) 9 Globalizations 56.
[44] A term commonly used in NATO to mean having the ability and capability to do everything.
[45] Christie (n 43) 57.

PRTs for using a militarised masculine approach which cast locals as either helpless, passive victims who needed to be saved or as brutal cowardly insurgents. Through PRTs, NATO effectively weaponised development and humanitarian aid to achieve military objectives.[46]

2.4 NATO, an International Security Organisation Newcomer

NATO's adoption of the Women, Peace, and Security agenda and action plan to operationalise UNSCR 1325 is relatively absent in non-feminist literature. My assessment of why is that NATO's engagement with the WPS agenda, implementation of GENADs, and gender mainstreaming is relatively recent and has existed mainly in the policy rather than capability domain. The third revision of Bi-SCD-040-001 (2021) is the first time a direct link is made between integrating a gender perspective and the application of fighting power.[47] With gender perspectives clearly identified as a capability, with an enabling function, it is more likely to attract the interest of military and defence strategists. A link could be made between NATO's current core tasks, global engagement strategy, and re-categorisation of conflict and war into crisis management and NATO's WPS agenda implementation strategy. Whilst NATO is arguably the largest political-military alliance, it is a relative newcomer to the ISO world and has struggled to prove legitimacy and effectiveness in this relatively new operating space.[48]

Gender mainstreaming efforts permit NATO to change the narrative that it is a hyper-masculine organisation. By operationalising UNSCR 1325, NATO can be portrayed as a progressive organisation, capable,

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[46] ibid.

[47] NATO Bi-Strategic Command Directive 40-001 (2021) 11 <https://www.act.nato.int/application/files/3916/3842/6627/Bi-SCD_040-001.pdf> accessed 26 May 2023.

[48] Williams (n 11) 115.

willing, and able to change.[49] Hardt and Von Hlatky assert in their article '… that NATO has adapted to gender mainstreaming to emulate other ISOs…'.[50] Across the spectrum of crisis, NATO is seeking ways to increase legitimacy and acceptance as a useful partner to other ISOs working in the same operating environment. Adopting UNSCR 1325 is a strategic way for NATO to demonstrate a 'softer' side. Portraying itself as a modern organisation supporting equal opportunity and acknowledging the important contribution of women in peace negotiations gives NATO representation and influence with other ISOs, namely the European Union's Informal Task Force on Women, Peace and Security, UN Women, and the Organization for Security and Co-operation in Europe (OSCE).

3 Women, Peace, and Security Agenda

The Security Council's adoption of UNSCR 1325 is the first time gender is recognised in the domain of international security.[51] The WPS agenda '…recognises women as bearers of a particular gendered burdens in conflict and as participants with valuable roles to play as conflict mediators and peacebuilders.'[52] Articles directly related to the WPS agenda are now commonly found in other security council resolutions, which is significant because security council resolutions create obligations on the part of member states. Two important aspects for understanding the significance of WPS language in a security council resolution are location and focus. WPS language located within

[49] Hardt and Von Hlatky (n 14) 136.
[50] ibid 137.
[51] Mathew Hurley, 'Gendering NATO: Analysing the Construction and Implementation of the North Atlantic Treaty Organisation's Gender Perspective' (DPhil thesis, Oxford Brookes University 2014) <https://radar.brookes.ac.uk/radar/file/9bf895af-5aa6-472c-90e7-3055183c3de3/1/hurley2014gendering.pdf> accessed 26 May 2023.
[52] Nicole George and Laura Shepherd, 'Women, Peace and Security: Exploring the Implementation and Integration of UNSCR 1325' (2016) 37 Int Political Sci Rev 297.

the preamble carries limited force. However, WPS language in the operative paragraphs will become mission tasks. When the language is focused on the impact of conflict-related sexual violence, mission tasks will relate to the protection of women and girls. A resolution with language focused on protection in the operative section will result in protective measures but not the inclusion of women in peace negotiations. A resolution with empowerment and participation language in the operative section should produce mission tasks to create mechanisms for the inclusion of women in peace talks. UNSCRs establishing UN missions must therefore include both the language of protection and participation in the operative paragraphs to achieve the full intent of the WPS agenda.

UNSCR 1325 and the subsequent WPS agenda security council resolutions create a legal framework. Cumulatively, the resolutions provide the international legislative framework to reinforce existing global commitments, treaties, and resolutions on women's rights.[53] Though sometimes criticised for not containing stronger language, the resolutions provide clear guidance to reduce the disproportionate burden of conflict borne by women and girls. NATO's operationalisation of the WPS agenda was influenced by the following four themes: increased participation of women; incorporation of a gender perspective; increase gender training; and protection from conflict-related sexual violence (CRSV).

Articles 1, 2, and 8(b) of UNSCR 1325 discuss increased involvement, participation, and representation of women at decision-making levels. Article 3 specifically calls for the UN Secretary General to appoint more women as special representatives and envoys. The creation of the NATO Secretary General's Special Representative for Women, Peace and Security position seems to be in direct response to UNSCR Article 3. The influence of the remaining articles is notable on p 4 of Bi-SCD 40-001 (2009); NATO encourages member states to increase the

[53] Griffiths, Jarman and Jensen (n 19) 271.

number of women in their armed forces by identifying the 'positive effect that including both men and women in appropriate proportions within the organisation.'[54] NATO's engagement with the participation element of the WPS agenda is predominantly through increasing the number of women in the military rather than participation and representation in peace negotiations. During the ISAF Afghanistan mission, NATO created female training battalions to recruit women into the Afghan National Army; however, Afghan women were almost completely excluded from peace negotiations with the Taliban.[55]

Articles 4, 6, 8(a), and 15 of UNSCR 1325 are concerned with including gender perspectives. The NATO Committee on Gender Perspectives (NCGP) was created to promote gender mainstreaming at the strategic level. GENADs and GFPs positions were created at the operational and tactical levels to ensure a gender perspective was incorporated in every aspect of planning. It is worth noting NATO's website currently describes gender mainstreaming 'as a strategy for making the concerns and experiences of both women and men an integral dimension of the design…military operations.'[56] This definition belies the intent of UNSCR 1325.

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[54] NATO Bi-Strategic Command Directive 40-001 (2017) 1–4 <https://www.nato.int/issues/women_nato/2017/bi-scd_40-1_2rev.pdf> accessed 26 May 2023.

[55] Tanya Henderson, '21 Years of 1325: What if the Landmark Resolution on Women, Peace and Security had been implemented in Afghanistan?' (*Mina's List*, 2021) <https://www.minaslist.org/blog/21-years-of-1325-what-if-the-landmark-resolution-on-women-peace-and-security-had-been-implemented-in-afghanistan-#:~:text=It%20would%20have%20made%20them,of%20the%20Afghan%20peace%20agreement> accessed 26 May 2023.

[56] NATO, 'IMS Office of the Gender Advisor' (20 April 2022) <https://www.nato.int/cps/en/natohq/topics_101372.htm> accessed 26 May 2023.

Articles 6 and 7 of UNSCR 1325 relate to the need to provide gender sensitivity training and increase training on the protection and rights of women for UN peacekeepers. NATO has directly transferred this requirement to all NATO forces prior to deployment. Since 2009 the amount of gender-related training has increased significantly. The Swedish Armed Forces International Centre (SWEDINT) has created the Nordic Centre for Gender in Military Operations (NCGM) which developed and delivers a suite of NATO-approved, gender-related training. Reference to gender training increased in NATO's 2009 version of the Bi-SCD 40-001 from a few lines dispersed throughout the directive to a full chapter in the 2017 version. Chapter 4 of the Bi-SCD 40-001(2017) makes gender sensitivity training mandatory as part of pre-deployment training mandatory for all NATO forces.

Article 11 of UNSCR 1325 and UNSCR 1820 focus on protection. NATO's operationalisation of the protection element of the WPS agenda is visible in its training guidance and pre-deployment training packages. Training related to protection tends to focus on CRSV, on how to recognise the signs and how to respond. Currently, the objective of the training seems to be to make war safer for women in the host nation rather than to demilitarise society in line with the objectives of the WPS agenda. Instead of exclusively focussing the training on CRSV, the directives could have addressed the hegemonic masculinity of NATO as an institution and broadened the scope beyond the notion of men as protectors and women needing protection.

The Bi-SCD 40-001 (2017) included an expanded chapter on standard of behaviour (ch 3) which explicitly states: 'Sexual relationships when based on inherently unequal power dynamics are strongly discouraged.'[57] Notably, neither the 2009 nor the 2017 version of the Bi-SCD 40-001 explicitly forbids sexual relations between NATO forces and members of the local population. The directive says only that it is strongly discouraged and may be illegal according to local or

[57] NATO Bi-Strategic Command Directive 40-001 (2017) 14.

national laws. This is a significant distinction, as disciplinary measures through NATO structures are not attracted if this discouraged act occurs. The 2021 version of Bi-SCD 40-001 does, however, forbid sexual relationships 'based on inherently unequal power dynamics'.[58] It will be interesting to see how this change in stance translates into reality.

3.1 Subsequent Security Council Resolutions

UNSCR 1325 was a starting point in acknowledging the connection between gender inequality and peace and security. The additional nine resolutions demonstrated the Security Council's ongoing commitment and continued belief in the direct link between the treatment of women and international peace and security.[59] Resolutions 1820, 1888, 1960, 2106, and 2467 focus primarily on sexual violence in conflict; recognising sexualised violence as a tactic of war; establishing a Special Representative of the Secretary General to strengthen efforts to end sexual violence in conflict; monitoring and reporting mechanism for CRSV; calling for GENADs and women protection advisors; and addressing the concerns related to children born of conflict-related rape. Resolutions 1889 and 2122 focus on women's empowerment and the importance of including women in all stages of the peace process. Resolutions 2242 and 2493 reaffirm the Security Council's commitment to the WPS agenda by calling for obstacles to its implementation to be removed and urging states to implement all previous WPS agenda resolutions.

The ten resolutions of the WPS agenda form the international normative framework addressing the gender-specific impact of conflict, including CRSV. Whilst the resolutions are recognised as forming international law (soft law) it was the 2004 request by the UN Secretary General to member states and international organisations (IO) to develop national

[58] NATO Bi-Strategic Command Directive 40-001 (2021) 21.
[59] Griffiths, Jarman and Jensen (n 19) 277.

action plans (NAPs) to implement the WPS agenda which was the driving force behind its proliferation.[60]

3.2 National and Regional Action Plans

National and regional action plans are strategic documents outlining an overall approach to implementing the WPS agenda. NAPs set out the domestic and international policy commitments to addressing the gender dimensions of peace and security.[61] The global proliferation of the WPS agenda has relied primarily on the UN member states' development and implementation of NAPs. This decentralised approach combined with the requirement for member states to form individual action plans results in a lack of normative alignment across states.[62]

True's study of the diffusion of WPS NAPs concluded there are similarities amongst the NAPs developed by member states of the global North. These NAPs are outward facing with a tendency to focus on protecting women, increasing the number of women soldiers or police in conflict areas. These same states have NAPs focused on extra-territorial peace and security whilst positioning themselves as expert providers of security and gender mainstreaming.[63] This approach to NAPs is highly militarised, resulting in NAPs which legitimise security (crisis) interventions focused on making war safer for women rather than on creating demilitarisation goals and objectives.[64] The majority of the NAPs True studied belonged to NATO countries. Shepherd's study also found NATO's implementation of the WPS agenda, through Bi

[60] Jaqui True, 'Explaining the Global Diffusion of the Women, Peace and Security Agenda' (2016) 37 Int Political Sci Rev 307.
[61] ibid.
[62] ibid 319.
[63] ibid 320.
[64] Laura Shepherd, 'Making War Safe for Women? National Action Plans and the Militarisation of the Women, Peace, and Security Agenda' (2016) 37 Int Political Sci Rev 327.

SCD 40-001, was predominantly outwardly focused and hyper militarised.

3.3 NATO Bi-Strategic Command Directive 040-001

NATO began engaging with the WPS agenda in 2007 by releasing a joint policy document with the Euro-Atlantic Partnership Council (EAPC) setting out the framework for the implementation of UNSCR 1325.[65] In 2009, NATO Strategic Command produced the first of three Bi-SCD Integrating UNSCR 1325 and Gender Perspectives into the NATO Command Structure. The documents direct NATO's commands to implement a gender mainstreaming process and to integrate the WPS agenda into doctrine. 'Gender mainstreaming in this context represents the process to recognise and incorporate the role gender plays in relation to NATO's various operational missions.'[66] To support the implementation of UNSCR 1325 and related resolutions, the NATO Committee on Gender Perspectives (NCGP) and the NATO Office on Gender Perspectives (NOGP) were created.[67]

Bi-SCD 40-001 (2009) links the inclusion of gender perspectives in NATO-led missions and operations with a competitive advantage. Throughout the directive, there are numerous references to the potential for gender mainstreaming to increase operational effectiveness and mission success. The directive acknowledges the disproportionate impact conflict has on women and girls and creates the requirement to include gender perspectives in the planning process. The directive further outlines the framework, role, and responsibilities of NATO GENADs. Bi-SCD 40-001 (2009) assigns a vast array of inward and outward-facing tasks to GENADs and GFPs. Tasks range from supporting commanders in planning, to supporting the commander's legal advisor in any inquiry or investigation related to breaches of NATO standards of behaviour, allegations of rape or other forms of

[65] Hurley (n 51).
[66] NATO Bi-Strategic Command Directive 40-001 (2009) 1.
[67] Hurley (n 51).

sexual abuse. Responsibilities include establishing and maintaining contact with the UN, (OSCE), EU, ICRC, NGOs, and other local and international women's organisations to facilitate sharing information during peacetime and crisis operations.[68] Establishing relationships for the purpose of information sharing is one of the principal strategic advantages of implementing the WPS agenda.

To combat resistance to gender mainstreaming, NATO revised Bi-SCD 40-001 (2017) to include a substantial section on the rationale for the directive. The first sentence of the paragraph states: 'The active participation of men and women is critical to the security and the success of the Alliance and its partners'.[69] Bi-SDC 40-001 (2017) mentions 'men' 50 times and 'women' 81 times. In the revised directive, the following has been added to the definitions of gender: 'Notably, gender does not equate to an exclusive focus on women.' And this addition was made to the definition of gender mainstreaming: 'Gender mainstreaming does not focus solely on women, but mainstreaming recognises women's disadvantaged position in various communities.'[70] The increase in the inclusion of men and boys in gender discussion within the directive is important as it demonstrates how NATO's implementation of UNSCR 1325 gradually shifted from women and girls to gender which is inclusive of men and boys. This shift was needed to improve the acceptance of gender mainstreaming and gender perspectives at the operational and tactical levels.

In 2021, NATO issued a third Bi-SCD 40-001, and NATO's language surrounding gender mainstreaming across the three Bi-SCDs became increasingly militaristic. The introduction, aim of gender mainstreaming, and the role of GENADs and GFPs are similar between the 2017 and 2021 versions; however, a new chapter, entitled 'Implementation in Warfare Development' was added in 2021. This

[68] NATO Bi-Strategic Command Directive 40-001 (2009) 1–3.
[69] NATO Bi-Strategic Command Directive 40-001 (2017) 3.
[70] ibid 5.

chapter clearly states the rationale for 'applying a gender perspective and ensuring gender mainstreaming will be critical to delivering today's MIoP (Military Instrument of Power) and sustaining the vision of the 2040 MIoP.'[71] With respect to gender perspectives, Bi-SCD 40-001 (2021) states that 'integrating a gender perspective contributes to the understanding and application of fighting power, as an integral part of both a human-centric and a comprehensive approach.'[72] This sentence militarises gender mainstreaming and two important approaches to international development, human-centric and comprehensive approach. Bi-SCD 40-001 (2021) has co-opted the WPS agenda and weaponised UNSCR 1325 and the subsequent resolution to further NATO objectives, just as feminists feared it would.[73]

3.4 Military Branch of NATO Leads the Way

The full support and engagement of senior military leadership is critical for an initiative such as gender mainstreaming to become part of military culture. Hardt and Von Hlatky's study demonstrates how senior military officers understood the political necessity of implementing the WPS agenda and grasped the strategic, operational, and tactical potential of gender mainstreaming for the Alliance.[74] At a strategic level, the creation of the NCGP and NOGP enabled NATO's engagement with other ISOs, NGOs, EU, and women's groups. The engagements legitimised NATO's presence across the spectrum of crisis, particularly in crisis prevention and post-conflict reconstruction which were previously the domain of other ISOs, humanitarian actors, and regional organisations.

Institutional resistance to gender mainstreaming and GENADs at the operational and tactical level has been discussed earlier in this article. To overcome this resistance, NATO created a narrative that GENADs

[71] NATO Bi-Strategic Command Directive 40-001 (2021) 11.
[72] ibid 11.
[73] Bastick and Duncanson (n 24) 556.
[74] Hardt and Von Hlatky (n 14) 141.

improve operational effectiveness, situational awareness, mission success, increase human intelligence gathering, and enhance force protection.[75] The latest version of Bi-SCD 40-001 considered integrating gender perspectives as an operational requirement and identifies GENADs and GFPs as a military capability to deploy.[76]

3.5 GENADs and GFPs

The NATO Gender Functional Planning Guide (FPG) issued in 2015 provides clarification on the gender advisory structure, and the role responsibilities of GENADs and GFPs.[77] This clarification was required as the number of GENADs and GFPs within NATO and NATO member states grew from 10 in 2010 to over 668 by the end of 2016.[78] The gender structure is relatively straightforward to those familiar with military staff structure and planning levels. At the political-strategic level is the NATO Special Representative for Women, Peace and Security,[79] also at the political-strategic level is the International Military Staff GENAD who provides information and advice on gender perspectives and on the implementation of the WPS agenda. At the operational level, GENAD positions form part of the Commander's specialist advisory staff,[80] providing support, advice, and expertise on gender perspectives. GFPs work at the tactical level as part of the HQ

[75] Hurley (n 27) 446.
[76] NATO Bi-Strategic Command Directive 40-001 (2021) 12.
[77] NATO Gender Functional Planning Guide (2021) <https://www.act.nato.int/wp-content/uploads/2023/05/ACO_Gender_Functional_Planning_Guide_2015.pdf> accessed 14 June 2023.
[78] Bastick and Duncanson (n 24) 557.
[79] This is a civilian position, and the incumbent representative is Irene Fellin, a visiting lecturer on Gender, Security, and Post Conflict Reconstruction at Durham University in the UK.
[80] Commander's specialist advisory staff includes Legal Advisors, Policy Advisors, Civil Military Cooperation (CIMIC) Advisor.

staff to support and facilitate the integration of gender perspectives in day-to-day operations.[81]

3.5.1 Gender Analysis

A core task of the GENAD/GFP is to conduct gender analysis for the planning process. A military GENAD 'industry' has been created to train GENADs and GFPs. In 2022, the Nordic Centre for Gender in Military Operations, one of the centres of excellence at SWEDINT conducted 10 gender-related training courses, including a three-day seminar for Commanding Officers, a ten-day NATO Gender Training of the Trainer course, and three 11-day NATO GENAD courses. The learning objectives for gender training at all levels were basic, focused on gender perspectives and did not relate to the protection, participation, and prevention goals of the WPS agenda.

In addition to the formalised gender training offered at NCGM, NATO developed a gender analysis tool. The NATO Gender FPG provides a three-page guide to conducting gender analysis. The guide and analysis tool, which were to be used at all levels of the GENAD structure, are overly simplistic and do not indicate how to incorporate the intent and objectives of the WPS agenda into planning. It is evident from the Gender FPG and the Bi-SCD 40-001 that the intent of including a gender perspective is to enhance and strengthen the operational planning output and to minimise the impact of NATO operations on women. Neither of these documents reference the goals or principles of the WPS agenda nor how to incorporate them into NATO operations.

The gender analysis tool provides further direction on conducting gender analysis which involves 'the analysis of information on gender differences and social relations in order to identify and understand inequalities based on gender.'[82] The instruction recommends using a

[81] NATO Bi-Strategic Command Directive 40-001 (2021) (Annex B) 2.

[82] NATO Supreme Headquarters Allied Powers Europe, Allied Command Operations, 'Gender Functional Planning Guide' (2015)

PMESII (political, military, economic, social, infrastructure, and information) model to address the goals, strengths, weaknesses, and interdependencies within these critical domains. Given the significance of UNSCR 1325 and the WPS agenda, the learning outcomes for gender training and the gender analysis tool are too basic, overly simplistic, and unlikely to provide the depth of training or analysis required to produce a gender perspective that is usable beyond a NATO context.

4 International Human Rights Law

IHRL and LOAC were founded on the common principles of humanity and respect for the dignity of the individual. LOAC is primarily concerned with the treatment of one nation's forces (and civilians) by another nation's forces in the conduct of war. IHRL is traditionally concerned with a government's treatment of citizens during peacetime.[83] Given that NATO now operates outside of the conflict spheres where IHL/LOAC govern, there is a growing need to understand IHRL. Moreover, the separation between the IHRL and IHL is less clear in the early and later phases of the spectrums of crisis, particularly in failed or failing states with weak or no recognised government. There is a growing convergence between the two bodies of law as the concept of humanising LOAC gains momentum with the growing knowledge, understanding, and acceptance of human rights norms.[84] Currently, expertise and familiarity with IHRL is not required at NATO's operational level. Legal advisors advise on IHL while HRBA Advisors offer the potential to bring IHRL knowledge to the

<https://www.act.nato.int/application/files/7316/7474/8543/ACO_Gender_Functional_Planning_Guide_2015.pdf> accessed 26 May 2023.

[83] Robert Delahunty and John Yoo, 'International Human Rights Law and the War on Terror' in Thomas Cushman (ed), *Handbook of Human Rights* (1st edn, Routledge 2012) 636.

[84] Rob McLaughlin, 'The Law of Armed Conflict and International Human Rights Law: Some Paradigmatic Differences and Operational Implications' in M Schmitt, L Arimatsu and T McCormack (eds), *Yearbook of International Humanitarian Law* (Asser Press 2011) 213.

planning process. Given NATO's core task of crisis management and the convergence of IHRL and IHL, NATO should be looking for ways to mainstream human rights thinking at all levels of command. Applying an HRBA to crisis management and creating HRBA advisors are two ways for NATO to mainstream human rights thinking.

4.1 HRBA Framework

The critical element of the HRBA framework, distinguishing it from other development frameworks, is the incorporation of legal tools and institutions. HRBA incorporates laws, the judiciary, and the rule of law principle into every phase of development planning.[85] Human rights theory and IHRL are based on four fundamental principles:[86] universality,[87] indivisibility,[88] accountability,[89] and participation.[90] As HRBA is founded on human rights theory and IHRL, the four principles form the foundation of the approach. HRBA provides a set of tools based on human rights standards and principles from the Universal Declaration of Human Rights (UN Charter), and all subsequent legally binding human rights conventions and treaties. The reliance of HRBA on these legally binding human rights conventions and treaties converts people's needs into rights, by recognising the human being as a right holder with the right to claim their rights.[91] Whilst HRBA generally

[85] Lauchlan Munro, 'The "Human Rights-Based Approach to Programming": A Contradiction in Terms?' in Sam Hickey and Diana Mitlin (eds), *Rights Based-Approaches to Development: Exploring the Potential and Pitfalls* (1st edn, Kumarian Press 2009) 190.

[86] ibid.

[87] Also referred to as non-discrimination or equality, which asserts all human beings have rights simply by virtue of being human.

[88] Also called interdependence, affirms there is no hierarchy of rights, and one right must not be realised at the expense of another right.

[89] Which asserts that to have a right is to have a claim against others (usually the state).

[90] Which implies those affected must have a role and a voice in decisions affecting them and their communities.

[91] UN Development Programme, 'A Human Rights-based Approach to

focuses on the most vulnerable segments of a population, it also recognises the need to strengthen the capabilities of the duty bearer (the state). Development agencies using a HRBA should develop programmes to address the state's capacity to fulfil obligations and responsibilities to rights holders, including the requirement to offer a means of remedy for failure to fulfil rights or for violating the rights of its citizens.[92] The strengths and weaknesses of the HRBA approach are discussed under the headings of consistency, systematic, levers of influence, and gender inequality.

4.1.1 Consistency

Broberg and Sano, as well as Nelson and Dorsey, have criticised HRBA for not having a coherent and consistent approach.[93] The development agency can claim to be using a rights-based approach provided the development projects conform to some extent with the principles of a HRBA. First, some applications of HRBA are particularly rights focused, leaning heavily on the legal instruments of human rights and therefore focusing development efforts on the duty bearer. Second, agencies will focus exclusively on the most marginalised elements of the population, thereby ignoring the importance of also strengthening the capacity of the duty bearer. Third, some approaches may favour a participatory approach focused on consultation and inclusion. And lastly, a development agency may choose to focus on indivisibility and interdependence, an approach that has drawn criticism for causing organisational paralysis as development organisations struggle with how to advance all rights.[94]

Development Programming in UNDP—Adding the Missing Link' (2001) <https://www.undp.org/sites/g/files/zskgke326/files/publications/HR_Pub_Missinglink.pdf> accessed 26 May 2023.

[92] Broberg and Sano (n 30) 669.

[93] Paul Nelson and Ellen Dorsey, *New Rights Advocacy: Changing Strategies of Development and Human Rights NGOs* (Georgetown University Press 2008) 92.

[94] Broberg and Sano (n 30) 672.

Whilst the lack of a singular approach to HRBA can be problematic in a development context, it represents an opportunity for NATO to apply HRBA differently across its three core tasks and the various levels of engagement. Whilst working with host nation security institutions and governments, in areas related to rule of law or impunity, NATO can lean heavily on the legal instruments in its approach and can work to strengthen the capabilities of the duty bearer. At the tactical level, NATO can utilise a participatory approach by engaging with the local population, and possibly implement initiatives focused on the most marginalised section of the host nation's population. As for indivisibility and interdependence, NATO can implement a project which seeks to address civil and political rights and social, economic, and cultural rights.

4.1.2 Systematic

The legal origins of the HRBA framework give the approach a systematic, logical, orderly, and transparent process to plan and conduct international development projects.[95] HRBA is powerful owing to the potential for wide application because a right does not change over time or from one location to another. The systematic nature of HRBA forces a shift in development programming from process and outputs to outcomes and impact.[96] My experience participating in NATO operational planning leads me to believe the systematic nature of HRBA could facilitate integration with NATO's planning process. NATO's planning process is systematic and methodical and is conducted following specific phases. For example, in phase 3 (Operational Estimate) of NATO Crisis Response Planning, the HRBA AD could identify which rights might be negatively affected by a planned activity. The HRBA AD would then identify ways to mitigate the impact of the action. If time and the security situation allowed for it, the HRBA AD could use a participatory approach and consult those

[95] Archer (n 36) 122; Schmitz (n 32) 534.
[96] ibid 534.

who would be impacted by the activity and develop a mitigation strategy together, which would be inserted into the next phase of the planning process.

To further illustrate the benefits of an HRBA AD in operational planning, I will draw on a personal example from my deployment on Operation SCULPTURE, as part of the British lead International Military Training Teams (IMATT) to Sierra Leone in 2001. This was not a NATO operation; however, it is not difficult to imagine for example, a similar task within NATO Mission Iraq (NMI). My task during the tour was to develop a list of people who should receive death benefits for family members killed in action (KIA) during the civil war. To accomplish the task, I travelled around the country with a small team conducting interviews and collecting 'proof' of an eligible relationship eg spouse, child, or other dependent, to the KIA soldier. Ultimately, I created a list and death benefit payments were made. The entire operation was planned and conducted without consulting the local population.

In this scenario, it is not difficult to imagine how a HRBA would change how the operation was conducted. During the early stages of planning, the HRBA AD would have identified the need to recognise the prospective claimants as rights holders and the state as the duty bearer; next an assessment of the rights holder's ability to claim the benefits should have occurred. Through engagement with the affected population the HRBA AD would have quickly learned most people were not able to provide the 'proof' (eg marriage certificate, birth certificate, or death certificate, of a relation) IMATT had requested. Through consultation, the HRBA AD could have identified other ways of establishing a basis for a claim. This information would have fed back into the planning cycle and a different set of criteria used to establish the relationship. Taking the example further, IMATT could have engaged with the duty holder to strengthen their ability to fulfil the rights. This is a critical change in perspective, in which (IMATT) empower, rather than disempower, the claimants by including them in

the design and implementation of the KIA benefit payment plan; and we support the duty holder in creating an enabling environment in which rights can be claimed. This approach has the additional benefit of giving legitimacy to and building trust in the government.

4.1.3 Levers of Influence

The legal authority from which HRBA derives its principles gives development programmes or projects legitimacy grounding their efforts in shared norms.[97] In relation to development work with the duty bearer, the HRBA framework establishes a range of mechanisms and tests which oblige governments to be more transparent and accountable to citizens, the effect of which is to give the government more legitimacy nationally and internationally. The legal underpinning and fundamental principles of HRBA directly influence how development work is done, putting the focus, even when working with the duty bearer, on the people.[98]

The levers of influence with the duty bearer (the state) which HRBA makes possible when conducting development work with governments, should be particularly attractive to NATO. NATO military personnel work closely with the host nation's national and regional governments, government institutions, security, and police forces. A good example of this is the NATO ISAF mission to Afghanistan. NATO was heavily involved with the Afghan Government, supporting government activities, and government institutions.[99] As discussed previously, through PRTs, NATO forces were also engaged in activities and decision-making at the provincial level.

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[97] ibid 525.

[98] Hanna Miller and Robin Redhead, 'Beyond "Rights-Based Approaches"? Employing a Process and Outcomes Framework' (2019) 23 Int J Hum Rights 707.

[99] NATO, 'ISAF Mission in Afghanistan (2001–2014)' <https://www.nato.int/cps/en/natohq/topics_69366.htm> accessed 26 May 2023.

4.1.4 Gender inequality

HRBA offers an opportunity to re-energise work on gender. The HRBA legal framework, particularly by including the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), incorporates a women's rights dimension. Through the principle of empowerment of the most vulnerable members of a population, there are several ways HRBA can be used to address the deep-rooted cultural causes of gender inequality. First, by undertaking a thorough analysis of why gender inequity is so pervasive; second, by challenging the existing power relationships and how they subordinate women; and finally, by challenging men to engage with women and treat women as rights holders rather than as passive recipients of aid.[100]

Given NATO's operationalisation of the WPS agenda and the criticism of its gender mainstreaming process thus far, NATO should welcome HRBA as an opportunity to re-engage with the WPS agenda. Incorporating a HRBA in the operational planning process has the potential to change NATO's perceptions and treatment of women in crisis-affected areas. By shifting the paradigm from a hyper-masculine militarised perspective which situates women as passive victims of crises to a rights-based paradigm focused on women as rights holders and on the principles of non-discrimination, inclusion, indivisibility, and participation, NATO can realign the implementation of the WPS agenda. Through implementing a HRBA to planning, NATO can change the gender mainstreaming narrative from one focused on operational effectiveness and benefit to the forces, to one which prioritises the recommendations and objectives of UNSCR 1325 and subsequent resolutions. HRBA could give NATO a second chance at integrating gender perspectives into planning, as intended in UNSCR 1325, by conducting a rights-based analysis.

[100] Michael Drinkwater, '"We Are Also Human": Identity and Power in Gender Relations' in Sam Hickey and Diana Mitlin (eds), *Rights-Based Approaches to Development Exploring the Potential and Pitfalls* (1st edn, Kumarian Press 2009) 157.

NATO's approach to gender mainstreaming and operationalisation of UNSCR 1325 and subsequent resolutions has been severely criticised by feminists for being diametrically opposed to the intent of the resolutions and objectives of the WPS agenda.[101] HRBA's legal framework, guiding principles, and the social norms on which HRBA is based should 'protect' the fundamental principles of HRBA from being militarised or weaponised.

4.2 Mainstreaming HRBA in NATO

NATO's implementation of the WPS agenda and gender mainstreaming process provides a useful template for implementing a human rights-based approach to NATO's planning process. First and foremost, HRBA mainstreaming in NATO should be led by civilian bodies; the policies, guidance, and implementation directives should originate from International Staff (IS) and/or the North Atlantic Council (NAC), not from military senior executive officers. Hardt's research highlights that many criticisms of NATO's implementation of the WPS agenda stem from it being driven by the military side of NATO's command structure.[102] Second, senior civilians, such as the Secretary General and other senior members of the NATO secretariat, should include rights-based language in speeches, press releases, and planning guidance.[103] The inclusion of rights-based language in official communiques begins the process of associating human rights language with NATO's strategic core task of crisis management and interventions in areas with gross human rights abuses.[104]

[101] Bastick and Duncanson (n 24) 554.
[102] Hardt and Von Hlatky (n 14) 141.
[103] ibid 142.
[104] In NATO, this process is often referred to as 'socialising', where a concept is introduced periodically, gradually the concept becomes more defined, and accepted.

After a period of socialisation, the next step would be to introduce a directive outlining the requirement to include human rights analysis during all phases of planning. This directive must articulate the requirements to create HRBA AD and HRBA FP (focal points) in all NATO headquarters; member states to develop a HRBA action plan; and to develop and deliver HRBA training to all forces prior to deployment. Once the advisor and focal point positions are established, a human rights situational awareness analysis tool is needed. The Universal Periodic Review (UPR) process offers an invaluable source of information for analysis, objective setting, and planning. For HRBA analysis, UPR submissions provide information on the current state of human rights, the host government's commitments vis-a-vis human rights, and what INGOs, NGOs and civil society organisations have said about a host nation's human rights record. The availability of country-specific information through the UPR process is a significant resource for conducting human rights analysis. To avoid the militarisation of HRBA, the final stage of mainstreaming must include robust monitoring and evaluation to ensure the fundamental principles of HRBA are applied throughout NATO's involvement in crisis management.

5 Conclusion

Seeking to answer the central research question — what is the desired operational effect of gender advisors in NATO? — this article has approached the question from distinct areas of study, all of which have converged on the strategic importance of gender mainstreaming to NATO. Previous studies evaluating the effectiveness of GENADs were focused on the operational and tactical levels, the same level I worked at during my career. These studies report significant resistance to GENADs and GFPs from male soldiers and officers.[105] Where they

[105] Hurley ME, 'Gendering NATO: Analysing the Construction and Implementation of the North Atlantic Treaty Organisation's Gender Perspective' (DPhil, Oxford Brookes University 2014)

report success, it is either from the point of view of the GENAD/GFP or from the NATO perspective. Very little evidence was found in the literature on the impact of NATO's implementation of UNSCR 1325 in terms of the aims or intent of the WPS agenda. This was expected, as it matches my personal experience of establishing GENADs and GFP in my unit. The strategic success, at least from a NATO perspective, of gender mainstreaming including the use of GENADs and GFPs, was unexpected. Key senior civilian positions, such as NCGP and NOGP have given NATO access to meetings, conferences, and other information-sharing venues with other ISOs, IOs, INGOs, and civil society networks.

The evolution of the Bi-SCD 40-001 is particularly interesting. Between 2009 and 2017, NATO appears to recognise the strategic potential of adopting the WPS agenda. Two significant changes occur between the two directives. First, the 2017 version incorporates more references to men and boys as part of the gender discussion. The inclusion of men in gender definitions ensures gender mainstreaming is made acceptable to male soldiers and officers at the operational and tactical level, who initially resisted gender mainstreaming because it was about women. Second, the focus is on framing gender mainstreaming and the role of GENADs in terms of enhanced

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https://radar.brookes.ac.uk/radar/items/9bf895af-5aa6-472c-90e7-3055183c3de3/1/hurley2014gendering.pdf; Wright K, 'Silences and Silos: NATO's Implementation of UNSCR 1325' (DPil, University of Surrey 2016) https://ideas.repec.org/p/osf/thesis/5cyng.html accessed 4 May 2022; Bastick M and Duncanson C, 'Agents of Change? Gender Advisors in NATO Militaries' (2018) 25 International Peacekeeping 554-577; Hurley M, 'The "Genderman": (re)negotiating Militarized Masculinities When "Doing Gender" at NATO' (2018) 4 Critical Military Studies 72; Hurley M, 'Watermelons and Weddings: Making Women, Peace and Security "Relevant" at NATO Through (Re)Telling Stories of Success' (2018) 32 Global Society: Journal of Interdisciplinary International Relations 436; and, Wright K, 'Challenging Civil Society Perceptions of NATO: Engaging the Women, Peace and Security Agenda' (2022) Cooperation and Conflict 1.

intelligence gathering, force protection, and operational success. In the 2021 version of Bi-SCD 40-001 the tone changed again, focusing more on the competitive advantage of gender mainstreaming. The 2021 version makes specific reference to GENADs as a military capability to be deployed and whose success must be exploited.[106] NATO appears to have become bolder in identifying gender mainstreaming efforts as self-serving, which makes NATO's adoption of the WPS agenda incompatible with the ideals and intent of UNSCR 1325. Given these findings, particularly those related to the 2021 version of the Bi-SCD 40-001, new research is required into NATO's implementation of the UNSCR 1325. Specifically, a feminist analysis of Bi-SCD 40-001 (2021) is needed to evaluate the extent of the gap between the ideals and intent of the WPS agenda and its progressive implementation by NATO.

Another question to consider is whether a HRBA AD could augment or replace GENADs as part of a Commander's advisory staff. In considering the intent and purpose of a HRBA to development, it would seem that HRBA mainstreaming represents the next logical step in NATO's process to align itself with other ISOs. Operationally and tactically, HRBA is likely to face less resistance than gender mainstreaming because human rights are less nuanced and contested than gender.[107] Human rights are codified in law and HRBA has a more robust legal framework than the WPS agenda.

HRBA planning is compatible with NATO's planning process. The lack of a definitive process for HRBA is a frequent criticism of the approach, however, for NATO, this represents a strength. Provided the tenets of the approach are adhered to, NATO could adapt the process as required.

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[106] NATO Bi-Strategic Command Directive 40-001 (2021) 15.

[107] The codification of rights norms in international law means rights are consistent from one country to another whereas the idea of gender changes from one culture to another. The enduring nature of rights simplifies the incorporation of a human rights analysis of a task or mission while the same is not true for gender considerations.

Even within the development sector, not all HRBA principles are adhered to all the time. The lack of a consistent human rights-based approach provides NATO with significant leeway in mainstreaming HRBA.

The possibility of mainstreaming HRBA in NATO is encouraging because including a HRBA AD in NATO's staff structure offers the opportunity to orient mission tasks and objectives to strengthen the capacity of the duty holder to fulfil human rights obligations and to conduct activities which support the rights holder's ability to claim and fully enjoy those rights. NATO can re-engage with the WPS agenda by applying the HRBA principles of participation, empowerment, non-discrimination, accountability, indivisibility and interdependence, while prioritising the rights of women in future operations.

International Unaccountability: The Normalisation of the Syrian Regime and its Impact on Refugee Protection

Taran Anna Kaur Cheema

Abstract

The failures of our international legal edifices to end atrocity crimes in Syria have paved the way for normalisation. This article considers the legal and political implications of normalisation with regimes like Bashar al-Assad's on refugee protection. It does so by demonstrating how states are exploiting the trend of normalisation and the implicit suggestion that Syria is safe to erect illegal refugee return practices. It closely examines the security situation in Syria that precludes refugee returns in accordance with International Refugee Law and concludes that normalisation is placing Syrian refugees in an increasingly vulnerable position. Centring the priorities of the Syrian community is the principal component to achieving meaningful accountability in Syria. Insofar as most Syrians are unwilling to return to a Syria ruled by Assad and continue to demand a political transition, opposing normalisation should be one of these priorities. Failing to do so poses a serious challenge to ongoing accountability efforts. This article argues that normalisation will affect the strength of the international refugee protection regime by encouraging short-sighted return policies and beyond the Syrian context, is likely to contribute to broader disrespect for international laws and global norms. Ultimately, although normalisation with Assad has a myriad of concerning implications, particularly on the force and leverage of international law, this article identifies that its most imminent threat is to the safety of Syrian refugees.

1 Introduction

The Syrian regime[1] is said to be responsible for some of the worst crimes against humanity in modern political history. And yet Syria's President, Bashar al-Assad, has enjoyed complete impunity.[2] The conflict in Syria emerged as a test; a test of the strength and efficacy of our international justice system, and a test of the international community's ability to deliver accountability for atrocity crimes. An examination of the last twelve years demonstrates that 'the international community largely failed this test.'[3]

Driven by war fatigue and innumerable failures to deliver justice and end gross human rights violations in Syria, many states appear resigned to the inevitability of the Syrian regime's survival.[4] This has paved the way for the deepening of political and economic cooperation between the Syrian regime and other regional states, widely referred to in political commentary and discourse as 'normalisation.' Normalisation of the Syrian regime has generated much criticism, and the fear that 'failing to hold the Syrian government accountable for abuses would legitimise authoritarianism and destabilise the country and the region.'[5] This fear is compounded by the fact that the Syrian regime's crimes continue to this day. In 2023, the Independent International

[1] This paper refers to the present and central Syrian government as the 'Syrian regime'. The United Nations and its agencies use the term 'the Syrian government'. Other referenced materials for this paper may use the term 'Assad regime' as synonymous with the Syrian regime.

[2] Wolfgag Kaleck and Patrick Kroker, 'Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?' (2018) 16(1) JICJ 165, 166.

[3] Beth Van Schaak, *Imagining Justice for Syria* (OUP 2020) 14.

[4] Burcu Ozcelik, 'Normative Costs of Normalizing Al-Assad' (*Carnegie Endowment for International Peace*, 1 December 2022) <https://carnegieendowment.org/sada/88528> accessed 26 March 2023.

[5] The Tahrir Institute for Middle East Policy, 'TIMEP Brief: Normalization of the Syrian Regime' (13 May 2019) <https://timep.org/2019/05/13/timep-brief-normalization-of-the-syrian-regime/> accessed 27 May 2023.

Commission of Inquiry on the Syrian Arab Republic (COI) reports 'continuing patterns of crimes against humanity and war crimes'[6] related to torture and ill-treatment in detention, including practices causing death in detention, as well as arbitrary detention and enforced disappearances.

Normalisation has created uncertainty and confusion among stakeholders, policymakers and other key actors. Despite ample evidence to the contrary, the international community has slowly begun to espouse the narrative that 'Syria is safe' for the return of Syrian refugees.[7] Failures to accurately report the threats facing Syrian returnees has contributed to a rise in anti-refugee policies and sentiment. As a result of the international community's failure to act in Syria, we have seen a growing disrespect for the international legal framework and specifically, the global refugee protection regime. This article aims to demonstrate how the normalisation of regimes such as Assad's is likely to increase the risk of forced refugee returns that may violate International Refugee Law.

Normalisation is an increasingly important part of the discourse of accountability in Syria. This article asks what normalisation with Assad means for accountability and for the political resolution that Syrians

[6] United Nations General Assembly, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (7 February 2023) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/010/21/PDF/G2301021.pdf?OpenElement>; United Nations General Assembly, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (17 August 2022) <https://digitallibrary.un.org/record/3987490?ln=en> both accessed 27 May 2023.

[7] Alica Medina, '"Syria is safe, refugees should return": The dangers of the growing narrative' (*Syria Direct*, 29 June 2021) <https://syriadirect.org/syria-is-safe-refugees-should-return-the-dangers-of-the-growing-narrative/#:~:text=According%20to%20a%20SACD%20study,persecution%20for%20returnees%20is%20real> accessed 27 May 2023.

continue to call for. Accountability and justice efforts for Syria must prioritise the demands of Syrian civil society, survivors, victims, displaced populations, and other actors in order to be meaningful and lasting. As a result of the international community's failure to act in Syria, we have seen a growing disregard for the international legal framework beyond the Syrian context and specifically, for the global refugee protection regime. This article maintains that despite a host of concerning legal implications associated with normalisation, the most imminent threat is to the safety of Syrian refugees.

Section 2 defines normalisation in the Syrian context. It examines the trajectory of normalisation over the last five years and identifies a shift from symbolic acts to more substantial actions that qualify the rising threat to refugee protection. Section 3 demonstrates how normalisation with the Syrian regime has impacted refugee protection and the increasing vulnerability of Syrian refugees. This section examines the substantive requirements that govern refugee returns as per international law. It finds that the security situation in Syria makes it clear that any return policy or practice would violate the international legal obligations of states under the Refugee Convention.[8]

Section 4 will situate the discussion of normalisation within the larger discourse regarding accountability in Syria. It evaluates current accountability routes and the remarkable role of Syrian actors in ongoing transitional justice processes. It argues that understanding how we can achieve accountability requires prioritising Syrian voices. Section 4 concludes by drawing the connection between normalisation and a broader growing disregard for international norms.

[8] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

2 The Problem of Normalisation

2.1 Defining Normalisation

The process of normalisation has become important to our understanding of the protracted conflict in Syria and critical to our imagining of the future for Syria. Visoka and Lemay-Hébert argue that implicit studies related to normalisation in international politics are scarce, and therefore the term is often subject to semantic debate.[9] The vocabulary of normalisation has often been used interchangeably with concepts of recovery, reconstruction, order, peace, and safety.[10] Existing accounts in world politics frame normalisation as analogous with peacekeeping, state-building, and humanitarian assistance. In these cases, invocations of normalcy and normalisation are neutral and objective, uninfluenced by political dynamics. Visoka and Lemay-Hébert maintain that this conceptualisation negates the political dynamics behind discourses of normalisation.[11]

This article supports this hypothesis and evidences how normalisation can be a prerequisite for strategic political relationships, by demonstrating how rapprochement with Assad is enabling various governments to capitalise on situations that could yield both sides economic or political benefits.[12] "Political discourse" concerning Syria is a valuable lens through which to contribute to recent academic debates that cite a shift from the term's past association with a 'good and desired state of affairs'[13] to its current relegation as a means to strengthen the legitimacy of an authoritarian regime.

[9] Gëzim Visoka and Nicolas Lemay-Hébert, *Normalization in World Politics* (University of Michigan Press 2022) 2.
[10] ibid 4.
[11] ibid.
[12] ibid 149.
[13] ibid 2.

The concept of normalisation discussed in this article more closely resembles the latter association. Normalisation throughout this article, refers to a process, as opposed to a 'fixed destination',[14] one that is at odds with the safe and voluntary return of Syrian refugees. Normalisation with the Syrian regime encapsulates many political phenomena and is happening on different levels.[15] The following analysis takes as its point of departure the characterisation of normalisation as cooperation with the Syrian regime. This article does not have the scope to examine all normalisation gestures. Instead, it focuses on instances of regional and international normalisation efforts that can be characterised as economic, diplomatic, or security-based approaches initiated by political actors.

2.2 Normalisation of the Syrian Regime

[14] Frederick Z Brown, 'Cuba, Vietnam and Normalisation' (*SSRC*, April 2015)1 <https://www.american.edu/centers/latin-american-latino-studies/upload/2015-au-ssrc-brown-cuba-vietnam-and-normalization-final.pdf> accessed 27 May 2023.

[15] For example, there is an increasing use of light-toned language: a shift from usage of 'the Syrian regime' to the 'Syrian government'. Furthermore, there is an increase of travel influencers entering Syria after a security clearance from Syria's General Intelligence Directorate. These visits are supervised by a regime affiliated tour to ensure that influencers project the image of Syria that the regime wants. Scholars have accused them of 'whitewashing crimes' and normalising the Syrian regime. Hussam al-Mahmoud, 'How EU officials' visits to Syria give share in "Illusion Building"' (*Enab Baladi*, 20 September 2022) <https://english.enabbaladi.net/archives/2022/09/how-eu-officials-visits-to-syria-give-share-in-illusion-building/> accessed 27 May 2023; Zaman al-Wasl, 'The Influencers "Whitewashing" Assad Regime Despite War Crimes' (*The Syrian Observer*, 18 August 2022) <https://syrianobserver.com/features/78180/the-influencers-whitewashing-assad-regime-despite-war-crimes.html> accessed 27 May 2023; Sophie Fullerton, 'Influencers are whitewashing Syria's regime with help from sponsors' (*The Washington Post*, 8 August 2022) <https://www.washingtonpost.com/opinions/2022/08/08/travel-influencers-whitewash-syrian-war/> accessed 27 May 2023.

Twelve years after the outbreak of the Syrian conflict, Syria is still mired in low-level conflict, political instability, human rights violations, civil society repression, and poverty.[16] The human rights abuses common before 2011, have only been exacerbated by the war. Despite this, international punitive isolation has developed into 'step by step'[17] diplomacy.

There is a general consensus amongst scholars and critics of the regime that normalisation has 'been tacit and continues to increase incrementally.'[18] Normalisation efforts were set into motion in 2018 when the United Arab Emirates (UAE) and Bahrain reopened their embassies in Damascus.[19] Shortly after this, several other countries in the region, including, Egypt, Jordan, Sudan, Bahrain and Oman undertook tentative public cooperation with Syria.[20] These actions can

[16] United Nations General Assembly, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2022) (n 6).

[17] In addressing the Security Council in December 2021, UN special envoy, Geir Perderson endorsed normalisation as a viable approach to securing a meaningful political solution in Syria: 'political and economic steps are needed—and that these can really only happen together—step-by-step, step-for-step'. United Nations Special Envoy for Syria Geir O Pedersen, 'Briefing to the Security Council on Syria' (26 January 2022) 2 <https://reliefweb.int/report/syrian-arab-republic/united-nations-special-envoy-syria-geir-o-pedersen-briefing-security-11> accessed 27 May 2023.

[18] Joe Macaron, 'The Muted Arab Attempt to Restore Influence in Syria' (*Arab Centre Washington DC*, 18 March 2020) <https://arabcenterdc.org/resource/the-muted-arab-attempt-to-restore-influence-in-syria/> accessed 27 May 2023.

[19] 'UAE reopens Damascus embassy after seven years' (Aljazeera, 28 December 2018) <https://www.aljazeera.com/news/2018/12/28/uae-reopens-damascus-embassy-after-seven-years> accessed 12 June 2023.

[20] For example, Ali Mamlouk, security advisor to Assad, undertook an unofficial visit to Egypt in 2016, there was a meeting between Syrian and Jordanian officials to discuss cross-border trade and Sudanese President Omar al-Bashir visited Syria. In 2019, Jordan appointed a charge d'affaires to its Damascus embassy, and in 2020, Oman reinstated its ambassador to

be said to have been purely symbolic gestures, however, recent developments are indicative of a more meaningful shift. In 2021, Syria's return to the Arab fold accelerated substantially. Several moves towards normalisation from key regional actors, such as the United Arab Emirates and Saudi Arabia, attracted global concern, prompting discussions about its potential legal implications.[21] In May 2021, a Saudi delegation led by intelligence chief General Khaled Humaidan

Damascus. 'Syria spy chief in Egypt to discuss "Assad support"' (*The New Arab*, 17 October 2016) <https://www.newarab.com/news/syria-spy-chief-egypt-discuss-assad-support> accessed 27 May 2023; 'Sudan's Bashir first Arab leader to visit Syria since war began' (*Aljazeera*, 17 December 2018) <https://www.aljazeera.com/news/2018/12/17/sudans-bashir-first-arab-leader-to-visit-syria-since-war-began> accessed 27 May 2023; Giorgio Cafiero, 'Jordan makes a U-turn to reintegrate Syria into the regional fold' (*TRT World*, 4 October 2021) <https://www.trtworld.com/opinion/jordan-makes-a-u-turn-to-reintegrate-syria-into-the-regional-fold-50469> accessed 27 May 2023; 'Oman Becomes First Gulf state to reinstate ambassador in Syria' (*Aljazeera*, 5 October 2020) <https://www.aljazeera.com/news/2020/10/5/oman-becomes-first-gulf-state-to-reinstate-ambassador-in-syria> accessed 27 May 2023.

[21] Further developments included the Nassib-Jordan border crossing between Syria and Jordan being reopened, and a meeting between the respective Egyptian and Syrian Foreign Minister during the United Nations General Assembly in September. Following this, Jordanian leader King Abdullah took an official phone call with Assad and UAE Foreign Minister met Assad in Damascus. 'Jordan says Jaber-Nassib border crossing with Syria will reopen this week' (*The New Arab*, 27 September 2021) <https://www.newarab.com/news/jordan-announces-reopening-border-crossing-syria> accessed 27 May 2023; Suleiman Al-Khalidi, 'Jordan's Abdullah receives first call from Syria's Assad since start of conflict' (*Reuters*, 3 October 2021) <https://www.reuters.com/world/middle-east/jordans-abdullah-receives-first-call-syrias-assad-since-start-conflict-2021-10-03/> accessed 27 May 2023; Kareem Chehayeb, 'UAE foreign minister meets Syria's Assad in Damascus' (*Aljazeera*, 10 November 2021) <https://www.aljazeera.com/news/2021/11/9/uae-foreign-minister-visits-damascus-set-to-meet-president-assad> accessed 27 May 2023.

visited Damascus, hinting at the thawing of relations between regional adversaries.[22]

In 2011, in a move to reprimand the regime for its violations of its Arab League resolutions, and the rights of the Syrian people, Syria's membership in the Arab League was suspended.[23] Over the last twelve years, scholars have maintained that Saudi Arabia is the 'main obstacle to Assad's rehabilitation in the Middle East'.[24] Yet in April 2023, Syrian Foreign Minister, Faisal Mekdad travelled to Jeddah to discuss 'efforts to reach a political solution to the Syrian crisis…and the return of Syrian refugees to their homeland'.[25] This was the first visit of its kind in more than a decade and it came days before an Arab foreign Ministers' meeting that discussed Syria's possible return to the Arab League.[26] On 7 May 2023, Arab leaders agreed to readmit Syria, ending

[22] Martin Chulov, 'Meeting between Saudi and Syrian intelligence chiefs hints at detente' *The Guardian* (London, 4 May 2021) <https://www.theguardian.com/world/2021/may/04/meeting-between-saudi-and-syrian-intelligence-chiefs-hints-at-detente> accessed 27 May 2023.

[23] Neil MacFarquhar, 'Arab League Votes to Suspend Syria Over Crackdown' *The New York Times* (12 November 2022) <https://www.nytimes.com/2011/11/13/world/middleeast/arab-league-votes-to-suspend-syria-over-its-crackdown-on-protesters.html> accessed 27 May 2023.

[24] Aron Lund, 'After Syria earthquake, Saudi Arabia is linchpin to Assad's normalization' (*Al-Monitor*, 22 February 2023) <https://www.al-monitor.com/originals/2023/02/after-syria-earthquake-saudi-arabia-linchpin-assads-normalization> accessed 1 March 2023.

[25] Saudia Arabia Foreign Ministry Government Account (KSAmofaEN), 'Vice Minister of Foreign Affairs H.E. receives Minister of Foreign Affairs and Expatriates of Syria Dr Faisal Mekdad upon his arrival at King Abdulaziz Airport' (*Twitter*, 12 April 2023) <https://twitter.com/KSAmofaEN/status/1646157720955789314> accessed 13 April 2023.

[26] Samer Al-Atrush, 'Saudia Arabia hosts foreign minister for first time since civil war' *Financial Times* (London, 12 April 2023) <https://www.ft.com/content/7ba0dfcd-efb2-4a13-b72c-17fdf2a6c1fa>

the 12-year suspension and consolidating regional efforts to normalise ties. The readmittance of Syria into the Arab League is perhaps the most significant move in the trend of normalisation and a tangible move towards the end of Assad's regional isolation.

The 'normalisation momentum'[27] across the region is having a catalytic effect on Europe. On the 13th of September 2022, the United Nations High Commissioner for Refugees (UNHCR), Filippo Grandi, met with Syrian Foreign Minister in Damascus to discuss the UNHCR's programs in Syria.[28] He was joined by Head of the EU Delegation to Syria, Dan Stoenescu.[29] This visit was authorised despite the EU's own agreement, drawn up in 2021, that prohibited any diplomatic engagement with the Syrian regime.[30]

The 2023 Syria-Türkiye earthquake appears to have provided a platform for states interested in normalisation to accelerate a trend already in the making. After the earthquake, delegations from the UAE, Jordan and Egypt visited Damascus and messages of solidarity from other Arab leaders were received through a series of official phone

accessed 12 April 2023.

[27] Mattia Serra, 'Syria's Normalization Momentum' (*Italian Institute for International Political Studies*, 10 December 2021) <https://www.ispionline.it/en/publication/syrias-normalization-momentum-32594> accessed 27 May 2023.

[28] Mazen Eyon, 'Mikdad, Grandi discuss UNHCR's programs in Syria' (*SANA*, 13 September 2022) <https://sana.sy/en/?p=283684> accessed 27 May 2023.

[29] 'EU Supports Safe, Dignified Return of Syrian Refugees: Dan Stoenescu' (*The Syrian Observer*, 15 September 2022) <https://syrianobserver.com/news/78750/eu-supports-safe-dignified-return-of-syrian-refugees-dan-stoenescu.html> accessed 27 May 2023.

[30] European Parliament Resolution of 11 March 2021 on the Syrian conflict – 10 years after the uprising [2021] OJ C 474/130<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021IP0088> accessed 27 May 2023.

calls.[31] Whilst most of this diplomatic activity has come from states that have already started normalisation with Assad, many critics of the regime argue that Assad exploited the humanitarian situation and manipulated the need for earthquake relief in order to advance his normalisation agenda.[32] Following the earthquake, Grandi conducted a five-day visit to Syria, meeting with Assad in Damascus to discuss the humanitarian response to the earthquake.[33]

In March 2023, a Bipartisan Policy Letter addressed to President Joe Biden and Secretary of State Antony Blinken criticised the administration's silence in response to accelerating normalisation of diplomatic ties with Assad.[34] The letter, signed by US officials, experts, humanitarian professionals and civil society actors, stated that accountability and war crimes investigations must remain a priority. The EU have reiterated its rejection of any normalisation with Assad and explained their meetings as having humanitarian purpose only.[35]

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[31] Hèlène Sallon, 'Bashar Al-Assad, expert in disaster diplomacy' (*Le Monde*, 6 March 2023) <https://www.lemonde.fr/en/opinion/article/2023/03/06/bashar-al-assad-expert-in-disaster-diplomacy_6018362_23.html> accessed 27 May 2023.

[32] Kadir Üstün, 'The debate over normalization with the Assad regime in Washington' (SETA, 29 March 2023) <https://www.setav.org/en/the-debate-over-normalization-with-the-assad-regime-in-washington/> accessed 27 May 2023; Sallon (n 31); Charles Lister, 'Syria's Earthquake Victims Are Trapped by Assad' (*Foreign Policy*, 7 February 2023) <https://foreignpolicy.com/2023/02/07/syria-earthquake-aid-assad/> accessed 9 February 2023; Lund (n 23).

[33] 'Step up support to Syria-Türkiye earthquake survivors: UN; refugee chief' (*UN News*, 13 March 2023) <https://news.un.org/en/story/2023/03/1134502> accessed 15 March 2023.

[34] Foundation for Defence of Democracies, 'Lawmakers, Former Top Officials Offer Bipartisan Rebuke of Biden's Syria Policy' (27 March 2023) <https://www.fdd.org/analysis/2023/03/27/lawmakers-former-top-officials-offer-bipartisan-rebuke-of-bidens-syria-policy/> accessed 30 March 2023.

[35] Saaed Abdulrazek, 'EU Reiterates Refusal to Normalize Ties with Syrian Regime' *(Asharq Al-Awsat*, 5 February 2023)

However, the optics of political acceptance have real consequences. They may influence public opinion through the implicit suggestion that Syria is safe, which could increase the risk of forced refugee returns. These meetings promote continued normalisation and grant Assad the opportunity to re-establish the regime's regional and international legitimacy.

In the wake of Assad's return the Arab League, the international community must assert their commitment to the human rights regime by calling for the Syrian regime to cease atrocity crimes altogether. States must assert that any normalisation is contingent on the Syrian regimes' support of United Nations Security Council Resolution 2254.[36] In June 2012, representatives of the international community agreed on a political solution to the conflict in Syria.[37] This was to be achieved through a Syrian-led- and owned political transition to a pluralistic, democratic Syria.[38] In 2015, the United Nations Security Council (UNSC) unanimously adopted Resolution 2254, which marked a moment of international opposition to the normalisation or rehabilitation of the Syrian regime.[39] Over time,

<https://english.aawsat.com/home/article/4138616/eu-reiterates-refusal-normalize-ties-syrian-regime> accessed 27 May 2023.

[36] UNSC Resolution 2254 (18 December 2015) <https://digitallibrary.un.org/record/814715?ln=en> accessed 27 May 2023.

[37] UNSC, 'Final communiqué of the Action Group for Syria - Identical letters dated 5 July 2012 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council' (6 July 2012) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/407/87/PDF/N1240787.pdf?OpenElement> accessed 27 May 2023.

[38] Muriel Asseburg, Wolfram Lacher and Mareike Transfeld, 'Mission Impossible? UN Mediation in Libya, Syria and Yemen' (2018) Stiftung Wissenschaft und Politik German Institute for International and Security Affairs SWP Research Paper 8/36 <https://www.swp-berlin.org/publications/products/research_papers/2018RP08_Ass_EtAl.pdf> accessed 27 May 2023.

[39] UNSC Resolution 2254 (18 December 2015).

international agreements calling for political reform were obstructed by increasingly complex conflict dynamics. Both Russia and the US respectively convinced the regime and the opposition that Syria could be won through military intervention.[40] As foreign military involvement escalated and a complex pattern of alliances emerged, it became increasingly clear that the Syrian regime was unlikely to engage genuinely in the process endorsed by the UNSC. Consequently, the international agreements lost gravitas. *The resolution demands not only a political solution, but the release of arbitrarily detained persons and* that all parties cease human rights violations and comply with their obligations under international law.[41] In order to prevent normalisation, the international community can use tools at their disposal. They must work to achieve the political transition called for in UNSC Resolution 2254.

Although this article will not analyse the motivations behind each state's reengagement with the Syrian regime, there are various factors, particularly the regional security situation and shared threat perceptions, that are potential push factors. In particular, the desire to limit Iran's regional influence and the need for regional stability.[42] Other motivations include the 'prospects of profiting from investment opportunities in the reconstruction of Syria,'[43] combating drug smuggling, and containing regional Islamist movements.[44] The importance of illustrating these interests is to demonstrate that, against the landscape of normalisation, negotiating the safe and voluntary

[40] Asseburg, Lacher and Transfeld (n 37).
[41] UNSC Resolution 2254 (18 December 2015).
[42] Muriel Asseburg and Sarah Charlotte Henkel, 'Normalisation and Realignment in the Middle East' (*SWP Berlin*, 28 July 2021) <https://www.swp-berlin.org/en/publication/normalisation-and-realignment-in-the-middle-east> accessed 27 May 2023 6.
[43] ibid 4.
[44] 'IntelBrief: The United Arab Emirates Engages Assad' (*The Soufan Center*, 16 November 2021) <https://thesoufancenter.org/intelbrief-2021-november-16/> accessed 27 May 2023.

return of Syrian refugees is becoming more complicated. Opening up to Damascus is becoming more compelling to Syria's neighbours due to their increasing economic interests. It seems that as a result, the interest and safety of Syrian refugees is competing with other domestic priorities. Lebanon and Jordan, countries that host respectively the highest and second highest share of refugees per capita globally,[45] have unveiled plans to repatriate refugees. This is not only to the detriment of refugee safety, but also to the possible benefit of both countries' domestic political pressures and economic infrastructures.[46] Since 2019 Lebanese Lira has lost 90% of its value and more than 80% of Lebanon's population have been pushed below the poverty line.[47] With living costs increased by 600%,[48] the Lebanese population has been deprived of basic rights to electricity, public services, healthcare, education.[49] Critics highlight that it is becoming common for Lebanese politicians to argue that Syrian refugees are an economic

[45] UNHCR, 'Factsheet: Lebanon 2023' <https://reporting.unhcr.org/document/4449> accessed 12 April 2023; UNHCR, 'Jordan' <https://www.unhcr.org/uk/countries/jordan> accessed 10 April 2023.

[46] Nohad Topalian, 'Lebanon releases plan for Syrian refugees' return' (30 July 2020) <https://almashareq.com/en_GB/articles/cnmi_am/features/2020/07/30/feature-01> accessed 27 May 2023.

[47] United Nations General Assembly, 'Visit to Lebanon Report of the Special Rapporteur on extreme poverty and human rights, Olivier De Schutter' (11 April 2022) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/306/19/PDF/G2230619.pdf?OpenElement> 27 May 2023.

[48] Human Rights Watch, 'Lebanon: Electricity Crisis Exacerbates Poverty, Inequality' (9 March 2023) <https://www.hrw.org/news/2023/03/09/lebanon-electricity-crisis-exacerbates-poverty-inequality> accessed 11 April 2023.

[49] Human Rights Watch, 'World Report 2022: Lebanon' (2022) <https://www.hrw.org/world-report/2022/country-chapters/lebanon#:~:text=More%20than%2080%20percent%20of,according%20to%20the%20United%20Nations> accessed 11 April 2023.

burden.[50] Since 2011, Jordan's GDP growth has averaged 2%annually,[51] and studies show that hosting refugees has put additional pressure on Jordan's public services and the labour market.[52] Both Jordan and Lebanon have suffered economically over the last decade. The worsening economic situation in both countries combined with public figures using Syrian refugees as scapegoats to divert attention away from their economic failures has caused increasing social unrest.[53] It can be argued that such host countries, are encouraging refugee returns in order to alleviate domestic political pressures and perceived strain on public infrastructure, housing and livelihoods.

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[50] Cathrine Brun and Ali Fakih, 'Debunking the dangerous myth that refugees are an economic burden in Lebanon' (*The New Humanitarian*, 26 September 2022) <https://www.thenewhumanitarian.org/opinion/2022/09/26/Syrian-refugees-Lebanon-economics> accessed 12 April 2023. Also see, 2021 report from the World Refugee and Migration Council shows that the steady collapse of Lebanon's economy predates the arrival of Syrian refugees. It concludes that due to the presence of Syrian refugees, Lebanon's economy has benefitted from substantial international aid. Cathrine Brun and others, 'The Economic Impact of the Syrian Refugee Crisis in Lebanon What It Means for Current Policies' (World Refugee and Migration Council Research Report, September 2021) <https://wrmcouncil.org/publications/research-paper/the-economic-impact-of-the-syrian-refugee-crisis-in-lebanon-what-it-means-for-current-policies/> accessed 10 April 2023.

[51] World Bank, 'GDP growth (annual %)—Jordan' <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=JO> accessed 11 April 2023.

[52] Hamzah Khawaldah and Nidal Alzboun, 'Socio-economic and environmental impacts of Syrian Refugees in Jordan: A Jordanian's perspective' (2022) 8 Heliyon <https://www.cell.com/heliyon/fulltext/S2405-8440(22)01293-2?_returnURL=https%3A%2F%2Flinkinghub.elsevier.com%2Fretrieve%2Fpii%2FS2405844022012932%3Fshowall%3Dtrue> accessed 11 April 2023.

[53] Kelly Petillo, 'From aid to inclusion: A better way to help Syrian refugees in Türkiye, Lebanon, and Jordan' (*European Council on Foreign Relations*, 31 January 2023) <https://ecfr.eu/publication/from-aid-to-inclusion-a-better-way-to-help-syrian-refugees-in-T%C3%BCrkiye-lebanon-and-jordan/> accessed 27 February 2023.

Normalisation may contribute to further human rights abuses in Syria.[54] Ben Taub argues that 'nowhere has the supposed deterrent of eventual justice proved so visibly ineffective as in Syria'.[55] According to the Syrian Network for Human Rights (SNHR), over 135,253 people are still forcibly detained, having been arrested since March 2011.[56] Normalisation validates the habitual methods of the regime and allows the continuing unravelling of the rule of law in Syria. Evidence from Syrians living under regime-control supports this conclusion: 'respondents were more than twice as likely to state that Syrian regime behaviour had worsened rather than improved.'[57] Normalisation indicates to the Syrian regime that it has emerged triumphant and can engage with the international community without any changes in behaviour or reform.[58]

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[54] National Coalition of Syrian Revolution and Opposition Forces, 'SOC: Assad Regime Won't Change its Behaviour as it Lives Off Terrorism' (23 June 2022) <https://en.etilaf.org/all-news/news/soc-assad-regime-wont-change-its-behavior-as-it-lives-off-terrorism> accessed 27 May 2023.

[55] Ben Taub, 'Does Anyone in Syria Fear International Law?' (*The New Yorker*, 31 August 2016) <https://www.newyorker.com/news/news-desk/does-anyone-in-syria-fear-international-law> accessed 27 May 2023.

[56] Syrian Network for Human Rights, 'On the 12th Anniversary of the Popular Uprising: A Total of 230,224 Civilians Documented as Dead, including 15,275 Who Died due to Torture, 154,871 Arrested and/or Forcibly Disappeared, and Roughly 14 Million Syrians Displaced' (15 March 2023) <https://reliefweb.int/report/syrian-arab-republic/12th-anniversary-popular-uprising-total-230224-civilians-documented-dead-including-15275-who-died-due-torture-154871-arrested-andor-forcibly-disappeared-and-roughly-14-million-syrians-displaced accessed 18 March 2023.

[57] Syrian Association for Citizens' Dignity (SACD), 'Normalisation of Horror, Security and Living Conditions in Assad-Held Syria' 31 (17 August 2021) <https://syacd.org/wp-content/uploads/2021/08/Normalisation_of_Horror.pdf> accessed 27 May 2023.

[58] Asseburg and Henkel (n 41).

3 The Impact of Normalisation on Refugee Protection

3.1 The International Political Context

Since August 2021, the Taliban has seized control of Afghanistan, Russia started its aggression against Ukraine, Iran responded to anti-regime protests with excessive and lethal force, and torrential rain and flooding affected 33 million people in Pakistan.[59] The combination of these events has contributed to the speed and scale of forced displacement,[60] outpacing any long-term solutions for refugees. In 2022, EU Member States recorded a 64% increase in detections of irregular border crossings and a 46% increase in asylum applications.[61] This recent surge in migration has raised political tensions across Europe leading to an increase in anti-refugee sentiment and a drift towards the far-right.[62] In response, many European countries have

[59] Human Rights Watch, 'World Report 2022: Events of 2021' (2022) <https://www.hrw.org/sites/default/files/media_2022/01/World%20Report%202022%20web%20pdf_0.pdf> accessed 10 April 2023; Human Rights Watch, 'World Report 2023: Events of 2022' (2023) <https://www.hrw.org/sites/default/files/media_2023/01/World_Report_2023_WEBSPREADS_0.pdf> accessed 10 April 2023.

[60] UNHCR, Press Release, 'Global displacement hits another record, capping decade-long rising trend' (16 June 2022) <https://www.unhcr.org/mx/news/unhcr-global-displacement-hits-another-record-capping-decade-long-rising-trend> accessed 10 April 2023.

[61] International Centre for Migration Policy Development, 'ICMPD Migration Outlook 2023' (2023) <https://www.icmpd.org/file/download/58952/file/ICMPD_Migration_Outlook_2023.pdf> accessed 10 April 2023.

[62] Anna Bailey-Morley and Claire Kumar, 'The rise of the far right in Denmark and Sweden—and why it's vital to change the narrative on immigration' (*Overseas Development Institute*, 14 December 2022) <https://odi.org/en/insights/the-rise-of-the-far-right-in-denmark-and-sweden-and-why-its-vital-to-change-the-narrative-on-immigration/and> accessed 7 March 2023.

adopted a tougher line on immigration, prioritising short-term strategies and allowing the root causes of displacement to go unaddressed.[63] The last few years have seen a diminished respect for migrant and refugee rights across Europe, with increased violations of refugee rights with very few repercussions.[64]

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[63] The UK has recently introduced the Illegal Immigration Bill. In public statements, the UNCHR and the Equality and Human Rights Commission noted that the Bill, if passed, would breach the UK's obligations under international law and would amount to an asylum ban—extinguishing the right to seek refugee protection in the United Kingdom for those who arrive irregularly, no matter how compelling their claim may be.
Illegal Migration Bill HC 284 (2022–2023), Equality and Human Rights Commission, 'Statement following the announcement of the Illegal Migration Bill' (7 March 2023) <https://www.equalityhumanrights.com/en/our-work/news/statement-following-announcement-illegal-migration-bill> accessed 10 March 2023; UNHCR, 'Statement on the Illegal Migration Bill' (7 March 2023) <https://www.unhcr.org/uk/news/statement-uk-asylum-bill> accessed 10 March 2023; UNHCR, 'Legal observations on the Illegal Migration Bill' (2 May 2023) <https://www.unhcr.org/uk/media/unhcr-legal-observations-illegal-migration-bill-02-may-2023> accessed 27 May 2023.

[64] Including but not limited to: States increasingly using border violence to circumvent their obligations. The practice of pushbacks of men, women and unaccompanied children, executed on land and sea to unsafe countries, are becoming more common. Asylum seekers and refugees are being detained in abusive and brutal detention centres that by no means reach the UN international standards. Refugees are routinely denied access to asylum processes, and countries are preventing rescues at sea, and criminalising those who attempt it. Border Monitoring Violence Network, 'The Black Book of Pushbacks: Volume I' (December 2020) <https://acrobat.adobe.com/link/track?uri=urn%3Aaaid%3Ascds%3AUS%3A3f809f15-bada-4d3f-adab-f14d9489275a&viewer%21megaVerb=group-discover> accessed 27 May 2023; Human Rights Watch, 'Frontex Failing to Protect People at EU Borders: Stronger Safeguards Vital as Border Agency Expands' (23 June 2021) <https://www.hrw.org/news/2021/06/23/frontex-failing-protect-people-eu-borders> accessed 27 May 2023; Giorgos Christides and others, 'EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign' (*Spiegel International*, 23 October 2020)

The Mixed Migration Centre uses the term 'scandalously extreme'[65] to describe the divergence between the stated value systems of these countries and their migration policies.[66] In the face of large-scale migration, it appears that European states are rushing to reinforce their collective and individual borders by any means necessary. This political landscape is crucial to understanding how normalisation with the Syrian regime is likely to accelerate this trajectory and endanger Syrian refugees. The latest asylum trends show that applications for asylum in the EU from Syrian refugees rose by 74% between January 2022 and January 2023.[67] Governments such as Poland, Hungary, Greece, Cyprus, Austria, and Italy have all called for policy changes that align

<https://www.spiegel.de/international/europe/eu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7?utm_source=dlvr.it&utm_medium=twitter#ref=rss> accessed 27 May 2023; United Nations Human Rights Council, 'Report of the Independent Fact-Finding Mission on Libya' (1 October 2021) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/355/67/PDF/G2135567.pdf?OpenElement> accessed 27 May 2023; OHCHR, '"Lethal Disregard" Search and rescue and the protection of migrants in the central Mediterranean Sea' (May 2021) <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf> accessed 27 May 2023; Amnesty International, 'Greece: humanitarian workers' lives remain on hold as trial is adjourned' (18 November 2021) <https://www.amnesty.org/en/latest/news/2021/11/sean-binder-and-sarah-mardinis-lives-remain-on-hold-as-trial-is-adjourned/> accessed 27 May 2023.

[65] Chris Horwood, 'Normalisation of the extreme 2020' (*Mixed Migration Centre*, 17 December 2020) <https://mixedmigration.org/articles/normalisation-of-the-extreme-2020/> accessed 27 May 2023.

[66] ibid.

[67] European Union Agency for Asylum, 'Latest Asylum Trends—January 2023' (23 March 2023) <https://euaa.europa.eu/latest-asylum-trends-asylum> accessed 28 March 2023.

with the interests of Assad.[68] Some scholars have attributed this to a rise in nationalist and populist politics.[69] Others maintain that these governments consider Assad a fundamental factor in curbing migration movements and reducing the number of Syrian refugees seeking protection in Europe.[70]

As normalisation of the Syrian regime proliferates, and countries begin to restore ties with the Syrian regime, there will be significant implications for the protection and safety of Syrian refugees. Charles Lister argues that 'governments ought to realize that letting Assad off the hook will only lead to even greater refugee flows than before'.[71] It is clear that the global political landscape is compounding the damage that normalisation may do to refugee protection and we are seeing that 'Syrians can be exposed to danger if European politicians decide they must be'.[72]

3.2 The Designation of Syria as a 'Safe Country'

The normalisation of Assad's regime has enabled a political environment in which states are able to espouse the false narrative that 'Syria is safe'.[73]

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[68] Charles Lister, 'Is the EU Starting to Wobble on Freezing Out Assad?' (*Foreign Policy*, 27 October 2022) <https://foreignpolicy.com/2022/10/27/eu-syria-policy-assad-migration/> accessed 17 March 2023.
[69] ibid.
[70] The Tahrir Institute for Middle East Policy (n 5).
[71] Lister (n 68).
[72] James Snell, 'Syrians across Europe start to feel the anti-refugee tide turn on them' (*TRT World*, 13 January 2022) <https://www.trtworld.com/opinion/syrians-across-europe-start-to-feel-the-anti-refugee-tide-turn-on-them-53618> accessed 27 May 2023.
[73] Info Migrants, 'Denmark declares parts of Syria safe, pressuring refugees to return' (3 April 2021) <https://www.infomigrants.net/en/post/30650/denmark-declares-parts-of-syria-safe-pressuring-refugees-to-return> accessed 27 May 2023.

Immigration policies that fail to consider accurate assessments of the safety situation for returning refugees are already being seen in countries such as Denmark, Lebanon, and . In March 2023, contrary to the UN and the EU's official positions, Denmark deemed it safe for refugees to return to certain regions in Syria, namely Latakia and Tartous.[74] The decision was made on the grounds that 'improved security in the province made it safe for refugees to return'.[75] Denmark is now one of two European countries to revoke the residency permits of Syrian refugees. This decision comes despite ample documentation that Syrians face grave abuse from security services when returning home.[76] Danish policy has led to a worrying trend across Europe.[77] In 2019, the Swedish Migration Agency declared parts of Syria safe,[78] and Eastern European states like Romania, Hungary, the Czech Republic,

[74] Marta Bernild, 'Syrian Refugees in Denmark at Risk of Forced Return' (*Human Rights Watch*, 13 March 2023) <https://www.hrw.org/news/2023/03/13/syrian-refugees-denmark-risk-forced-return> accessed 18 March 2023.

[75] Johannes Birkabaek and Nikolaj Skysdgaard, 'Denmark deems Syrian province safe for returning refugees, worrying UNCHR' (*Reuters*, 17 March 2023) <https://www.reuters.com/world/middle-east/denmark-deems-syrian-province-safe-returning-refugees-worrying-unhcr-2023-03-17/> accessed 28 March 2023.

[76] Amnesty International, 'You're Going to Your Death' (2021) <https://www.es.amnesty.org/fileadmin/user_upload/Report__You_re_going_to_your_death__ENG.pdf> accessed 27 May 2023.

[77] Human Rights Watch, 'Denmark: Flawed Country of Origin Reports Lead to Flawed Refugee Policies: Joint Statement' (19 April 2021) <https://www.hrw.org/news/2021/04/19/denmark-flawed-country-origin-reports-lead-flawed-refugee-policies?fbclid=IwAR0LLPWZF4pZM0zFtqv5YpL6iw53-QXoYeoY9meorDyHfHQRPCClcwB3_ZQ> accessed 27 May 2023.

[78] European Council on Refugees and Exile ECRE, 'Sweden: Migration Agency Declares Parts of Syria Safe' (5 September 2019) <https://ecre.org/sweden-migration-agency-declares-parts-of-syria-safe/> accessed 27 May 2023.

and Poland have followed suit.[79] Since 2019, Hungary has been attempting to re-open their embassy in Damascus in plans to normalise with Assad's regime.[80] Furthermore, the UK Home Office advised a 25-year-old Syrian asylum seeker he could return to the country because it is now safe.[81] There is an increasing risk that states in designating Syria as safe for return, are not meeting their international refugee law obligations under the 1951 Convention[82] or 1967 Protocol,[83] and in particular, the principle of non-refoulement, which I will discuss in the next section.

Countries such as Denmark have 'set a dangerous precedent from within the European Union.'[84] Türkiye and Lebanon, which host far more refugees,[85] may see these decisions as a form of clearance to

[79] Giorgio Cafiero and Alexander Langlois, 'Why the EU's Consensus on Syria Could Be Slowly Unravelling' (*The New Arab*, 30 November 2021) <https://www.newarab.com/analysis/why-eus-consensus-syria-could-be-slowly-unravelling> accessed 27 May 2023.

[80] 'Hungary looking to upgrade diplomatic relations with Assad's Syria' (*The New Arab*, 11 September 2019) <https://www.newarab.com/news/hungary-looking-upgrade-diplomatic-relations-assads-syria> accessed 27 May 2023.

[81] Diane Taylor, 'Home Office tells asylum seeker he can return to Syria safely' *The Guardian* (London, 9 January 2022) <https://www.theguardian.com/uk-news/2022/jan/09/home-office-tells-syrian-asylum-seeker-he-can-return-safely> accessed 27 May 2023.

[82] UN Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[83] UN Refugee Protocol (entry into force 4 October 1967, in accordance with paper VIII) 606 UNTS 267 (Refugee Protocol).

[84] Human Rights Watch, 'Syria: Returning Refugees Face Grave Abuse' (20 October 2021) <https://www.hrw.org/news/2021/10/20/102tanf-returning-refugees-face-grave-abuse102tanf> accessed 27 May 2023.

[85] Approximately 5.5 million refugees—live in neighbouring countries within the region, such as Türkiye, Lebanon, Jordan, Iraq and Egypt. Türkiye hosts the largest population—3.6 million. United Nations High Commissioner for Refugees Cyprus, 'Syria Refugee Crisis—Globally, in Europe and in Cyprus' (18 March 2021) <https://www.unhcr.org/cy/2021/03/18/102tanf-refugee-

implement their own anti-refugee policies and practices of mass returns. In October 2022, Lebanese authorities reported that 751 Syrian refugees were voluntarily returning to Syria under a repatriation programme coordinated by Lebanon's General Security.[86] President Recep Tayyip Erdogan recently announced a plan for the 'voluntary' return of a million Syrians to Northern Syria.[87]

Globally, Syria is ranked among the worst nations when it comes to human rights abuses. Freedom House's 2023 Syria Country Report finds that 'political rights and civil liberties in Syria are severely compromised by one of the world's most repressive regimes'[88] and Syria is ranked in 161st place out of 163 nations on the annual Global Peace Index 2022.[89] It is becoming clear that normalisation with Assad is not contingent on adherence to human rights obligations but can be explained as 'led by convenience and an alignment of mutual interests and concerns.'[90] For many countries seeking to normalise with Assad,

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crisis-globally-in-europe-and-in-cyprus-meet-some-syrian-refugees-in-cyprus/102tanf> accessed 27 May 2023.

[86] 'Lebanon begins "voluntary" repatriation of Syrian refugees' (*Aljazeera*, 26 October 2022) <https://www.aljazeera.com/news/2022/10/26/103tanfor-begins-voluntary-repatriation-of-syrian-refugees103tanfor> accessed 15 March 2023.

[87] Martin Chulov, 'Turkey's plan to forcibly relocate Syrian refugees gains momentum' *The Guardian* (London, 27 May 2022) <https://www.theguardian.com/world/2022/may/27/turkeys-plan-to-forcibly-relocate-syrian-refugees-gains-momentum> accessed 27 May 2023.

[88] 'Freedom in the World—Syria Country Report' (*Freedom House*, 2023) <https://freedomhouse.org/country/103tanf/freedom-world/2023103tanf> accessed 1 April 2023.

[89] Institute for Economics and Peace, 'Global Peace Index 2022' (2022) <https://www.economicsandpeace.org/wp-content/uploads/2022/06/GPI-2022-web.pdf> accessed 18 March 2023.

[90] Nicholas Frakes, 'As countries normalise with Syria, refugees remain in limbo' (*NOW*, 17 March 2023 <https://nowlebanon.com/as-countries-normalize-with-syria-refugees-remain-in-limbo/> accessed 18 March 2023.

discussions of refugee return have been a priority, and it seems some will exploit this trend to benefit their own interests.[91]

Normalisation is beginning to affect the strength of the international refugee protection regime. To date, no European country has actually deported refugees to return to Syria.[92] However, considerations of safe return are undermining any protections granted to Syrian refugees and causing them to feel insecure in their host countries.[93] The attempts to ramp up the anti-refugee rhetoric or detain individuals under deportation notices[94] that cannot yet be implemented, subvert the essence of the international refugee protection regime, namely that people fleeing war, conflict and persecution deserve compassion and empathy.[95] Parekh maintains our policies and practices must necessarily treat the forcibly displaced as fully human and with dignity,[96] and argues that the refugee protection regime is underpinned by moral

[91] Malik al-Abdeh and Lars Hauch, 'Political settlement first, refugee return second' (*IPS*, 4 April 2023) <https://www.ips-journal.eu/topics/foreign-and-security-policy/political-settlement-first-refugee-return-second-6619/> accessed 4 April 2023.

[92] Kelly Petillo, 'Stuck in Limbo: How Europe can protect Syrian refugees' (*European Council on Foreign Relations*, 20 January 2022) <https://ecfr.eu/article/stuck-in-limbo-how-europe-can-protect-syrian-refugees/> accessed 27 May 2023.

[93] Human Rights Watch, 'Our Lives Are Like Death' (20 October 2021) <https://www.hrw.org/report/2021/10/20/our-lives-are-death/Syrian-refugee-returns-lebanon-and-jordan> accessed 27 May 2023.

[94] At present, Denmark does not have direct dealings with the Syrian regime. The Danish Embassy remains closed in Damascus. This means that Syrians without valid residency or accepted form of identification to Syrian border authorities are held in detention holding centres indefinitely as they await deportation.

[95] UNHCR, 'UN Refugee Agency opposes UK plan to export asylum' (14 April 2022) <https://www.unhcr.org/uk/news/news-releases/un-refugee-agency-opposes-uk-plan-export-asylum-0> accessed 27 May 2023.

[96] Serena Parekh, *Refugees and the Ethics of Forced Displacement* (Routledge 2017) 3.

significance.[97] To that end, the trend towards designating Syria as 'safe' should be cautiously and seriously considered, in line with the legal and moral implications.

3.3 Returning Home

There are two main forms of return migration: voluntary return and forced return. In the context of migration frameworks and refugee protection, 'return' is often used as an umbrella term that encompasses the numerous ways that non-nationals return to their country of origin—whether independent, with assistance or by force.[98] As there is no legal definition in relation to 'returns', institutional ambiguity has meant that discussions of return migration are complex.

Nonetheless, voluntary repatriation is a 'core tenet of the international refugee regime'[99] and is specifically envisaged in UNHCR's statute.[100] The repatriation of refugees has thus become a legally and practically distinct process. UNHCR developed a set of protection thresholds that must be met before they can justify a returning program and ensure the safe and dignified return of refugees is possible.[101] Some of the 22

[97] ibid.

[98] United Nations General Assembly, 'Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations Report of the United Nations High Commissioner for Human Rights' (3 January 2018) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/001/99/PDF/G1800199.pdf?OpenElement> accessed 27 May 2023.

[99] 'Return: voluntary, safe, dignified and durable?' (*FMR*, October 2019) 62 <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/return/return.pdf> accessed 27 May 2023.

[100] UNHCR, 'Statute of the Office of the United Nations High Commissioner For Refugees' (adopted by the UN General Assembly Resolution 428 on 14 December 1950) <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/060/26/PDF/NR006026.pdf?OpenElement> accessed 27 May 2023.

[101] UNHCR, 'Comprehensive Protection and Solutions Strategy: Protection

protection thresholds include: the Syrian regime providing guarantees that no returning refugees will face persecutory or punitive measures, that every individual's decision to return is genuinely voluntary without any coercion, that the safety of refugees is ensured, that the UNHCR is granted 'free and unhindered access to all refugees and returnees'.[102]

In 2021, the UNHCR announced that the present conditions in Syria 'remain unconducive for large-scale organized returns that are safe, dignified and sustainable'[103] and that it would likely take several years for them to be realised. As a result, the UNHCR's recent visits to Syria in September 2022 and March 2023 by the UNCHR chief have caused alarm amongst human rights groups.[104] Amnesty International state that 'there has been a growing focus in returns programming—particularly inside Syria—across the UN in recent months',[105] in contrast to the UNCHR's own policy and strategy that states only when the conditions in Syria have 'substantially changed'[106] would voluntary return plans be discussed.

Thresholds and Parameters for Refugee Return to Syria' (February 2018) <https://data.unhcr.org/en/documents/details/63223> accessed 27 May 2023.

[102] ibid.

[103] UNHCR, 'International Protection Considerations with regard to people fleeing the Syrian Arab Republic' (March 2021) Update VI 52–53 UN Doc HCR/PC/SYR/2021/06 <https://www.refworld.org/docid/606427d97.html> accessed 14 June 2023.

[104] Amnesty International, 'Public Statement: Rights Groups Urge UNHCR Chief Grandi To Halt Syria Return Programme' (12 September 2022) <https://www.amnesty.org/en/wp-content/uploads/2022/09/MDE2460192022ENGLISH.pdf> accessed 27 May 2023.

[105] ibid.

[106] UNHCR, 'Comprehensive Protection and Solutions Strategy: Protection Thresholds and Parameters for Refugee Return to Syria'(n 101).

The strongest moral and legal norm related to people seeking asylum is the principle of non-refoulement,[107] which has been described as 'the cornerstone of refugee protection'.[108] The essence of the principle is to protect the most fundamental human rights of any migrant or refugee from being returned to any territory where they would face torture, cruel, inhuman, or degrading treatment or punishment and other irreparable harm.[109]

As much as non-refoulement is the bedrock of the refugee protection regime, free and informed consent should be the cornerstone of any discussions about refugee return. In terms of repatriation, the only protection guarantee for individuals is that repatriation to their country of origin must be voluntary. Refugees must have access to sufficient information about the conditions in the country of origin and the situation in the country of asylum, 'presented objectively and through appropriate media'.[110] Surveys suggest that returning Syrian refugees

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[107] The principle is enshrined in the (1951 Refugee Convention) and its (1967 Refugee Protocol). Article 33 of the 1951 Convention Relating to the Status of Refugees:

> No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion. Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33; Protocol relating to the Status of Refugees (entry into force 4 October 1967, in accordance with paper VIII).

[108] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (26 January 2007) 2 <https://www.unhcr.org/uk/media/advisory-opinion-extraterritorial-application-non-refoulement-obligations-under-1951-0> accessed 29 May 2023.

[109] UN Refugee Convention, art 33.

[110] UNHCR, 'Discussion Note on Protection Aspects of Voluntary Repatriation' (1 April 1992) <https://www.unhcr.org/publications/discussion-

felt they did not have accurate information about the conditions in Syria. They felt unaware of 'critical factors that present enormous risks' to their personal security and freedom on return.[111]

Rights groups have criticised the UNHCR for failing to accurately report the threats facing returnees, especially the security situation in regime-controlled areas.[112] Failure to do so enables other governments to continue ignoring the reality faced by individuals in regime-held Syria, giving them the legitimacy needed to encourage refugee returns. Furthermore, without transparency, it is difficult to guarantee that refugees choosing to return home are able to 'make an informed choice and to feel confident about their return.'[113] If influential organisations such as the UNHCR are seen to be seemingly encouraging normalisation, it may result in other key actors and states doing the same. SACD assert that UNHCR's failures are leading to 'ill-informed returns decisions which therefore cannot be considered to be voluntary.'[114] In light of this implication, Amnesty has urged the UNHCR and other UN agencies to halt any programmes that could incentivise unsafe returns.[115] Returnees must also be assured of legal, physical and material safety and be ensured their dignity.[116] Dignity in

note-protection-aspects-voluntary-repatriation> accessed 29 May 2023.

[111] Syrians Association for Citizens' Dignity (SACD), 'We are Syria' (20 July 2020) <https://syacd.org/wp-content/uploads/2020/07/SACD_WE_ARE_SYRIA_EN.pdf> accessed 29 May 2023.

[112] Syrian Association for Citizens' Dignity (SACD), 'Normalisation of Horror, Security and Living Conditions in Assad-Held Syria' 31 (n 57).

[113] UNHCR, 'Discussion Note on Protection Aspects of Voluntary Repatriation' (n 110).

[114] Syrians Association for Citizens' Dignity (SACD), 'New SACD briefing details deep concerns over UNHCR's approach to return in Syria' (9 September 2022) <https://syacd.org/new-sacd-briefing-details-deep-concerns-over-unhcrs-approach-to-return-in-syria/> accessed 30 May 2023.

[115] Amnesty International, 'Public Statement: Rights Groups Urge UNHCR Chief Grandi To Halt Syria Return Programme' (n 104).

[116] UNHCR, 'Handbook on Voluntary Repatriation: International Protection'

practice includes treating refugees 'with respect and full acceptance by their national authorities, including the full restoration of their rights'.[117]

The legal status of the refugee in the country of asylum is also a way to determine informed consent.[118] If recognised as a refugee, an individual has rights and protections.[119] In this case, their choice to repatriate is more likely to be truly free and voluntary. In the case of refugee returns from Lebanon or Türkiye, as detailed below, it is clear that the decision is not an exercise of free will but is 'dictated by a combination of pressures due to political factors, security problems or material needs'.[120] Authorities in countries such as Lebanon and Türkiye have pursued a series of coercive policies that make life exceedingly difficult so that Syrian refugees cannot access basic necessities and often their human rights. In Lebanon, Syrians have been subject to ad hoc curfews, evictions, arbitrary arrests, and detention and demolition of their shelters.[121] Türkiye has used hate speech, exploitation, deportations,

(1996) <https://www.unhcr.org/uk/media/handbook-voluntary-repatriation-international-protection> accessed 30 May 2023.

[117] ibid.

[118] UNHCR, 'Comprehensive Protection and Solutions Strategy: Protection Thresholds and Parameters for Refugee Return to Syria'(n 101).

[119] The Convention Relating to the Status of Refugees is the main source of legal protections for refugees. It provides a definition of refugee, safeguards the right to seek asylum, protects against being forcibly returned to a country where one would face persecution (non-refoulement) and sets minimum standards for the treatment of persons who are found to qualify for refugee status. UN Refugee Convention.

[120] UNHCR, 'Handbook on Voluntary Repatriation: International Protection' (n 116) 10.

[121] UNHCR, 'Inter-Agency Coordination Lebanon: Key Findings of the 2020 Vulnerability Assessment of Syrian Refugees in Lebanon' (16 February 2021) <https://reliefweb.int/report/lebanon/inter-agency-coordination-lebanon-key-findings-2020-vulnerability-assessment-syrian> accessed 30 May 2023.

and threats of long-term detention to coerce Syrians into surrendering their residency permits.[122]

To satisfy the criteria of voluntariness, it should be evident that the 'positive pull-factors in the country of origin are an overriding element in the refugee's decision to return, rather than possibly push-factors in the host country.'[123] Despite this, reports show there has been no significant increase in spontaneous refugee returns to Syria.[124] Those who have stayed and continue to live in these 'increasing levels of vulnerability' are adamant that returning to Syria poses a greater threat to life.[125] Syrian refugees cannot freely and readily consent to return to their country due to the conditions in Lebanon and Türkiye. It subverts the essence of non-refoulement to mount such intense indirect pressure that refugees feel compelled to return to a country where they face serious harm.

The importance of the voluntary nature of refugee return is critical and emphasises the key distinction between forced returns and repatriation. This line is often blurred by states interested in the return of refugees. In this case, espousing the narrative that 'Syria is safe' empowers states to believe that the return of displaced Syrians is under the mandate of voluntary repatriation. Erdogan described his plans to encourage the 'repatriation of thousands of Syrians' as a 'voluntary return' project.[126]

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[122] Syrians for Truth and Justice, 'Turkey Continues to Forcibly Return Refugees, Ignoring International Warnings that Syria is Still Unsafe' (14 February 2022) <https://stj-sy.org/en/turkey-continues-to-forcibly-return-refugees-ignoring-international-warnings-that-syria-is-still-unsafe/> accessed 30 May 2023.

[123] UNHCR, 'Handbook on Voluntary Repatriation: International Protection' (n 115) 7.

[124] Human Rights Watch, 'Our Lives Are Like Death' (n 93).

[125] ibid.

[126] Hosem Salem, 'Fear among Syrian refugees over Türkiye "voluntary return" plan' (*Aljazeera*, 20 July 2022) <https://www.aljazeera.com/news/2022/7/20/fear-among-syrian-refugees-

Lebanon has already begun its 'voluntary repatriation' programme without the involvement of the UNHCR.[127] This amounts to a breach of Lebanon's obligations not to forcibly return people to countries where they face a clear risk of torture or persecution under international legal instruments.[128] It is becoming increasingly clear that these returns are neither voluntary nor legal.[129]

Under the right conditions, the option for Syrians to return home would be a positive development and welcomed. However, the COI maintains that, in 2023, the conditions in Syria are not safe for return.[130] This is primarily due to the fact that the root causes of the displacement remain unaddressed and unaffected. The 'authoritarian and repressive nature of the regime'[131] remains unchanged. Surveys conducted with displaced Syrians show that security-related reasons were the largest cause of displacement throughout the years of the conflict, and that security concerns remain the biggest obstacle for return.[132]

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over-turkey-voluntary-return-plan> accessed 30 May 2023.

[127] Lama Fakih, 'Forced Return of Syrians by Lebanon Unsafe and Unlawful' (*Human Rights Watch*, 6 July 2022) <https://www.hrw.org/news/2022/07/06/forced-return-syrians-lebanon-unsafe-and-unlawful> accessed 10 April 2023.

[128] Lebanon has not signed the 1951 Refugee Convention however it has signed most other human rights treaties relevant to the protection of refugees. Lebanon is party to the Convention Against Torture and is also bound by the customary international law principle of nonrefoulement.

[129] Syrian's Association for Citizens' Dignity (SACD), 'The Myth of "Voluntary" Returns from Lebanon' (2022) <https://syacd.org/wp-content/uploads/2022/11/Lebanon-Report-En.pdf> accessed 18 April 2023.

[130] United Nations General Assembly, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2023) (n 6).

[131] Veronica Bellintani, 'The Assad Regime's Post-Conflict Narrative in the International Arena' (*The Tahrir Institute for Middle Eastern Policy*, 5 October 2022) <https://timep.org/2022/05/10/the-assad-regimes-post-conflict-narrative-in-the-international-arena/> accessed 30 May 2023.

[132] Syrians Association for Citizens' Dignity (SACD), 'We are Syria' (n 111).

The Syrian regime is pushing a narrative that the problems in Syria can be reduced to a military conflict, leading many countries to equate safety with an absence of military offensives. However, the 'the vast majority of surveyed Syrians don't feel safe in regime-controlled areas',[133] despite claims from states such as Denmark that these areas are safe for return. All components of the Syrian security forces have been involved in systematic detention, torture, and murder of tens of thousands of Syrian civilians in secret detention centres.[134]

Between 2016 and 2020, the UNHCR has verified that some 267,170 refugees spontaneously returned to Syria.[135] In 2021, the UNHCR recorded the return of close to 36,000 refugees to Syria.[136] Refugee returnees have experienced arbitrary arrests, sexual violence, rape, detention, extortion, enforced disappearance, severe beatings, dehumanising treatment, summary executions, and torture at the hands of the Syrian government and affiliated militias.[137] Amnesty

[133] Syrian Association for Citizens' Dignity (SACD), 'Normalisation of Horror, Security and Living Conditions in Assad-Held Syria' 83 (n 57).

[134] United Nations General Assembly, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (11 March 2021) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/059/73/PDF/G2105973.pdf?OpenElement> accessed 30 May 2023.

[135] UNHCR Data, 'Syria Refugee Regional Response Durable Solutions' (Operational Data Portal Refugee Situations, 2023) <https://data.unhcr.org/en/situations/syria> accessed 30 May 2023.

[136]UNHCR UK, 'Eleven years on, mounting challenges push many displaced Syrians to the brink' (15 March 2022) <https://www.unhcr.org/uk/news/briefing-notes/eleven-years-mounting-challenges-push-many-displaced-syrians-brink> 30 May 2023.

[137] Human Rights Watch, 'Our Lives Are Like Death' (n 93); Louisa Loveluck, 'Assad urged Syrian refugees to come home. Many are being welcomed with arrest and interrogation' (*The Washington Post*, 2 June 2019) <https://www.washingtonpost.com/world/assad-urged-syrian-refugees-to-come-home-many-are-being-welcomed-with-arrest-and-interrogation/2019/06/02/54bd696a-7bea-11e9-b1f3-

International confirms these gross violations are 'consistent with and confirms a wider pattern of violations committed by the Syrian regime against perceived political opponents since the beginning of the conflict'.[138] There have also been widespread land and property seizures making sustainable return impossible.[139]

Dignity in relation to the return of refugees implies that the choice of individuals must be respected. It is manifest in social reforms that empower individuals to shape their own future. 'We live in humiliation inside Syria and outside Syria',[140] and 'dignity is being able to reply and speak out when there is abuse';[141] these testimonies from Syrian refugees demonstrate the condition of dignity has not been realised. Accountability for Syrians must aim for the 'recognition of the dignity of individuals, the redress and acknowledgement of violations' and 'to prevent them from happening again'.[142]

The creation of 'voluntary, safe and dignified' conditions is an ongoing political process, and it goes far beyond the capacities of the UNHCR. At a minimum, the UNCHR has a responsibility to halt any shift from

b233fe5811ef_story.html> accessed 30 May 2023; Amnesty International, 'You're Going To Your Death' (n 76).

[138] ibid.

[139] Voices for Displaced Syrians, 'Is Syria Safe for Return? Returnees' Perspective' 33 (November 2021) <https://voicesforsyrians.org/wp-content/uploads/2021/12/Syrian-Returnees-11.12.2021.pdf> accessed 30 May 2023.

[140] ibid.

[141] Francesca Grandi, Kholoud Mansour and Kerrie Holloway, 'Dignity and displaced Syrians in Lebanon' 10 (*Humanitarian Policy Group*, November 2018) <https://cdn.odi.org/media/documents/12532.pdf> accessed 30 May 2023.

[142] Ashi Al-Kahwati and Johanna Mannergren Selimovic, 'Addressing Atrocity in Syria: New Challenges for Transitional Justice' (*Swedish Institute of International Affairs*, 2021) 21 <https://www.ui.se/globalassets/ui.se-eng/publications/ui-publications/2021/ui-paper-no.-2-2021.pdf> accessed 30 May 2023.

refugee aid to 'return programming'.[143] The UNHCR and other European states may have failed to adhere to the position that Syria is unsafe due to normalisation. Many states have espoused the narrative that Syria is safe, despite the consensus of human rights organisations that facilitating returns to Syria right now would be 'knowingly putting Syrian refugees at risk of suffering from heinous abuse and persecution upon their return to Syria'.[144] The failure of these states has contributed to a dangerous refugee return agenda. The principles of protection and preconditions for safe return are a prerequisite of any repatriation. As of 2023, there is no evidence that the Assad regime is committed to sustainably reintegrating individuals forced to flee or individuals associated with the opposition.[145] Therefore encouraging returns to Syria will amount to a breach of states' non-refoulement obligations.

4 Accountability in Syria

4.1 Imagining Accountability

> Accountability means a lot of different things. The simplest meaning is that individuals who are responsible for grave human rights abuses—should

[143] UNHCR, 'Comprehensive Protection and Solutions Strategy: Protection Thresholds and Parameters for Refugee Return to Syria' (n 101).

[144] Amnesty International, 'Lebanon: Stop the so-called voluntary return of Syrian refugees' (14 October 2022) <https://www.amnesty.org/en/latest/news/2022/10/lebanon-stop-the-so-called-voluntary-returns-of-syrian-refugees/> accessed 30 March 2023.

[145] United Nations General Assembly, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2022) (n 6); Centre for Strategic and International Studies, 'Babel: Translating the Middle East: "Accountability in Syria"' (9 August 2022), comments by Beth Van Schaack, United States Ambassador-at-Large for Global Criminal Justice <https://www.csis.org/podcasts/babel-translating-middle-east/accountability-syria> accessed 30 May 2023.

> be held responsible in some way—for what they have done and how they have harmed others.[146]

The problem of normalisation is part of a much larger intentional legal conversation about accountability in Syria. The demands of demonstrators for accountability and reform in 2011 were 'among the first demands that triggered the popular Syrian revolution.'[147] Over twelve years later and despite the conflict having the most substantive and 'well-documented international crime base in human history',[148] the Syrian regime continues to 'benefit from a long-standing culture of impunity'.[149] In the wake of systemic human rights abuses, criminal justice often occupies centre stage as a form of accountability. However, in the case of Syria, there are no options to pursue justice domestically,[150] and at the international level, the UNSC is largely gridlocked from implementing coercive measures against Assad's

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[146] ibid 1.

[147] Haid Haid, 'Towards Tangible Actions for Transitional Justice in Syria: Where to Go From Here?' (*Heinrich Böll Stiftung Middle East*, October 2017) 3 <https://lb.boell.org/sites/default/files/transitional_justice_paper_final.pdf> accessed 30 May 2023.

[148] Van Schaak (n 3) 1.

[149] United States Senate Committee on Foreign Relations, 'Closing the Accountability Gap in Syria: Pathways to Prosecution' (testimony of Professor Milena Sterio, The Charles R. Emrick Jr—Calfee Halter & Griswold Professor of Law, Cleveland-Marshall College of Law; Managing Director, Public International Law and Policy Group) (18 May 2022) <https://www.foreign.senate.gov/imo/media/doc/060822_%20Sterio_Testimony.pdf> accessed 30 May 2023.

[150] Howard Varney and Katarzyna Zduńczyk, 'Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes' (*International Center for Transitional Justice*, 2020) <https://www.ictj.org/sites/default/files/ICTJ_Report_Universal_Jurisdiction.pdf> accessed 9 April 2023; Human Rights Watch, 'Syria: Criminal Justice for Serious Crimes under International Law' (November 2013) <https://www.hrw.org/news/2013/12/17/syria-holistic-approach-needed-justice > accessed 27 March 2023.

regime. Because of this fact, international accountability in Syria remains elusive and extremely challenging politically.

This section will address the current accountability routes and their potential impact on Syrians. It will first consider criminal justice but argue that due to its limitations in the case of Syria, other transitional justice mechanisms may become a more viable avenue. This section will highlight the remarkable contributions of Syrian civil society in transitional justice processes—inside the courtrooms, but also through truth-telling mechanisms, memorialisation, and storytelling.[151] By defining what accountability looks like for Syrians, this section identifies the objectives that should drive the accountability process. This article argues that centring Syrian voices is the principal component of understanding how we can achieve accountability. This is becoming more pertinent in the face of normalisation.

Accountability for atrocity crimes perpetrated by the Syrian regime is already challenging, made more so by the fact that crimes are still being committed in Syria by parties to the conflict, most notably by the Syrian regime. Normalisation complicates this further. This section demonstrates that the implications of normalisation are likely to transcend the Syrian context and be reflected generally in the current political climate. It identifies the broader global implications of normalisation with the Syrian regime in the pursuit for international accountability.

4.2 Criminal Justice Measures

Criminal prosecutions of atrocity crimes committed by the Syrian regime present immense challenges. The administration of justice in Syria is fundamentally flawed—this is because the judiciary lacks

[151] Alanah Travers, 'The Prolonged Path to Accountability in Syria' (*RUDAW*, 17 March 2022) <https://www.rudaw.net/english/middleeast/syria/17032022> accessed 5 April 2023.

independence and as a result, injustice and impunity are enmeshed.[152] Syria's criminal justice system, including its institutions and laws, criminalise fundamental freedoms, such as freedom of speech, expression, assembly and association.[153] In addition to this, there is an absence of political will to initiate independent and criminal prosecutions.[154] There have been no steps taken by the Syrian government to identify, investigate, prosecute, or punish officials who have violated human rights. The same is true for crimes that preceded the war.[155] This is likely because persons in positions of authority or close to those in power are implicated.[156] The UN Commission of Inquiry concluded that there are serious impediments to domestic criminal justice and it very unlikely that independent, credible national prosecutions in line with international standards could be carried out in Syria.[157]

Since 2021, attention has shifted to the possibility of prosecuting international crimes committed in Syria in European courts, through the principle of universal jurisdiction. Universal jurisdiction refers to 'the assertion of jurisdiction over offences regardless of the place where they were committed and the nationality of the perpetrator or the victim.'[158] The principle allows states that recognise it to investigate

[152] International Legal Assistance Consortium, 'ILAC Rule of Law Assessment Report: Syria 2017' (2017) <http://www.ilacnet.org/wp-content/uploads/2017/04/Syria2017.pdf> accessed 24 April 2023.
[153] Varney and Zduńczyk, 'Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes' (n 150).
[154] ibid.
[155] Human Rights Watch, 'Syria: Criminal Justice for Serious Crimes under International Law' (n 150).
[156] ibid.
[157] United Nations General Assembly, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' 124 (5 February 2013) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/010/21/PDF/G2301021.pdf?OpenElement> accessed 30 May 2023.
[158] International Committee of the Red Cross (ICRC), 'Factsheet: Universal

allegations of war crimes and crimes against humanity, for instance in Syria. Syrian human rights advocate and member of Families for Freedom, Lamis Alkhateeb, states that 'universal jurisdiction provides a glimmer of hope',[159] and it has led to the possibility of justice in contexts previously thought impossible.[160] Domestic legal proceedings to address crimes committed in Syria are ongoing in France, Austria, Belgium, Norway, Germany, the Netherlands, Sweden, and Switzerland.[161] In January, 2022, at the Higher Regional Court in Koblenz, Germany, senior Assad government official Anwar Raslan was convicted for a crime against humanity—'in the form of killing, torture, serious unlawful detention, rape and sexual assault'.[162]

Whilst criminal accountability is a key component of justice for Syria, there were substantial criticisms of the Koblenz trial that must be considered. Due to the various actors involved in trying to achieve accountability through criminal justice for Syria, there is always a risk that Syrians themselves may be unheard 'with little chance to influence strategies.'[163] The trial was held in a German court, with German

Jurisdiction Over War Crimes' (21 May 2021) <https://www.icrc.org/en/document/universal-jurisdiction-over-war-crimes-factsheet> accessed 28 April 2023.

[159] Human Rights Foundation and The Syria Campaign, 'Framing Justice in Syria: The Road Towards Comprehensive Justice' (April 2022) <https://hrf.org/new-report-framing-justice-in-syria/> accessed 12 April 2023.

[160] Varney and Zduńczyk, 'Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes' (n 148).

[161] United Nations General Assembly, 'International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011' (11 February 2022) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/256/36/PDF/N2225636.pdf?OpenElement> accessed 30 May 2023.

[162] United States Senate Committee on Foreign Relations, 'Closing the Accountability Gap in Syria: Pathways to Prosecution' (n 149).

[163] Al-Kahwati and Selimovic, 'Addressing Atrocity in Syria: New Challenges

judges, in German, which meant it was largely inaccessible for the majority of Arabic-speaking Syrians.[164] Syria Justice and Accountability Center (SJAC) executive director, Mohammad Al Abdallah argued this alienation 'can lead to serious long-term impacts on survivors and the families of victims beyond what they already face.'[165] Universal jurisdiction is important for global accountability.[166] Universal jurisdiction cases may inspire other justice initiatives, and act as international acknowledgment and record of the crimes committed. However, work needs to be done to ensure that the Syrian community is included in the process.

This trial also demonstrated the significance of documentation efforts in pursuing justice.[167] Scholars claim that 'the issue of accountability was literally delivered to the doorsteps of the European States by the refugees arriving from Syria.'[168] Since the start of the conflict, international actors, UN bodies and NGOs created and maintained huge databases of human rights violations and documentation that would be relevant for justice in Syria.[169] As the German police could not access

for Transitional Justice' (n 142) 20.

[164] In addition to this, courts in Germany are under no obligation to provide translations of their verdicts, which are exclusively written in German. Alexander Dünkelsbühler, 'Universal jurisdiction without universal outreach?' (*Völkerrechtsblog*, 13 January 2021) <https://voelkerrechtsblog.org/universal-jurisdiction-without-universal-outreach/> accessed 30 May 2023.

[165] Human Rights Foundation and The Syria Campaign, 'Framing Justice in Syria: The Road Towards Comprehensive Justice' (n 159).

[166] Varney and Zduńczyk, 'Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes' (n 150).

[167] Mansour Omari, 'Reflections on the Syrian Torture Trial in Koblenz' (*Amnesty*, 13 January 2022) <https://www.amnesty.org.uk/blogs/campaigns-blog/reflections-syrian-torture-trial-koblenz> accessed 30 May 2023.

[168] United States Senate Committee on Foreign Relations, 'Closing the Accountability Gap in Syria: Pathways to Prosecution' (n 149).

[169] Some of these documentation efforts: The Independent International Commission of Inquiry on the Syrian Arab Republic (COI), The International,

any crime scene to collect evidence, around 800,000 original documents collected in Syria were smuggled out by Syrian refugees, lawyers, activists, and others for this trial.[170]

Documenting human rights violations is often seen as a 'steppingstone'[171] to catalysing and supporting accountability and criminal justice efforts. However, there is a growing body of scholars who argue for its function as a transitional justice mechanism in and of itself, on which the next section will expand.[172] The Syrian case differs because the majority of evidence was collated by Syrian eyewitnesses and ordinary citizens.[173] For this reason, documentation was of intrinsic importance. Syrians were not solely collecting evidence to 'support judicial efforts in post-conflict settings'.[174] Aboueldahab argues that their documentation was essential in another way: 'writing atrocities is, in and of itself, a healing process, as it ensures that victimization is

Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM) The Organisation for the Prohibition of Chemical Weapons (OPCW) set up a Fact Finding Mission (FFM) The Commission for International Justice and Accountability (CIJA).

[170] Mansour Omari, 'Countless Brave Syrian Activists Made The Koblenz Torture Trial Possible' (*Amnesty International*, 12 October 2020) <https://www.amnesty.org.uk/blogs/campaigns-blog/countless-brave-syrian-activists-made-koblenz-torture-trial-possible> accessed 30 May 2023.

[171] Noha Aboueldahab, *Writing Atrocities: Syrian Civil Society and Transitional Justice* (Brookings Doha Analysis Paper 21, May 2018) <https://www.brookings.edu/wp-content/uploads/2018/04/transitional-justice-english_web.pdf> accessed 10 April 2023.

[172] Al-Kahwati and Selimovic, 'Addressing Atrocity in Syria: New Challenges for Transitional Justice' (n 142); Aboueldahab (n 171).

[173] Aboueldahab (n 171).

[174] Paul Williams, Lisa Dicker and Danae Paterson, 'The Peace vs. Justice Puzzle and the Syrian Crisis' (2017) 24(2) ILSA J Intl & Comp L 417 <https://nsuworks.nova.edu/ilsajournal/vol24/iss2/7/> accessed 8 April 2023.

acknowledged, recorded, and remembered.'[175] She goes on to explain that their involvement contributed to producing a transitional justice process that is more victim-led.[176] The process of documentation in the Syrian context presented a unique opportunity to localise an often-internationalised justice process.[177]

Universal jurisdiction as a route to accountability is simply one potential component of larger criminal justice efforts. It is not adequate to address the magnitude and complexity of the crimes committed in Syria. The flaws of the Koblenz trial process crystallise that centring Syrian voices is the most important element of achieving accountability. Only through the initiation of a well-planned, transparent, and inclusive consultation with Syrian civil society[178] can we best serve those affected by the crimes.

4.3 Transitional Justice

Syrian society has suffered immeasurable loss and the innumerable atrocity crimes committed in Syria are too vast to be addressed by judicial measures alone. A multifaceted transitional justice approach has emerged as a means of addressing these challenges.[179] This section evaluates the ongoing efforts to pursue accountability in Syria from a

[175] Aboueldahab (n 171).
[176] ibid.
[177] ibid.
[178] Paul Seils, 'Towards a Transitional Justice Strategy for Syria'(*International Centre of Transitional Justice*, 2013) <https://www.ictj.org/sites/default/files/ICTJ-Syria-Analysis-2013_0.pdf> accessed 21 April 2023.
[179] Centre for Strategic and International Studies, 'Babel: Translating the Middle East: "Accountability in Syria"' (n 143); Al-Kahwati and Selimovic, 'Addressing Atrocity in Syria: New Challenges for Transitional Justice' (n 140); Anwar El Bunni, 'Breaking new ground: Transitional justice in Syria' (*Brookings*, 24 November 2020) <https://www.brookings.edu/opinions/breaking-new-ground-transitional-justice-in-syria/> accessed 30 May 2023.

transitional justice perspective. Using the lens of a practice that represents itself as victim-centred,[180] enables us to identify the gulf, often cited by critics between 'the demands of victims and what transitional justice processes deliver'.[181] The Koblenz trial illustrated the tension 'between the idea of a process centred on the needs of victims and an increasingly prescriptive global approach to transitional justice'.[182] As Simon Robins argues, 'despite the claim of victim-centrism, transitional justice does not in practice effectively address the needs of victims'.[183]

The UN defines transitional justice as,

> 'the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[184]

Within academic literature there is a lack of semantic clarity around the idea of transitional justice, and it is 'still struggling for a consistent definition that reflects a worldwide consensus'.[185] Paul Gready and

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[180] United Nations, 'Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice' (March 2010) <https://digitallibrary.un.org/record/682111?ln=en> accessed 10 April 2023.

[181] Simon Robins, 'Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations' in *Human Rights and International Legal Discourse* (University of York 2017) 41–58 <https://eprints.whiterose.ac.uk/122438/> accessed 10 April 2023.

[182] ibid.

[183] ibid 57.

[184] UNSC, 'The rule of law and transitional justice in conflict and post-conflict societies' (23 August 2004) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement > accessed 30 May 2023.

[185] Laurel E Fletcher and Harvey M Weinstein, 'Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic

Simon Robins explain that the fundamental challenge transitional justice faces is that it does not know what it is or who it is for.[186] In turn, transitional justice is deemed an over-burdened and under-conceptualised idea.[187]

What is clear is that transitional justice encompasses a range of responses that help societies transition from the legacies of atrocity crimes toward a sustainable future. Ultimately, we cannot formulate a one-size-fits-all remedy for a society marked by systematic violations of human rights. Justice will look different within different contexts. Transitional justice has become associated with transition phases and an important component to 'successfully complete a transition from war or dictatorship to peace and democracy.'[188] A transitional phase may have been previously seen as a prerequisite for pursuing transitional justice. However, Al-Kahwati and Selimovic argue in sum that this criterion is too narrow and that rather than moving from war to peace definitively, today's conflicts often morph into 'uneasy states of grey zones' that fall somewhere between.

In the case of Syria, transitional justice mechanisms have comprised a combination of initiatives such as the use of universal jurisdiction to hold perpetrators accountable, digital displays of art, large-scale collection of documentation, memorialisation efforts, and reparations to the victims.[189] A distinguishing feature of the transitional justice

Journals' (2015) 7 J Hum Rights Pract 193.

[186] Paul Gready and Simon Robins, 'Transitional Justice and Theories of Change: Towards evaluation as understanding' (2020) 14 Int J Transit Justice 280 <https://academic.oup.com/ijtj/article/14/2/280/5874491> accessed 10 April 2023.

[187] Anna Macdonald, *Local Understandings and Experiences of Transitional Justice: A Review of the Evidence* (Justice and Security Research Programme, Paper 6, 2013) 4.

[188] Robins (n 181).

[189] Al-Kahwati and Selimovic, 'Addressing Atrocity in Syria: New Challenges for Transitional Justice' (n 140) 20.

process for Syria is that crimes are still being committed by the Syrian regime and there is exhaustive documentation to evidence it.[190] Syrian human rights lawyer and head of the Syrian Center for Legal Studies and Research, Anwar Al-Bunni, notes that 'historically, transitional justice processes have been delayed, evidence has vanished, been hidden, or destroyed, and victims and witnesses have died or moved away, making fully detailed memory impossible.[191] A huge advantage of this is that the documentation movement, a key component of transitional justice started whilst the conflict was ongoing and continues today. In contrast to previous experiences of transitional justice, Syrian civil society has had the chance to define their vision and course of justice. Noha Aboueldahab suggests that 'Syrian civil society has transformed how transitional justice is pursued during active conflict'.[192]

According to Aboueldahab, Syrian civil society has also necessitated rethinking how of civil society is understood—exactly how we can define it and what its role is in advocating and securing various forms of justice.[193] Transitional justice processes have become more institutionalised due to being funded by Western donors and backed by intergovernmental organisations and NGOs.[194] Gready and Robins argue that this has led to the neglect of the 'full range of roles civil society can play in shaping transitional justice.'[195] They coin the term

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[190] Syrian Network For Human Rights, 'Most Notable Human Rights Violations in Syria in December 2022' (5 January 2023) <https://snhr.org/?s=Most+Notable+Human+Rights+Violations+in+Syria+in+December+2022> accessed 10 April 2023.

[191] El Bunni, 'Breaking new ground: Transitional justice in Syria' (n 177).

[192] Aboueldahab (n 171) 27.

[193] ibid.

[194] Eric Hoddy and Paul Gready, 'Transitional Justice and Peacebuilding' *Palgrave Encyclopedia of Peace and Conflict Studies* (2020) 1503–1514 <https://link.springer.com/referenceworkentry/10.1007/978-3-030-77954-2_133> accessed 10 April 2023.

[195] Gready and Robins (n 184) 280.

'"new" civil society' in an effort to provide a new model for understanding transitional justice. They distinguish between 'new' civil society that 'champions autonomy, independent action and the modelling of alternatives, often choosing not to see the state as a principal'[196] and 'old' civil society that 'privileges advocacy, support and capacity building, with the state and state institutions as the main point of reference'. [197] Syrian civil society organisations focused on accountability and justice do not have the capacity to work with the state. The absence of this relationship has encouraged Syrians to reinvent transitional justice 'as a set of political processes within society rather than institutional mechanisms.'[198] To this end, Syrian civil society epitomises the 'new civil society' that Gready and Robins describe.

Transitional justice is important to the Syrian case, but the reverse is true also. The Syrian context may transform the way transitional justice is sought. In the case of Syria, it is acknowledged that the transitional justice process was initiated by Syrian society and the will of the victims themselves.[199] Looking at the idea of transitional justice from the Syrian perspective supports Bready and Robins new model of transitional justice where both 'justice and transition are dynamic, diverse and contextual'.[200] Reconsidering the importance of Syrian civil society in ongoing accountability efforts may offer 'new avenues to address histories of rights violations and the potential to re-imagine transitional justice as justice in transition.'[201]

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[196] Paul Gready and Simon Robins, 'Rethinking Civil Society and Transitional Justice: Lessons from Social Movements and "New" Civil Society' (2017) 21(7) Int J Hum Rights 956–975.
[197] ibid.
[198] ibid.
[199] El Bunni, 'Breaking new ground: Transitional justice in Syria' (n 179).
[200] Gready and Robins (n 196).
[201] ibid.

4.4 Centring Syrian Voices

As this push for accountability comes at the same time that many states are taking steps to normalise relations with Assad, it is becoming pertinent to ask how we can act in the best interests of Syrians themselves. We must seriously consider the concerns raised against the poor efforts of the ongoing justice processes to centre Syrian civil society. This section looks at the surveys, interviews and reports produced by Syrian survivors, CSOs, NGOs, and actors that should be used as the springboard for any attempts to secure accountability. Whilst justice is important, any attempt to secure accountability for the commission of atrocity crimes should not divert attention away from the priorities of the victims.[202] Syrians must play an active role in constructing a vision of rights and justice. They should not be relegated to recipients of transitional justice or as 'nominal or instrumental actors'[203] but engaged as leading partners.

A coalition of organisations of Syrian survivors and relatives of victims of enforced disappearance put forward a Truth and Justice Charter in February 2021.[204] One of the principal aims was to 'develop a discourse expressing the demands and aspirations of the victims, and prioritizing their own narrative, within the framework of international legal

[202] Jeremy Julian Sarkin, *The Conflict in Syria and the Failure of International Law to Protect People Globally: Mass Atrocities, Enforced Disappearances and Arbitrary Detentions* (Routledge, 2021) 229.
[203] Robins (n 181).
[204] Association of Detainees and Missing Persons in Sednaya Prison, Caesar Families Association, Coalition of Families of Persons Kidnapped by ISIS (Massar), Families for Freedom and Ta'afi Initiative, 'Truth and Justice Charter: A Common Vision on the Question of Enforced Disappearance and Arbitrary Detention in Syria by Syrian Victims' and Family Members' Organisations' (February 2021) <https://www.impunitywatch.org/wp-content/uploads/wix-legacy/f3f989_ea2bcacb68664b52a2b9dc090b3c775e.pdf> accessed 5 March 2023.

principles and humanitarian standards'.[205] This Charter should be seen as an instructive document and an essential point of reference to policymakers, stakeholders, and human rights organisations involved in accountability efforts. This charter is a reflection of '[Syrians'] common vision on how to advance victims' rights and the cause of justice and truth in Syria.'[206]

Determining what happened to the disappeared, along with securing the immediate release of all detainees, is the most urgent priority in the Truth and Justice Charter and among Syrians for the last twelve years.[207] Syrian associations and organisations representing families of victims and survivors of detention and enforced disappearance in Syria believe that peace can only be achieved once the fates of detainees and the disappeared are revealed and all the unjustly detained are released.[208] The Syrian regime continues to withhold information about the fate of those forcibly disappeared, prolonging the anguish and suffering of hundreds of thousands of families.[209] While it seems

[205] ibid.
[206] ibid.
[207] The Independent International Commission of Inquiry on the Syrian Arab Republic, 'Syria's Missing and Disappeared: Is there a way forward?' (2022) <https://www.ohchr.org/sites/default/files/2022-06/PolicyPaperSyriasMissingAndDisappeared_17June2022_EN.pdf> accessed 21 April 2023; Position paper, prepared by Caesar Families Association, Families for Freedom, the Coalition of Families of Persons Kidnapped by ISIS-Daesh (Massar), Ta'afi Initiative, Hevdesti (Synergy) Association for Victims, the Association of Detainees and the Missing in Sednaya Prison (ADMSP), Adra Detainees Association, Families of Truth and Justice, Release Me, and lastly the General Union of Detainees, 'An international mechanism for confronting the crisis of detention and enforced disappearance in Syria' (2021) <https://hevdesti.org/wp-content/uploads/2022/07/Position-Paper-En.pdf> accessed 20 April 2023.
[208] Syria Justice and Accountability Centre, 'New Justice Charter Gives Voice to Victims' Demands' (18 March 2021) <https://syriaaccountability.org/new-justice-charter-gives-voice-to-victims-demands/> accessed 30 May 2023.
[209] United Nations General Assembly, 'Report of the Independent International

unlikely that this normalisation momentum can be stalled, 'progress on detainee releases and missing persons is a much more attainable, but nonetheless valuable, goal.'[210] SJAC argue that normalisation could be used to incentivise the Syrian government's cooperation in a missing persons process and bring important relief to Syrians. SJAC proposes that we can simultaneously reject normalisation but work with regional allies to demand the release of detainees in exchange for reintegration.

Displacement is another key issue in considering transitional justice in the Syrian context. Transitional justice as a whole seeks to contribute to the issue of displacement by 'facilitating the integration or reintegration of displaced persons'.[211] However due to the scope and complexity of the Syrian case, 'transitional justice measures have a limited capacity to deal directly with the problem'.[212] The security situation in Syria precludes the creation of justice mechanisms designed to facilitate return and reintegration in accordance with international refugee law. Transitional justice mechanisms often fail to meaningfully engage forcibly displaced in national processes.[213]

A review of surveys and interviews with Syrians shows a clear consensus and three key concerns that define a safe environment in which Syrians would consider returning home:

Commission of Inquiry on the Syrian Arab Republic' (2021) (n 133).

[210] Syria Justice and Accountability Centre, 'Syria's Normalisation: An Opportunity for Reform?' (13 April 2023) <https://syriaaccountability.org/syrias-normalization-an-opportunity-for-reform/> accessed 19 April 2023.

[211] ICTJ Research Unit, 'Transitional Justice and Displacement: Challenges and Recommendations' (Brookings-LSE Project on Internal Displacement, June 2012) 4 <https://www.refworld.org/pdfid/506158102.pdf> accessed 20 May 2023.

[212] ibid 5.

[213] Anna Lise Purkey, 'Justice, Reconciliation and Ending Displacement' (2016) 35(4) RSQ 1–25.

1. The security situation in Syria is the main barrier to return. Most believe only a sustainable political transition will ensure their safety.[214]

2. The immediate release of detainees and forcibly disappeared persons. A joint statement made by civil society groups maintains that revealing the fate of the missing and releasing detainees is the best guarantee to end impunity and lay the foundations for political peace and stability.[215]

3. Syrians demand complete accountability for 'the aftermath of war crimes and crimes against humanity'.[216] They have asked the international community to consider the 'creation of a Nuremberg-like tribunal for the prosecution of Syrian war criminals'.[217]

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[214] Maya Yahya, Jean Kassir and Khalil el-Hariri, 'Unheard Voices: What Syrian Refugees Need to Return Home' (*Carnegie Middle East Center*, 2018) 17 <https://carnegieendowment.org/files/Yahya_UnheardVoices_INT_final.pdf > accessed 30 May 2023.

[215] Syrians for Truth and Justice, 'Joint Statement on the Fate of the Missing, Detained and Forcibly Disappeared and Guarantee the Freedom and Safety of Human Rights Defenders in Syria 2191 days' (11 December 2019) <https://stj-sy.org/en/joint-statement-on-the-fate-of-the-missing-detained-and-forcibly-disappeared-and-guarantee-the-freedom-and-safety-of-human-rights-defenders-in-syria/> accessed 30 May 2023.

[216] Syrian Association for Citizens' Dignity (SACD), 'What Needs to Happen Before Voluntary, Safe, and Dignified Return to Syria is Possible?' (8 May 2022) 3 <https://syacd.org/wp-content/uploads/2022/05/What-needs-to-happen-before-voluntary-safe-and-dignified-return-Briefing-.pdf> accessed 30 May 2023 .

[217] Syria Justice and Accountability Centre, 'Consideration of a "Pooled Jurisdiction" Tribunal for Syria' (25 November 2020) <https://syriaaccountability.org/consideration-of-a-pooled-jurisdiction-tribunal-for-syria/> accessed 30 May 2023.

These concerns must be incorporated in appropriate ways into justice and accountability efforts, particularly in the increasingly complex landscape of normalisation where discussions of refugee returns are emerging. Syrians continue to leave Syria every day, to a large extent, because 'they fear the outcome of normalisation with Assad'.[218] Evidence suggests that that 'prematurely induced returns result in increased needs and exposure to risks among returnees, such as cycles of displacement and exile'.[219] In other words, when refugees return to unstable situations, they often need to flee again. As anti-refugee policies and sentiments become more prevalent, justice and accountability efforts must confront not only past human rights abuses but mitigate future ones. Accountability for Syria must include a 'comprehensive transitional justice process in which the forcibly displaced are partners in designing and directing it in a way that makes it compatible with their priorities and grievances'.[220] Only by doing so will accountability initiatives in Syria 'be more achievable and conducive to the justice desires of Syrian society'.[221]

4.5 The Impact of Normalisation on International Accountability

The greatest harm of normalisation is perhaps the damage to the legitimacy of the international community if those responsible for gross

[218] Rena Netjes, 'Normalization With Assad Could Lead to a New Exodus of Syrian Refugees' (*DAWN*, 23 September 2022) < https://dawnmena.org/normalization-with-assad-could-lead-to-a-new-exodus-of-syrian-refugees/> accessed 30 May 2023.

[219] World Bank, 'Forcibly Displaced: Toward a Development Approach Supporting Refugees, the Internally Displaced, and Their Hosts' (2017) <https://openknowledge.worldbank.org/server/api/core/bitstreams/3a36a9f4-209d-587e-b082-78a0f78af577/content> accessed 30 May 2023.

[220] Global Initiative for Justice Truth and Reconciliation, 'Forced Displacement and Transitional Justice in Northern Syria' (2022) <https://gijtr.org/wp-content/uploads/2022/05/TDA-Syria-Forced-Migration-and-TJ-Case-Study-Jan-2022-EN-final.pdf>> accessed 18 March 2023.

[221] Aboueldahab (n 171) 27.

human rights violations are not held accountable. The lack of decisive action from the international community has bred a culture of impunity, and this has contributed to a political landscape that has permitted normalisation. The inverse is equally true. Continued cooperation with the Syrian regime is softening the international community's stance on Syria, their sanctions, policies, and practices. The repercussions of this will be felt by Syrian refugees, who are becoming increasingly more vulnerable to forced returns.

Through the prism of Syria, 'international law seems to wane, receding into the background and losing its normative force.'[222] The Syrian regime has not only committed atrocity crimes that violate international humanitarian and customary law, but has also breached numerous UN Security Council resolutions, without any accountability.[223] In the context of Syria, many scholars and legal professionals have begun to focus on the failings of the law in practice and the limitations of UN processes dependent largely on state consent.[224] The academic scholarship on this subject argues that the law and relevant UN processes that investigate, report and make recommendations, failed to protect and assist civilians in Syria.[225] Sarkin argues that 'ensuring

[222] Dan E Stigal, 'The Syrian War's Forcing Effect on International Law' (*Just Security*, 13 May 2022) <https://www.justsecurity.org/70144/the-syrian-wars-forcing-effect-on-international-law/> accessed 30 May 2023.
[223] In particular, Resolutions 2042, 2139 and 2254. UNSC Resolution 2042 (14 April 2012) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/295/28/PDF/N1229528.pdf?OpenElement>; UNSC Resolution 2139 (22 February 2014) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/243/39/PDF/N1424339.pdf?OpenElement>; UNSC Resolution 2254 (18 December 2015) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/443/34/PDF/N1544334.pdf?OpenElement> all accessed 30 May 2023.
[224] Sarkin (n 202).
[225] Van Schaak (n 3); Michael P Scharf, Milena Sterio and Paul R Williams, *The Syrian Conflict's Impact on International Law* (CUP March 2020); Sarkin (n 202).

Syria's compliance and commitment to its international human rights obligations through soft law has achieved little to no success.'[226]

Much of this criticism is directed at the UNSC which is tasked with the primary responsibility of 'maintaining international peace and security'.[227] In the last twelve years, seventeen vetoes by Russia and China have blocked international efforts to end atrocities in Syria.[228] As a result of these vetoes, UNSC has failed to adopt draft resolutions that called for the situation in Syria to be referred to the International Criminal Court.[229] It has further failed to adopt resolutions that condemned the Syrian regime's war crimes and crimes against humanity, calling for the immediate cessation of indiscriminate shelling on civilian infrastructure, the killing of peaceful protestors, the end of enforced disappearance, the prohibition of chemical weapons, and the delivery of UN aid for more than four million internally displaced persons.[230] The UNSC's failure to act and halt the conflict in Syria has

[226] Sarkin (n 200) 45.

[227] UNSC Meeting: Peacebuilding and Sustaining Peace (2023) <https://www.un.org/securitycouncil/> accessed 28 March 2023.

[228] Syrian Network for Human Rights, 'Russia and China's Arbitrary Veto Use 16 Times Contributed to Killing Nearly a Quarter of a Million Syrians, the Arrest of Nearly 150,000 Others, and the Spread of Impunity' (17 July 2020) <https://snhr.org/wp-content/pdf/132tanfor/Russia_and_Chinas_Arbitrary_Veto_Use_16_Times_Contributed_to_Killing_Nearly_a_Quarter_of_a_Million_Syrians_en.pdf132tanfor> accessed 20 March 2023; UNSC Meetings and Outcomes Tables, 'Security Council—Veto List' <https://research.un.org/en/docs/sc/quick> accessed 20 March 2023.

[229] UNSC Draft Resolution S/2014/348 <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_348.pdf> accessed 30 May 2023.

[230] UNSC Draft Resolution S/2011/612, UNSC Draft Resolution S/2012/77, UN Draft Resolution S/2012/538, UNSC Draft Resolution S/2014/348, UNSC Draft Resolution S/2016/846, UN Draft Resolution S/2016/1026, UN Draft Resolution S/2017/172, UN Draft Resolution S/2017/315, UN Draft Resolution S/2017/884, UN Draft Resolution S/2017/962, UN Draft

rendered it 'increasingly impotent'[231] and respect for the international legal framework and UN has been weakened by a failure to act in Syria.[232]

The eventual outcome of normalisation will be the erasure of the regime's crimes. Normalisation poses a serious challenge to ongoing accountability efforts for Syria. However, failing to challenge normalisation may lead to broader disrespect for international laws and global norms. We have begun to see this reflected generally in the current climate, not just the Syrian context.

International law has been undermined intrinsically, but also instrumentally, and this has wide-reaching implications. For example, the procedural power of the veto, preventing the council from enforcing international law has encouraged perpetrators to act 'without fear of accountability.'[233] International law is important in the matter of global deterrence: 'law has a deterrent effect only if those in power believe they may have to explain their actions in front of a court of justice'.[234]

Resolution S/2017/970, UN Draft Resolution S/2018/321, UN Draft Resolution S/2019/756, UN Draft Resolution S/2019/961, UN Draft Resolution S/2020/654, UN Draft Resolution S/2020/667, UN Draft Resolution S/2022/538.

[231] D Malone and A Day, 'The UN at 75: How today's challenges will shape the next 25 years' (2020) 26(2) Global Governance 236–250.

[232] Independent International Commission of Inquiry on the Syrian Arab Republic, 'Civilians Under Attack in Syria: Towards Preventing Further Civilian Harm' (28 June 2022) <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coisyria/2022-06-28/Policy-paper-CoH-27-June.pdf> accessed 31 May 2023.

[233] Global Centre for the Responsibility to Protect, 'A Decade of Atrocities and International Failure in Syria' (17 March 2021) <https://www.globalr2p.org/publications/a-decade-of-atrocities-and-international-failure-in-syria/> accessed 20 March 2023.

[234] United Nations Meeting Coverage, Press Release, 'Briefing General Assembly, International Mechanism Head Calls Crimes Committed in Syria "Barbaric" Urges Pursuing Accountability' (1 April 2022)

The systematic failures to ensure accountability at every level in Syria have set a dangerous precedent of immunity for atrocities, which may have encouraged further human rights abuses globally.

For example, many scholars are beginning to draw similarities between the conflict in Syria and the conflict in Ukraine.[235] Accountability and resisting normalisation are critical now 'in the wake of the ongoing conflict in Ukraine, and the commission of atrocities there by Russian forces'.[236] It appears now that Syria was the military testing ground for the offensive in Ukraine; the tactics, people and weapons used by Russia mirror those it tested in Syria.[237] Drawing on these parallels, a statement issued by the Syria Justice and Accountability Centre (SJAC) called for the international community to consider the Syrian experience as instructive.[238] The statement instructed that 'to maintain the international legal order and to ensure that perpetrators are held to account, the hard work of preserving evidence must start now'.[239]

In March 2023, the International Criminal Court (ICC) issued an arrest warrant for Mr Vladimir Vladimirovich Putin for war crimes in

<https://press.un.org/en/2022/ga12413.doc.htm> 31 May 2023.

[235] Ozcelik (n 4); Marc Otte, 'Syria, The Middle East and the War in Ukraine' (*Egmont Royal Institute of International Relations*, 6 September 2022) <https://www.egmontinstitute.be/syria-the-middle-east-and-the-war-in-ukraine/> accessed 12 April 2023; Emma Beals, 'How the Lessons in Syria May Safeguard Lives In Ukraine' (Carnegie Middle East Center, 27 April 2022) <https://carnegie-mec.org/2022/04/27/how-lessons-of-syria-war-may-safeguard-lives-in-ukraine-pub-87005> accessed 10 March 2023; United States Senate Committee on Foreign Relations, 'Closing the Accountability Gap in Syria: Pathways to Prosecution' (n 147)13.

[236] United States Senate Committee on Foreign Relations (n 147).

[237] Beals (n 235).

[238] Syria Justice and Accountability Centre, 'Accountability for Russian Crimes in Syria and Ukraine' (18 March 2022) <https://syriaaccountability.org/accountability-for-russian-crimes-in-syria-and-ukraine/> accessed 10 March 2023.

[239] ibid.

Ukraine.[240] Whilst this warrant doesn't reflect the magnitude of atrocity crimes that Russian leadership is potentially responsible for, Amnesty International expect that future warrants will be issued as investigations begin to yield results.[241] The international community's response to Ukraine is very likely to have implications for justice in Syria, and the reverse is true also. As Syrian criminals begin to be prosecuted on the principle of universal jurisdiction, we can begin to explore other avenues for justice in Ukraine. Normalisation with Assad is coinciding with the international community's attempts to hold Russia to account for human rights violations in Ukraine. This demonstrates profound inconsistencies and double standards in the application of international law and norms. This inconsistency is also reflected by the duality of normalisation happening at the same time as a push for accountability. Some have suggested that the exercise of universal jurisdiction shows that the commission of atrocities will not continue to be tolerated by the international community.[242] However, at the same time, the international community's limited efforts to stall normalisation are becoming more challenging to accept in light of the Assad regime's ongoing crimes and the greater evidence that has been made available from these cases.[243]

Demands for justice and accountability in Syria will reverberate for decades. Whilst we have seen some victories from accountability

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[240] International Criminal Court, Press Release, 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (17 March 2023) <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> accessed 17 March 2023.

[241] Amnesty International, 'Russia: ICC's arrest warrant against Putin a step towards justice for victims of war crimes in Ukraine' (17 March 2023) < https://www.amnesty.org/en/latest/news/2023/03/russia-iccs-arrest-warrant-against-putin-step-towards-justice/ > accessed 20 March 2023.

[242] Human Rights Foundation and The Syria Campaign, 'Framing Justice in Syria: The Road Towards Comprehensive Justice' (n 157) 53.

[243] Travers (n 149).

efforts in Syria, these processes 'often need political backing as much as they need financial support.[244] For most Syrians, 'an integral part of any justice process involves systemic change'.[245] The trend of normalisation paired with the failures of international law are beginning to calibrate the expectations of this happening. The UK, France, USA and Germany reject normalisation and have reiterated their commitment to 'a political process that represents the will of all Syrians'.[246] However, if normalisation continues, and there is no unified international policy, the Syrian regime has no incentive to engage in a political process, and Assad may be empowered to continue committing atrocity crimes—including against Syrians returning to the country.[247] It is not sufficient to bring claims against perpetrators of crimes in Syria under universal jurisdiction mechanisms outside the country. The international community must recommit to the priorities of Syrians and find ways and mechanisms to facilitate the political transition called for in Res 2254.

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[244] The Swedish International Development Cooperation Agency, 'Transitional Justice and Reconciliation: Thematic Overview' (2020) <https://cdn.sida.se/app/uploads/2020/12/01125338/transitional-justice-and-reconciliation.pdf> accessed 10 April 2023.

[245] Human Rights Foundation and The Syria Campaign, 'Framing Justice in Syria: The Road Towards Comprehensive Justice' (n 157) 56.

[246] US Department of State, 'Joint Statement on the Occasion of the 12th Anniversary of the Syrian Uprising' (16 March 2023) <https://www.state.gov/joint-statement-on-the-occasion-of-the-12th-anniversary-of-the-syrian-uprising/> accessed 18 March 2023; 'US says opposed to normalisation of "brutal" Syrian regime after Assad's UAE visit' (*The New Arab*, 23 March 2022) <https://www.newarab.com/news/us-says-opposed-normalisation-brutal-syrian-regime > accessed 31 May 2023; United States Mission to the United Nations, 'Remarks at a UN Security Council Briefing on the Political Situation in Syria' (29 June 2022) <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-political-situation-in-syria-7/> accessed 31 May 2023.

[247] Human Rights Watch, 'Our Lives Are Like Death' (n 92).

5 Conclusion

The principle aim of this article was to demonstrate how normalisation with Assad is affecting the strength and efficacy of the international refugee protection regime. This article argues that several countries seeking to normalise with Assad are exploiting the trend of normalisation and its pretext that Syria is safe to discuss refugee return. This conclusion has already begun to be realised, evidenced by a wave of policies for the mass return of Syrian refugees, advanced by Türkiye, Lebanon, Denmark and Sweden. Forced returns that have already begun in Lebanon and Jordan are likely to be accelerated by the decision to readmit Syria into the Arab League.[248] Syria's readmission represents a prioritisation of regional political interests, raising critical questions about the precarious situation of Syrian refugees.

This article demonstrates that the conditions in Syria preclude the safe return of refugees. Returning refugees have already faced grave human rights abuses and persecution perpetrated by the Syrian government[249] and SACD found that those who did not face threats to their life or physical integrity, were living in constant fear.[250] This already dire situation was compounded by 'the worst economic and humanitarian crisis the country has faced since the start of conflict.'[251] UNHCR's polling data, released in May 2023, shows that only 1.1% of Syrian refugees are willing to consider returning to Syria in the next 12

[248] Cathrin Schaer, 'Syria returns to Arab League: What will it change?' (9 May 2023, Deutsche Welle) <https://www.dw.com/en/syria-returns-to-arab-league-what-will-it-change/a-65561532> accessed 13 June 2023.
[249] Human Rights Watch, 'Our Lives Are Like Death' (n 92).
[250] Syrian Association For Citizens' Dignity (SACD), 'UNHCR's Failure to Uphold its Responsibility to the Displaced Syrians' (25 November 2019) <https://syacd.org/wp-content/uploads/2020/09/UNHCRSACDBriefing1.pdf> accessed 31 May 2023.
[251] United Nations General Assembly, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (2022) (n 6).

months[252] and data collected by SNHR shows that as long as human rights violations continue, Syrian refugees will not return voluntarily.[253] In light of this, present plans or policies to return Syrian refugees would violate the principle of non-refoulement. UNHCR argues that returning home voluntarily 'remains a deep and longed-for aspiration'[254] and centring the demands of Syrians in the pursuit of accountability is the only way to realise this goal.

Normalising relations with the Syrian regime, who are responsible for war crimes, crimes against humanity and forcibly disappearing tens of thousands of civilians over the last twelve years, is highly contentious for several reasons. Without efforts to implement genuine accountability and pressure for political transition, there is little reason to assume these practices will stop. Further to undermining ongoing accountability efforts for Syria, normalisation will also have broader global ramifications. It is likely to damage to the legitimacy of the international community. Coupled with the systemic failures of the international legal system to hold those accountable for grave human rights violations, normalisation is contributing to a broader disregard for international laws and global norms. Syrian voices are central to our understanding of accountability and, in the face of normalisation, the

[252] UNHCR, 'Eighth Regional Survey on Syrian Refugees' Perceptions and Intentions on Return To Syria' (May 2023) <https://data.unhcr.org/en/documents/details/10085>1 accessed 15 June 2023.
[253] Syrian Network for Human Rights, 'Statement: Readmitting the Syrian Regime into the Arab League Does Not Mean that Syria is Safe for the Return of Refugees Since the Syrian Regime is Still Committing Crimes Against Humanity' (18 May 2023) <https://reliefweb.int/report/syrian-arab-republic/readmitting-syrian-regime-arab-league-does-not-mean-syria-safe-return-refugees-syrian-regime-still-committing-crimes-against-humanity> accessed 13 June 2023.
[254] UNHCR UK, 'UNHCR statement on the return of displaced Syrians' (26 July 2021) <https://www.unhcr.org/uk/news/news-releases/unhcr-statement-return-displaced-syrians138tanfor> accessed 31 May 2023.

international community must use their voice and vision as the framework for any accountability efforts. This must include opposing the normalisation and appeasing of Assad and demanding the political transition called for in Resolution 2254. Two recent moves are indicative of a long overdue and concerted effort by States to use existing accountability tools to pursue justice and counter the trend of normalisation. Firstly, Bipartisan U.S lawmakers introduced a bill on 16 May 2023, dubbed the 'Assad Anti-Normalisation Act' to hold Assad accountable and deter normalisation.[255] The Bill explicitly prohibits any official action to recognise or normalise relations with any Government in Syria led by Assad.[256] The release of the Bill came days after the Arab League voted to readmit Syria and is a presumed warning to other countries that normalising ties with Assad will have severe consequences.[257] Moreover, on 8 June 2023, Canada and the Kingdom of the Netherlands started joint legal proceedings at the International Court of Justice against the Syrian Arab Republic for systemic violations of the Convention against Torture[258] since 2011. 'A lasting

[255] Foreign Affairs Committee Chairman Mccaul, 'McCaul, Wilson, Gonzalez, Hill, Boyle Introduce Bipartisan Bill to Hold Assad Regime Accountable' (11 May 2023) <https://foreignaffairs.house.gov/press-release/mccaul-wilson-gonzalez-hill-boyle-introduce-bipartisan-bill-to-hold-assad-regime-accountable/> accessed 13 June 2023.

[256] Assad Regime Anti-Normalisation Act of 2023 HR 3202 Bill (2023–2024) <https://acrobat.adobe.com/link/track?uri=urn%3Aaaid%3Ascds%3AUS%3A11958dc6-4a15-374a-ae63-3a38dfaff1d2&viewer%21megaVerb=group-discover> accessed 14 June 2023.

[257] Daphne Psaledakis and Maya Gebeily, 'US lawmakers introduce bill to combat normalization with Syria's Assad' (11 May 2023) < https://www.reuters.com/world/us-lawmakers-introduce-bill-combat-normalization-with-syrias-assad-2023-05-11/#:~:text=The%20bill%2C%20first%20reported%20by,sanctions%20on%20Syria%20in%202020.> accessed 13 June 2023.

[258] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Convention Against Torture).

political solution in Syria is only possible if there is no impunity'[259] and this is an important addition to ongoing criminal justice efforts.

A lasting political solution must also prioritise the 12 million Syrians who are displaced either inside the country or in exile.[260] This ongoing regional normalisation with the Syrian regime necessitates more – not less – protection for Syrian refugees. Preventing their forced return is not only a moral imperative but a significant component of accountability and a lasting political solution for Syria. This article demonstrates that the global refugee protection regime remains only as strong as the political will, interests and deterrent behind it. This conclusion is drawn from a close examination of the relationship between normalisation, international accountability and the increase in illegal refugee return practices. Ultimately, normalisation has many concerning legal implications, but in the imminent future, its impact will be felt most acutely by Syrian refugees.

[259] Government of the Netherlands, 'The Netherlands holds Syria responsible for gross human rights violations' (18 September 2020) <https://www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations> accessed 12 June 2023.

[260] Jeremy Julian Sarkin, The Conflict in Syria and the Failure of International Law to Protect People Globally: Mass Atrocities, Enforced Disappearances and Arbitrary Detentions (Routledge, 2021) 65.

Loophole or Law-Breaking? Rwanda Plan's Inconsistency with International Refugee Law

Rhys Drakeley

Abstract

In April 2022, the United Kingdom announced its plans to deport asylum seekers arriving by small boat to Rwanda, a policy which has been dubbed the 'Rwanda Plan'. The Rwanda Plan seeks to address a problem which British policymakers have grappled with for decades—how to reduce the number of asylum seekers entering the country and achieving refugee status. The UK Government argued that the Rwanda Plan is entirely congruent with international refugee law. This claim has been refuted by various human rights agencies, the most prominent of which is the United Nations High Commissioner for Refugees. These organisations have argued that the Rwanda Plan violates the principle of non-refoulement. This article contributes to the international legal critique of the Rwanda Plan by arguing that the Rwanda Plan also violates the principle of non-discrimination. It does so by inspecting the demographics of asylum seekers likely to be affected and contrasting the Rwanda Plan with the contemporaneous Ukraine asylum schemes. This article deploys an interpretivist legal perspective to put forward this argument, that international human rights law has an inherently moral purpose and therefore must be understood in its moral context.

1 Introduction

On the 28 April 2022, the Nationality and Borders Act 2022 achieved Royal Assent, paving the way for asylum-seekers arriving through 'irregular' means to be sent to an 'alternative safe country'. Two weeks prior, the United Kingdom (UK) had agreed to a Memorandum of Understanding (MoU) with Rwanda, which established that Rwanda would receive said asylum seekers in exchange for financial remuneration.[1] These are the constituent elements of the 'Rwanda Plan', a policy that paved the way for asylum seekers arriving in the UK to be permanently relocated to Rwanda. The Rwanda Plan is the newest instalment in years of policies dedicated to reducing the UK's intake of asylum seekers.[2] Asylum policy in the UK, and a host of other wealthy Western nations, has become increasingly more restrictive since international refugee law (IRL) was made universally applicable in 1967.[3] Architect of the Rwanda Plan, the former Home Secretary Priti

[1] Home Office, 'Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement' (*GOV.UK*, 14 April 2022) <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r#part-4–financial-arrangements> accessed 1 June 2023.

[2] Home Office, 'Impact assessment: Migration and Economic Development Partnership with Rwanda: equality impact assessment (accessible)' (*GOV.UK*, 4 July 2022) <https://www.gov.uk/government/publications/migration-and-economic-development-partnership-with-rwanda/migration-and-economic-development-partnership-with-rwanda-equality-impact-assessment-accessible> accessed 1 June 2023.

[3] Matthew Gibney and Randall Hansen, 'Asylum Policy in the West: Past Trends, Future Possibilities' in George Borjas and Jess Crisp (eds), *Poverty, International Migration and Asylum* (Palgrave Macmillan 2005); Lucy Mayblin, *Asylum After Empire*: *Colonial Legacies in the Politics of Asylum Seeking* (Rowman and Littlefield 2017).

Patel, argued that the policy is the 'humane, decent, and moral response' to a 'broken' global asylum system.[4] Patel asserted that the Rwanda Plan would 'break the cycle' of people smugglers facilitating small boats making dangerous journeys across the Channel.[5]

Proponents of the Rwanda Plan perceive it as exploiting a loophole in IRL and the distinction between an asylum seeker and a refugee. Once a person achieves refugee status—known as being granted asylum—the state must uphold extensive obligations to ensure their welfare, and may not forcibly relocate them outside of the state's jurisdiction. However, the state does not have the same obligations towards asylum *seekers*—those engaged in the process of achieving refugee status. By exporting asylum seekers during their application process, the UK avoids activating most of its obligations towards them altogether. The UK Home Office has elaborated a legal defence of the Rwanda Plan which essentially reiterates this position, that relocating asylum seekers who have not yet had their claims processed is not prohibited under IRL.[6]

Despite this defence, the Rwanda Plan has been widely criticised as morally deficient,[7] and it is an ongoing and highly controversial debate

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[4] Priti Patel, 'Oral statement on Rwanda' (*Home Office*, 2022) <https://www.gov.uk/government/speeches/oral-statement-on-rwanda> accessed 1 June 2023.

[5] Priti Patel, 'World first partnership to tackle global migration crisis' (*Home Office*, 2022) <https://www.gov.uk/government/news/world-first-partnership-to-tackle-global-migration-crisis> accessed 1 June 2023.

[6] Home Office, 'Nationality and Borders Bill: A differentiated approach factsheet' (*GOV.UK*, March 2022)<https://www.gov.uk/government/publications/nationality-and-borders-bill-differentiation-factsheet/nationality-and-borders-bill-differentiation-factsheet> accessed 1 June 2023.

[7] Yasmine Ahmen and Emilie McDonnel, 'UK Plan to Ship Asylum Seekers to Rwanda Is Cruelty Itself' (*Human Rights Watch*, 2022) <https://www.hrw.org/news/2022/04/14/uk-plan-ship-asylum-seekers-rwanda-cruelty-itself> accessed 1 June 2023; BBC, 'UK's Rwanda policy "immoral, ineffective" – Archbishop of Wales' (14 June 2022)

whether the UK's use of offshoring is compliant with the UK's obligations under IRL.[8] This article employs the legal philosophical school of interpretivism to make the argument that the Rwanda Plan is not compliant with IRL. By deploying an interpretivist lens, this article offers a new perspective and makes legal arguments not present elsewhere in the academic literature. Legal interpretivism is valuable for our investigation as it holds that there is no separation between legality and morality.[9] This allows one to develop the moral critique of the Rwanda Plan into a legal argument.

IRL protects the right to asylum and contains three fundamental principles: non-discrimination, non-refoulement, and non-penalty.[10] This article does not detail the principle of non-penalty in relation to the Rwanda Plan because the policy complies with this principle. In the sense of the 1951 Refugee Convention, a 'penalty' is one 'meted out as

<https://www.bbc.co.uk/news/uk-wales-61802560> accessed 1 June 2023.

[8] UNHCR, 'Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement' (June 2022); 'Rwanda: Commonwealth leaders must oppose UK's racist asylum seeker deal' (*Amnesty International*, June 2022) <https://www.amnesty.org/en/latest/news/2022/06/rwanda-commonwealth-leaders-must-oppose-uks-racist-asylum-seeker-deal/#:~:text=%E2%80%9CCommonwealth%20leaders%20must%20take%20a,and%20asylum%20seekers%20to%20Rwanda.%E2%80%9D> accessed 1 June 2023; Nigel Chidombwe, 'The Legality Of The Asylum Partnership Agreement Between The UK And Rwanda Under International Law' (*Human Rights Pulse*, May 2022) <https://www.humanrightspulse.com/mastercontentblog/the-legality-of-the-asylum-partnership-agreement-between-the-uk-and-rwanda-under-international-law> accessed 1 June 2023.

[9] Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24(1) OJLS 1–37; Gianluigi Palombella, 'The Principles of International Law: Interpretivism and its Judicial Consequences' (Robert Schuman Centre for Advanced Studies, Working Paper 70, 2014) 4.

[10] This is noted in the UNHCR's introductory note on the treaty. UNHCR, 'Convention and Protocol Relating to the Status of Refugees' (2010) 3.

a punishment by a judicial or semi-judicial body' and includes 'imprisonment and fines'.[11] This article focuses on the principles of non-discrimination and non-refoulement, which it argues are violated by the Rwanda Plan. Legal critiques of the Rwanda Plan, the most comprehensive of which is the analysis provided by the United Nations High Commissioner for Refugees (UNHCR),[12] have not sufficiently engaged with the principle of non-discrimination. This is primarily the area to which this article contributes. This gap in the literature is striking as the outcomes of the Rwanda Plan are demonstrably discriminatory. The Rwanda Plan targets 'irregular' asylum seekers, particularly those arriving into the UK via small boats.[13] Home Office statistics show that small boat entrants are overwhelmingly of African and Middle Eastern origin.[14] Former Prime Minister Boris Johnson, in relation to increasing barriers to access for asylum has said that 'our compassion may be infinite, but our capacity to help people is not'.[15] Meanwhile, the UK

[11] UNHCR, 'Commentary of the Refugee Convention 1951 (Articles 2–11, 13–37)' (1997) 98.

[12] UNHCR, 'Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement' (n 8).

[13] The UK Government foregrounds small boat crossings in its 'Impact Assessment' of the Rwanda Plan: Home Office, 'Impact assessment: Migration and Economic Development Partnership with Rwanda: equality impact assessment (accessible)' (n 2).

[14] Home Office, 'Irregular Migration to the UK, year ending June 2022' (*GOV.UK*, 2022) <https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-march-2022> accessed 1 June 2023. Here, and throughout the article, I use the term 'Middle East' to include Afghanistan, which though controversial, is more in line with the Western-conceived 'Greater Middle East' than typical notions of the Middle East. I generalise in the Interest of clarity rather than reimagining political boundaries. For a discussion of the Greater Middle East, see Aylın Güney and Fulya Gökcan, 'The "greater Middle East" as a "modern" geopolitical imagination in American foreign policy' (2010) 15(1) Geopolitics 22–38; Medhi Amineh, *The Greater Middle East in Global Politics: Social Science Perspectives on the Changing Geography of the World*, vol 106 (Brill 2007).

[15] Boris Johnson, 'PM speech on action to tackle illegal migration' (*GOV.UK*,

has facilitated the arrival of over 125,000 Ukrainian refugees in a space of months.[16] This is around as many refugees the UK accepted in 2021,[17] and twice the number of small boat arrivals since 2018.[18] To premise that the UK was 'at capacity' for refugees is clearly false. As will be argued, the driving difference between the UK's approach to refugees from Ukraine compared with those from Africa and the Middle East is nationality.

The importance of asking whether the Rwanda Plan is compliant with the UK's international legal obligations is undeniable. Interrogating any asylum policy is significant because of how it could materially affect the lives of some of the world's most vulnerable people. The UK, as a relatively wealthy country, has the resources to meaningfully improve the lives of refugees fleeing war and persecution. The 1951 Refugee Convention and 1967 Protocol have been instrumental in creating a system whereby wealthy states like the UK play a part in international refugee protection. With the Rwanda Plan, the UK is seeking to circumvent its obligations in a way that it perceives as legal. Should the Rwanda Plan ever be put into practice,[19] this will have serious consequences for the lives of any of the affected asylum seekers. Challenging the perception that the Rwanda Plan is legally valid, and therefore legitimate state practice, is extremely important.

2022) <https://www.gov.uk/government/speeches/pm-speech-on-action-to-tackle-illegal-migration-14-april-2022> accessed 1 June 2023.

[16] Home Office, 'Ukraine Family Scheme, Ukraine Sponsorship Scheme (Homes for Ukraine) and Ukraine Extension Scheme visa data' (*GOV.UK*, 2022) <https://www.gov.uk/government/publications/ukraine-family-scheme-application-data/ukraine-family-scheme-and-ukraine-sponsorship-scheme-homes-for-ukraine-visa-data--2> accessed 1 June 2023.

[17] 'United Kingdom Refugee Statistics 1960–2023' (*Macrotrends*, 2022) <https://www.macrotrends.net/countries/GBR/united-kingdom/refugee-statistics#:~:text=U.K.%20refugee%20statistics%20for%202021,a%204.01%25%20increase%20from%202017> accessed 1 June 2023.

[18] Home Office, 'Irregular Migration to the UK, year ending June 2022' (n 14).

[19] At the time of writing, no asylum seekers have been sent to Rwanda.

Beyond the UK, the international context amplifies the significance of this article. The Rwanda Plan is the answer to a problem not unique to the UK. Refugee displacement is a growing crisis which requires a global solution and international cooperation. Like the UK, other wealthy Western states are well poised to assist in this. Consistently across the West, states have long sought to reduce their intake of refugees from the Global South.[20] Without challenges to the Rwanda Plan, it is reasonable to speculate that it may inspire other like-minded states to adopt similar policies, particularly given that other versions of offshoring for asylum seekers already exist in Australia and the European Union.

In the next section, this article establishes an overview of legal interpretivism and details a brief history of British asylum policy and the immediate context from which the Rwanda Plan emerges. Having laid the theoretical and empirical groundwork necessary for our investigation, this article then answers the question: is the Rwanda Plan compliant with the UK's legal obligations under IRL? This article argues that the answer is no: the Rwanda Plan violates the principles of non-refoulement and non-discrimination. This article's contribution to the literature on the Rwanda Plan is found in the later discussion in the argument that the Rwanda Plan is discriminatory. This bolsters the critique of the Rwanda Plan, ensuring that it isn't solely contingent on poor conditions in Rwanda, but also on British asylum policy itself.

2 Interpretivism

Legal interpretivism's preeminent scholar is Ronald Dworkin and thus this article's discussion of interpretivism will centre around his ideas and writings.[21] Dworkin's arguments begin by critiquing the legal

[20] Gibney and Hansen (n 3).

[21] Nicos Stavropoulos, 'Legal Interpretivism' in *The Stanford Encyclopaedia of Law* (rev edn, Spring 2021) <https://plato.stanford.edu/cgi-

philosophy of positivism, specifically the legal theory put forward by HLA Hart.[22] Both Dworkin and Hart were trying to create a theory on the nature of law, explaining what law *is*. The basic distinction between Hart's positivism and Dworkin's interpretivism is that the former claims that morality and legality are separate while the latter argues that there is no such separation. Positivists believe the basis of law is its origin. Interpretivists believe that the content of the law is partly determined by the moral purpose it fulfils. For interpretivists, the law should be interpreted in the most morally attractive manner because that is the most accurate way to do so.

The unifying proposition for all legal positivists is that 'in any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on it sources, not its merits'.[23] For positivists, morality is not part of the law: it exists purely as a matter of historical fact. In Hart's theory, law is valid when it fulfils the 'rule of recognition', a master rule which sets the criteria for what qualifies as law.[24] Whilst this may vary in different legal systems, the unifying feature of every sophisticated legal system is a convention whereby legal officials accept the rule of recognition.[25] Laws can take form in many ways, including legislation, customary practice, jurisprudence, or general declarations from specified persons.[26] These things constitute valid law if they fulfil the rule of recognition. This is known as the 'pedigree thesis' which 'explains legal validity in terms of how or by whom standards are promulgated'.[27] In the positivist story

bin/encyclopedia/archinfo.cgi?entry=law-interpretivist> accessed 1 June 2023.

[22] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978).

[23] John Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 Am J Jurisprud 199.

[24] HLA Hart, 'The Foundations of a Legal System' in *The Concept of Law* (OUP 2012).

[25] ibid.

[26] ibid.

[27] Kenneth Himma, 'Judicial Discretion and the Concept of Law' (1999) 19(1) OJLS 72.

of legality, it sometimes occurs that the law is incomplete, or that it 'runs out'; in novel and complex cases, where existing rules may be ambiguous or vague, a judge has to exercise discretion to fill in this gap and reach a decision.[28]

For interpretivists, the positivist account of law is insufficient. 'When the rules "run out", one must look to why those rules are there in the first place to determine how they should be extended'.[29] In novel cases, judges are only able to make decisions by considering 'what is valuable about the law'.[30] Dworkin argues that judges apply moral principles when adjudicating novel cases. This argument is evidenced through various examples of the judges' deliberations and reasonings for their rulings in complex cases,[31] such as in *Riggs v Palmer*. In *Riggs v Palmer*,[32] the court deliberated as to whether or not Elmer Palmer should inherit his grandfather's estate, as was his grandfather's will. The case arose because, fearing his grandfather would change his will, Palmer had murdered his grandfather seeking to ensure his inheritance. The court argued that whilst reading the legislation literally, in isolation from other relevant considerations, Palmer would inherit his grandfather's estate; this defied the moral principle that 'no one may profit by his own fraud' and thus the judge ruled against him.[33]

The Dworkinian account of law, therefore, opposes the positivist thesis that law is composed solely of historical facts, arguing that 'law includes not only the specific rules enacted in accordance with the community's accepted practices but also the principles that provide the best moral justification for those enacted rules'.[34] Dworkin continues to

[28] Hart (n 24) 'Postscript'.
[29] Alexander Green, 'Expanding Law's Empire: Interpretivism, Morality and the Value of Legality' (2011) 4(1) Eur J Leg Stud 154.
[30] ibid.
[31] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 15–30.
[32] *Riggs v Palmer* 115 N.Y. 506, 22 N.E. 188 (1889).
[33] Dworkin (n 22) 23.
[34] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011)

state that law 'also includes the rules that follow from those justifying principles, even though those further rules were never enacted'.[35] For interpretivists, the principles and moral justifications of the law which judges must consider are part of the law, but do not fulfil the positivist 'pedigree test' as they have a normative, rather than institutional, foundation.

The incompleteness of the positivist account leads interpretivists to a different conceptualisation of law. Interpretivists believe that the content of law is determined by both social and moral facts; law is comprised of rules *plus* the moral justification for those rules. Therefore, law and morality are not separate spheres, as positivists argue. In the interpretivist account, law must be interpreted 'as an adequate response to the moral concern that is characteristic of legal practice'.[36] Interpretivism, then, is concerned with discerning the moral justification for law, and then applying that justification to novel cases. In Dworkin's words 'legal argument is a characteristically and pervasively moral argument. Lawyers must decide which of competing sets of principles provide the best—morally most compelling—justification of legal practice as a whole'.[37] The interpretive process is as follows:

(1) Pre-interpretative stage—identifying the social phenomenon known as law but knowing nothing other than that it exists and where to look.
(2) Interpretative stage—the interpreter settles on some general justification for the main elements of the practice identified.
(3) Post-interpretive stage—the interpreter adjusts their sense of what the practice 'really' requires so it serves the interpretation they accept at the interpretive stage.[38]

401–402.
[35] ibid.
[36] Stavropoulos (n 21).
[37] Dworkin (n 9) 4.
[38] Dworkin (n 31) 65–67.

In line with the interpretivist method outlined above, this article first identifies the relevant pieces of international refugee legal practice, before discussing the moral principles which justify international refugee legal practice. Then, social facts are interpreted in the light of their moral justification, discerning what IRL requires states to do. Finally, this article applies this analysis of IRL to the Rwanda Plan and asks whether the policy is compliant with the legislation.

There is a debate in the literature as to whether interpretivism can rightly be applied to international law. Without contributing to the debate per se, this article assumes that this application is possible. Nonetheless, it is worthwhile to roughly sketch the nature of the dispute. The essence of this disagreement is that Dworkin's ideas were about a domestic legal system, not an international one. Anti-application scholars such as Jason Beckett argue that Dworkin's ideas cannot be transposed into the realm of international law,[39] while pro-application scholars such as Başak Çali and Alexander Green argue the reverse.[40] This debate focuses on the asymmetrical features of national and international legal systems, such as the relative impotence of international courts, or the contrast between the value-homogenised nation and the value-heterogenized international system.

In the face of disagreement about how to interpret international law, a choice must be made. To do so, it must be asked: what is gained from separating morality from international law? Nahuel Maisley presents a convincing argument, stating that even if this separation is possible, it is not desirable.[41] This is particularly salient given our focus on IRL, a

[39] Jason Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' (2001) 12 EJIL4.

[40] Alexander Green, 'Legal Interpretivism Beyond the State' (McMaster Philosophy of Law Conference, 2014); Başak Çali, 'On Interpretivism and International Law' (2009) 20 EJIL 3.

[41] Nahuel Maisley, 'Better to see International Law This Other Way: the Case Against International Normative Positivism' (2021) 12(2) Jurisprudence 151–174.

branch of human rights law. Human rights legal practice is so imbued with moral notions of fairness and freedom that interpreting it in lieu of this moral purpose risks missing the point altogether. Many scholars now accept that interpretivism can be applied to international law and have developed arguments on this basis.[42]

Even for those unconvinced by interpretivism in general, or its application to this case, it is wise not to throw the baby out with the bathwater. Interpretivism is fundamentally concerned with moral coherence and the law. There is an intrinsic value in analysing whether the moral foundations of an area of law are consistent with a new piece of practice. Regardless of a lawyer's philosophical allegiance, and indeed whether they find the legal argument presented here convincing, the moral argument which is presented here is compelling and significant. The UK has adopted a policy which will have a serious impact on the lives of asylum seekers; weighing the moral soundness of this in the light of international law is a meaningful endeavour.

3 UK's Asylum Policy

Having presented an outline of the theoretical framework, it is now time to establish the 'facts of the case', as it were. For centuries, refugees have sought asylum in the UK. After WWII, as British asylum politics became increasingly racialised, the UK Government sought to reduce its intake of refugees from outside of Europe.[43] Initially, it did so by influencing the architecture of IRL to exclude citizens of colonies from

[42] See George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509; Dimitrios Tsarapatsanis, 'Human Rights beyond Ideal Morality: The ECHR and Political Judgement' (2021) 10 Laws 4; Başak Çali, Nicola Bruch and Anna Koch, 'The Legitimacy of Human Rights Courts: a Grounded Interpretivist Analysis of the European Court of Human Rights' (2013) 35(4) Hum Rts Q 955–984.

[43] Stephen Small and John Solomos, 'Race, Immigration and Politics in Britain: Changing Policy Agendas and Conceptual Paradigms 1940s–2000s' (2006) 47(3-4) Int J Comp Sociol 235–257.

the right to asylum.[44] However, the event of the 1967 Refugee Protocol undermined these efforts by universalising the right to asylum.[45] From the 1980s, facing high numbers of refugees from the Global South, the UK Government introduced a barrage of national legislation aimed at drastically increasing the barriers to entry to asylum for prospective refugees.[46] In academic literature, this is referred to as a *non-entrée* regime.[47] In 2022, the *non-entrée* regime has had its newest addition—the Rwanda Plan. Meanwhile, the Russian invasion of Ukraine created a new refugee crisis in Europe. In response, the UK Government has introduced schemes to assist Ukrainian refugees achieve asylum in the UK. The juxtaposition between the Rwanda Plan and the Ukrainian refugee schemes demonstrates that the right to asylum is not enjoyed equally amongst asylum seekers arriving in the UK.

3.1 A Brief History

The UK has a rich history of sheltering refugees in the centuries preceding WWI, starting in earnest in the late 17th century with the flight of Huguenots fleeing religious persecution, followed by political exiles escaping the French Revolution in the 1780s, and starving refugees escaping the Irish Potato Famine. British asylum legislation is relatively sparse prior to WWI. On one hand, there are examples of the UK legislating to protect refugees within its borders, such as the Foreign Protestants Naturalisation Act of 1708 (which provided Huguenots with the same rights as citizens), and the 1870 Extradition Act (which prohibited extradition for political fugitives). However, the UK had also foreshadowed its propensity to legislate against refugees it deemed undesirable. This is evidenced by the Aliens Act 1793, which established powers to deport foreign nationals on account of their political views, and later by the 1905 Aliens Act, which introduced

[44] Mayblin (n 3).
[45] UN Refugee Protocol (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol).
[46] ibid.
[47] Phil Orchard, *A Right to Flee* (CUP 2014).

immigration controls into the UK for the first time, with the aim of restricting Jewish immigration.[48]

After WWI, the UK's asylum policy was managed through the League of Nations.[49] This was the case until the League of Nations was dissolved and replaced by the United Nations (UN). Refugee treaties from the League of Nations focused solely on refugees coming from Europe. Foremost amongst these was the 1933 Convention relating to the International Status of Refugees, which created arrangements for refugees fleeing Russia and Armenia.[50] The UK did not engage in the drafting of the 1933 Convention.[51] Further arrangements in 1936 and 1938 extended the provisions of the 1933 Convention to Jewish and other 'non-Aryan' refugees fleeing Germany and Austria.[52]

3.2 1951–1993: The Changing Face of Refugees

In 1950, facing a huge refugee crisis in the wake of WWII, UN representatives began drafting a new refugee treaty at the Conference of Plenipotentiaries.[53] Ultimately, the Conference authored the 1951 Refugee Convention.[54] Records from the Conference demonstrate that the UK representatives sought to limit obligations to refugees from the

[48] Bernard Gainer, *The Alien Invasion: The Origins of the Aliens Act of 1905* (Pearson Education 1972).
[49] Mayblin (n 3) 16.
[50] Robert Beck, 'Britain and the 1933 Refugee Convention: National or State Sovereignty' (1999) 11(4) IJRL 597–624.
[51] ibid.
[52] Provisional Arrangement concerning the Status of Refugees Coming from Germany (1936) vol CLXXI LNTS No 3952; Convention concerning the Status of Refugees Coming from Germany (1936) vol CXCII LNTS No 4461.
[53] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (1951) 189 UNTS 137 < https://www.unhcr.org/uk/what-we-do/publications/final-act-united-nations-conference-plenipotentiaries-status-refugees-and> accessed 4 June 2023.
[54] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

Global South by 'purposefully excluding' non-Europeans from the 1951 Convention.[55] UK representatives pushed for a 'colonial' clause to be inserted which would have given the UK a veto on applying the Convention to its colonies.[56] After resistance, a compromise was found with the 'territorial application clause', which had the same effect.[57] The UK made it clear that it would be reluctant to agree to the Convention without this clause.[58] At the time of accession, the UK extended the rights of the Convention only to the Channel Islands and the Isle of Man.[59] The UK ratified the Refugee Convention operating under the assumption that refugees would be predominantly European, which was true until the early 1980s.[60] Initially, many refugees arriving in the UK had been displaced by Nazi Germany, and they were fleeing communism in the East, reinforcing the standard conception of a refugee in the West as being 'white', and later 'anti-communist'.[61] During the Cold War, the Refugee Convention was regarded by the West as an ideological victory against the Communist Bloc, with refugee flows from East to West demonstrating the superiority and desirability of the Western way of life.[62]

Over time, with the weakening and eventual disintegration of the Soviet Union, the demographics of refugees in the UK changed. After an initial dip in refugee intake following the end of the Cold War, the numbers began to increase sharply. The increased number of asylum seekers migrating to Europe was caused by factors like decolonisation, the departure from policies which allowed migration from the

[55] Mayblin (n 3) 20–21.
[56] ibid.
[57] ibid.
[58] ibid.
[59] ibid.
[60] Charles Keely, 'The End of the Cold War Matters' (2001) 35(1) Int Migr Rev 306.
[61] BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) J Refug Stud 350–374.
[62] Keely (n 60) 306.

Commonwealth, the spread of technology, and the broader definition of a refugee offered by the 1967 Refugee Protocol.[63] The refugees arriving in the UK were now predominantly from the Global South, fleeing conflicts far from the imagination and sympathy of the British public. Lucy Mayblin explains that 'these new refugees are *different*, and there are a lot of them. They also come from poor countries, meaning that they implicitly blur the boundaries between economic migrant and refugee'.[64] A corollary of this was that asylum and immigration, which had previously been regarded as conceptually distinct by the UK Government, was increasingly regarded as the same category. [65] Most of the 'new' refugees were poor and not white.[66] They were undesirable by the British state or media and portrayed as 'uncivilised hoards'.[67] The British state quickly began to regard asylum seekers with considerable hostility, and by the late 1980s, they were categorised as 'a problem around which government policy must be focused'.[68]

3.3 1990–2019: The *Non-Entrée* Regime

The average annual number of refugees being accepted in the UK each year was steadily declining in the decades prior to 1993. In the 1960s, it was 163,200; in the 1970s, 151,750; in the 1980s, 113,277.[69] However, after the 1990s, these figures began to increase sharply. In 1990, the UK accepted 43,625 refugees, and the 1990s saw a decade average of 88,505. This was the first time that this figure at the start of a decade was *higher* than the 10-year average. Throughout the 2000s, the average number of refugees accepted in the UK averaged at

[63] Gibney and Hansen (n 3).
[64] Mayblin (n 3) 19.
[65] Gibney and Hansen (n 3) 1.
[66] It is important to note that this type of refugee had existed for decades, 'newness' refers only to their increased presence in Europe.
[67] Mayblin (n 3) 26.
[68] ibid 16.
[69] 'United Kingdom Refugee Statistics 1960–2023' (n 17).

272,146, peaking in 2005 at 303,163.[70] Between 1990 and 2005, there was a 695% increase. This, combined with and likely leading to a growing hostility towards refugees, led to British asylum policy transforming, in tandem with the rest of the West, into a '*non-entrée* regime', focused on 'containing refugees in the developing world'.[71] The chief goal of Western states since the early 1990s was to prevent the arrival of asylum seekers.[72] Between 1993 and 2013, nine pieces of asylum legislation were introduced in the UK, making it harder for refugees to achieve and retain asylum status, while also reducing the assistance that came with asylum.[73] In comparison, three pieces of legislation were introduced in the previous two centuries.[74]

The *non-entrée* regime was continued with the Immigration Acts of 2014 and 2016 respectively, which introduced penalties for airlines who failed to prevent the entry of 'irregular entrants'. Practices like these are known as 'border externalisation', whereby the barriers to entry into a country do not begin on the geographic boundaries of the sovereign state.[75] While the Coalition Government (2010–2015) ostensibly committed itself to taking in refugees in response to crises in North Africa and the Mediterranean, only a 'fraction' of the 20,000 quota was ever accepted.[76] Asylum seekers became indistinguishable from migrants in popular discourse,[77] and were continually painted as 'illegal' entrants, both in the UK and in the wider Western world.[78]

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[70] ibid.
[71] Orchard (n 47) 20–21.
[72] Gibney and Hansen (n 3) 5.
[73] Mayblin (n 3) 16–18.
[74] ibid 8.
[75] Alison Mountz, *The Death of Asylum: Hidden Geographies of the Enforcement Archipelago* (University of Minnesota Press 2020) 7–8.
[76] Mayblin (n 3) 18.
[77] Lamis Abdelaaty and Rebecca Hamlin, 'Introduction: The Politics of the Migrant/refugee Binary' (2022) 20(2) J Immigr Refug Stud 233–239.
[78] Mountz (n 75).

Since 2012, annual figures for refugee intake in the UK have been less than half that of the peak between 2004–2008.[79] In fact, the average number of refugees accepted in the UK in the decade preceding 2021 was 17% lower than it was in the decade following the UK's ratification of the Refugee Protocol. Despite this, the hysteria around asylum seekers has continued to pervade public discourse. The resurgence of right-wing populist and nationalistic debates in Europe resulted in the use of the phrase 'refugee crisis' to describe the influx of asylum seekers from the Middle East in 2015, described by Krzyzanowski and others as 'unnecessarily alarmistic' and 'intentional and purposeful'.[80] The 'refugee crisis' fed into the ongoing debate about the UK's membership of the EU, which itself was fuelled by racial tensions and anti-immigrant rhetoric.[81] The UK's exit from the EU in 2019 has made it more difficult for asylum seekers to arrive in the UK due to an increase in border checks.[82] Ultimately, as a result of a concerted wave of legislation and government policy aimed at stifling the arrival of asylum seekers, the period of 1993–2019 has seen the enlargement of already huge barriers for asylum seekers who do not have the resources to arrive in the UK through conventional means.

3.4 Channel Crossings

The *non-entrée* regime has not prevented asylum seekers arriving in the UK, but it has made it significantly harder for many to do so safely, as demonstrated by the proliferation of asylum small boats across the Channel. The number of people making this journey annually has

[79] 'United Kingdom Refugee Statistics 1960–2023' (n 17).
[80] Michał Krzyżanowski, Anna Triandafyllidou and Ruth Wodak, 'The Mediatization and the Politicization of the "Refugee Crisis" in Europe' (2018) 16(1-2) J Immigr Refug Stud 3.
[81] Valeri Modebadze, 'The Refugee Crisis, Brexit and the Rise of Populism: Major Obstacles to the European Integration Process' (2019) 5(1) JLIA 86–95.
[82] Thom Davies and others, 'Channel Crossings: Offshoring Asylum and the Afterlife of Empire in the Dover Strait' (2021) 44(13) Ethn Racial Stud 2308.

increased from around 300 in 2018 to 45,755 in 2022.[83] During this time, the death toll has risen year on year, with 209 known to be dead or missing between 2014 and 2022.[84] The so-called 'Channel crossings' have become the epicentre of anti-immigration rhetoric in the UK, despite representing a relatively low proportion of overall immigration; for example, only 3% of visas enabling extended stays were given to asylum seekers arriving by small boat in 2021.[85] It also bears mentioning that these asylum seekers, like those in the decades prior, are coming from the Global South; the overwhelming majority coming from the Middle East or Africa.[86]

It is essential to emphasise that those making the journey across the Channel are not conventional migrants. A sobering number of people have died in pursuit of asylum; at least 203 migrants have died or gone missing trying to cross the English Channel since 2014,[87] including an infant child who drowned in 2021.[88] Furthermore, 98% of those making the journey in small boats across the Channel claim asylum upon arrival in the UK.[89] The UK Government has seemingly refused to

[83] BBC, 'How many people cross the Channel in small boats and where do they come from?' 29 March 2023) <https://www.bbc.co.uk/news/uk-53699511> accessed 9 April 2023.

[84] Missing Migrants Project, 'English Channel to the UK' (2022) <https://missingmigrants.iom.int/region/europe?region_incident=4061&route=3896&year%5B%5D=2503&year%5B%5D=2502&year%5B%5D=2501&year%5B%5D=2500&year%5B%5D=10121&incident_date%5Bmin%5D=&incident_date%5Bmax%5D=> accessed 2 June 2023.

[85] Home Affairs Committee, 'Channel crossings, migration and asylum—Report Summary' (July 2022) <https://publications.parliament.uk/pa/cm5803/cmselect/cmhaff/199/summary.html> accessed 2 June 2023.

[86] Home Office, 'Irregular Migration to the UK, year ending June 2022' (n 14).

[87] Missing Migrants Project, 'English Channel to the UK' (n 84).

[88] 'Drowning of 27 migrants in English Channel is worst disaster on record: IOM' (*UN News,* November 2021) <https://news.un.org/en/story/2021/11/1106562> accessed 2 June 2023.

[89] Peter Walsh, 'Q&A: Migrants crossing the English Channel in small boats'.

acknowledge the latter of these facts. Instead, its rhetoric, and deployment of military personnel, has insinuated that arrival of asylum seekers via Channel Crossings is tantamount to an invasion by economic migrants.[90] Asylum seekers are painted as criminals, with the Home Office using language like 'intercepted', 'caught', and 'detained'.[91] 'Migrants are criticised for not following due process—for "exploiting" loopholes, entering "without notifying authorities", using "unseaworthy vessels", and "choosing" reckless routes'.[92]

3.5 The Rwanda Plan

In July 2021, the UK Government published its 'New Plan for Immigration', which stated its intention to 'overhaul' the current asylum system.[93] The centrepiece of this overhaul is the Rwanda Plan which is comprised of a bilateral agreement with Rwanda, the Memorandum of Understanding (MoU) and the Nationality and Borders Act. Despite being presented as a 'new' direction, the Rwanda Plan is in every way an extension of the *non-entrée* regime which has existed in the UK since the 1990s. The MoU between the UK and Rwanda is an agreement that asylum seekers, whose claims are not being processed by the UK, may be sent to Rwanda on the basis of mutual consent between the state parties. The MoU confirms that Rwanda will uphold the human rights of asylum seekers who are transferred in accordance with the Refugee Convention of which it is a state party.[94] It further states that Rwanda will ensure asylum seekers

[90] Davies and others (n 82).
[91] Joseph Maggs, 'The "Channel Crossings" and the Borders of Britain' (2020) 61(3) Race Cl 78–86.
[92] Emma Jacobs, "'Colonising the Future": Migrant Crossings on the English Channel and the Discourse of Risk' (2020) 4(4) Brief Encounters 42.
[93] Home Office, 'Consultation on the New Plan for Immigration: government response (accessible version)' (29 March 2022) <https://www.gov.uk/government/consultations/new-plan-for-immigration/outcome/consultation-on-the-new-plan-for-immigration-government-response-accessible-version> accessed 2 June 2023.
[94] UNHCR, 'States parties, including reservations and declarations, to the 1951

are not returned to their country of origin at any personal risk or be subject to any cruel or degrading treatment.[95] It also elaborates a generous arrangement for those whose asylum claims are unsuccessful; asylum seekers whose claims are rejected are still eligible to apply for permission to remain in Rwanda 'on any other basis in accordance with its domestic immigration law'.[96]

The Nationality and Borders Act changed British asylum law to establish two groups of refugees. To be considered 'Group 1', a refugee must have entered lawfully or shown good cause for their 'illegal' entry.[97] Any refugee failing this condition is considered a 'Group 2' refugee.[98] Group 2 refugees are eligible for 'removal to a safe third country'. The Nationality and Borders Act amends previous asylum legislation—the Nationality, Immigration and Asylum Act 2002 and the Asylum and Immigration (Treatment of Claimants, etc) Act—to send asylum seekers to Rwanda before their asylum claims are processed in the UK.[99]

3.6 Routes to Legal Entry

Given the Rwanda Plan's emphasis on the illegality of entry, it is significant to consider how few legal routes to asylum there are. To claim asylum in the UK, an asylum seeker must be physically present in the country.[100] There are very few avenues for this to happen legally; the UK does not offer 'asylum visas' except in specific cases, meaning the only legal routes are for those able to achieve other visas such as

Refugee Convention' <https://www.unhcr.org/media/38230> accessed 8 August 2022.

[95] Memorandum of Understanding (n 1) 9.1.1.

[96] ibid 10.2.

[97] Nationality and Borders Act 2022, s 12(1)(a), (2), (3)

[98] ibid 12(1)(b).

[99] ibid sch 4.

[100] Immigration Act 1971, art 11(1).

students or tourists, an option not available for many asylum seekers.[101] Because of the difficulty to secure 'legal' arrival, it has long been the case that most asylum seekers have arrived in the UK 'illegally'; 62% of asylum claims in the year ending in 2019 were made by 'illegal' entrants.[102] The UK sometimes opens legal routes to entry using ad hoc asylum arrangements in response to international crises. At present, there are three such arrangements: the Ukrainian schemes; the Hong Kong British Nationals (Overseas) Route; and the Afghan Citizens Resettlement scheme.[103]

The Ukrainian refugee programs (referred to as the 'Ukraine schemes' by the UK Government's website) are substantially more relaxed than the others mentioned, reminiscent of the UK's historic preference for European refugees. There is no limit on how many Ukrainian refugees the UK will accept.[104] At the time of writing, over 185,00 visas have been issued to Ukrainian refugees, with over 125,000 arrivals.[105] To

[101] The Migration Observatory, 'Asylum and refugee resettlement in the UK' (updated 27 January 2023) <https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/%20> accessed 2 June 2023.

[102] Home Office, 'New Plan for Immigration: Policy Statement' (2021) 8 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972517/CCS207_CCS0820091708-001_Sovereign_Borders_Web_Accessible.pdf> accessed 2 June 2023.

[103] Home Office, 'New Plan for Immigration: legal migration and border control (accessible)' (n 93) 24.

[104] Home Office, 'Guidance: Apply for a Ukraine Family Scheme visa' (*GOV.UK*, 2022) <https://www.gov.uk/guidance/apply-for-a-ukraine-family-scheme-visa> accessed 1 March 2023. Home Office, 'Immigration information for Ukrainians, British nationals and their family members (accessible)' (*GOV.UK*, August 2022) <https://www.gov.uk/government/publications/immigration-information-for-ukrainians-in-the-uk-british-nationals-and-their-family-members/immigration-information-for-ukrainians-in-the-uk-british-nationals-and-their-family-members> accessed 2 June 2023.

[105] Home Office, 'Ukraine Family Scheme, Ukraine Sponsorship Scheme

qualify, Ukrainian refugees must either have family in the UK or be able to find a sponsor (someone willing to house them).[106]

The Hong Kong asylum scheme is analogous to the Ukraine schemes in terms of scale, but fundamentally very different. Hong Kong was a British colony from 1851 until 1997 before the jurisdiction of Hong Kong was handed back to China. Conscious of the huge political differences between British Hong Kong and China, when negotiating the hand-over, the UK successfully negotiated the Sino–British Joint Declaration, whereby Hong Kong would be governed under a 'one country, two systems' framework, and would be afforded a high level of political and economic autonomy.[107] The UK now argues that China has breached this agreement, eroding Hong Kong's autonomy to such an extent that, as a co-signatory of the Sino–British Joint Declaration, the UK is compelled to take action to uphold its promises to former British citizens.[108] The British Government states that the Hong Kong asylum scheme is one way that it continues to support Hong Kong citizens. Only those who lived in Hong Kong when it was a British colony are eligible under the Hong Kong scheme.[109] The rationale for

(Homes for Ukraine) and Ukraine Extension Scheme visa data' (n 16).

[106] UK Visas and Immigration, 'UK visa support for Ukrainian nationals' (*GOV.UK*, August 2022) <https://www.gov.uk/guidance/support-for-family-members-of-british-nationals-in-ukraine-and-ukrainian-nationals-in-ukraine-and-the-uk> accessed 2 June 2023.

[107] National Legislative Bodies/National Authorities, Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984 <https://commonslibrary.parliament.uk/research-briefings/cbp-8616/> accessed 2 June 2023.

[108] UK Foreign, Commonwealth and Development, 'Guidance: Six monthly report on Hong Kong: 1 January to 30 June 2022' (*GOV.UK*, 2023), <https://www.gov.uk/government/publications/six-monthly-report-on-hong-kong-january-to-june-2022/six-monthly-report-on-hong-kong-1-january-to-30-june-2022> accessed 2 June 2023.

[109] UK Visas and Immigration, 'Guidance: Hong Kong British Nationals (Overseas) welcome programme—information for local authorities'

the Hong Kong scheme—that the UK has an obligation to reintegrate its former subjects given the breaching of an agreement that the UK signed—cannot be applied to Ukraine.

The Afghanistan scheme exists on a fundamentally different scale to the 'blank cheque' of the Ukraine schemes. The Afghanistan scheme is limited by a quota (capped at 20,000) and prioritises 'those who have assisted the UK's efforts in Afghanistan' and vulnerable people such as women or children.[110] Many Afghan asylum seekers continue to seek asylum in the UK via irregular means and may be affected by the Rwanda Plan.[111] For instance, over 10,000 Afghani asylum seekers crossed the English Channel in 2022.[112] That Afghani asylum seekers are likely to be affected by the Rwanda Plan should the plan ever come into practice means that the argument being presented in this article about Ukrainian asylum seekers cannot be extended to Afghani asylum seekers.

Since WWII, the UK has sought to reduce its intake of asylum seekers from the Global South using an immigration policy called a *non-entrée* regime. Despite ever-growing barriers, the UK has not been able to prevent 'unwanted' asylum seekers from arriving on its shores. As the *non-entrée* regime has made entry into the UK more difficult for asylum seekers, they have been forced to opt for more dangerous routes, leading

(*GOV.UK*, 2021) <https://www.gov.uk/guidance/hong-kong-uk-welcome-programme-guidance-for-local-authorities#introduction> accessed 2 June 2023; UK Visas and Immigration, 'British National (Overseas) visa' (*GOV.UK*, 2022) <https://www.gov.uk/british-national-overseas-bno-visa> accessed 2 June 2023.

[110] UK Visas and Immigration, 'Guidance: Afghan citizens resettlement scheme' (*GOV.UK*, 2021) (https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme> accessed 2 June 2023.

[111] Home Office, 'Irregular Migration to the UK, year ending June 2022' (n 14).

[112] BBC, 'How many people cross the Channel in small boats and where do they come from?' (n 83).

to the proliferation of Channel crossings. Facing backlash from the Channel crossings, the UK Government drafted and introduced the Rwanda Plan in 2022, creating a pathway for the UK to remove 'unwanted' asylum seekers. The Rwanda Plan stands in stark contrast to the Ukraine schemes, whereby Ukrainian asylum seekers experience vastly fewer barriers to entry to asylum in the UK compared with asylum seekers crossing the Channel, the vast majority of whom are of African or Middle Eastern origin.

4 The Right to Asylum

The right to asylum was first invoked in the Universal Declaration of Human Rights (UDHR)[113] which, though not legally binding, is the organising document of human rights treaties adopted by the UN.[114] The right to asylum was formalised by two international legal instruments which apply specifically to asylum seekers and refugees—the 1951 Convention Relating to the Status of Refugees (the Convention)[115] and the 1967 Protocol Relating to the Status of Refugees (the Protocol).[116] The UK is a party to both.[117] The UK has also ratified other international documents which are relevant to the rights of refugees and asylum seekers, such as the 1984 Convention Against Torture (CAT)[118] and the 1965 Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[119]

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[113] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Resolution 217 A(III) (UDHR), art 14.

[114] Ed Bates, 'History' in Daniel Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2017).

[115] UN Refugee Convention.

[116] UN Refugee Protocol.

[117] UNHCR, 'States parties, including reservations and declarations, to the 1951 Refugee Convention' (n 94).

[118] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

[119] International Convention on the Elimination of All Forms of Racial

The 1951 Convention establishes that anyone fulfilling the definition of a refugee is entitled to asylum.[120] The Convention initially offered a limited definition of who could be considered a refugee—with temporal and geographical limitations—but this was rectified by the 1967 Protocol so that it could theoretically apply to anyone fleeing persecution.[121] The Convention defines what 'asylum' status consists of—an extensive layer of legal protection including welfare, employment rights, housing, and the right to remain.[122] However, as suggested by the name, asylum 'seekers'—the foci of this article—are those aspiring for refugee status but who have not had their claims accepted yet.

4.1 Morality

It is essential to first establish what is meant by morality to weigh the moral justifications for rules and obligations. For Dworkin, morality 'is the study of how we must treat other people'.[123] Personal morality begins with the idea of self-respect and then leads to respect for others. Dworkin terms this the 'Kant principle', stating that achieving dignity and self-respect requires one to regard their own life as being of intrinsic value, and this in turn requires one to recognise that the lives of others also hold intrinsic and objective importance.[124] This theory means accepting the equal importance of the lives of all human beings.[125] To be moral, 'we try to decide what we must do for—and not do to—other people by asking what behaviour would fail to respect the equal

Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

[120] UN Refugee Convention.

[121] ibid art 1; UN Refugee Protocol, art 1.

[122] UN Refugee Convention.

[123] Dworkin (n 34) 13.

[124] ibid 19, 255.

[125] ibid 260–261.

importance of lives'.[126] Everyone is entitled to well-being, however, what this means is subjective. 'Someone's well-being is not a commodity that can be measured. It is a matter of having a good life, and we have no appropriate way to measure or compare the success of different lives.'[127]

What of political morality? Political morality, as conceptualised by Dworkin, is the collective's articulation of personal morality.[128] It is the political community's propensity to treat 'all of its members as equal, that is, with equal concern and respect'.[129] Questions of political morality ask which 'rights, liberties, distributions of resources and governance structures are necessary to ensure equality for everyone pursuing the good life'.[130]

4.2 The Moral Basis of the Right to Asylum

To reiterate the interpretivist account of law outlined earlier, law is partially constituted by political morality. Insofar as legal practice is justified by political morality, legal instruments must be interpreted in a way that respects the equal importance of individuals' right to pursue the 'good life'. From this moral basis, we can conceptualise what IRL requires. The Convention protects the right of refugees to seek asylum, and finding sanctuary in another country. The Convention, amended by the Protocol, defines a refugee as anyone who is persecuted for their identity, and for that reason, cannot return to their country of nationality.[131] This definition is instructive as to the moral justification of the right to asylum. To qualify as a refugee under the Convention and Protocol, an individual must be facing an existential threat to life for

[126] ibid 271.
[127] ibid 273.
[128] Green (n 40) 12.
[129] Ronald Dworkin, '*Sovereign Virtue*, Revisited' (2002) 113(1) Ethics 106.
[130] Green (n 40) 11.
[131] UN Refugee Convention, art 1(a)(2), with text amended to reflect changes made by the UN Refugee Protocol, art 1(2).

reasons they are unable to escape within the confines of their country. There is no definitive conception of 'the good life', but it is logical to argue that the persecution of a person would threaten whichever version of the good life they choose to pursue. Simply, one cannot pursue a 'good' life if one's life itself is threatened. IRL is thus justified by political morality as it is an attempt by the collective to treat everyone's life equally.

5 Non-Discrimination

At the pre-interpretative stage of analysis, all the relevant legal instruments on non-discrimination must be gathered. At this stage, it can be observed that the principle of non-discrimination is present in virtually every major human rights treaty,[132] including in Article 3 of the Convention.[133] " Human rights literature recognises numerous types of discrimination, such as that driven by gender and sexuality, but this article focuses exclusively on racial discrimination. An instructive legal instrument on the legal definition of racial discrimination is the ICERD, which the UK has ratified.[134] The ICERD defines racial discrimination as 'any distinction, exclusion, restriction, or preference based on race, nationality, or ethnicity, which has the effect of impairing the equal recognition, enjoyment or exercise of human rights'.[135] Significant for our investigation is the stipulation that, for an act to constitute racial discrimination, it must result in the differential treatment of individuals which has the effect of impairing the enjoyment of a separate right. The notion of the impairment of another right is also found in Article 3 of

[132] Daniel Moeckli, 'Equality and Non-Discrimination' in Moeckli and others (eds), *International Human Rights Law* (3rd edn, OUP 2017) 3.1.

[133] The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin. UN Refugee Convention, art 3.

[134] OHCHR, 'Status of Ratification' (2020) <https://indicators.ohchr.org/> accessed 2 June 2023.

[135] International Convention on the Elimination of All Forms of Racial Discrimination 1965, art 1(1).

the Convention. As such, Article 3 'becomes relevant only if another provision of the 1951 Convention is affected, as it is an *accessory* prohibition of discrimination'.[136] A qualifying feature of discrimination, therefore, is that the alleged act must affect another part of the Convention.

What moral justification exists for the principle of non-discrimination? It has already been established that the right to asylum itself is justified by the moral principle that all individual lives should be treated as equally valuable, and the necessary preconditions of being a refugee mean that one's life itself is endangered. A political system which privileges one refugee over another cannot be seen to treat the lives of everyone as equally valuable. Non-discrimination in the enjoyment of the right to asylum is therefore morally justified by the notion of equal treatment of and regard for the lives of individuals.

The principle of non-discrimination in the right to asylum obliges states to regard the lives of refugees equally. States must do so by treating refugees without discrimination. The social and moral facts which comprise discrimination in IRL mean that a state has discriminated if each of the following tests are met. First, the subjects of the alleged discrimination must be refugees, else our initial moral justification is irrelevant. Second, the relevant action of the state must treat refugees differently, thus failing to recognise the equal value of their lives. Third, this differential treatment must affect the enjoyment of a right or fulfilling of an obligation stipulated in the Convention, therefore impeding the ability of the refugee to achieve asylum. These are the criteria which must be adopted when weighing whether the Rwanda Plan is discriminatory.

[136] Reinhard Marx and Wiebke Staff, 'Article 3 1951 Convention' in Andreas Zimmermann (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, (OUP 2011) 647.

5.1 Is the Rwanda Plan Discriminatory?

5.1.1 Are Those Affected by the Rwanda Plan Refugees?

The first test requires us to ask whether the Rwanda Plan will affect refugees. It is clear that the Rwanda Plan affects asylum seekers. The Rwanda Plan targets those crossing the English Channel in small boats, 98% of whom claim asylum.[137] The important question is whether or not asylum seekers can be considered refugees. There is some ambiguity here as the phrase 'asylum seeker' is not mentioned in the Convention or the Protocol because this term only exists in the domestic sense.[138] The UK Government argues that the majority of asylum seekers arriving in the UK in small boats are not 'genuine' refugees, rather most are economic migrants.[139] Conversely, UNHCR argues that most *are* refugees.[140] Home Office statistics create a blurry picture; 34% of all asylum applications (including legal entrants) between January 2018 and June 2022 were successful, whilst 36% were rejected.[141] The remaining 32% were either provided with a different form of protection, such as humanitarian protection, which has slightly different eligibility

[137] Walsh, 'Q&A: Migrants crossing the English Channel in small boats' (n 89).

[138] Aimee Chin and Kalena Cortes, 'The Refugee/Asylum Seeker' in Barry Chiswick and Paul Miller (eds), *Handbook of the Economics of International Migration* (Elsevier 2015) 585.

[139] HC Deb Monday 22 November 2021, vol 704.

[140] Rajeev Syal, 'Clear majority of people crossings Channel are refugees, says UNHCR' *The Guardian* (London, 2022) <https://www.theguardian.com/uk-news/2022/jun/02/clear-majority-of-people-crossing-channel-are-refugees-says-unhcr> accessed 2 June 2023.

[141] Home Office, 'Asylum applications, initial decisions and resettlement—Asy D02' in 'National statistics: how many people do we grant protection to?' *(GOV.UK,* 2023) <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2021/how-many-people-do-we-grant-asylum-or-protection-to> accessed 2 June 2023.

parameters to asylum,[142] relocated, or withdrew their application.[143] This suggests that 'only' a third of asylum seekers arriving in the UK are refugees.

However, accounting for nationalities typically associated with small-boat crossings, this ratio is significantly higher. Between 2019 and 2021, 79% of small boat crossings were made by asylum seekers from Iran, Iraq, Eritrea, Syria, Sudan, and Afghanistan.[144] A weighted average based on these six nationalities demonstrates that for every 100 asylum seekers arriving from these countries, 80 are accepted as refugees. Compare this to the 34% success rate for all asylum claims, and it can be seen that asylum seekers crossing the Channel are substantially more likely to be accepted as refugees than other asylum seekers.

The purpose of IRL is to protect those fleeing from persecution. Clearly, a significant number of those who could be affected by the Rwanda Plan are genuine refugees. Therefore, it must be accepted that the Rwanda Plan involves refugees as designated by IRL. This statement is reinforced by the fact that the UK has tacitly acknowledged that subjects of the Rwanda Plan *are* eligible for asylum status, or else they could simply be deported rather than sent to Rwanda in an altogether more complex arrangement.

5.1.2 Differential Treatment Based on Nationality

The Rwanda Plan makes it more difficult for refugees coming to the UK through 'illegal' means to achieve asylum status in the UK. By

[142] UK Visas and Immigration, 'Indefinite leave to remain (refugee, humanitarian protection or discretionary leave)' (*GOV.UK*) <https://www.gov.uk/settlement-refugee-or-humanitarian-protection> accessed 9 April 2023.
[143] ibid.
[144] Home Office, 'Irregular Migration to the UK, year ending June 2022' (n 14).

specifically targeting those making small-boat crossings, the Rwanda Plan will disproportionately affect refugees from the Middle East and Africa. Between January 2019 and June 2022, of the 51,582 people making this journey, 71% were Middle Eastern, and 16% were African.[145]

Meanwhile, the UK has opened legal routes for Ukrainian refugees. By adopting the Rwanda Plan and the Ukrainian refugee schemes concurrently, the UK is now operating parallel systems which lead to different outcomes depending on the nationality of the refugee. It can thus be concluded that the UK is treating asylum seekers differently based on their country of origin.

5.1.3 Does the Rwanda Plan affect a separate human right?

The fundamental effect of the Rwanda Plan is that some refugees will not be deemed eligible for asylum in the UK. This means that they would be prevented from enjoying any of the rights stipulated in the provisions of the 1951 Convention. Furthermore, by opening a legal pathway for Ukrainian refugees, the UK Government has enhanced their ability to be considered refugees lawfully residing in the UK. This directly affects 10 Articles of the Convention.[146] By not reciprocating this legal avenue for refugees from Africa or the Middle East, barring a small number from Afghanistan, the UK has effectively prevented those refugees from the enjoyment of the provisions of those Articles where it has been promoted for others. Both the Rwanda Plan and the Ukrainian refugee schemes affect how the UK applies the provisions of the Convention, fulfilling the third test for discrimination.

In 2022, the UK has effectively introduced a ‘pro-asylum’ policy for Ukrainian refugees and an ‘anti-asylum’ policy for Middle Eastern and African refugees. The effects of these two policies are that, once again,

[145] ibid.
[146] UN Refugee Convention, arts 15, 17–19, 21, 23, 24, 26, 28, 32.

white European refugees are given preferential access to asylum in the UK over refugees from the Middle East and Africa. This directly affects the UK's application (or lack thereof) of the provisions of the Convention to those refugees. Thus, it has been shown the UK is discriminating amongst refugees based on nationality and thus is violating Article 3 of the Refugee Convention. For the same reason, it also violates Article 2 of the ICERD.[147]

Perhaps without the war in Ukraine, a sceptic might have argued that it is simply the case that most refugees come from Africa and the Middle East, and thus the effects of the Rwanda Plan are not discriminatory, rather they just reflect the realities of refugee flight. Whilst this assertion would not have been completely unfounded—over a quarter of the world's refugees come from Syria alone, for example—it is fundamentally flawed.[148] First, it oversimplifies; where do Chinese Uighurs, Burmese Rohingya, or Venezuelan refugees fit into this characterisation? Each of these groups feature prominently in recent UN refugee statistics and none are from Africa or the Middle East.[149] Second, it is blind to history, and indeed now the present day; the UK has been and continues to be more welcoming to certain refugees than others. That different policies exist for refugees fleeing Russia's invasion of Ukraine and the enduring crises in Africa and the Middle East offers a stark demonstration of this fact.

Interested as this article is in morality, it is worthwhile briefly discussing the UK Government's moral argument for differentiating between refugees. It has been argued that the Rwanda Plan is necessary to prevent 'illegal' entry into the UK, and that legality under domestic law, rather than nationality, is the defining feature of asylum seekers

[147] International Convention on the Elimination of All Forms of Racial Discrimination 1965, art 2.
[148] UNHCR, 'Refugee Data Finder' (2022) <https://www.unhcr.org/refugee-statistics/> accessed 2 June 2023.
[149] ibid.

entering the UK in small boats.[150] The UK Government has rightly argued that 'illegal' routes such as via small boat are dangerous,[151] but the notion that this morally exonerates the Rwanda Plan is entirely false. The idea that the Rwanda Plan distinguishes purely between 'legal' and 'illegal' entrants is a transparent veneer; the UK Government has the power to define and redefine what 'legal' asylum seeking is under domestic law, as indeed it did twice in 2022 with the Rwanda Plan and Ukraine refugee schemes. These categories are demonstrably changeable. Why selectively change the law for refugees of certain nationalities if not to deliberately manifest an asylum policy which reflects a (dis)preference for those nationalities? If the safety of asylum seekers was paramount, why refuse to open safer and legal routes for asylum seekers who, it is known for a fact, will risk their lives otherwise?

6 Non-Refoulement

The principle of non-refoulement is protected in Article 33 of the 1951 Convention and is regarded as so fundamental that it is considered both customary international law and *jus cogens.*[152] Customary international law are rules which are not only consistently practiced by states but also as *opinio juris* accepted as law.[153] *Jus cogens* are rules which are so fundamental to the international community that it 'binds all states regardless of whether they have ratified [relevant treaties]'.[154]

[150] Patel, 'World first partnership to tackle global migration crisis' (n 5).
[151] ibid.
[152] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (n 107); Jean Allain, 'The *jus cogens* nature of *non-refoulement'* (2001) 13(4) IJRL 533–558.
[153] United Nations, Statute of the International Court of Justice (1946), art 38(1)(B); UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (n 107).
[154] Christine Chinkin, 'Sources' in Moeckli and others (eds), *International*

Paragraph 1 of Article 3 states that 'no Contracting State shall expel or return […] a refugee […] to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.[155]

Non-refoulement means that states may not send a refugee to a country or territory where their life or freedom may be endangered. This includes the country from which the refugee came. In the sense of the Convention it applies to refugees but in wider international human rights law it applies to every migrant.[156] Non-refoulement creates a positive obligation whereby states must ensure that the destination of relocation is safe, a stipulation contained in Article 3 of the CAT.[157] The moral justification for non-refoulement is simple. States are morally obligated to respect and protect human life; by 'refouling' a human being, a state would have collaborated in the persecution of a human being. Thus, refoulement is morally prohibited.

Non-refoulement requires all states to uphold their duty to respect human life by ensuring that they do not relocate an asylum seeker to a country or territory where there is a risk of serious endangerment of life or freedom. Because states must factor in the likelihood of risks, it logically follows that they must ensure that they have appropriate monitoring mechanisms to procure the necessary information to make risk-related judgements. Danger, in the sense of IRL, does not include incidental dangers such as poor health or accidents. Instead, danger refers to serious and intentional risks owing to the identity of the asylum seeker.

Human Rights Law (3rd edn, OUP 2017).

[155] UN Refugee Convention, art 33.

[156] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (n 107).

[157] Convention Against Torture 1984, art 3.

6.1 Does the Rwanda Plan Violate the Principle of Non-Refoulement?

The question as to whether the Rwanda Plan violates non-refoulement is essentially whether the UK can legitimately argue that asylum seekers will not be persecuted in Rwanda. In the MoU, Rwanda has committed to upholding the human rights of all asylum seekers relocated there.[158] The MoU also established a Joint Committee which will allow the UK to monitor the implementation of these assurances.[159] However, there are many relevant factors which could be taken into consideration such as abuse of asylum seekers, abuse of LGBTIQ+ persons, and the possibility of human trafficking of women. These will be discussed by providing an overview of recent human rights issues, and the UK Government's response to each problem.

Rwanda faces accusations of the maltreatment of asylum seekers, which is highly concerning given that those affected by the Rwanda Plan will continue to be asylum seekers in Rwanda. The human rights situation of every country is reviewed through the Universal Periodic Review (UPR) mechanism of the UN Human Rights Council. The most recent UPR for Rwanda reveals that Amnesty International raised the concern that during a protest over food rations, 12 asylum seekers in Rwanda were shot and killed by police, 66 were arrested, some of whom remain under detention.[160] The UK Government notes this, but fails to explain which measures have been established to avoid this happening again other than to allude to 'greater care' being taken. [161] The UNHCR has

[158] Memorandum of Understanding (n 1).
[159] ibid 10.6.
[160] UNHCR, 'Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement' (n 8) 20.
[161] Home Office, 'Country policy and information note: Rwanda, general human rights, May 2022 (accessible)' (*GOV.UK*, 2022) <https://www.gov.uk/government/publications/rwanda-country-policy-and-information-notes/country-policy-and-information-note-rwanda-assessment-may-2022-accessible> accessed 2 June 2023.

also raised concerns specifically about the arbitrary detention of asylum seekers who have been 'denied access to asylum procedures'.[162] As has been established, access to asylum is a fundamental human right, the deprivation of which would constitute a serious risk to freedom. On the issue of access to asylum, the UK Government has said that there are insufficient grounds to believe there would be a 'substantial risk' to persons relocated to Rwanda.[163]

There are reasonable grounds to believe LGBTIQ+ asylum seekers in Rwanda will face persecution. *Africa News* has reported that an LGBTIQ+ Ugandan refugee was tortured due to his sexuality.[164] Human Rights Watch reported that nine LGBTIQ+ people were arbitrarily detained by Rwandan police.[165] Additionally, in a submission to the UPR, the UNHCR stated that some LGBTIQ+ asylum seekers faced discrimination and were unable to register their asylum claims.[166] Given that some of these concerns specifically affect refugees and asylum seekers, these are extremely worrying reports and should be regarded as such. The UK Government has responded to concerns about the treatment of LGBTQ+ people, saying that 'despite several sources' stating the LGBTIQ+ people, and in particular asylum seekers, have faced discrimination, it has not been able to verify the extent or scale.[167]

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[162] ibid 18.

[163] ibid.

[164] 'Rwanda's LGBTQ+ community still faces discrimination' (*Africa News*, 2022) <https://www.africanews.com/2022/06/01/rwanda-s-lgbtq-community-still-faces-discrimination//> accessed 2 June 2023.

[165] Human Rights Watch, 'Rwanda: Events of 2021' (2021) <https://www.hrw.org/world-report/2022/country-chapters/rwanda> accessed 2 June 2023.

[166] UNHCR, 'Rwanda: UNHCR Submission for the Universal Periodic Review—Rwanda—UPR 37th Session (2021)' (2020) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/282/37/PDF/G2028237.pdf?OpenElement> accessed 4 June 2023.

[167] Home Office, 'Country policy and information note: Rwanda, assessment, May 2022 (accessible)' (n 161).

Instead, the UK Government argues that Rwanda's commitment to the MoU is sufficiently compelling to believe that LGBTIQ asylum seekers sent under the Rwanda Plan will be safe in Rwanda.[168]

There are also concerns about the status of trafficked people, particularly women, who are sent to Rwanda. As widely observed, some of those who enter the UK 'illegally' are the victims of human trafficking. This is of special concern as victims of trafficking are especially vulnerable to being re-trafficked; 'trafficked persons are highly vulnerable to re-trafficking immediately after having exited a trafficking situation and en route to assistance'.[169] There is a documented presence of trafficking in Rwanda.[170] On this, the UK Government has acknowledged 'that there is some risk of trafficking abuse' but argued that 'this does mean it is systemic such that women in general are at real risk of [trafficking]'.[171] As noted by the UK Government, Rwanda is ranked as 'Tier 2' by the United States Trafficking in Persons report, meaning it 'does not fully meet the minimum standards for the elimination of trafficking but is making significant efforts to do so'. [172]

There are other issues which asylum seekers may encounter, but those mentioned provide a sufficient overview of the problem at hand. Recent human rights complaints show that on numerous occasions in recent years, asylum seekers, refugees, or trafficked people in Rwanda have been subject to discrimination and danger because of reasons owing to

[168] ibid.
[169] Alison Jobe, 'The Causes and Consequences of Re-trafficking: Evidence from the IOM Human Trafficking Database' (IOM, 2010) <https://publications.iom.int/books/causes-and-consequences-re-trafficking-evidence-iom-human-trafficking-database> accessed 2 June 2023.
[170] OHCHR, 'Summary of Stakeholders' submissions on Rwanda' (2021) 55 <https://digitallibrary.un.org/record/3894160?ln=en> accessed 2 June 2023.
[171] Home Office, 'Country policy and information note: Rwanda, assessment, May 2022 (accessible)' (n 161).
[172] ibid.

their identity. The UK's answer to these reports is that these cases are insufficient to indicate systemic persecution. However, the UK's answers to these potential risks do not demonstrate that it has fulfilled all the necessary obligations under the non-refoulement. In particular, it is now clear how the UK has established that previous problems will be avoided in the future, for instance by elaborating specific protections for women who are vulnerable to trafficking, or the scale of discrimination towards LGBTQ+ asylum seekers. This article concurs with the UNHCR's analysis that the Rwanda Plan poses a risk of refoulement.

The question of non-refoulement is intrinsically a difficult question because it requires speculation on not only the conditions which asylum seekers might face but also on the good intentions of politicians in both the UK and Rwanda. The UK has frequently emphasised that to the letter of the MoU, Rwanda will be obligated to uphold human rights in line with international law. However, the obligations of international law have already existed in Rwanda, and seemingly the issue has not been the commitment to those standards but the execution of them. It is not clear how the UK will ensure that human rights standards are maintained, and thus ultimately, this article has argued that the Rwanda Plan does not fulfil the necessary conditions of risk-aversion which the UK is legally obligated to uphold.

7 Conclusion

In this investigation, it has been asked whether the Rwanda Plan, a policy whereby asylum seekers arriving unlawfully in the UK may be relocated to Rwanda, is compatible with international refugee law. Deploying an interpretivist methodology, a legal argument has been developed in the light of the moral justifications which lay behind the 1951 Refugee Convention and 1967 Protocol, the written documents which comprise IRL, and the right to asylum. It has been argued the Rwanda Plan fails two fundamental principles of the right to asylum: non-discrimination and non-refoulement.

The effects of the Rwanda Plan will disproportionately affect asylum seekers from Africa and the Middle East, making it substantially harder for them to achieve asylum in the UK. Taken in the context of the Ukrainian refugee schemes, the UK now has preferential asylum policies which differentiate based on nationality. To correctly interpret the principle of non-discrimination, it must be understood in light of the moral principle that human lives are of equal importance. Given the Rwanda Plan does not treat human lives equally, it is constitutive of discrimination under international refugee law and therefore violates Article 3 of the Refugee Convention.

There are reasonable grounds to suggest that asylum seekers sent from the UK to Rwanda may experience persecution. Despite assurances from both the UK and Rwandan Governments, recent human rights violations towards asylum seekers, LGBTIQ+ persons and women demonstrate that there is a serious element of risk to the life and freedom of asylum seekers sent to Rwanda. Morality compels us to interpret the principle of non-refoulement in a way which prioritises the value of human life, and as such, the Rwanda Plan violates Article 33 of the Refugee Convention.

For those reasons, the Rwanda Plan is not compatible with international refugee law. If the UK continues with the policy as planned, it will violate the right to asylum, and as such, would be in open rebellion against IRL. Previous legal critiques of the Rwanda Plan, such as those offered by the UNHCR, have focused almost entirely on non-refoulement. By arguing the Rwanda Plan is discriminatory, this article has built a legal critique which is not entirely reliant on the poor human rights conditions in Rwanda. In and of itself, this is an important discussion; if there were an imaginary scenario where Rwanda, or perhaps another nation, did not pose the risk of refoulement, would it be moral for the UK to send asylum seekers there? If that situation had come to pass, would it be morally acceptable to suggest that there was no other legal basis to challenge the UK? It is my opinion that neither

of those statements is true. For this reason, it is crucial that the legal critique of the Rwanda Plan is not solely contingent on non-refoulement, but also on a critical examination of the UK and its discriminatory asylum policy. The Rwanda Plan represents a seismic juncture in the history of British asylum policy, and may drastically alter both the nature of refugeehood in the UK, but also the UK's relationship with international refugee law.

Some Hope in Harm: A Normative Evaluation of the UK Government's Proposals to Bifurcate Drug Users, Dependent on Their Drug Use Status

Ed Clothier

Abstract

The developed world has been moving away from treating drug use as a matter for the criminal justice system and toward treating it as a public health concern or a matter for regulation. However, the United Kingdom has proposed a novel approach to drug use splitting drug users into two subgroups, recreational users and drug-dependent users, proposing two separate legal regimes for the different subgroups. This article is interested in the moral justification for treating different groups of users differently under the law for ostensibly the same act. This article commits to a thick conception of the rule of law, (civic-equality-plus), arguing that the UK Government, and governments more generally, are justified in treating drug users differently based on their drug-use status subject to the streamlining of other areas of legislation, offering hope for jurisdictions where there may be staunch opposition to more progressive approaches to drug policy.

1 Introduction

On the 17 June 2021 the Lord Advocate of Scotland released a statement to the Scottish Parliament advising that anyone found in simple possession of any class of drug could be dealt with by way of a warning or through diversion to an appropriate public health body.[1] This direction pre-empted the release of statistics, showing that Scottish drug deaths had risen to a record high of 1,339 people, the highest per capita rate in Europe.[2] While explicitly not representing de facto decriminalisation of drug use, the direction, and subsequent White Paper,[3] expressed a generational shift in treating drug use not as a criminal justice matter but as a 'public health emergency'.[4] Around the same time the UK Government released their 10-year drugs plan, 'From Harm to Hope', which appeared to follow suit.[5]

[1] Lord Advocate Bain QC, 'Lord Advocate Statement on Diversion from Prosecution' (22 September 2021) <https://www.copfs.gov.uk/about-copfs/news/lord-advocate-statement-on-diversion-from-prosecution/> accessed 3 June 2023.

[2] National Records of Scotland, 'Drug-related deaths in Scotland in 2020' (2021) 4 <https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/deaths/drug-related-deaths-in-scotland/2020> accessed 3 June 2023.

[3] Scottish Drugs Deaths Taskforce, 'Changing Lives: Our final Report' (2022) <https://drugstaskforce.knowthescore.info/wp-content/uploads/sites/2/2022/08/Changing-Lives-updated-1.pdf> accessed 14 June 2023.

[4] Lord Advocate Bain QC, 'Lord Advocate Statement on Diversion from Prosecution' (n 1) para 3.

[5] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (*GOV.UK*, 2021) <https://www.gov.uk/government/publications/from-harm-to-hope-a-10-year-drugs-plan-to-cut-crime-and-save-lives/from-harm-to-hope-a-10-year-drugs-plan-to-cut-crime-and-save-lives> accessed 3 June 2023.

Scotland's approach tracks global trends where there has been increasing de facto decriminalisation,[6] state level legalisation,[7] de jure trial decriminalisation,[8] and in some cases complex mixed systems of decriminalisation and legalisation.[9] While the array of different regimes may be confusing, and this article wishes to go some way toward clearing them up, the underlying trend is not. Globally, the consensus, backed up by legislation, has been moving from treating drug use as a criminal justice matter alone. The modern debate in academia has never really had convincing advocates for the criminalisation of drug use and has tended to focus on the when, what, how, and how far of decriminalisation.[10] Therefore, on first reading the claim in the Government's 10-years drugs plan to shift the focus of drug policy in the UK from 'not just a law enforcement issue but as a problem for all of society that all of government must deal with'[11] seems to be moving with this trend towards ending the decades long 'war on drugs' led by the US and the UK.[12]

[6] For example Portugal, see Hannah Laqueur, 'Uses and Abuses of Drug Decriminalization in Portugal' (2015) 40(3) LSI 746.

[7] For example California, see official website of the State of California, 'What's Legal' <https://cannabis.ca.gov/consumers/whats-legal/> accessed 3 June 2023.

[8] For example Canada, see BBC, 'Canada trials decriminalising cocaine, MDMA and other drugs' (1 June 2022) <https://www.bbc.co.uk/news/world-us-canada-61657095> accessed 3 June 2023.

[9] For example Thailand, see Chad De Guzman 'What Thailand's Legalization of Marijuana Means for Southeast Asia's War on Drugs' (*Time*, 14 June 2022) <https://time.com/6187449/southeast-asia-drugs-thailand/> accessed 3 June 2023.

[10] For an attempt to construct an argument for criminalisation see, Douglas Husak 'Drug Proscriptions as Proxy Crimes' (2017) 36(4) Law Philos 345.

[11] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 3.

[12] See Christopher Coyne and Abigail Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs* (Cato Institute 2017).

The UK Government's plan is in part a response to the two staged drugs review undertaken by Dame Carol Black in 2019 and 2021 respectively.[13,14] While adopting most of the recommendations of the review the Government's response commits to 'going further', insisting that changes to drug user classification be backed up with 'tough enforcement action',[15] committing to a White Paper that will be 'bolder in achieving tougher and more meaningful consequences for illegal drug use.'[16] This is despite the Dame Carol Black report explicitly stating that enforcement can have 'unintended consequences, such as increasing levels of drug-related violence' and that the 'evidence suggests that efforts to restrict the supply of drugs rarely have lasting impacts'.[17] Thus, while seeming to offer real hope for drug reform, the proposal looks more like a piece of populist propaganda aimed at escalating the 'war on drugs'.

However, Chapter 3, of the 'From Harm to Hope' plan, makes a relatively novel commitment, to make a distinction between 'recreational' drug use and 'drug dependency', with significant commitments to divert and fund the treatment and recovery of those suffering from drug dependency,[18] while imposing tougher criminal sanctions on 'recreational' users.[19] The primary concern is whether the

[13] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 1 ' (2019) <https://www.gov.uk/government/publications/review-of-drugs-phase-one-report> accessed 3 June 2023.
[14] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 2' (2021) <https://www.gov.uk/government/publications/review-of-drugs-phase-one-report> accessed 3 June 2023.
[15] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 31.
[16] ibid 47.
[17] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 1' (n 13) (Summary) 13–14.
[18] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) ch 3.
[19] ibid 49–53.

state is morally justified in having two different legal regimes for drug users contingent on their 'drug use status'. Specifically, what demands the rule of law and a version of civic-equality place upon a policy that proposes to treat citizens differently for committing ostensibly the same act.

Having set out the factual terms of the debate, and the Government's proposed response, this article will examine the demands a society governed by the rule of law places upon any proposed policy. Whilst it is accepted that there is no single account of the rule of law, I wish to commit to a working model. As such this article will take Green and Hendry's lead, arguing that any policy proposal cannot be assessed without first committing to at least a limited political legal philosophy.[20] The account does not intend to be comprehensive; proposing three minimum conditions a policy must pass to be 'rule of law compliant', namely: non-arbitrariness, full fidelity and capacity. This does not imply that any policy that passes these conditions *ought* to be implemented, as further demands may be layered on top, it only indicates that if it falls foul of these conditions it is not a suitable 'rule of law compliant' candidate for legislation.

Therefore, this article's focus will be on defining and defending a variation of 'civic-equality', ie civic-equality-plus, which is taken from Green and Hendry[21] and expands upon Gerald Postema's notion of 'fidelity', 'horizontal-social', and 'vertical-political mutuality'.[22] To fully justify the three conditions, particularly horizontal fidelity, will require a deep exploration of 'basic moral equality'. The case for a 'basic *human* moral equality' will be argued, which necessarily leads to conditions that place significant constraints on how and when we are

[20] Alex Green and Jennifer Hendry, '*Ad Hominem* Criminalisation and the Rule of Law: The Egalitarian Case against Knife Crime Prevention Orders' (2021) 42(2) OJLS 635-636.
[21] ibid 638-640.
[22] Gerald J Postema, 'Fidelity in Law's Commonwealth' in Lisa M Austin and Dennis Klimchuck (eds), *Private Law and the Rule of Law* (OUP 2014) 17, 39.

morally justified in treating one another differently. The article argues that these constraints exist prior to any considerations around the philosophy of criminalisation, acting as a starting gate through which policy candidates must pass.

2 The Proposal and The Problem

This article does not focus on the justification for criminalisation, nor on a theory of criminalisation. Rather, it is a normative examination of whether the state is justified in bifurcating the population based on their drug use and having two separate legal regimes dependent on use status. As such, the definition of criminalisation and decriminalisation is useful only insofar as it sets the context within which certain citizens will be treated differently under the law.

2.1 What are Drugs?

A look at the UK's Psychoactive Substances Act 2016[23] gives perhaps the clearest insight into what legislators are trying to get at when they use the word drug. The Act is a piece of legislation designed to be as un-circumvent*able* as possible in reaction to public hysteria around 'legal highs'.[24] The Act describes a 'psychoactive substance' as a substance 'capable of producing a psychoactive effect in a person who consumes it'.[25] A 'psychoactive effect' is one that stimulates a person's central nervous system, which in turn affects the person's mental functioning or emotional state. There is a list of 'exempted substances' in sch 1 of the Act, which includes: controlled drugs, medicinal drugs, alcohol, nicotine and tobacco products, caffeine, and food.[26] For the

[23] Psychoactive Substances Act 2016.
[24] Clare Wilson, 'You're Not Hallucinating, MP's Really Did Pass Crazy Bad Drug Law' (*New Scientist*, 21 January 2016) <https://www.newscientist.com/article/2074813-youre-not-hallucinating-mps-really-did-pass-crazy-bad-drug-law/> accessed 3 June 2023.
[25] Psychoactive Substances Act 2016, 2(1)(a).
[26] ibid sch1.

purposes of this article a drug will be defined as any substance capable of producing a psychoactive effect including all those substances on the exempted list *excluding* food.

This definition deviates from the strict classification of substances adopted under the Misuse of Drugs Act 1971 by the Advisory Council on the Misuse of Drugs.[27] Crucially, the definition adopted here treats alcohol or tobacco as a drug in the same way it treats heroin or cannabis for example. This is intentional; there is no discernible normative reason why we should, a priori, treat psychoactive substances differently simply because their consumption has been normalised over generations. In fact, doing so may be extremely unhelpful, especially when one considers things like the co-morbidity of alcohol and heroin dependency,[28] or the specific challenges of changing consumption habits of cannabis users who regularly consume it in conjunction with tobacco.[29]

2.2 Criminalisation and Punishment

At the centre of the three criminalisation definitions is punishment. The definition of punishment itself is problematic, given 'the range of possible sanctions and the difficulty of comparing' them.[30] Much of the punishment literature is focused on 'hard treatment'.[31] However, for the

[27] Misuse of Drugs Act 1971, s 1.

[28] See for example Aldo Polletini, Angelo Groppi and Maria Montagna, 'The Role of Alcohol Abuse in the Etiology of Heroin-Related Death: Evidence for Pharmacokinetic Interaction Between Heroin and Alcohol' (1999) 23(7) JAT 570.

[29] Hindocha and others, 'No Smoke without Tobacco: A Global Overview of Cannabis and Tobacco Routes of Administration and Their Association with Intention to Quit' (2016) 7 Front Psychiatry 104.

[30] Matt Matravers, 'The Place of Proportionality in Penal Theory: Or Rethinking Thinking about Punishment' in Michael Tonry (ed), *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime* (OUP 2019) 78.

[31] Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49(3)

purposes of this article a broader definition of punishment will be adopted. Put simply, punishment can be understood as any unwanted burden imposed upon an individual by the state for something for which they are deemed to be blameworthy. The reasons for adopting this definition are set out below.

Punishment is, in many cases, obvious, taking the form of penal sentences handed out for an act for which someone is blameworthy. Whilst this definition clearly precludes burdens for which we are not blameworthy, for example taxation, Douglas Husak, amongst others, seems to be unsure as to whether things like fines or non-voluntary substance abuse programmes are punishment.[32] It is hard to understand why Husak finds these cases difficult, in their non-voluntariness they are unwanted burdens, and assuming they have been imposed once blameworthiness is established, they are quite obviously punishment, not least because they are 'backed-up' by 'hard treatment' if not complied with. These deterrents are particularly stark in the case of drug offences. For many drug users, particularly for those with the severest dependencies, the ability to pay a fine is often reliant on them supplying drugs to other users or committing acquisitive crimes.[33] The same applies to the use of coercion in non-voluntary substance abuse programmes; the drug user is almost always faced with either engaging in the programme or suffering hard treatment. Thus, fines and non-voluntary programmes have almost practical equivalence with 'hard treatment' and as such ought to be treated as punishment.

The second part of the formulation focuses on blame. Nicola Lacey and Hanna Pickard argue that a 'consensus prevails' that only those that are responsible and therefore blameworthy 'deserve' punishment[34] as

Monist 397–398.

[32] Douglas Husak and Peter de Marneffe, *The Legalization of Drugs* (CUP 2005) 5–7.

[33] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 1' (n 13) (Evidence Pack) 91.

[34] Nicola Lacey and Hanna Pickard, 'From the Consulting Room to the Court

Husak states, 'refusing to punish in the absence of desert'.[35] This article adopts Lacey and Pickard's lighter definition of blameworthiness, or desert, avoiding affective blame, that is to say where blame itself *is* punishment, thus for the purposes of this article punishment is an unwanted burden imposed after blame or responsibility is established but not through blameworthiness in the first instance.[36]

Having adopted a definition of punishment, criminalisation and its analogues can be dealt with relatively easily. In this article, criminalisation will be understood to be where the *use* of drugs is explicitly prohibited and that prohibition is sustained through punishment. Decriminalisation is where, whether de facto or de jure, the use of drugs is not punished. Finally, legalisation is when the use, supply, and manufacture of a drug is not punished, still allowing for non-criminal regulation, much like the alcohol industry in the UK today. These definitions roughly map the landscape of different legal regimes across the globe and therefore have practical and meaningful significance when used.[37]

2.3 From Harm to Hope—The Proposal

The Government's paper, 'From Harm to Hope', proposes a mixture of de facto decriminalisation, and continued criminalisation. Legalisation is not discussed nor contemplated. The most significant change proposed is in the re-classification of 'drug dependency', the Government proposes to treat drug dependency as a 'chronic health condition' that requires 'long-term support'.[38] In line with Dame Carol

Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm' (2013) 33(1) OJLS 1, 2.

[35] Douglas Husak, *The Philosophy of Criminal Law: Selected Essays* (OUP 2010) 9.

[36] Lacey and Pickard (n 34) 3.

[37] See (n 6–9).

[38] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 31.

Black's advice, this would put drug dependency on a par with conditions 'like diabetes, hypertension or rheumatoid arthritis'.[39] One could, of course, be dependent to varying degrees, but there is a very important distinction made between 'recreational users' and 'drug-dependent users'.[40] Notably, this change in classification is a major deviation from other areas of law, particularly the Mental Health Act 1983 where drug dependency is specifically excluded as a mental disorder,[41] and the Equality Act 2010, which denies drug dependency as a legitimate 'impairment'.[42]

Before exploring how the subgroups will be treated, it is worth looking at how they are to be identified as this may have some bearing on the legitimacy of the overall proposal. The proposal suggests the possibility of establishing problem-solving 'substance misuse courts' to oversee 'treatment and other interventions tailored to their [drug-dependent users] needs'.[43] This approach bears some resemblance to the system in Portugal, where specialist drug courts deal with cases of drug use, conducted by a Ministry of Health and Ministry of Justice appointment alongside an addiction specialist.[44] The Government's proposals are at such an early stage that they do not set out concrete details as to how this would work in practice in the UK, but it can be expected that their proposal is similar. As such, it is assumed that where an individual is apprehended for drug use they are seen by a specialist 'drug court' who determine whether the individual before them is 'legally' drug-

[39] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 2' (n 14) 2.
[40] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 47–49.
[41] Mental Health Act 1983, s 1(3).
[42] Equality Act 2010 (Disability) Regulations 2010, s 3(1).
[43] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 41.
[44] Glenn Greenwald, *Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies* (Cato Institute 2009) 3–4.

dependent and therefore suffering from a 'chronic health condition'.[45] In such cases it will be assumed that the individual, if at this point having committed no other crime than drug use, will be immediately diverted into treatment.

The report is unequivocal on the requirement that 'offenders fully engage with recovery-focused treatment services',[46] a sentiment reinforced by the recent Ministry of Justice's White Paper on sentencing that commits to utilising compulsory community treatment.[47] In essence, such non-voluntary substance abuse programme's would be considered 'diversion' and thus 'treatment' by the Government, whereas for the purposes of this article, dependent on the consequences of non-compliance, they would be considered punishment.

It is worth roughly sketching out what is meant, or at least implied by diversion into treatment and recovery. By examining the Dame Carol Black report, the recent Scottish 'Changing Lives'White Paper,[48] and systems in other jurisdictions it is possible to piece together what diversion might look like. First, there are the physical, funded and delivered treatments, which look far more like a public health offering than anything associated with criminal justice. This should include crucial things such as inpatient detoxification centres,[49] access to

[45] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 31.
[46] ibid 40.
[47] Ministry of Justice, 'A Smarter Approach to Sentencing' (*GOV.UK*, 2021) 53 <https://www.gov.uk/government/publications/a-smarter-approach-to-sentencing> accessed 3 June 2023.
[48] Scottish Drugs Deaths Taskforce, 'Changing Lives: Our final Report' (n 3).
[49] ibid (n 3) 61–62.

buprenorphine treatment,[50] needle exchanges,[51] safe injection facilities,[52] naloxone provision,[53] early intervention initiatives for young people,[54] imbedded 'brief alcohol' interventions in primary care settings[55] and probably most controversially learning from the Swiss model and accepting Heroin Assisted Treatment as the most effective treatment for the most entrenched drug users.[56] Finally sustained investment needs to be made into the workforce, to make working in drug treatment, whether as a psychiatrist, nurse or support worker, a stable and attractive career.[57]

The second prong of treatment and recovery relates to society as a whole and the law more generally. It is important that not only is drug dependency recognised as a health condition as per the Dame Carol Black report but that it is recognised as a *treatable* health condition.[58]

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[50] Matisyahu Shulman, Jonathan Wai and Edward Nunes, 'Buprenorphine Treatment for Opioid Use Disorder: An Overview' (2019) 33(6) CNS Drugs 367.
[51] Scottish Drugs Deaths Taskforce, 'Changing Lives: Our final Report' (n 3) 23.
[52] ibid.
[53] ibid 47–48.
[54] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 40.
[55] Robin Room, Thomas Babor and Jurgen Rehm, 'Alcohol and Public Health' (2005) 365 Lancet 519, 523–524.
[56] See either Jurgen Rehm and others, 'Feasibility, Safety and Efficacy of Injectable Heroin Prescription for Refractory Opioid Addicts: A Follow-Up' (2001) 358 Lancet 1417 or John Strang and others, 'Heroin on Trial: Systematic Review and Meta-Analysis of Randomised Trials of Diamorphine-Prescribing as Treatment for Refractory Heroin Addiction' (2015) 207(1) BJ Psych 5.
[57] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 2' (n 14) 13–14.
[58] Emma McGinty and others, 'Portraying Mental Illness and Drug Addiction as Treatable Health Conditions: Effects of a Randomized Experiment on Stigma and Discrimination' (2015) 126 Soc Sci Med 73.

Drug-dependent users must be treated in the same way as anybody else suffering from a chronic health condition is now treated, with just as valuable life choices and expectations, approached with an attitude of compassion.[59] For the differentiation of users under the law to be defensible it will be essential that the law avoids any stigmatisation once a person is diagnosed as drug-dependent. Legal classification must in fact be the first step in a positive journey of understanding.

One thing is clear; those deemed non-dependent under the proposals would continue to be dealt with solely through the criminal justice system with 'no implicit tolerance of so-called recreational drug users' and 'new penalties' for such use.[60] These penalties are to include escalating sanctions such as 'curfews or the temporary removal of a passport or driving license'.[61] Thus drug users, committing the same offence, would be bifurcated and treated differently under the law.

2.4 Why We Should Care

To deal with why drug reform is something we should care about, approximately 3.2 million people used an illegal drug in the UK in 2020. Of those, roughly 715,000 were using illegal drugs regularly.[62] In addition, when surveyed, roughly 25 million adults had consumed alcohol in the week prior to questioning.[63] These statistics tell us two things: drug use is widespread; and a drug's legal status doesn't deter vast numbers of people from using it. Given over half the adult UK population engages in regular drug use, at the very least we should be

[59] Scottish Drugs Deaths Taskforce, 'Changing Lives: Our final Report' (n 3) 14.
[60] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 4.
[61] ibid 6.
[62] Office for National Statistics, 'Drug Misuse in England and Wales: year ending March 2020' (2020).
[63] Office for National Statistic, 'Adult Drinking Habits in Great Britain: 2017' (2018).

asking why we have such diverse legal regimes dependent on the drug of choice.

Moreover, the data implies that people want to, or at least are in some way compelled to, take drugs, regardless of their legal status. 60% of British adults believe that a drug's legal status is ineffective in preventing usage.[64] Indeed, people appear to have equally little regard for the implied 'risk' to their health, 84% of British adults think regular drinking is either 'very harmful' or 'fairly harmful',[65] yet clearly many of those same people continue to engage in it. Putting these two points together we have the first reason to care: we use a lot of drugs, and the legal landscape for specific drugs is different.

However, there is a far more significant reason to care, the UK has seen an 80% increase in deaths from illegal drugs since 2012,[66] with 3,284 deaths reported in 2018, the highest level in Europe.[67] In addition, there are an estimated 300,000 people dependent on crack-cocaine and heroin in England, this group tend to spend their lives cycling in and out of prison, and are responsible for roughly half of all acquisitive crimes.[68] Acquisitive crimes from this cohort are caused by the need to fund addiction; this is clearly having a damaging effect on all of society. Furthermore, when those suffering from drug dependency enter prison, they are faced with a prison system in crisis and 'plagued by drugs'.[69]

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[64]'YouGov—Drugs Results' (*YouGov*, 2021) Question 1 <https://docs.cdn.yougov.com/dst8x5o1s4/YouGov%20-%20Drugs%20Results.pdf> accessed 3 June 2023.

[65] ibid Question 3.

[66] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 12.

[67] European Monitoring Centre for Drugs and Drug Addiction, 'Drug-related deaths and mortality in Europe' (2021) 7.

[68] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 3.

[69] HM Inspector of Prisons, 'HM Chief Inspector of Prisons for England and Wales: Annual Report 2018–2019' (2019) 7.

Given roughly one third of offenders are in prison on drug related offences, drug users undoubtedly account for some of the 83 suicides and 45,310 incidents of self-harm across all prisons in 2018–2019, up 25% year on year.[70] The help upon leaving prison is no better. Thus, the Government is right to want 'a generational shift in the country's relationship with drugs'.[71].However, the question remains whether this shift can be achieved while discriminating against individuals based on their 'drug-use status'.

3 Three Fair Conditions

This section will set out 'three fair conditions' that as a minimum a policy must pass to be 'rule of law compliant' and therefore an acceptable candidate for legislation. These conditions can be summarised as non-arbitrariness, full fidelity, and capacity, collectively, to distinguish them from Green and Hendry[72] they are better termed "civic-equality-plus". it will ultimately be shown that the Government's proposal, to have two separate legal regimes based on drug use status can be compatible with civic-equality-plus.

3.1 Thin Rule of Law and Non-Arbitrariness

The initial question that teases out the conditions coalesces around what the rule of law means and why we should care about it. As Nicola Lacey points out, there is a 'vast literature' on the subject and no clear consensus on what the rule of law demands.[73] While Lacey in her article exploring populism and its relation to the rule of law delineates four 'broad approaches',[74] this article is not particularly interested in the

[70] ibid 25.
[71] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 12.
[72] Green and Hendry (n 20) 3–9.
[73] Nicola Lacey, 'Populism and the Rule of Law' (2019) 15(1) Ann Rev Law & Soc Sci 79.
[74] ibid 85.

categorisation of approaches, agreeing with Joseph Raz that 'most classifications do no greater harm than being boring'.[75] As such in what follows, a singular rather thick concept of the rule of law will emerge that evolves out of different approaches and will be defended against possible critiques from across the spectrum.

The first thing to note is that across the gamut of rule of law theories there is consensus that 'legality' is important to any conception of the rule of law. Legality can roughly be understood as an agreement to be 'governed by rules' to 'provide real protection against arbitrary power'.[76] As Green and Hendry point out, this feature appears in all mainstream accounts of the rule of law.[77] Simply put we should care about the rule of law because it protects us from the arbitrary use of power.

For many it may simply take on a Hobbesian form and be limited to a commitment to subject oneself to a set of rules regardless of the rule's content.[78] For example, as Raz states, the law *can* be morally valuable and 'a worthy object of identification and respect' but it *need not* 'enjoy legitimate authority' to meet it's 'inherent claim to authority'.[79] In other words the law could and indeed should aspire to be in some way morally valuable, but that is not a precursor to a polity or policy being compliant with the rule of law. There can be plenty of 'bad' legitimate rules.

This concept of legality is just as important to much 'thicker' accounts of the rule of law, for example Susanne Baer who sees an 'inextricable connection' between a set of defined 'fundamental rights' and the rule

[75] Joseph Raz, 'About Morality and the Nature of Law' (2003) 48(1) Am J Juris 1, 2.
[76] Trevor Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2004) 2.
[77] Green and Hendry (n 20) 4.
[78] Thomas Hobbes, *Leviathan: with selected variants from the Latin edition of 1668* (Edwin Curley ed, Hackett Publishing 1994) 219–220.
[79] Raz (n 75) 15.

of law.[80] Baer, in defending a rights-based version of constitutionalism, concerned with the 'growing intensity and popular success' of attacks on the rule of law,[81] turns the standard account on it's head echoing the Platonic fears of democracy and its vulnerability to tyrants.[82] She nonetheless still conceptualises 'legality' as an agreement to be governed by a set of rules and to be protected from the arbitrary use of power, even if that is the arbitrariness of 'the mob' or nationalist elite.

This generates the first and most fundamental characteristic of the rule of law, and the first condition of this article: non-arbitrariness. Colloquially 'arbitrary' has a very different meaning to the one adopted here, often meaning something that is done randomly, without reason or without good reason.[83] This article is interested in the far more specific concept of arbitrariness which flows from *libero arbitrium*, where an act may 'be reasonable, reasoned or otherwise justified but it is still arbitrary if it is taken entirely at the will or pleasure of the agent'.[84] That is to say, it takes consideration of nothing other than the interests of the agent. Non-arbitrariness merely demands that due and careful consideration be given to the interests of others, that is, in the case of legality, the interests of those who are governed. As such it is best conceptualised as a deliberative condition, which demands that the 'deliberative perspective'[85] of the entirety of *the governed* to be taken into account when a decision is being made.

This may at first appear a very weak condition. However, an exploration of what the condition demands shows it to be quite constraining. Take the 2019 controversy over then British Prime Minister Boris Johnson's

[80] Susanne Baer, 'The Rule of—and not by any—Law. On Constitutionalism' (2019) 71(1) CLP 335, 362.
[81] ibid 338.
[82] Plato, *The Republic* (Desmond Lee (tr), 2nd edn, Penguin 2007) 290–308.
[83] Merriam-Webster, <https://www.merriam-webster.com/dictionary/arbitrary> accessed 3 June 2023.
[84] Postema (n 22).
[85] ibid.

attempt to prorogue Parliament and avoid scrutiny and debate over the Government's 'Brexit Bill'.[86] The Government's case for prorogation ultimately went to the Supreme Court and lost.[87] This is a clear instance of a government violating the condition of non-arbitrariness, as the policy, in this case the Brexit Bill, had been drafted from the 'deliberative perspective' of the Government *alone* and had not, indeed, had purposefully attempted to avoid, the deliberative perspective of those it purported to govern. Looked at in this way the condition demands that any policy must be scrutinised from the perspective of those to whom it is going to apply. A reasonable reading of this condition is that it demands that for a policy to be compliant it is given due consideration by a body of representatives of the governed, even if the executive ultimately overrules them.

Deliberation alone has merit as a condition for the rule of law, as at a minimum it places hurdles in the way of tyrants and bullies looking to bypass established social deliberative norms. Deliberation is also clearly a rule of law asset as it generates and solidifies the norms amongst the ruling classes (whether they be executives, officials, judges, or legislatures) who then reach a shared consensus as to what the law is. This is essential for example, to any rule of recognition in a modern legal system, which is dependent on a legislature for validity.[88] Absent deliberation, consensus would be almost impossible to locate. The requirement for a deliberative condition is exemplified across the world in the current era of 'strongman' politics, where even in seemingly developed democracies, individuals, acting as executives, have tried to avoid or override deliberative scrutiny.[89]

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[86] European Union (Withdrawal) Act 2018.

[87] *R (On the Application of Miller) v The Prime Minister* [2019] UKSC 41.

[88] Hart (n 24) 100–106.

[89] For an overview see, Seraphine Maerz and others, 'State of the World 2019: Autocratization Surges—Resistance Grows' (2020) 27(6) Democratization 909, 910–914 or, for a specific case study of arbitrary rule in Hungary see, Péter Krekó and Zsolt Enyedi, 'Explaining Eastern Europe: Orban's Laboratory of Illiberalism' (2018) 29(3) J Democr 39, 43–50 or, Flora

However, an anecdotal example illustrates the shortcomings of this stand-alone condition. Emperor Nero's decree of AD64, following the great fire in Rome of that century, would most probably have passed the non-arbitrariness condition.[90] If the consensus is to be believed he did call a council of advisors as per Roman law of the time, and considered multiple other 'culprits', or one could argue perspectives, notably the Jews, before issuing his decree against Christianity.[91] While executively choosing to legislate against the interests of those he governed he at least nominally considered their deliberative perspective and as such his decision was 'non-arbitrary'.

Postema, quoting Pettit, quite rightly sees non-arbitrariness alone being insufficient to determine the rule of law.[92] Postema argues that truly what is required for the protection from arbitrary rule is *answerability*, or more specifically 'mutual accountability', which he sees as sitting independently of arbitrariness.[93] In answer Postema advances a 'fidelity thesis', which has two dimensions, one vertical and the other horizontal.

3.2 Full Fidelity

Fidelity is to be read as a binding commitment. Specifically, Postema sees fidelity as a three-way street, a tripartite marriage of equals. First, mutual commitment and accountability between subjects and the state for the rules they institute, second between citizens and the rules, and finally amongst citizens themselves, generating a compact amongst the

Garamvolgyi and Jennifer Rankin, 'Viktor Orban's Grip on Hungary's Courts Threatens Rule of Law' *The Guardian* (London, 14 August 2022) <https://www.theguardian.com/world/2022/aug/14/viktor-orban-grip-on-hungary-courts-threatens-rule-of-law-warns-judge> accessed 3 June 2023.

[90] Francis Bacchus, 'The Neronian Persecution' (1908) 143 Dub Rev 346, 347.

[91] Michael Gray-Frow, 'Why the Christians? Nero and the Great Fire' (1998) 57 Latomus 595, 615.

[92] Postema (n 22) 19.

[93] ibid.

governed and the governors as we 'the people', to our law.[94] The vertical element relates to the mutual commitment owed between the state and its citizens and the horizontal is that which is owed between citizens bound together in a commonwealth.[95] This idea of vertical and horizontal commitments is not unique, for example Jeremy Waldron talks of terms like 'equal concern' and 'human dignity', 'clustering together to form a powerful body of principle' which do two jobs 'one vertical and one horizontal'.[96]

3.2.1 Vertical Fidelity

The vertical element of the fidelity thesis is expressed under many different guises and can be seen as the natural answer to Hobbes' unchecked Leviathan. Stated simply, the lawmakers and powerholders may construe laws however they please, provided that they themselves are beholden to them and cannot 'opt out'. For example Martin Krygier, rejecting a purely technical account of the rule of law, argues for 'at least a reliable constraint on the exercise of power' by those in positions of authority.[97] Krygier quotes Frank Upham's frustration that 'the training of Chinese judges by American law professors does not prevent the detention of political dissidents',[98] this is a handy example of where the 'means' of the rule of law are not met by the 'ends' of the rule of law. Vertical fidelity demands that our hypothetical Chinese judge cannot detain or decree against an individual simply because they dislike them or their views.

It could be argued, that had the hypothetical judge, expressed dissident views, and broken some codified law, they may well be subject to

[94] Green and Hendry (n 20) 25.
[95] Postema (n 22) 39–40.
[96] Jeremy Waldron, *One Another's Equals: The Basis of Human Equality* (Harvard University Press 2017) 3.
[97] Martin Krygier, 'The Rule of Law and "The Three Integrations"' (2009) 1 HJRL 21, 26.
[98] ibid 23.

sanction. But Upham's frustration is of the type where the judge uses their discretion too freely, correlating the law with their own morality rather than seeing it as an independent instrument. All judges, and therefore office holders, must be held to the same standard as the accused.

Vertical fidelity at its most basic prevents *the governed* from being treated differently from the *governors*, that is all. However, this alone does not satisfy the sort of 'moral equality' or equal standing someone like Waldron has in mind when he expresses that 'human life has a high worth that is important and equal in the case of each person'.[99] For a more thorough determination of 'basic moral equality' and therefore full fidelity, we need to look to the horizontal element of the formulation.

3.2.2 Horizontal Fidelity

The following element of civic-equality-plus will be fundamental in determining the defensibility of the Government's proposals. Via means of a justification of a 'basic human moral equality', that doesn't rely on human uniqueness or the possession of a range of human characteristics, it will be shown that, so long as we meet a standard of treating drug-dependent users with a sufficient level of esteem, the law is justified in having different legal regimes for different types of drug users.

The horizontal element to the rule of law can be understood as involving three dimensions: 1) a commitment to treat each other as moral equals, 2) a commitment to one another to be ruled by '*one* set of governing standards', 3) a commitment to hold one another to account for those rules.[100] It is from the first dimension that the other following two dimensions stem. In this way the rule of law can be conceptualised as a social communal phenomenon where humans, as agents in a social

[99] Waldron (n 96) 2.
[100] Green and Hendry (n 20) 5.

enterprise, commit to being ruled with some minimal guarantees of fairness and dignity. This is admittedly not a particularly novel idea, as Postema acknowledges, Kant and Rousseau commit to a form of horizontal fidelity, but despite the criticisms levelled against them it is an idea worth defending.[101]

3.2.3 Horizontal Fidelity as Basic Moral Equality

The crux of the horizontal commitment implicitly relies on the theory that 'all persons have equal moral standing', something George Sher notes as 'a rare point of agreement' amongst moral and political philosophers.[102] This article relies heavily on this consensus and as such perhaps the most pressing demand, and one that Waldron notes Ronald Dworkin apparently takes for granted,[103] is a justification as to why we should assume ourselves 'moral equals'. If we can establish good reasons for this, then we are in a strong position to accept the 'horizontal duties' expected of us without further concern as to how they are formulated.

Waldron provides a starting point, proposing two reasons as to why we might consider ourselves moral equals. The first argument, he terms 'continuous equality', in which he argues that 'the principle of basic equality is opposed to any claim that there are moral distinctions and differentiations to be made *among humans* like unto or analogous in scale and content to the moral distinctions commonly made between humans and other animals'.[104] Stated simply there are no 'moral distinctions' that we can make amongst humans akin to those we can make between humans and 'other animals', or rather, all humans are more human than any other animal is human.

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[101] Postema (n 22) 36.
[102] George Sher, 'Why We Are Moral Equals' in Uwe Steinhoff (ed), *Do All Persons Have Equal Moral Worth? On 'Basic Equality' and Equal Respect and Concern* (OUP 2015) 17.
[103] Waldron (n 96) 15.
[104] ibid 30.

Waldron's second principle, termed 'distinctive equality' takes the first principle further and argues for human exceptionalism. Waldron commits himself to this second stronger principle of moral equality.[105] This is not a necessity; a modified version of his first principle alone is sufficient as a basis for moral equality.

In dealing with Waldron's second principle, his first is undermined but easily revisable. What Waldron calls 'distinctive equality' should be better termed 'anthropocentric equality'. Waldron sets out that humans are in some way special. He allows that this may be a religious claim,[106] or it may be a more 'modern' claim that our 'moral standing depends on some variable property or capacity',[107] most often this capacity is consciousness or intelligence. Whatever the root cause the argument is that we are 'special', not just different, but different *and* better.

Human exceptionalism tends to fall into two groups. This article will not deal with the more eccentric ideas around what Anil Seth calls "'spooky" free will', that is the type of humanness that invokes some sort of 'spirit force' or soul,[108] but rather with the more plausible suggestion that we are special because we are especially conscious or intelligent.

Consciousness and intelligence turn out to be very poor traits to base human uniqueness on, largely because of what Sher terms the 'scalar problem',[109] something that Waldron, by way of Rawls, is alert to.[110] This posits that if we are to determine our uniqueness, and therefore our moral equality, on a certain property, say our intelligence or our

[105] ibid 31.
[106] ibid ch 5.
[107] Sher (n 102) 18.
[108] Anil Seth, *Being You: A New Science of Consciousness* (Faber & Faber 2021) 211.
[109] Sher (n 102) 18.
[110] Waldron (n 96) 113–141.

consciousness, how conscious or intelligent do we need to be to be moral equals. If we set some, arbitrary level, inevitably we will end up with scenarios where for example the severely learning disabled or children may fall out with the required level of intelligence or consciousness. Indeed, we are becoming acutely aware that many mammals and birds outperform quite advanced children at different intelligence tests, and machines are certainly outperforming adult humans.[111] This is problematic, not because if, by 'lowering the bar', we award moral equality to non-human beings, rather that in setting the bar at any level we will almost always exclude humans we would wish to include. This is clearly not a firm basis on which to base basic moral equality.

So, to turn to Waldron's 'continuous equality', the idea that denies the 'existence of major discontinuities in the human realm',[112] the starting premise needs clearer elucidation. What is unsaid is that we are concerned with humanity, and how we organise ourselves. We need not resort to other animal comparisons; the argument here is one of sufficiency, homogeneity and potential. First of all, all humans are sufficiently homogeneous, that is to say sufficiently human, for us not to discriminate against one another, something Waldron agrees with.[113] Is this really true? After all there are 'innumerable physical and mental differences that separate people'.[114] These differences, however, are not enough to ever stop someone being human. There is yet to be a human born with a granite rock for a head, or a sun for a nose, or who is able to navigate the world through magnetoreception.[115] Yes, within the bounds of what a human is like, there are differences, but on the physical scale of the universe these are minute. We really are just too

[111] Seth (n 108) 251.
[112] Waldron (n 96) 30.
[113] Waldron (n 96) 134.
[114] Sher (n 102) 17.
[115] Jason Daley 'Can Humans Detect Magnetic Fields' (*Smithsonian Magazine*, 20 March 2019) <https://www.smithsonianmag.com/smart-news/can-humans-detect-magnetic-fields-180971760/> accessed 3 June 2023.

similar, 'we inhabit a tiny region in a vast space of possible conscious minds, and the scientific investigation of this space so far amounts to little more than casting a few flares out into the darkness'.[116]

Second, this article posits a stronger theory, that all humans while having the potential, however small, to make up the gaps in some of what we might have previously seen as the characterising features of being specifically human, are still always human. This is distinct from Waldron's 'telos', which states that any person could have been, or at any point might fail to be within the *range* of humanness,[117] but is rather grounded in the reality of our changing circumstances. Children grow up, those suffering from mental illness have new treatments that in some cases alleviate all their symptoms,[118] the visually impaired can increasingly see,[119] and the drug-dependent recover.[120] That matters to the individuals but what matters most is the simple fact that we are born humans and it is humans, and the way in which we organise ourselves that we are concerned with. Our equality stems from the simple fact of our birth into the set we call human animals.

Basic moral equality and therefore status equivalence is based on an acceptance of *sufficient* human homogeneity, which proscribes citizens, or those that govern, from discriminating against one another based upon a *sufficient* set of standardised 'human' characteristics. As such differences in skin colour, gender, height or intelligence are *insufficiently* heterogeneous amongst humans. If we were to insist upon

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[116] Seth (n 108) 245.

[117] Waldron (n 96) 250.

[118] Hannah Devlin, 'Woman Successfully Treated for Depression with Electrical Brain Implant' *The Guardian* (London, 4 Oct 2021) <https://www.theguardian.com/society/2021/oct/04/woman-successfully-treated-for-depression-with-electrical-brain-implant> accessed 3 June 2023.

[119] Reza Dana, 'A New Frontier in Curing Corneal Blindness' (2018) 378 N Engl J Med 1057.

[120] See for example Patrick Flynn and others, 'Looking Back on Cocaine Dependence: Reasons for Recovery' (2003) 12(5) Am J Addict 398.

going outside the human sphere for cardinal differences a better gauge might be that we are *certainly* distinctive from rocks or stars, maybe single-cell amoeba, but not from one another. This is enough to establish 'basic human moral equality'.

3.2.4 Esteem and Horizontal Fidelities Duties

Having established basic moral equality amongst humans, we can then deal with the other two dimensions of the horizontal element of the rule of law, namely a commitment to be ruled by a set of rules and a commitment to hold one another to account for those rules. These flow quite neatly from basic human moral equality, the first condition insists that if we accept each other as moral equals, that is to accept oneself as an equal, no better, no worse, and as such having no *good* reason for excusing oneself from the set of rules we have, albeit perhaps tacitly, agreed to be governed by. [121]

The second condition is more nuanced; if we believe ourselves moral equals then it is incumbent on us to hold each other in equal esteem. However esteem ought to be understood through two paradigms. The first type, for the purposes of this article is 'strong esteem', the second, 'sufficient esteem', it is this second variety that basic human moral equality demands.

Strong esteem can be thought of as a sort of attitude, regard and perhaps even reverence with which we might treat people who we see as being of good standing or moral excellence, the opposite being where an individual falls short of what we might expect of them.[122] Basic moral equality doesn't require us to go around revering all people at all times, and we can often have very good reasons not to. However, 'sufficient esteem' is implied by basic moral equality, and it requires that no matter

[121] For a comprehensive discussion on the possibility of tacit consent to be governed see, Hanna Pitkin, 'Obligation and Consent I' (1965) 59 APSR 990 and Hanna Pitkin, 'Obligation and Consent II' (1966) 60 APSR 39.
[122] For example, see 'affective blame' in Lacey and Pickard (n 34) 18–20.

the conduct of 'others' they remain human and therefore we owe them the duties of human dignity and respect, regardless of their acts. That extends to respect for their mental welfare as much as to their bodily integrity, for as basic moral equals we can't possibly have any good reasons not to.

An extension of 'sufficient esteem' is the requirement to hold one another accountable to the rules to which we have prescribed. This should not be thought of as a sort of Foucauldian social policing[123] but rather a positive commitment to hold each other to account to our rules, to which we have, perhaps only putatively, agreed in common. This is better understood as for example calling out racism or misogyny when we see it, whether that is amongst citizens or within laws, rather than calling the local council when our neighbour has parked on a double yellow line. A commitment to basic moral equality is a positive commitment that demands non-passivity and therefore the defence of our shared rules.

Together these three dimensions generate horizontal fidelity, and along with vertical fidelity create full fidelity, a commitment to the equal subjection to the rules by the ruled and the ruler, and a stronger commitment between all, to both treat each other as moral equals under those rules and hold each other to account for them. Any policy to be rule of law compliant must be capable of passing this condition.

3.3 Capacity

The type of capacity relevant to this article is the individual's capacity to give, to commit, even if only in a hypothetical sense, to the full fidelity required of them as outlined above. The obvious case is, of course, minors, from whom we cannot expect full fidelity. Thus while a newborn baby is a moral equal, we are justified in temporarily suspending and making rules that intervene on the duties owed to, and

[123] Michel Foucault, *Discipline and Punish: The Birth of The Prison* (1st edn, Penguin Classics 2020).

by, them but only if we are working toward a point that they can fully participate in the commonwealth. This applies not only to minors but also acutely, to the insane[124] and the severely mentally disordered,[125] and requires stringent checks and balances, that emphasise some scheme in which there is a 'way back' to full fidelity and the maintenance of sufficient esteem.

These three conditions can collectively be conceived of as a version of civic equality. It is this account, civic-equality-plus, which extends the rule of law beyond its more familiar and limited contours, into a socio-phenomenological one, which can then be used to determine whether any given policy is rule of law compliant. It helps to see what policies this account of civic equality permits, to see if it is doing any real-world work, before moving on to test the Government's drugs policy proposal against it.

3.4 Testing Civic-Equality-Plus

The paradigm of three potential 'marriage laws' is useful for testing this version of civic equality, namely: interracial marriage, marriage to a minor and 'no marriage'.

To start with interracial marriage, could a fair society institute a policy, which allowed those of the same ethnicity to enter into marriage but ban marriage between those of different ethnicities?[126] Such a policy would pass the first condition, non-arbitrariness, provided it was debated in a legislature before being passed, and the views of those who wished to

[124] See for example, Matt Matravers, 'Holding Psychopaths Responsible' (2007) 14(2) PPP 139 or, Michael Moore, 'The Quest for a Responsible Responsibility Test: Norwegian Insanity Law After Breivik' (2015) 9(4) Crim Law and Philos 645.

[125] See for example, Ailbhe O'Loughlin, 'Sentencing Mentally Disordered Patients: Towards a Rights-Based Approach' (2021) 2 Crim LR 98.

[126] For example in Apartheid South Africa see, Prohibition of Mixed Marriages Act, Act No 55 1949.

engage in interracial marriage were represented in that debate. The demands of vertical fidelity would permit it, provided those governing also abstained from interracial marriage, however it would clearly fail on the grounds of horizontal fidelity. The key to its failure is not in the banning of interracial marriage; it is in the instituting of any marriage. If marriage is to be permissible, then as moral equals, we must apply the institution evenly across us 'the people' for it to be our law, ethnicity would not be a sufficient ground for discrimination. A law against interracial marriage would not be a permissible candidate for legislation.

What of the unpleasant question of marriage to a minor, to make it easy what of a proposed law that permitted marriage between anyone over the age of six.[127] Non-arbitrariness would be satisfied, as would vertical and horizontal fidelity, however it would clearly stumble on capacity, as no serious person would deem a six-year-old sufficiently capacious to enter into something as solemn and consequential as marriage. So no, civic-equality-plus would not permit a marriage policy that allowed marriage to or amongst minors.

Finally, there is the somewhat unusual outcome of a rule banning all marriage, something civic-equality-plus would permit. However this is where the important point of civic-equality-plus comes in, it is merely a starting gate through which policies pass to be rule of law compliant. If after that point thicker political philosophies wish to be applied then civic-equality-plus remains silent. There may be rights or harm-based grounds, paternalistic or even perhaps some moralistic reasons why a law, policy or regime may or may not be instituted. Civic-equality-plus simply sets a benchmark, a benchmark designed to protect polities from

[127] I have intentionally used a dramatically low age, as the focus of this paper is not on adolescents and their capaciousness, for a comprehensive discussion see, Mathew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (Palgrave MacMillan 2005).

the 'arbitrary use of power' and offer a minimum level of protection for human dignity amongst moral equals.[128]

4 Is There Any Hope?

Having established and defended an account of civic-equality-plus one can now assess the Government's proposal and decide whether the policy is rule of law compliant and thus a suitable candidate for legislation.

4.1 Is Bifurcation Defensible?

4.1.1 Is it Non-Arbitrary?

This article defends a strong interpretation of non-arbitrariness, namely that the proposal needs to go through sufficient 'normal' stages of deliberation, to include scrutiny by Parliament, taking into account the perspective of all those who would be affected by the proposal, before any changes to law are implemented. Crucially this ought to include the 'deliberative perspective' of the 'recreational user' as well as that of the 'drug-dependent'.

There are two critical things that give hope that this condition will be met, first the way in which the proposal has gotten to where it is today. The Dame Carol Black report was commissioned, and the work in that report was rigorous, consulting with most of the key stakeholders.[129] For example, User Voice was consulted, a charity run by those who 'have been in prison and on probation', representing the views of those with experience of the criminal justice system, many of whom will have lived experience of drug dependency,[130] as well as more institutional consultee's like police forces and academics specialising in addiction

[128] See Allan (n 76).
[129] Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 1' (n 13) (Summary) Annex A and B.
[130] User Voice (2014) <https://www.uservoice.org/ > accessed 3 June 2023.

and criminology.[131] Not only was the report commissioned, it has undoubtedly been considered, indeed there is a commitment to implement the 'key recommendations, this is more than satisfactory'[132] for non-arbitrariness. In fact, provided they were given sufficient consideration, the Government could have chosen not to implement any of the recommendations and non-arbitrariness would still be satisfied.

Second, the Government committed to a 'White Paper next year'[133] to bring the matter forward. Again, this seems to be a commitment to follow the deliberative norms of the UK, and, if followed up would lead to a hearing in Parliament. This would satisfy non-arbitrariness.

However, there are two notes of caution to be struck which can nevertheless be easily resolved. The first relates to the 'deliberative perspective' of the 'recreational user'. This point is difficult, as the Government challenges the 'notion of recreational use',[134] despite repeatedly referring to it, admittedly often with the antecedent 'so-called'. Dame Carol Black certainly did not consult with recreational users, and the Government while semi-acknowledging the possibility, denies their validity. However, if the proposal were to get to Parliament and be deliberated there, given the 'principle-agent model' of the House of Commons, it would be adequate to say that all the peoples of the UK's perspective are s*ufficiently* considered when something is deliberated in the Commons. [135] That is to say sufficient to satisfy non-

[131] For example an interview with Cressida Dick the then Commissioner of the Metropolitan Police Service or the Neuroscience of Substance Misuse Roundtable held at Cambridge University both in, Home Office, 'Independent Review of Drugs by Dame Carol Black: Phase 2' (n 14) Annex B.
[132] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 8.
[133] ibid 6.
[134] ibid 5.
[135] For a good comparator showing strong links between constituencies and MP's see, Katrin Auel and Resul Umit, 'Who's the Boss? An analysis of the vote on the "The European Union (Withdrawal) Bill" in the House of

arbitrariness. However, this leads to the second concern, namely the scope of the proposed White Paper.

Currently, the Government only proposes that the White Paper explores 'new measures to reduce demand and deter people from illegal drug use through a set of tougher sanctions'.[136] This is insufficient, particularly with regard to the crucial element of treating addiction as a 'chronic health condition'. As will be shown below, an awful lot of work is being done by this change in classification, as such the White Paper ought to include this, and any proposals around the means by which drug dependency is ascertained. Given there is a simple fix, ie broadening the scope, this is not an impediment to the potential defensibility of the Government's proposals. So if the scope of the White Paper is broadened and it is brought before Parliament, non-arbitrariness is satisfied.

4.1.2 Does It Meet the Demands of Full Fidelity and Capacity?

There is nothing to suggest vertical fidelity is under threat; for example, there is no suggestion of special privileges for the governing classes, or an uneven application of the policy. This is obviously dependent on the policy being enforced uniformly, something that may be of concern in light of recent and historic revelations around institutional racism and misogyny in many police forces.[137] However, as a basic normative

Commons' (2021) 29 JCES 468.

[136] HM Government, 'From Harm to Hope: a 10-year drugs plan to cut crime and save lives' (n 5) 49.

[137] For example, for instances of institutional racism and misogyny in the Metropolitan Police Force, see, Independent Office for Police Conduct, 'Operation Hotton: Learning Report' (2022) <https://www.policeconduct.gov.uk/sites/default/files/Operation%20Hotton%20Learning%20report%20-%20January%202022.pdf> accessed 3 June 2023.

premise, the proposal does not recommend exclusions for the rulers or powerful.

Horizontal fidelity requires more careful consideration. Treating the drug-dependent differently under the law can be justified due to a lack of capacity, coupled with the ability to return to capacity, whilst holding drug-dependent individuals in 'sufficient esteem' for the period in which they may need to receive treatment. This is where a comparison with mental health law is useful and can provide a template for thinking about drug dependency.

It is already accepted under the Mental Health Act 1983 that individuals suffering from a mental disorder, who have committed a crime, may be dealt with by way of a hospital order, known as s 37 orders.[138] Such orders can only be used when the court is satisfied that the offender is suffering from a mental disorder and that appropriate treatment is available and that this is the best way of disposing of the case.[139]

While current mental health legislation, contrary to the DSM-V,[140] doesn't treat drug dependency as a valid mental health disorder a specialist drug court could. Indeed, the Government's proposal to treat drug dependency as a chronic health issue is doing just that. The diagnosis and classification of the individual as suffering from a condition which prevents them from being able to offer fidelity is one of the key concepts that keeps horizontal fidelity intact. Thus, the separation of the drug-dependent user is justified simply by the acknowledgment of it as a chronic health condition, one of the symptoms of which is the compulsive consumption of a drug or drugs. This speaks to a complete, but temporary, lack of capacity when it comes to the individual's ability to control their drug use.

[138] Mental Health Act 1983, s 37.
[139] ibid s 37(2).
[140] James Morrison, *DSM-V Made Easy: The Clinicians Guide to Diagnosis* (The Guilford Press 2014).

Of course if other crimes were committed concurrently this does not mean drug-dependent offenders would be diverted for *all* crimes. Just as in mental health law the degree to which the individual's mental disorder contributed to the commission of the crime is a matter of the degree of culpability, which can be greater and lesser.[141] This article is only concerned with the act of drug *use* and as such, the individual's commission of other crimes may be related to their dependency to varying degrees or indeed not at all.

The stipulation that treatment is available is also essential, as it speaks to the individual's ability to return to capacity and therefore fidelity, and thus the commitment to basic moral equality. Given the commitment to divert drug-dependent users into a treatment and recovery system, we have to assume, with the help of empirical data showing the possibility of recovery for even the most entrenched drug users,[142] that some form of treatment will always be hypothetically available even if it is not practically available in this jurisdiction now. There are no lost causes.

These two considerations alone, are not enough to fully satisfy horizontal fidelity, as there are two further considerations, that of 'sufficient esteem' and punishment. Dealing with the latter leads to a satisfactory answer to the former.

As discussed previously, this article considers non-voluntary substance abuse programmes as having practical equivalence with punishment, as they are backed up with hard treatment. Therefore this article argues that all 'diversion' would have to be voluntary. There are good practical reasons for this, as intervention usually requires the compliance and acceptance of responsibility by the individual to achieve successful

[141] Nicholas Hallett, 'To What Extent Should Expert Psychiatric Witnesses Comment on Criminal Culpability?' (2020) 60(1) Med Sci Law 67, 69—71.
[142] See Office for National Statistics, 'Drug Misuse in England and Wales: year ending March 2020' (n 62).

outcomes.[143] However, normatively, if the individual is forced into a non-voluntary programme, it is a failure to treat that person with 'sufficient esteem' as demanded by basic moral equality. An example helps to illustrate this; no one would accept that a diabetic ought to be forced to take insulin, even if it were a very foolish thing to refuse to do. We might be justified in not holding them in 'strong esteem' but we ought to have respect for their bodily integrity. To respect their decision to handle their health condition as they see fit is to show them sufficient esteem and as such acknowledge our basic moral equality. The same must be applied to the individual suffering from drug dependency, people 'should be supported to make informed decisions about their drug use' not coerced.[144] On the basis that diversion means genuine diversion to services, which are voluntary in nature, then horizontal fidelity can be met.

In addition, a determination that someone is drug-dependent must not lead to any form of stigmatisation, this again speaks to sufficient esteem. This conclusion however raises a much harder question as to why we are then justified in treating the 'recreational user' so harshly and whether horizontal fidelity has anything to say on the matter? To answer this question consideration needs to be given to the grounds for discriminating against the recreational user.

The discrimination can best be understood as discrimination against the 'recreational user' for a 'lifestyle choice', much like the decision to take up competitive horse racing or boxing (two lifestyle choices which come with significant risks). Lifestyle choices are not intuitively offered any protection by civic-equality-plus, they are things that come after the rule of law, and as such, civic-equality-plus is silent on them. If we are assuming the choice is made with full, or at least sufficiently full, capacity, that is knowledge of the rules and how they apply to them,

[143] Lacey and Pickard (n 34).
[144] Scottish Drugs Deaths Taskforce, 'Changing Lives: Our final Report' (n 3) 9.

the recreational user is not suffering from a disorder that would interfere with their ability to offer horizontal fidelity. The recreational use of drugs, just as the decision to sky dive for example, is not an adequately accidental characteristic in the same way as something like ethnicity, height, mental illness or gender is.

Again to strike a note of caution the classification and subsequent punishment of someone for recreational use must not lead us to fail to hold them in 'sufficient esteem'. We ought to be particularly concerned in light of recent work on collateral consequences, and the Government's 'threat' to get tougher on recreational drug users. Collateral consequences can range from social stigmatisation and loss of self-esteem to loss of employment, loss of the right to vote, and being assaulted in the community. The important thing is that they are all in some way burdensome.[145] Zach Hoskins notes that over 65 million US adults have criminal records[146] a huge number of them for drug-related offences, thus if a policy is proposed that wishes to be tougher on existing recreational drug users then it needs to guard against collateral consequences unintentionally leading to a failure to treat those users with sufficient esteem.

In summary a policy that bifurcates individuals based on their drug consumption status is justified and passes the conditions of civic-equality-plus provided the following apply: first, when being considered the policy adheres to deliberative norms that consider all parties interests, second, any subsequent policy is equally applied. Finally, drug dependency is recognised as a genuine health condition, which has severe effects on capacity, and that all subsequent 'treatment' for the condition is voluntary with both those that are and aren't drug-dependent continuing to be treated with sufficient esteem.

[145] Zachary Hoskins, 'Criminalization and the Collateral Consequences of Conviction' (2018) 12(4) Crim Law and Philos 625, 626–628.
[146] ibid 637.

It is worth noting that for such a policy to be successfully implemented there are legislative inconsistencies and amendments that need to be considered. Both the Mental Health Act and the Equality Act need to be updated, to remove the carve out of drug dependency as a mental disorder or impairment,[147,148] the latter in line with demands made by the Changing Lives White Paper.[149] A brief example illustrates the importance of this amendment, if an individual suffering from drug dependency is not defined as suffering from an impairment this could result in them being unfairly disbarred from appropriate housing or employment, employers would be able to unfairly discriminate against them, with appropriate jobs failing to be tailored to the specific needs of someone in treatment or recovery while also not qualifying for certain welfare benefits. This may seem like a big ask, however much of this stems from a complete lack of understanding of what the lives of most people suffering from drug dependency might be like given proper treatment and dignity. Instead it is based on our experience of rife, life-ruining, untreated drug dependency. Carl Hart probably puts it best, in quite startling language, when he talks of his surprising year-long experience of working with the most entrenched heroin users receiving high-quality and holistic treatment in Switzerland, a country which has been offering such treatment for over 20 years:

> Like a Swiss watch, so-called junkies were reliably on time. They were almost never late … they were happy and living responsible lives. It became impossible for me to retain the misguided notion that heroin addicts are irresponsible degenerates.[150]

[147] See Mental Health Act 1983, s 1(3).
[148] See Equality Act 2010 (Disability) Regulations 2010, s 3(1).
[149] Scottish Drugs Deaths Taskforce, 'Changing Lives: Our final Report' (n 3) 23.
[150] Carl Hart, *Drug Use for Grown-Ups: Chasing Liberty in the Land of Fear* (Penguin Press 2021) 226.

Without these key changes to existing legislation the bifurcation of drug users would serve no purpose, and society would lose the chance to benefit from the transformation of so many lives, a reduction in crime, the depopulation of prisons, and the restoration of dignity.

5 Conclusion

This article, taking it's lead from the recent UK Government 'From Harm to Hope' proposal, set out to evaluate the moral defensibility of a drugs policy that operates two separate legal regimes for drug use dependent on drug use 'status'. After setting out the key terms of the debate, the Government's proposal for a dual regime was fleshed out. At the core of this proposal is the separation of users into 'recreational' and 'drug-dependent' categories, with the former group being dealt with via punishment through the criminal justice system and the latter being diverted into treatment.

Subsequently a legal-political theory against which any proposed policy could be tested was put forward. Starting with a relatively thin rule of law theory, it was expanded along the lines of Postema's fidelity thesis. Unlike Postema, the theory relies heavily upon the concept of 'basic human moral equality', which generates the vertical and horizontal commitments and duties owed to one another under a thick conception of the rule of law. In addition individuals require capacity of a specific kind to be held accountable to the duties generated by 'basic human moral equality', while maintaining that a lack of capacity does not obviate an individual's moral equality. Collectively this legal-political theory is called civic-equality-plus, which establishes three conditions for compliance, namely: non-arbitrariness, full fidelity and capacity.

Having set out a policy along the lines of the UK Government's proposal and committed to a legal-political theory, the proposed theory was put to the test to see if it could be morally justified, concluding that it could, subject to a number of provisions. Most crucial amongst those provisions was that drug dependency be treated by the law, and society,

as a chronic yet treatable, health condition which seriously impairs drug users' capacity in relation to use. The article argues against the use of punishment of those suffering from drug dependency whilst treating all users with sufficient esteem due to their status as moral equals. Finally it is proposed that for such a policy to work in the UK key changes to existing UK mental health and equalities legislation would be required.

Overall, a proposal of the type put forward by the UK Government does offer some hope for meaningful drug reform in polities where there may be deep-rooted aversion to drug use generally. By understanding addiction as a mental health condition and thus something requiring a public-health response such polities may find a way out of the current mess caused by purely prohibitionist policies. This article has tried to give such a policy a normative grounding in the hope that it will not be simply rejected by those who want a swifter and more comprehensive route to decriminalisation and legalisation, while attempting to allay the fears of those against more progressive drug reform.