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Content

# Foreword

The seventh issue of the University of Liverpool Law Review is here and, as has become customary, it presents remarkable and diverse scholarship written by our talented students and edited with great care by their peers on the Editorial Board.

Topics in this volume display the breadth of intellectual interests shown by students at the University of Liverpool for contemporary social justice issues, such as the regulation of the organ trade (Megan Cox), crimes on the dark web (Elin Nia Williams), asylum law (Marisa Sehmar), humanitarian interventions and state sovereignty (Rishma Mehta), modern slavery and sex workers (Eleanor Suthern), as well as the rights of transgender children (Emiko Seawright).

The 2020/21 Editorial Board can be proud of this new issue and of all their hard work in putting it together. I would also like to thank academic colleagues, including doctoral candidates, who kindly agreed to provide comments to the authors to help bring their papers to publication standard. This issue would not have been possible without their contribution.

Dr Laurène Soubise

*Lecturer in Law, University of Liverpool*

# Preface

I would like to extend my personal thanks to everyone involved in producing this year's edition of the University of Liverpool Law Review. Despite the difficulties that have continued this academic year both for the individual and globally, through the determination and commitment of our authors and the Editorial Board, we have produced another excellent edition of the Law Review and I am immensely proud.

As is always the case, we had a huge number of excellent submissions that showcased the breadth of study that is undertaken across the law school and credits the depth of research undertaken. I would like to extend a personal thanks, not only to our selected authors, but all of those who submitted work to this edition of the Law Review. It was a pleasure to read your submissions and learn more about the world from the perspective of like-minded students.

We are proud to present a selection of articles that both represent the quality of the study at Liverpool Law School, and confront key social, political and legal issues. We hope that acknowledging these issues and bringing them to the forefront of discussion will allow us to engage in a deeper understanding of their broader implications, that not only allows readers to consider their own opinion but also encourages them to challenge their own perceptions and take this forward into society.

I would like to extend a personal gratitude to this year's Editorial Board. It has been an absolute pleasure to work with such a hard-working group of fellow students, who have dedicated their time to ensuring the high standard of the review is upheld. Even through uncertain times they have continued to show nothing but commitment and professionalism, and I thank you all personally.

This paper is a credit to the students of Liverpool Law School. I am immensely proud of their professionalism and determination in producing a quality paper despite all the odds.

Elizabeth Hood

*Editor-in-Chief, Liverpool Law Review 2020-2021*

# A Note From the Editorial Board 2021-22

"No one can whistle a symphony. It takes a whole orchestra to play it" – H.E. Luccock. The seventh edition of the University of Liverpool's Law Review would not have been delivered in its present form without the cooperation of the entire orchestra of student editors behind it, who worked online throughout the academic year despite crippling global events that has disrupted much of our lives at university and elsewhere. So, we would like to thank everyone for their continued enthusiasm and commitment to the Law Review, which allows us to showcase the exceptional quality of academic work produced by our fellow students.

The Editorial Team worked together to choose the published articles from a diverse selection of submissions. We worked hard with our authors to strengthen their articles and develop crucial points of legal debate. While working with each author entirely online has been challenging, we have been inspired by the editorial team of the sixth edition in their perseverance and dedication to the Law Review whilst sailing in turbulent waters.

This edition of the Law Review covers a broad spectrum of issues. Truly, this is an edition that showcases the brilliance and tenacity of our fellow students in debating contentious and often morally complex areas of the law.

I would like to conclude by thanking all of our wonderful authors for assisting us in our editorial role and pushing themselves to present their ideas in a clearer, succinct manner. Passion and commitment are at the forefront of this year's volume which has been supplied in ample quantities by the incumbent Editor-in-Chief, Elizabeth Hood. Finally, to our readers, we appreciate the constant support and encouragement provided to us.

*Charanian Reddy*

*On behalf of the Editorial Team of the 7th Edition of the University of Liverpool Law Review 2020-21*

# Regulating the Organ Trade: A Solution or A Means for Exploitation?

*Megan Cox*

## Abstract

*This article explores the organ trade and the current legislative framework which prohibits the sale of organs. The idea of a regulated market in organs is then explored as a method to reduce the demand for illicit transplants and as a method to help prevent organ trafficking.*

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## Introduction

The organ trade has been described as a growing global crisis due to the shortage of donated organs and the increasing demand for transplant.[1] It is this shortage of organs that has led to the development of an illicit market in organs; hence the organ trade is often described as a consequence of organised crime.[2] The World Health Organisation has estimated that 5-10% of organ transplants take place illegally each year.[3] When the illicit practice of buying and selling organs was first brought to the attention of the public, it sparked outrage;[4] so, an outright ban on organ sales was proposed as the necessary measure to protect organ sellers from exploitation and to prevent the growth of the illicit market.[5] The secondary focus of the legislation is to increase the donor pool by legitimate means to reduce the demand for illegally sourced organs.[6] This article will examine the current legislative framework of the organ trade, to show that the overriding focus on the trafficking element of the trade and the main aim of criminalisation is an inadequate response. The article will then go on to explore the idea of a regulated market as an alternative method for dealing with the organ trade. It will be argued that although a

[1] Francis Delmonico, 'A call for government accountability to achieve national self-sufficiency in organ donation and transplantation' (2011) 378 The Lancet 1414–1418.
[2] Sean Columb, 'Excavating the Organ Trade: An Empirical Study of Organ Trading Networks in Cairo, Egypt' (2017) 57(6) British Journal of Criminology 1301.
[3] Yosuke Shimazono, 'The state of the international organ trade: A provisional picture based on integration of available information, (2007) 85 Bulletin of the World Health Organization 955.
[4] Sean Columb, *Trading Life* (Stanford University Press 2020) 134.
[5] World Health Organisation, *Guiding Principles on Human Cell, Tissue, and Organ Transplantation* (2010).
[6] Sean Columb, 'Beneath the Organ Trade: A Critical Analysis of the Organ Trafficking Discourse' (2014) 63 Law and Social Change 21.

regulated market might increase the supply of organs, there are deeper socio-economic issues at the core of this trade, which need to be dealt with as a priority as this is the only way to prevent exploitation of the most vulnerable members of society.

## Current Legislative Framework

The organ trade is comprised of four separate elements, organ trafficking, organ sales, organ harvesting and transplant tourism. Despite this, the current legislative framework has an overriding focus on the trafficking element of the organ trade. The term trafficking is defined under Article 3 of the United Nations Protocol to Suppress and Punish Trafficking in Persons Especially Women and Children 2000 (which henceforth will be referred to as the Trafficking Protocol).[7] From this definition, the offence of trafficking can be comprised of three elements an action, a means, and a purpose. Therefore, to be considered a victim of a trafficking offence, an individual must satisfy all three of these elements. Under the Article 3 definition, the action can include *'recruitment, transportation and transfer,*' means includes the use of '*threat or use of force or other forms of coercion'* for the purpose of exploitation.[8] Therefore, as Yea argues,[9] most commercial organ sellers will only satisfy some elements of trafficking, as it is defined in the Trafficking Protocol. This is because it is common for organ sellers to choose to sell their kidneys, in exchange for money so that they can either feed their families or to pay for passage on migrant smuggling ships.[10] It is these organ sellers that slip through the cracks in the anti-trafficking response. However, because these individuals are not categorised as victimsthat they are not helped by any policy interventions, which could improve their livelihoods.[11] When considering the reasons why organ sellers chose to sell their organs, it seems counterproductive that these individuals are not receiving help from policy intervention and are instead criminalised for actions that they take to try and improve their lives. Despite this, the current legislative framework is not protecting these individuals, because they do not fall within the definition of a trafficked victim.

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[7] United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Trafficking Protocol) art.3.

[8] Ibid.

[9] Sallie Yea, 'Trafficking in part(s): The commercial kidney market in a Manila slum, Philippines' (2010) 10 Global Social Policy 358.

[10] Nancy Scheper-Hughes, 'The Global Traffic in Human Organs' (2000) 41(2) Current Anthropology 191.

[11] Ibid 359.

Moreover, the overwhelming focus of the current legislation is to criminalise the organ trade, this can be seen under Article 1(a) of the Council of Europe Convention against Trafficking in Human Organs.[12] So, instead of protecting the individuals who are forced to sell an organ due to the circumstances they find themselves in, the legislation prosecutes these individuals. The success of criminalisation can be assessed regarding the Transplantation of Human Organs and Tissues Act 2010,[13] this Act was introduced in Egypt's domestic law to prohibit the commercial exchange of organs. Under Article 11(a) of the Act,[14] the criminal sanction which can be imposed for selling an organ can extend to ten years of imprisonment. This is problematic as those who have been exploited into selling their organs are less likely to come forward and report the crime, due to fears of the repercussions they might face. Columb contends that this criminalisation in Egypt has *'served to further conceal the nature and the extent of the organ trade.'*[15] This argument can be reinforced by the fact that there have not been many successful prosecutions of offences relating to the organ trade.[16] This shows the inadequacy of the current legislation at protecting victims, as the victims of the trade will often be too afraid to come forward, due to fear of prosecution. This point is reinforced by Andrijasevic who contends that the focus on criminalisation marginalises certain groups, as their contextual situations are not considered when determining whether they have committed an offence.[17] Moreover, although criminalisation is a deterrent from committing future offences, it does nothing to solve the problems which cause the crime.[18] Therefore, this focus on criminalisation combined with the narrow sighted view of the organ trade as a trafficking offence, leads to a lack of protection for the victims of this offence. Moreover, the legislative framework is overall inadequate because of the lack of attention given to the root causes of the organ trade such as poverty and immigration.

[12] Council of Europe Convention against Trafficking in Human Organs (adopted 25 March 2015, entered into force 1 March 2018) CETS 216 art.1(a).
[13] Transplantation of Human Organs and Tissues Act 2010.
[14] ibid art.11(a).
[15] Columb (n 4) 144.
[16] Medicus Clinic case [2011] KA 278/10; U.S. v Rosenbaum, 11-cr-00741, US District Court, District of New Jersey; The State v Kwa-Zulu Ltd [2010] 41/1804/2010 (Commercial Crime Court, South Africa November 2010).
[17] Franko Andrijasevic, 'Beautiful Dead Bodies: Gender, Migration, and Representation in Anti-Trafficking Campaigns' (2007) 86 Feminist Review 24-44.
[18] Columb (n 6) 37.

## The Impact of Contextual Issues

Poverty is a key driving force of the organ trade. In interviews with individuals who sold their kidneys undertaken by Columb,[19] it is clear that where individuals need money for 'medical expenses,' 'safety,' or for living expenses when 'money was stolen,' that these individuals felt that they had no other choice. It is the structural inequalities within society that have enabled the exploitation of those of a lower socioeconomic status.[20] Individuals struggling for money feel that they have no other choice than to sell their organs to survive, hence exploitation is easier due to their vulnerability. As such, the improvement of socioeconomic infrastructures needs to be a target for law reform, as this will reduce the ability of the organ trade to operate.

Another contextual issue which drives the organ trade is the failure of immigration laws. The governmental ability to apply and interpret refugee law in a national context does not often allow for individuals to receive protection and instead reflects shifting national attitudes towards refugees.[21] Therefore, asylum seekers awaiting for their refugee application decisions have not got as many legal rights in the countries where they are seeking refuge, as such jobs and housing are limited pushing these individuals to try and gain money where they can, even if this means by selling a kidney.[22] This legal infrastructure is inadequate to achieve its aims in protecting those who seek refuge. Social policies must be developed to help and support individuals who are seeking refuge, to protect them from falling into poverty and hence enabling their exploitation into selling organs as a means to survive.

The final contextual issue that will be discussed is the issue of supply and how demand for organs outweighing the supply has led to the formation of an illegal market in organs. One way to improve this imbalance of supply to demand could be through the enforcement of an opt out system. In such a system, individuals would automatically be assumed to want to donate their organs upon death unless they specifically opt out of donation. The UK has recently adopted such a system following the coming into force of the Organ Donation (Deemed Consent) Act

[19] Columb (n 4) 81.
[20] John Roemer, 'What is exploitation? Reply to Jeffrey Reiman,' (1989) 18(1) Philosophy and Public Affairs 91.
[21] Heaven Crawley and Dimitris Skleparis, 'Refugees, migrants, neither, both: Categorical fetishism and the politics of bounding in Europe's 'migration crisis'' (2018) 44(1) Journal of Ethnic and Migration Studies 51.
[22] Columb (n 4) 83.

2019.[23] There is evidence that there is a positive correlation between opt-out legislation and higher rates of donation.[24] Therefore, if such a system were adopted in other countries around the world this could help to reduce the shortage of organs and as such reduce the demand for illegal organ sales. A reduction in the demand for illegal organ sales, would also serve to reduce the exploitation of individuals who are targeted to sell their organs due to their social position.

## Regulated Market as a Solution?

A regulated market in organs has been proposed by many academics as a solution to the organ trade; as the formulation of a regulated market will increase the supply of organs hence, there will be less need for the illicit trade in organs.[25] One argument that has been put forward in favour of a regulated market in organs is based on the concept of autonomy; that individuals should have the autonomy to choose whether they wish to sell an organ or not.[26] Under the current legislation, it is a criminal offence if an organ is removed without the *'free, informed consent of the donor.'*[27] This highlights the importance that has been placed on autonomy concerning the donation of organs, hence this concept of autonomy would also be deemed important in a regulated market. However, the ability to ensure that the decision to sell an organ is being made completely autonomously would be difficult in different countries. In wealthier countries, where individuals are less poverty stricken, the decision to sell an organ would be more likely to be autonomous. Whilst in third world developing countries, individuals who choose to sell their organs can never make this decision with complete autonomy, because their decision will always be tainted by their need to receive money to assist themselves or their families.[28] Therefore, the ability for a regulated market to allow for autonomy is questionable.

On the other hand, the Working Group on Incentive for Living Donation have stated that *'permitting incentives would allow competent, properly informed adults to make their own judgements about their own best interest- widely regarded as an essential feature of respect*

[23] Organ Donation (Deemed Consent) Act 2019.
[24] Organ Donation Taskforce, *The potential impact of an opt out system for organ donation in the UK* (London: Department of Health, 2008).
[25] Benjamin Hippen, 'In Defense of a Regulated Market in Kidneys from Living Vendors' (2005) 30 Journal of Medicine and Philosophy 593.
[26] Julian Savulescu, 'Is the sale of body parts wrong?' (2009) 29 Journal of Medical Ethics 138.
[27] Council of Europe Convention (n 11) art.4(1)(a).
[28] Nancy Scheper-Hughes (n 10) 192.

*for human dignity.'*[29] Moreover, Kishore argues that it would be contrary to the concept of human dignity to allow individuals with a terminal illness to die, or families who are hungry to starve.[30] Therefore, the creation of a regulated market would help two categories of people, those who have organ failure and those affected by poverty. Delmonico contends that poor organ sellers are more likely to be uneducated so will not understand the risks that are involved in selling their organs,[31] which juxtaposes the concept of human dignity. This idea can be contrasted when looking at an interview taken by Columb where an organ seller stated,[32] *'if I had another kidney, I would sell it. The problem is that they did not pay me what I was promised. Now I have nothing.'* This comment from an organ seller shows that he is aware of the risks involved in organ donation, as he has already sold a kidney, and he still would sell another if he could. The issue raised here is about ensuring individuals are paid the correct amount. This is something that could be rectified with the introduction of a regulated market.[33] However, even though the arguments raised above seem to suggest that a regulated market in organs would not be contrary to human dignity, the individuals most likely to sell their organs in this regulated market are those who need money, as seen in Columb's interview.[34] Therefore, disadvantaged individuals are used by those who are highly advantaged to undergo transplantation in the same society, which cannot be denied as a violation of human dignity for those who are forced to sell their organs.[35]

Another argument that is in favour of a regulated market in organs, is that the introduction of such a system might serve to reduce the exploitation of individuals who feel they have no other choice than to sell an organ. Erin and Harris have proposed a regulated system with a single purchaser in a confined marketplace,[36] this would ensure everyone got paid the same amount for their organ. Moreover, it would ensure that those who contribute to the scheme are also

[29] Working Group on Incentives for Living Donation, *Incentives for organ donation: Proposed standards for an internationally acceptable system* (2012).
[30] R Kishore, 'Human Organs, Scarcities, and Sale: Morality Revisited' (2005) 31 Journal of Medical Ethics 364.
[31] Francis Delmonico, 'The implications of Istanbul Declaration on Organ Trafficking and transplant tourism' (2009) 14(2) Current Opinion in Organ Transplantation 118.
[32] Columb (n 4) 136.
[33] Charles Erin and John Harris, 'An ethical market in human organs' (2003) 29 Journal of Medical Ethics 137.
[34] Columb (n 4) 136.
[35] Francis Delmonico and Nancy Scheper-Hughes, 'Why we should not pay for human organs' (2003) 38(3) Zygon: Journal of Religion and Science 689-98.
[36] Erin and Harris (n 26) 137.

those who benefit from it.[37] Despite this, Scheper-Hughes contends that a regulated market would still exploit those who are most vulnerable in society,[38] as it would only be these individuals who would sell their organs as a way of earning money. Cohen opposes this argument as he states that if the reason a kidney seller is being exploited is due to *'being offered the opportunity to sell at a given price, then there must be a hypothetical higher price at which he will not be exploited.* '[39] This approach is consistent with that of other academics, who argue that exploitation is minimised if the price for a kidney or organ is proportionate with the health risks involved.[40] This is a strong argument in favour of a regulated market, but the moral objection persists;[41] no matter whether you pay them more, individuals who are desperate for the money will still be exploited as a means of increasing the supply of organs. This reinforces the point that these deeper socio-economic issues, which are the root causes of this trade, need to be dealt with as a priority before regulating a market in organs.

The need to deal with these socio-economic issues is reinforced in a study undertaken by Zargooshi of the Iranian regulated market in organs. In his study, Zargooshi found that poverty prevented 79% of organ sellers from attending follow up healthcare checks after donation.[42] One of the arguments in favour of a regulated market is that it is safer for transplants to occur in legal conditions.[43] Nicholson and Bradley contend that the risk of harm for a kidney donation performed under appropriate medical conditions is minimal,[44] a worse outcome is more likely when performed illegally.[45] However, these arguments are rendered useless if the individuals undergoing donation are unable to receive their follow up healthcare checks, due to poverty. Therefore, it seems that one of the issues with regulating a market in organs is whether it will

[37] Ibid 137.
[38] Scheper-Hughes (n 21) 192.
[39] Glenn Cohen *Patients with Passports: Medical Tourism, Law and Ethics* (Oxford University Press 2014) 18.
[40] Janet Radcliffe-Richards, 'Commentary: An Ethical Market in Human Organs' (2003) 24(1) Journal of Medical Ethics 139.
[41] William Harmon and Francis Delmonico, 'Payment for Kidneys: A Government-Regulated System is Not Ethically Achievable' (2006).
[42] Javaad Zargooshi, 'Quality of Life of Iranian Kidney Donors' (2001) 166 The Journal of Urology 1790.
[43] Stewart Cameron and Raymond Hoffenberg, 'The ethics of organ transplantation reconsidered: Paid organ donation and the use of executed prisoners as donors' (1999) 55(2) Kidney International 724.
[44] Michael Nicholson and Andrew Bradley, 'Renal transplantation from living donors should be seriously considered to help overcome the shortfall in organs (1999) 318(7181) British Medical Journal 409.
[45] Muna Canales, Betram Kasiske and Mark Rosenberg, 'Transplant tourism: Outcomes of United States residents who undergo kidney transplantation overseas' (2006) 82(12) Transplantation 1658.

be successful in practice in developing countries. If the healthcare infrastructures in countries are not as strong and follow up healthcare checks cost a lot for the organ seller, a regulated market in organs could actually detriment the individuals who the market would aim to benefit. Some of the side effects that appear following the removal of a kidney are fatigue and loss of strength, hence making it more difficult for those who have sold a kidney to maintain work, especially in countries where the majority of work available requires manual labour.[46] Therefore, this reinforces the overriding point of this article that it is these contextual issues- poverty, immigration, and a lack of work- that must be resolved before a regulated market can even be considered.

## Conclusion

As Kishore puts it if we regulate a market in organs it means that '*we are prepared to inflict harm on others in order to improve our health or prolong our life.*'[47] Although a regulated market might be a good option to increase the supply of organs, more thought needs to be centred around how we can improve the lives of those who have no option other than to sell an organ. By framing the organ trade as a trafficking offence under the current legislation, the individuals who, arguably, are the true victims of this trade are slipping through the cracks of the anti-trafficking response, hence this current framework is insufficient to deal with the organ trade.

A regulated market might increase the supply of organs, but it will not prevent exploitation. Exploitation, arguably, is the biggest issue of the organ trade and it occurs because of the desperate situations individuals are in. To protect individuals from exploitation it is important for the law that criminalises the sale of an organ to be reformed. The law should not criminalise those who have sold an organ. This criminalisation enables the ongoing cycle of exploitation that these individuals find themselves trapped in, as they are too afraid to come forward to the authorities out of fear of prosecution. Instead, to prevent the exploitation of individuals insufficient labour frameworks which leave individuals vulnerable must be reformed and improved. By investing into more poverty-stricken areas of society and improving their working and social conditions, this will ensure that more individuals have the necessary money for themselves and their families to survive. Furthermore, international

[46] Columb (n 4)
[47] Kishore (n 23) 362.

immigration laws need to be developed further to give asylum seekers more legal entitlements, this would ensure that individuals waiting for their refugee status decisions are less likely to fall within the cycle of poverty and exploitation which is a major cause of the organ trade. Overall, the only way to resolve the issues of the organ trade is to develop social policies that protect the individuals who have no choice but to sell a kidney, as oppose to criminalising them for their actions.

# Crime on the Dark Web: Challenges for Law Enforcement in Regulating Technological Phenomena

*Elin Nia Williams*

**Abstract**

*Criminals are now operating within a rapidly evolving technological landscape, generating unique challenges for law enforcement. Through the lens of broader themes of Law and Social Justice, this article seeks to critically analyse the ever-evolving challenges in regulating technological phenomena. Overall, the dark web embodies a safe haven for criminals by providing multi-layered anonymity and fostering a communal culture amongst users. Moreover, the technologies underpinning both the dark web and cryptocurrencies bring unparalleled challenges when applying the current regulatory framework and confiscation mechanisms in practice. Available countermeasures employed in response are also unfit for purpose due to the lack of wider commitment to proportionality and consistency. Looking forward, we are headed for an even darker future, based on the extent of the challenges posed to law enforcement. Since we are only at the infancy of such technological phenomena, immediate regulatory attention is required to regulate contemporary as well as emerging challenges.*

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## Introduction

Criminals are now operating within a rapidly evolving technological landscape, generating unique challenges for law enforcement. Through the lens of broader themes of law and social justice, this article seeks to critically analyse the ever-evolving challenges in regulating technological phenomena. First, it will be debated as to whether the dark web embodies a safe haven for a wide variety of criminals by exploring the implications of its provision of multi-layered anonymity and fostering of a communal culture amongst users. Second, the unparalleled nature of the challenges posed will be scrutinised by considering the application of current regulatory framework and confiscation mechanisms in practice. Last, it will be questioned as to whether the available countermeasures employed in response are fit for purpose by discussing wider commitment to proportionality and consistency.

## A Safe Haven for Criminals

### 1. Multi-Layered Anonymity

Overall, the dark web embodies a safe haven for criminals by providing multi-layered anonymity via underlying encryption software. For example, Tor (or other specialist browsers) routes users through a sequence of other 'volunteer' users' computers to mask their identity through a process also referred to as 'onion routing.' Additionally, Virtual Private Networks (if utilised as advised) hold the ability to change the Internet Protocol address of users to conceal their location. As personally identifiable information is consequently obscured, users are provided with multi-layered anonymity. This is open to the abuse of criminals, as evidenced by research by Moore and Rid which discovered that 2,723/5,205 of live Tor sites involved some form of criminality.[1] Clearly, a larger proportion of its use is criminal, revealing that the dark web has realistic prospects of being exploited as a safe haven to commit crimes undetected.

Due to this association with criminality, Bradbury labels the dark web as a *'secretive, anonymous place'* with '*shadowy users.'* Such an ominous depiction is justified, since it constitutes a hidden section of the deep web only accessible through specialist browsers (occasionally in conjunction with permission or a password).[2] Alternatively, Rosenburg of the US Drug Enforcement Administration characterises dark web anonymity as being *'illusory.'*[3] Although its anonymity is not necessarily impenetrable, this is a dangerous trivialisation of the challenge, as it significantly impedes dark web investigations. Testifying to this, the creator of Freedom Hosting (a hosting service for illicit webpages), avoided detection for five years. Despite the eventual success of the US Federal Bureau of Investigations in tracing them (locating a French server and then to Ireland),[4]

[1] Daniel Moore and Thomas Rid, 'Cryptopolitik and the Darknet' (2016) 58(1) Survival: Global Politics and Strategy 7, 21.
[2] Danny Bradbury, 'Unveiling the Dark Web' (2014) 4 Network Security 14 <https://doi.org/10.1016/S1353- 4858(14)70042-X> accessed 28 November 2020.
[3] US Department of Justice, 'AlphaBay, the Largest Online 'Dark Market,' Shut Down' (*Office of Public Affairs*, 20 July 2017) <https://www.justice.gov/opa/pr/alphabay-largest-online-dark-market-shut-down> accessed 1 December 2020.
[4] Patrick O'Neill, 'A Dark Web Tycoon Pleads Guilty. But How Was He Caught?' (*MIT Technology Review*, 8 February 2020) <https://www.technologyreview.com/2020/02/08/349016/a-dark-web-tycoon-pleads-guilty-but-how-was-he-caught/> accessed 13 December 2020.

the multi-layered anonymity created extensive delays. Comparably, the Wall Street Market investigation was delayed by three years,[5] proving that such delays are not uncommon. As such, criminals evidently take advantage of the multi-layered anonymity offered on the dark web to avoid identification.

Despite this, it is also important to respect the rights of legitimate dark web users. Affirming this, the United Nations Human Rights Council reported that they have a '*responsibility to protect encryption*'[6] surrounding the freedom of expression[7] and right to privacy.[8] Expressing such commitment to protecting encryption appropriately acknowledges its broader public interest without endorsing the dark web as a safe haven for crime. In accordance with the utilitarianism doctrine,[9] balancing any legislative response to the challenge of multi-layered anonymity between combatting crime and protecting human rights allows the benefit of the majority to prevail. In particular, Jiang highlights that China has a strong firewall which can bar an individual's freedom of expression.[10] Providing a solution to this, the dark web equally acts as a safe haven for individuals to express themselves without oppression (amongst other innocent purposes).

### 2. Communal Culture

Supplementing this challenge, the dark web fosters a communal culture amongst users. In addition to other uses, criminals utilise the dark web as a platform to sell illicit goods, engage in fraud and commit theft.[11] Arguably, housing a wide variety of likeminded criminals together to render laws and social custom meaningless cultivates an influential communal culture. Echoing this, ex-Home

[5] US Drug Enforcement Administration, 'Global Investigation of Dark Web Drug Network Leads to Arrest of 3 German Nationals' (3 May 2019) <https://www.dea.gov/press-releases/2019/05/03/global-investigation-dark-web-drug-network-leads-arrest-3-german> accessed 4 May 2021.
[6] United Nations Human Rights Council, *Encryption and Anonymity Follow-Up Report* (Research Paper 1/2018, June 2018) [5] <https://www.ohchr.org/Documents/Issues/Opinion/EncryptionAnonymityFollowUpReport.pdf> accessed 14 December 2019.
[7] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10(1).
[8] Ibid, art 8(1).
[9] John S Mill, *Utilitarianism* (Cambridge University Press 2015) 8-38.
[10] Ying Jiang, *Cyber-Nationalism in China: Challenging Western Media Portrayals of Internet Censorship in China* (University of Adelaide Press 2012) 12-16.
[11] Gabriel Weimann, 'Going Dark: Terrorism on the Dark Web' (2016) 39(3) Studies in Conflict and Terrorism 195, 196.

Secretary Amber Rudd propounds that dark web anonymity *'emboldens'* users to break the law.[12] This is plausible, as establishing a safe haven for criminals can not only empower criminals but also realistically coax lawful individuals into committing crimes. While the communal culture is only one of many contributing factors, Sixgill recently reported that the illicit drug economy of the dark web surged by 495% between December 2019 and April 2020.[13] Evidently, the criminal community of the dark web is growing exponentially in notoriety, so the dark web is becoming a safe haven for an alarming number of criminals.

However, a communal culture can also be seen in terms of encouraging socially advantageous uses. In a nuanced manner, Finklea argues that that the dark web can be used for crime in addition to other *'legitimate purposes*.'[14] As it objectively appreciates both the criminal and legitimate uses of the dark web, this is a viable argument. For instance, dark web hacker Intangir removed links from the Hidden Wiki to child pornography sites,[15] demonstrating that a communal culture also exists amidst legitimate users to aid law enforcement in preventing crime. Despite this, the value of this is severely overshadowed by the fact that this would be entirely unnecessary if the criminal community of the dark web did not initially exist.

Alternatively, a more feasible legitimate purpose of the dark web is the use of forums. An example of this is DoctorX, who advises users on illicit substances to prevent health complications and overdoses.[16] Sharing such vital knowledge is invaluable; Hout and Bingham support this, recognising that it can lead to safer outcomes for drug users.[17] Granted, these communities provide

[12] 'Amber Rudd Earmarks £9m to Fight 'Dark Web' Criminals' (*BBC News*, 11 April 2018) <https://www.bbc.co.uk/news/uk-43721108> accessed 2 December 2019.
[13] Sixgill, *State of the Underground: 2020 Annual Report* (February 2021), 16 <https://www.cybersixgill.com/wp-content/uploads/2021/02/State_of_the_underground_2020_Annual_Report.pdf> accessed 13 April 2021.
[14] Kristin Finklea, *Dark Web* (Congressional Research Service, 10 March 2017), 15 <https://fas.org/sgp/crs/misc/R44101.pdf> accessed 1 December 2020.
[15] Joseph Cox, 'The Secret Side of the Web Is Home to Heroes, Not Just Crooks' (*Wired*, 6 May 2014) <https://www.wired.com/2014/06/the-secret-side-of-the-web-is-home-to-heroes-not-just-crooks/> accessed 19 December 2019.
[16] Theresa Locker, 'The Dark Net's Drug Counselor' (*Vice*, 29 January 2015) <https://www.vice.com/en_us/article/ypwxwj/doctorx-is-the-darknets-most-reliable-drug-counselor> accessed 13 December 2019.
[17] Marie C Van Hout, Tim Bingham, ''Silk Road', the Virtual Drug Marketplace: A Single Case Study of User Experiences' (2013) 24(5) Journal of Drug Policy 385, 387 <https://www-sciencedirect-

essential education, though this concerningly reveals the absence of equality of opportunity and condition, as only those who seek this information attain it. One option would be to decriminalise illicit substances (regulating ingredients and sellers). Instead, it is preferable for the UK Government to initiate an equal distribution of information by improving education on the topic, also removing the need for individuals use the dark web as a safe haven to seek advice.

## 2. Unparalleled Challenges

### 1. Current Regulatory Framework

At present, there is no specific legislation for the dark web, strongly suggesting that the challenges posed to law enforcement are unparalleled in nature. Existing acts such as the Misuse of Drugs Act 1971 merely touch upon similar issues, such as sanctioning marketplaces which facilitate the sale of illicit substances.[18] While similar regulatory framework, covering relevant issues, are capable of application, this is unsustainable in the long term as the technological landscape is continuously evolving.

In order to tackle this, the Global Commission on Internet Governance has brought attention to the need for cybersecurity researchers to remain alert and find new strategies to detect technological phenomena.[19] While this could reduce the risk of emerging challenges, this solution is insufficient alone. Shillito emphasises that the potential of this strain of cybercrime is endless, so technological neutrality is vital when combatting dark web crime.[20] Additionally adopting broad legislation could achieve the best outcome by tailoring the current regulatory framework to account for possible technological advancements. While indefinite regulation is impossible, this policy of anticipation ensures that the doctrine of the Rule of Law is upheld, especially Fuller's precept that the law should be '*clear*.'[21] Since all criminals would be regarded as equal under the same law,

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com.liverpool.idm.oclc.org/science/article/pii/S0955395913000066?via%3Dihub> accessed 14 December 2019.

[18] Misuse of Drugs Act 1971, s.4(3)(a)-(b).

[19] Global Commission on Internet Governance, *The Impact of the Dark Web on Internet Governance and Cyber Security* (Paper Series: No. 6, February 2015), 7 <https://www.cigionline.org/sites/default/files/gcig_paper_no6.pdf> accessed 14 December 2020.

[20] Matthew R Shillito, 'Untangling the Dark Web: An Emerging Technological Challenge for the Criminal Law' (2019) 28(2) I & CTL 186, 207.

[21] Lon L Fuller, *The Morality of the Law* (Revised edn, Yale University Press 1977) 63.

accounting for emerging technological challenges under a versatile approach inevitably supports the principle of equality by preventing the relentless exacerbation of unparalleled challenges.

Nevertheless, the challenge of '*uncertainty*' and '*limited knowledge'* associated with regulating the dark web remains, as noted by Weimer and Marin.[22] However, justifying deficient framework on this basis undermines the principle of legal accountability, allowing some criminals to escape judicial scrutiny due to regulatory loopholes. To resolve this, law enforcement could temporarily utilise the expertise and experience of the private sector while conducting further research into the regulation of relevant technological phenomena. Being a success in the Hansa investigation, this is a viable resolution; here, law enforcement outsourced hacking assistance via a public-private partnership with Bitdefender.[23] Regardless of their business-driven nature (meaning they may lack the accountability of traditional law enforcement), the private sector could valuably assist in building certainty and knowledge surrounding the dark web.

### 2. Confiscation Mechanisms

More specifically, confiscating proceeds of crime brings further unparalleled challenges due to the abuse of cryptocurrencies on the dark web. In particular, the blockchain technology underpinning cryptocurrencies is a considerable challenge as they lack the traditional regulatory oversight of the banking sector. As cryptocurrencies confirm to a decentralised, peer-to-peer model instead, this arguably denounces the principle of legitimate expectations, since state protection against all avenues of criminality is curtailed. More specifically, each transaction is recorded on a public distributed ledger, meaning they are merely pseudonymous (destroying any link with identities, not wallet addresses). Although, combined with the multi-layered anonymity of the dark web, applying confiscation mechanisms in practice is particularly troublesome.

[22] Maria Weimer and Luisa Marin, 'The Role of the Law in Managing the Tension between Risk and Innovation: Introduction to the Special Issue on Regulating New and Emerging Technologies' (2016) 7(3) EJRR 469, 473.
[23] Filip Truta, 'Bitdefender Helps Europol, FBI, DOJ Shut Down Hansa' (*Bitdefender*, 21 July 2017) <https://businessinsights.bitdefender.com/bitdefender-europol-fbi-doj-darknet-hansa> accessed 4 May 2021.

Here, the challenge is the heavy reliance on criminal compliance when confiscating cryptocurrencies. In this context, confiscation occurs by threatening to extend a custodial sentence if the confiscation order is not complied with (by handing over their Bitcoin key) under Section 41 of the Proceeds of Crime Act 2002.[24] Despite cases such as *Teresko*[25] (confiscating £1.25M worth of Bitcoin) which led to cooperation, this mechanism is most likely only successful due to plea bargaining and the threat of imprisonment. Supporting this theory is the failure of German prosecutors to access over €50M worth of Bitcoin, allowing the criminal to maintain silence throughout their sentence.[26] Fundamentally, criminals can therefore withhold their assets by retaining exclusive access to their Bitcoin address and associated key without any central body (such as a bank) to freeze their proceeds of crime.

Acknowledging the challenge of decentralisation, the 5AMLD specifically includes crypto-to-fiat exchanges and custodian wallet providers as *'obliged entities'* within its scope.[27] As such, this mandates a range of new intermediaries (as with the *'regulated sector'*) to operate under the regulation of the Financial Conduct Authority in its anti-money laundering efforts. Although the 5AMLD has been transposed successfully and will be retained post-Brexit,[28] the UK opted out of doing so with its successor, the 6AMLD,[29] which aims to extend its scope with further detail as well as tougher penalties. Justifying its decision, the UK Government asserts that the existing regulatory framework goes further by imposing longer sentences and broader provisions (in relation to predicate offences).[30] Even though transposition would not benefit the UK's current

[24] Proceeds of Crime Act 2002, s.41(7).
[25] *R v Teresko (Sergejs)* (Crown Court, 11 October 2017).
**[26]** John O'Donnell, 'Police Seize $60 Million of Bitcoin! Now, Where's the Password?' (*Reuters*, 5 February 2021) <https://www.reuters.com/article/us-crypto-currency-germany-password/police-seize-60-million-of-bitcoin-now-wheres-the-password-idUSKBN2A511T> accessed 12 March 2021.
[27] Parliament and Council Directive (EU) 2018/843 of 30 May 2018 amending Directive (EU) No 849/2015 of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (5AMLD), art 1(2)(d).
[28] The Money Laundering and Terrorist Financing (Amendment) Regulations (Money Laundering Regulations) 2019, SI 2019/1511, reg 4(7).
[29] Parliament and Council Directive (EU) 2018/1673 of 23 October 2018 on combating money laundering by criminal law (6AMLD), art 2-8.
[30] Home Office, *Eighth Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the Union (TFEU) in Relation to EU Justice and Home Affairs (JHA) Matters (1 December 2016 – 30 November 2017)* (Cm 9580, 2018), 7-8

regulatory framework, opting out diminishes the principle of legal certainty by suggesting waning global interconnectedness in tackling such unique challenges.

Disputing the unparalleled nature of this challenge, Kirby contends that opportunities for crime is '*strong in all currencies*.'[31] Of course, traditional criminal challenges such as money laundering is possible with physical with cash, but cryptocurrencies are becoming increasingly advanced with differing levels of risk, so this view is too simplistic. Furthermore, dark web users are increasingly migrating towards newer privacy-oriented variants of cryptocurrencies such as Monero, Dash and ZCash.[32] As these are more effective in protecting information, this confirms that the technological landscape is continuously creating new challenges for law enforcement.

## 3. Available Countermeasures

### 1. Proportionality

Building on this, the available countermeasures employed in response are unfit for purpose due to their failure in ensuring a proportionate balance between crime regulation and public interest. In the Silk Road investigation, law enforcement impersonated 'buyers' and utilised Tor-cracking malware.[33] Albeit in the pursuit of justice, this breaches the principle of formal equality as law enforcement were shielded from the law, despite being on a similar moral footing as the criminal involved by committing and facilitating crime.

Concerning this challenge, Joh argues that undercover policing often involves '*justifiable and sometimes necessary*' criminal measures.[34] On one hand, the countermeasures could be deemed as

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684374/eighth-annual-report-to-parliament-eu-justice-home-affairs-matters.PDF> accessed 1 December 2020.

[31] Patrick Kirby, 'Virtually Possible: How to Strengthen Bitcoin Regulation Within the Current Regulatory Framework' (2014) 93(1) NCL Rev 189, 220.

[32] Turner Wright, 'DOJ Says Use of Privacy Coins is 'Indicative of Possible Criminal Conduct'' (*Cointelegraph,* 8 October 2020) <https://cointelegraph.com/news/doj-says-use-of-privacy-coins-is-indicative-of-possible-criminal-conduct> accessed 4 May 2021.

[33] Peter Van Buren, 'Tor Developer Created Malware for FBI to Hack Tor Users' (*AntiWar.Com,* 5 May 2016) <https://www.antiwar.com/blog/2016/05/05/tor-developer-created-malware-for-fbi-to-hack-tor-users/> accessed 21 December 2019.

[34] Elizabeth E Joh, 'Breaking the Law to Enforce it: Undercover Police Participation in Crime' (2010) 62(1) Stan LR 155, 157.

causing entrapment (similar to *Loosely*)[35] as it could be argued that criminals are coerced into committing acts they may not have otherwise done. Though despite the fine line between the two, one can distinguish between cases where a site has been set up (enticing potential criminals) or maintained (tracing actual criminals). Thus, Joh's approach is preferable; some level of criminality is acceptable, as remaining covert avoids providing criminals with warning signals. To ensure that a balance of interests is maintained, Hadjimatheou proposes that law enforcement should develop supplementary detailed guidance to guarantee necessary and proportionate policing.[36] Strict guidelines have an inherent potential to be rigid, so an appropriate level of discretion would be required to enable law enforcement to disrupt major criminal supply chains while avoiding any abuse of process.

Also, a disproportionate weighting can be seen in terms of the principles of fairness and justice when sentencing dark web criminals. Illustrating this is the US case of Ross Ulbricht (founder of Silk Road), who received a double life sentence plus forty years with no possibility of parole.[37] Conversely, in the UK case of Thomas White (founder of Silk Road 2.0), a mere 64-month custodial sentence was imposed.[38] Arguably, Ulbricht's sentence could be regarded as grotesquely disproportionate; White indisputably engaged in graver conduct by selling child sexual abuse images while Ulbricht advocated for free markets and privacy. Here, it could be argued that the lack of proportionality is irrational and unjust in denying individuals a fair hearing (which *Ridge*[39] and *Re HK*[40] deem paramount). Considering bias, Griffith contends that the conventionally conservative background of the judiciary may lead to prejudiced views unrepresentative of the majority.[41] Despite the differing jurisdictions involved, the continuation of disproportionality in the available countermeasures will inevitably lead to a harsh and law laden with inconsistencies.

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[35] *R v Loosely* [2001] UKHL 53 [1]-[5].
[36] Kat Hadjimatheou, 'Policing the Dark Web: Ethical and Legal Issues' (*University of Warwick and TNO*, November 2017), 7 <https://ec.europa.eu/research/participants/documents/downloadPublic?documentIds=080166e5c2573eef&appId=PPGMS> accessed 13 December 2020.
[37] *United States of America v Ross William Ulbricht* 14-cr-068.
[38] The Independent, 'Thomas White: Self-Taught Computer Mastermind Behind 'Silk Road' Illegal Drugs Website Jailed' (12 April 2019) <https://www.independent.co.uk/news/uk/crime/thomas-white-silk-road-drugs-jail-bitcoin-liverpool-a8867996.html> accessed 14 March 2021.
[39] *Ridge v Baldwin* [1964] AC 40, 135.
[40] *Re HK (An Infant)* [1967] 2 QB 617, 633.
[41] John AG Griffith, *The Politics of the Judiciary* (5th edn, Fontana Press 1977) 295.

### 2. Consistency

Inconsistent prioritisation in the available countermeasures is another significant challenge. Disparately, the US prioritises the top 1% of sellers on illicit marketplaces, while the Netherlands focuses on all criminal actors.[42] While discrepancies in culture, linguistics and opinions remain in certain instances, these problems are easier resolved than systemic inconsistency. Fundamentally, international efforts must be harmonised across the board to ensure uniformity; otherwise, the available countermeasures will severely undermine the principle of citizenship by eroding public trust in the state's abilities to deter crime.

Conceivably, Mutual Legal Assistance Treaties attempt to resolve inconsistencies by cementing similar procedures with regards to international efforts in combatting cross-border crime. A specific example of this is the EU Mutual Assistance Convention, whereby signatories committed to international consistency pertaining to technological developments in criminal matters.[43] Despite the fact that a formal agreement regarding consistency was reached, any success depends entirely on wider political appetite regarding international cooperation as well as genuine adherence to the countermeasures.

Emphasising the value in consistency at international level, ex-Secretary-General Kofi Annan attested that cooperation would cause a '*real impact'* in tackling international organised crime.[44] International cooperation is useful in bolstering communication, information sharing and partnerships between law enforcement. Despite this, it would be naïve to assume that this would wholly remedy the challenge of inconsistency. Expressing a more tenable interpretation, Brown

[42] Alois Afilipoaie and Patrick Shortis, 'Crypto-Market Enforcement – New Strategy and Tactics' (Swansea University, *Global Drug Police Observatory*, June 2018) <https://www.swansea.ac.uk/media/Crypto-Market-Enforcemnet-New-Strategy-and-Tactics.pdf> 1-2 accessed 17 December 2019.

[43] Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (European Mutual Assistance Convention) [2000] OJ C197/3 arts 1-7.

[44] United Nations Office on Drugs and Crime, United Nations Convention Against Transnational Organised Crime and the Protocols Thereto (New York, 2004) iii <https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf> accessed 15 December 2019.

contends that combatting cross-border crime will indefinitely lead to challenges, as it is '*becoming increasingly complex.*'[45] Technologies underpinning the dark web have the potential to develop and override the abilities of available countermeasures, so broad international cooperation will not have a sustained impact upon challenges posed to law enforcement.

Instead, Menon et al. proposes the establishment of a specific multinational platform by establishing common standards and key principles.[46] While bodies such as INTERPOL[47] and Europol[48] exist, they merely hold coordinating powers. Though ambitious, a supranational body provides a solid solution to enhance international consistency. Undoubtedly, this is essential countermeasure, considering the transnational scope of dark web crime.

## Conclusion

Looking forward, we are headed for an even darker future, based on the extent of the challenges posed to law enforcement. Undoubtedly, the dark web embodies a safe haven for criminals through its multi-layered anonymity and communal culture, despite the value of certain legitimate uses. Moreover, the ever-evolving technological landscape brings unparalleled challenges for the practical application of the current regulatory framework and confiscation mechanisms, despite being promising in theory. Finally, the available countermeasures employed in response are also unfit for purpose due to the lack of wider commitment to proportionality and consistency, in spite of the common aim of regulating crime. Since we are only at the infancy of such technological phenomena, immediate regulatory attention is required to regulate contemporary as well as emerging challenges.

[45] Steven David Brown, *Combating International Crime: The Longer Arm of the Law* (Routledge Cavendish 2008).
[46] Sundaresh Menon and Teo Siew, 'Key Challenges in Tackling Economic and Cybercrimes: Creating a Multilateral Platform for International Co-operation' (2012) 15(3) JMLC 243, 244, 254 <https://doi-org.liverpool.idm.oclc.org/10.1108/13685201211238016> accessed 2 March 2021.
[47] INTERPOL, 'What is INTERPOL?' <https://www.interpol.int/Who-we-are/What-is-INTERPOL> accessed 13 March 2021.
[48] Europol, 'About Europol' <https://www.europol.europa.eu/about-europol> accessed 13 March 2021.

# Crossing the Extraterritorial Border: The Illegalisation of Asylum

*Marisa Sehmar*

## Abstract

*The right to seek asylum as a result of a well-founded fear of persecution is a legal guarantee.Yet, in an age of securitisation, states are attempting to prevent those who are seeking asylumfrom entering the legal jurisdictions or territories of destination countries. This article seeks to explore how states are implementing extraterritorial border control and how such measuresinteract with their responsibilities under international law, using case studies from Europe, Australia, and the United States. The first half of this article considers the policies of unilateral non-entrée, including carrier sanctions, liaison officers, surveillance technology, interdiction at sea and excision zones. The second part of the article outlines the co-operative non-entrée policies of bilateral agreements and the use of both detention and offshore processing centres. This article concludes that the securitisation narrative has obscured the humanitarian narrative, allowing states to introduce policies which outlaw those potential protective needs. Subsequently, states have successfully evaded their obligations under international law.*

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## Introduction

Under Article 31 of the 1951 Convention, states are obliged to ensure that the process of seeking asylum is from "penalties"[1] and "restrictions other than what is necessary" [23] to allow "such refugees a reasonable period and all necessary facilities to obtain admission in another country".[4] To do this, the Convention provides that states are prohibited from the act of *refoulement* which might threaten his life or freedom.[5]This principle of *non-refoulment* prevents states from "transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of

[1] UN General Assembly 'Convention Relating to the Status of Refugees' (1951) 174
[2] UN General Assembly 'Convention Relating to the Status of Refugees' (1951) 174
[3] ibid
[4] ibid
[5] UN General Assembly 'Convention Relating to the Status of Refugees' (1951) Article 33

irreparable harm upon return"[6] irrespective of migration status. Yet, the Global North has been heavily criticised for their avoidance of these responsibilities by introducing a taxonomy of controls which form an international "architecture of repulsion"[7] against migrants with possible protection claims. This architecture effectively sees the democracies of the Global North restricting migrants' access to territorialised human rights and evading the spirit of international humanitarian law, whilst simultaneously *de jure* adhering to them. This piece will argue that the extraterritorial fortification of borders; either directly (through 'unilateral non-entrée' policies) or more indirect actions (known as 'cooperative non-entrée' policies), has effectively amounted to an illegalisation of asylum.

## Unilateral non-entrée policies

States have introduced policies which target those seeking protection through both regular and irregular channels. It will first be examined how states are curtailing the access of asylum seekers to their territory through regular channels by operating a "remote control border";[8] this border keeps such individuals in countries of origin and first asylum, without excluding other migrants – the states' use of carrier sanctions, liaison officers and surveillance technology will be analysed. Then, it will be explored how destination states are combatting claims being made by those who bypass the "remote control border"[9] and irregularly seek asylum by interdicting at sea and creating excision zones.

## Carrier sanctions

Carrier sanctions are penalties imposed on transport companies. They were purposed for "immigration control, curbing drug traffickers, inhibiting the international movement of terrorists, and generating income"[10] and were to be held "without any prejudice to applicable

[6] UN Human Rights, 'The principle of non-refoulment under international law' (UN Human Rights Office of the High Commissioner) < https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> accessed 8 July 2021
[7] David Scott Fitzgerald, 'Remote control of migration: theorising territoriality, shared coercion, and deterrence' [2020] 46 Journal of Ethics and Migration Studies 4
[8] Aristide Zolberg, 'The Great Wall against China' in Jan Lucassen and Leo Lucassen (ed) *Migration, Migration History and History: New Perspectives* (Peter Lang, 1997) 111
[9] ibid
[10] Erika Feller, 'Carrier Sanctions and International Law' [1989] 1 International Journal of Refugee Law 48, 50

international conventions".[11] Recent developments in legislation have seen states penalising operators who allow passengers to board without proper documentation by introducing financial penalties, the possibility of imprisonment and seizure of aircraft. This was reflected in the passing of the Immigration (Carriers' Liability) Act[12] in the United Kingdom and the Migration Act[13] in Australia. States have justified this tightening of carrier sanctions as a means of disrupting criminal operations. However, these measures prove disproportionate to the threat posed, as a person being rejected on embarkment is an insufficient means to deal with smugglers with no further investigation being conducted by law enforcement.[14] Similarly, in the case of traffickers, there is little to protect or assist the victim as carriers are not obligated to alert public officials as they are not acting as a government authority.[15]

As the points of embarkment have been transformed into " a first instance immigration control, having to deal…with asylum seekers who may be in need of international protection",[16] airline operators have subsequently become *de facto* "international immigration officers".[17] Yet, the personnel are often inadequately equipped to deal with complex asylum matters and so, are tactfully coerced into denying the boarding of an undocumented passenger with possible protection claims, to not risk punishment. As Rodenhäuser discerns, this allows for states to distance themselves from their responsibility to protect asylum seekers in two ways: it not only means embarkation control takes place outside the territory of the destination state; but that it becomes the duty of non-state actors to check travel documents and possibly turn away asylum seekers seeking protection.[18]

The emphasis placed on human smuggling and transnational crime by states as a justification for carrier sanctions effectively debases discussion of persecution and protection. As such, asylum seekers are depicted as deviant and therefore undeserving of state protection and so, their movement is criminalised. This preclusion of asylum seekers without documentation

[11] ibid
[12] Immigration (Carriers' Liability) Act 1987
[13] Migration Act 1958
[14] ibid
[15] UN Anti-Smuggling Protocol and Anti-Trafficking Protocol Article 10(1)
[16] Tilman Rodenhauser, 'Another Brick in the Wall: Carrier Sanctions and the Privatisation of Immigration Control' [2014] 26 International Journal of Refugee Law 223, 224
[17] Antonio Cruz, 'Carrier Sanctions in four European Community States: Incompatibilities Between International Civil Aviation and Human Rights Obligations' [1991] 4 Journal of Refugee Studies 63
[18] ibid

from boarding the aircraft forbids such migrants the right to seek asylum and contravenes the principle of *non-refoulement.*[19] Accordingly, in his field report on carrier sanctions, Cruz observes the application of such carrier sanctions in states such as Belgium, Denmark, Germany and the UK have numerous conflicts with their human rights obligations.[20]

**Liaison officers**

To alleviate the burden placed on airline operators, states have stationed officers at airports to help facilitate the return of illegal immigrants. Australia introduced Airport Liaison Officers (ALOs); the EU, Immigration Liaison Officers (ILOs) and the US with the Carrier Liaison Program (CLP). These officers generally have "no legal powers in foreign jurisdiction…the decision to carry a passenger or to deny boarding is always made by the airline".[21] Nonetheless, the possibility of incurring a penalty is enough for personnel to follow the suggestions of the liaison officers.

Little data is available to measure the impact of officers preventing entry of asylum seekers, so "it is impossible to be precise about the number of refugees who are denied escape…the number is considered to be on the rise…not least since transport companies have been assisted by governmental liaison officers".[22] This lack of availability of data also means there is great difficulty to "determine who is responsible when things go wrong, muddying the ability to determine accountability for abuse".[23]This is particularly pertinent as Gammeltoft-Hansen has found such refugees struggle to access complaint procedures when harm occurs[24] and even where they have access to complaint procedures, there is an "inappropriately high burden of proof, resulting in every aspect of an applicant's clam being disbelieved or rejected…on the basis of only one or two negative credibility findings"[25].

[19] UN General Assembly 'Convention Relating to the Status of Refugees' (1951) Article 33
[20] Cruz (n 17)
[21] UK Border Agency, Entry Clearance Guidelines 2008
[22] Andrew Brouwer and Judith Kumain, 'Interception and Asylum: When Migration Control and Human Rights Collide' [2003] 21 Refuge: Canada's Journal on Refugees 11
[23]Theodore Baird, 'Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries' [2017] 19 European Journal of Migration and Law 307, 333
[24] Thomas Gammeltoft-Hansen, 'The Practice of Shared Responsibility in relation to Private Actor Involvement in Migration Management', University of Amsterdam, SHARES Research Paper 83 (Amsterdam: Amsterdam Center for International Law, 2016) 25
[25] Home Affairs Committee, Asylum Report (HC 2013-14, 7-I) para 53

## Surveillance technology

Surveillance technology grants states access to a greater amount of information about the activity of migrants, particularly asylum seekers, which strengthens states' control of its external borders. Admittedly, the surveillance technology itself is not an interference to the protection of asylum seekers as "policymaking increasingly depend[s] on the accuracy of big data and advanced analytics".[26] However, the manipulation of the data by states to prevent the entry of asylum seekers is. The EU is at the forefront of exploiting technology to bolster border control by the introduction of Eurodac, Eurosur, and use of social media.[27]

Eurodac was established to facilitate the application of the Dublin Convention, which is to determinate which state is responsible for examining an asylum application. It created a central European database comprised of the fingerprints of all asylum seekers (over the age of 14). Member States can "check whether an alien found illegally present on its territory has applied for asylum in another Member State"[28] to avoid asylum seekers filing multiple applications. Eurodac was later repurposed, by law enforcement agencies able to access the database because "the information contained in Eurodac is necessary for the prevention, detection or investigation of terrorist offences".[29] There has since been a proposal to broaden the scope of Eurodac by reducing the minimum age of biometrics to six and to begin collecting facial images of asylum seekers.[30] Eurosur, on the other hand, was designed for Member States and Frontex, "with the infrastructure and tools needed to improve their situational awareness and reaction capability at the external borders of the Member States of the Union".[31] Monitoring border crossing points, it is comprised of national coordination

[26] Jonas Lerman, 'Big Data and its Exclusions' [2013] 66 Stanford Law Review Online, <https://www.stanfordlawreview.org/online/privacy-and-big-data-big-data-and-its-exclusions/> accessed 17 January 2020

[27] Mark Latonero and Paula Kilt, 'On Digital Passages and Borders: Refugees and New Infrastructure for Movement and Control' [2018] 4 Social Media and Society 1

[28] Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L316

[29] Regulation [EU] 603/2013 of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice OJ L180/1

[30] Commission, 'A New Pact on Migration and Asylum' (Communication) COM 2020/609 final

[31] Council Regulation (EU) 1052/2013 of 22 October 2013 establishing the European Border Surveillance System OJ L295

centres for the exchange of information and the use of surveillance tools, such as offshore sensors and drones.[32] The surveillance extends past the EU, neighbouring third countries are also monitored and encouraged to share information and cooperate.[33]

Together, the digital infrastructure of Eurosur and Eurodac work to erect a digitalised system of border control. In this way, Latonero and Kilt assert that "Eurosur reinforces external borders through classification of *groups*, Eurodac reinforces internal boundaries through the identification of *individuals".*[34] So, whereas "Eurosur pushes the physical border *outwards* as satellites and drones are designed to prevent populations of asylum seekers and "illegal" migrants from reaching the continent in the first place, Eurodac pushes the border *inwards* as biometric information technologies inscribe the border into the bodies of each and every individual asylum seeker in Europe".[35]

Asylum seekers use social media platforms, just like everyone else, as part of everyday life. However, asylum seekers are not everyday consumers, for they have special characteristics that make them a vulnerable population[36]. As Latonero and Kilt explain, the risk of "increased visibility on social media may put their remaining relatives back home at risk or potentially stigmatize them in their host countries".[37] Nonetheless, based on the belief that social media is an instrument for human traffickers and migrant smugglers, states argue the monitoring of social media helps prevent the proliferation of criminal enterprises.[38] Member states, such as Belgium, Norway and Germany, have sought to implement legislation to access the smartphones and social media accounts of asylum seekers, "in order to make safety checks".[39] This growing focus on the social media accounts of migrants is not limited to the EU, in the US the Customs and Border Protection agency are also able to monitor social media. Not only can the collection of data be weaponised by states and private actors to design harmful policies, but it could also be understood as states inciting 'system

[32] (Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System OJ L295 Article 12(3)c)
[33] ibid Article 20
[34] Latonero and Kilt (n 29) 2
[35] ibid
[36] ibid 1
[37] ibid
[38] European Migration Network, 'Annual Report on Migration and Asylum' (2016) 71
[39] Maria Gabrielsen Jumbert; Rocco Bellanova & Raphaël Gellert, 'Smart Phones for Refugees: Tools for Survival, or Surveillance?*' Peace Research Institute Oslo* (Oslo, 2018) <https://www.prio.org/utility/DownloadFile.ashx?id=1597&type=publicationfile> accessed 7 July 2021

avoidance'. The collection of biometrics from asylum seekers is likely to leave them fearful and suspicious of authorities and regard it as "a badge of criminality".[40] This can result in asylum seekers exploring "off-the-grid alternatives [that] can expose refugees to new risks of avoidance, far beyond the reach of law enforcement or relief services"[41] and could shift the responsibility to another state.

Thus far, it has been demonstrated that the manipulation of carrier sanctions, liason officers and surveillance technology has worked to obstruct asylum seekers' access to the territory of the destination state via regular channels. As a (unintended) result of this, a rapidly growing number of migrants are now attempting to reach the territory irregularly by boat. The policies of interdiction of sea and creation of "migration zones" have been introduced to deal with these migrants, these will now be investigated.

## Interdiction at sea

It is well acknowledged since Grotius' 'Mare Liberum' that the seas are incapable of being possessed, for they are too vast to be controlled by a single power.[42] Conceding with this idea, Article 2 of the UN Convention on the High Seas 1958 states "the high seas [should be] open to all states, no State may validly purport to subject any part of them to its sovereignty".[43] Despite this, its signatories have continued to attempt to appropriate zones over which they exercise exclusive, or functional, jurisdiction. As such, the law of the sea has instead become a balancing act "between freedom, on the one hand, and the exercise of jurisdiction by coastal guards on the other".[44] This grappling for control of the sea by states means it has become a source of asylum violence.

Interdiction at sea, defined by Ryan, is a strategy employed by states "to prevent non-citizens from reaching their intended destination".[45] It began as Search and Rescue missions, but

[40] Achraf Faraj 'Refugees and the Biometric Future: The Impact of Biometrics on Refugees and Asylum Seekers' [2011] 42 Columbia Human Rights Review 891, 921
[41] Latonero and Kilt (n 29)
[42] Jan Klabbers, '*International Law'* (CUP, 2013) 255
[43] UN General Assembly, Convention on the High Seas (1958) Article 2
[44] Klabbers (n 44)
[45] Bernard Ryan, '*Extraterritorial Immigration Control: Legal Challenges'* (Martinus Nijhoff Publishers, 2010) 22

these ended after criticism for constituting a 'pull effect'; in their place, states founded operations to 'push back' migrants arriving by sea – demonstrated by the EU's termination of Mare Nostrum, which was superseded by Operation Sophia and Frontex's Trinton. Moreno-Lax theorises there are two distinct elements of the narrative surrounding boat migration: irregular migrants as a 'security problem' and interdiction as a means of saving migrant's lives.[46] Consequently, "interdiction is laundered into an ethically sustainable strategy of border governance… instead of being considered a problematic (potentially lethal) means of control, it is re-defined into a life-saving device".[47]

The account of boat migrants as a danger to border security cites the threat of human traffickers and migrant smugglers entering the state at unchecked border points. This vilification of irregular migrants has resulted in a climate of fear amongst the public and thus has led to demands for greater security, allowing states to justify militarised measures to defeat the 'threat' posed by migrants. Less attention and resources are given to the possible protective needs of asylum seekers. Instead, the focus is to prevent asylum seekers reaching the state's territory. An example of this is Frontex launching tender to "carry and use…service weapons and non-lethal equipment"[48] despite lacking the legal basis to do so.[49] Furthermore, states have sought to emphasise the disaster and devastation the migrants are leaving, which then "intersects with the securitisation discourse, articulating demands for 'urgent action' that reinforce the security response".[50] In this way, the securitisation narrative has been conflated and confused with humanitarian and human rights narrative. Thus, states are granted public approval to prevent asylum seekers reaching their territory and making a claim.

This tactical retreat of Search and Rescue missions by states has resulted in NGOs and individuals attempting to fill the gap. States are increasingly looking to limit their involvement by illegalising their activity, so to stop refugees embarking on their territory. In

[46] Violeta Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without Protection' Paradigm' [2018] 56 Journal of Common Market Studies 119
[47] ibid
[48] Frontex, *'*State of play of the implementation of the EBCG 2.0 Regulation in view of current challenges*'* of 27 April 2020 para 2.4
[49] ibid para 2.5
[50] Moreno-Lax (n 48) 121

the EU, the optional nature of the 'Facilitator's Package'[51] meant states did not have to exempt humanitarian smuggling from criminalisation. As a result, "even in those few Member States which have implemented the exemption, including Belgium, Greece, Italy, Malta, and the UK, criminal investigations and prosecutions against humanitarian actors have still taken place".[52] This adoption of a 'closed port' policy has the effect of increasing the number of deaths and reducing the amount of rescue missions, which avoids asylum claims being made.

## Creation of excised zones

For asylum seekers who do make it past the various extraterritorial barriers, they might still find themselves outside the destination state's "migration zone".[53] The excision of a migration zone is a border control policy currently unique to Australia. It was introduced in response to the Tampa affair, whereby the Australian government refused to permit the *MV Tampa* freighter attempts to enter Australian waters after having rescued 433 refugees. The subsequent introduction of the Migration Amendment Act 2001 excised certain northern islands of Australia from its "migration zone", which effectively prevented asylum seekers making claims under Australian law unless the Minister personally allowed it.[54] Since, the government have persisted in making the "migration zone" even smaller, so much so, that under the Migration Amendment Act 2013 the Australian mainland was excised from the "migration zone". This effectively deprives irregular migrants of any other means of being processed, they are left with no choice but to be processed in the state's offshore sites. As such, Hathaway explains, they are not "entitled to have their claims assessed under Australia's refugee status determination system. Rather [they are] treated as though they were in an overseas refugee camp and considered for discretionary admission either immediately or after having their circumstances considered in the territory of a partner state, such as Nauru, to which they might be removed".[55]

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[51] Commission Directive 2009/90/EC of 31 July 2009 laying down, pursuant to Directive 2000/60/EC of the European Parliament and of the Council, technical specifications for chemical analysis and monitoring of water status OJ L201

[52] Laura Schack, 'Humanitarian Smugglers? The EU Facilitation Directive and the Criminalisation of Civil Society' Border Criminologies (Oxford, 6 July 2020) <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/07/humanitarian> accessed 13 January 2021

[53] Asher Lazarus Hirsch, 'The Borders Beyond the Border: Australia's Extraterritorial Migration Controls' [2017] 36 Refugee Survey Quarterly 48, 67

[54] ibid 68

[55] James C. Hathaway, '*The Rights of Refugees under International Law'* (CUP, 2005) 298

**Cooperative non-entrée policies**

The unilateral non-entrée policies arguably push asylum seekers to seek more clandestine journeys as their desperation for protection intensifies. As a result, "a never-ending race between border authorities and even more inventive human smugglers [has been spawned]: for each loophole closed by officials, two new modes of unauthorized entry seem to emerge".[56] To deal with these migrants who still seem to find ways into the destination state's territory in spite of the extraterritorial borders, states have birthed a second generation of policies on the basis of cooperative deterrence.

The destination states have outsourced their obligations to states who cooperate and "sell [their] sovereignty"[57] in return for financial aid. States do this to avoid being found to exercise "continuous and exclusive *de jur*e and *de facto* control"[58] over asylum seekers. The agreements between destination states and their neighbouring nations seek to share intelligence and provide financial aid, training, military equipment, and other resources. A defining characteristic of these agreements is they are knowingly made with an ill functioning state, where asylum seekers are mistreated. This was exhibited in the Treaty of Friendship and the subsequent Memorandum of Understanding between Italy and Libya, which intended "to ensure the reduction of illegal migratory flows".[59] Libya is not a signatory to the 1951 Convention nor bound by the ECHR and asylum seekers often suffer "unimaginable horrors",[60] with many being abused and detained. These agreements are an attempt by the state to *refoul* asylum seekers "by proxy"[61] without contact.

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[56] James C. Hathaway and Thomas Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' [2015] 53 Columbia Journal of Transnational Law 235, 237

[57] Azadeh Dastayi, 'Detention of Australia's Asylum Seekers in Nauru: Is Depravation of Liberty By Any Other Name Just as Unlawful?*'* [2015] 38 University of New South Wales Law Journal 669, 692

[58] Hirsi Jamaa and Others v. Italy (2012) Application no. 27765/09

[59] Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic (2017) <http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> accessed 5 January 2021

[60] United Nations, 'Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya' of 20 December 2018, 4

[61] Sophie Hinger, 'Transformative Trajectories – The Shifting Mediterranean Border Regime and the Challenges of Critical Knowledge Production, An Interview with Charles Heller and Lorenzo Pezzani' [2018] 4 Journal for Critical Migration and Border Regime Studies 193, 205

## Detention and offshore processing

In these agreements, states authorise the use of offshore processing and detention in neighbouring states, to deter other migrants who are considering arriving by sea. Migrants are intercepted at sea and sent to a third country to have their refugee status determined. Australia's offshore processing centres in Papua New Guinea and Nauru have been of particular focus, for the detainees have been "largely beyond the reach of independent scrutiny or oversight…none of them had access to appropriate procedural safeguards or legal mechanisms to challenge their detention".[62] Australia maintains the responsibility for the management of the centres and for the abuses that take place there, rests solely with the host countries. Interestingly, extraterritorial processing has not had its intended effect, with more migrants arriving in the first ten months of its introduction than any other time.[63] This detaining of migrants in 'prison-like' conditions shows how states are desperately trying to outlaw asylum, casting them away at any cost (whether that be financial, or the lives of asylum seekers). Other states, such as the UK, are seeking to implement a similar model.[64]

## Conclusion

There has been a widespread acceptance of the mythical distinction between 'good migrants' and 'bad migrants'; those wishing to claim asylum have unfortunately found themselves cast as the latter – they have been framed as "feckless, fecund, ill-disciplined, violent, bad or dependant, of which the criminal is an ancient archetype".[65] This perception of asylum seekers has become a central consideration when it comes to designing policy, which has ultimately led to the "dehumanisation of forcibly displaced persons and for narratives to emerge that justify the often hostile actions that states take based on a narrow focus on border

[62] Janet Phillips, 'The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island' the Parliamentary Library, Parliament of Australia, 4 September 2012, http://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/bn/2012- 2013/pacificsolution#_Toc334509638 accessed 7 July 2021

[63] Jane McAdam and Madeline Gleeson, 'Australia's offshore detention centres have been a cruel disaster . They must not be replicated in the UK' *The Guardian* (London, 2 October 2020) < https://www.theguardian.com/commentisfree/2020/oct/02/australias-offshore-asylum-centres-have-been-a-cruel-disaster-they-must-not-be-replicated-by-the-uk > accessed 5 January 2021

[64] Paul Lewis, David Pegg, Peter Walker and Heather Stewart, 'Revealed: No 10 explores sending asylum seekers to Moldova, Morocco and Papua New Guinea' *The Guardian* (London, 30 September 2020) < https://www.theguardian.com/uk-news/2020/sep/30/revealed-no-10-explores-sending-asylum-seekers-to-moldova-morocco-and-papua-new-guinea > accessed 5 January 2021

[65] Melanie Griffiths, 'Foreign, criminal: a doubly damned modern British folk-devil' [2017] 21 Citizenship Studies 527, 529

'protection'".[66] With states' obligations under international law no longer considered to be just a humanitarian matter but a securitization matter too, the Global North have been able to fortify their borders as an urgent matter of preserving state sovereignty. However, concerningly, not only does this extra-territorialisation of borders entirely contravene the states' obligations under international humanitarian law but it appears to be 'a race to the bottom'. As states continue to innovate schemes to avoid their obligations under international law, the threatened asylum seekers are set to be continually disappointed by the Global North who insist on casting them as a threat.[67]

[66] Samuel Berhanu Woldemariam, Amy Maguire and Jason Von Meding, 'Forced Human Displacement, the Third World and International Law: A Twaill Perspective' [2019] 20 Melbourne Journal of International Law 248, 255

[67] Alexandria J. Innes, 'When the Threatened Become the Threat: The Construction of Asylum Seekers in British Media Narratives' [2010] 24 International Relations

# Humanitarian Intervention and the Principle of Sovereignty: One or the Other?

*Rishma Mehta*

**Abstract**

*The doctrine of humanitarian intervention is one of the most contested topics in international law. There are strong and varied opinions about whether such intervention is or should be legal. This paper studies these different opinions by referring to case studies, academic commentaries, and principles such as the principle of Sovereignty and Responsibility to Protect which are closely linked to the doctrine. In this article, the current law is reviewed, followed by the far-reaching implications of legalising humanitarian intervention under wider themes of social justice such as fairness, citizenship, and equality. This paper argues that no change should be made to international law which currently prohibits humanitarian intervention and deems it illegal. The purpose of this piece is to demonstrate the fact that the principle of sovereignty, a fundamental principle of International law, cannot be upheld if humanitarian intervention was to be legalised. I will consider the wider implication of this, through elements of social justice such as fairness, equality, and citizenship amongst countries.*

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## Introduction

Humanitarian intervention, defined as 'the use of armed force by a state (or states) to protect citizens of the target state from large-scale human rights violations there',[1] takes place without the authorisation of the United Nations Security Council (UNSC) or the consent of the state within whose territory the military force is applied.

This concept is extremely controversial as it relates to a significant legal dilemma, the battle between sovereignty and human rights violations. It has been particularly difficult to strike an appropriate balance between the sovereignty of a State and the human rights of its citizens. To illustrate this, the Kosovo case study will be used as an example. In 1999, former Yugoslavia waged a war against its Kosovo Albanian population, in an attempt at ethnic cleansing, majorly violating citizens' human rights. The UNSC, however, refused to intervene and did not authorise the use of external force in Yugoslavia to stop the killings of innocent people.

[1] Anthony Arend and Robert Beck, *International law and the Use of Force* (Routledge 1993) 113.

Although this position would now change pursuant to the evolution of the idea of state sovereignty discussed later in this paper, the reason for the non-intervention could have been because the UN did not want to encroach upon Yugoslavia's sovereignty. Subsequently, the North Atlantic Treaty Organisation (NATO) illegally launched an air campaign on Yugoslavia for 78 days to stop these atrocities, thereby illustrating the contemporary relevance of humanitarian intervention to stop the violations of fundamental human rights, while also shedding light on the importance the UNSC places on state sovereignty and non-intervention. This is further explored below in the discussion of humanitarian intervention with reference to customary international law.

This paper will argue that humanitarian intervention is and should remain prohibited under International law, upholding the long-standing principle of sovereignty that lies at the heart of international law. Various elements of social justice such as fairness, citizenship and equality will be utilised as guidelines to further substantiate this argument. The first section of this piece will examine the elements of the current law with reference to the principle of State Sovereignty and United Nations (UN) Charter. The second section will go on to inspect Customary International law (CIL) and the Responsibility to Protect. Finally, the last part of this paper will be divided into two sections to consider the implications of legalising humanitarian intervention: the third section will explore aspects such as the role of the UN and the abuse of power by States and the fourth section will explain the difficulties of creating new thresholds. The effect of these new thresholds, discussed later, emphasises the fact that humanitarian intervention should not be permitted, and thus safeguards state sovereignty.

## Principle of State Sovereignty

The idea of sovereignty is one of the oldest principles in international law and is intricately linked to the debate of humanitarian intervention. international law is a decentralised legal system. States are both the authors and primary subjects of legal rules. Since the decentralised system is horizontal, there is no enforcement mechanism such as a police force or a court and so the highest authority is the State itself. The implication of this is that the principle of State sovereignty emerges as an organising principle.

This principle can be analysed through internal and external dimensions. Internally, the State has full autonomy to conduct its affairs in any way; externally, the rules of international law suggest that States cannot intervene and invade another State without its consent. At its core,

the ideas of both sovereignty and equality are that no state is legally superior to another- *par in parem non habet imperium*.[2]

The principle of sovereign equality is codified in Article 2(1) of the Charter: the UN 'is based on the principle of the sovereign equality of all its Members',[3] bringing the notion of formal equality to the forefront. Viewing this through the lense of fairness, the Aristotelian belief to 'treat like cases as like'[4] implies that all States should be equally sovereign before the law, and none should be granted special privileges. In addition, Article 2(7) outlines the principle of non-intervention which protects the internal dimensions of state sovereignty by preventing interference in the domestic affairs of a State. These provisions imply that applying force in another State without its consent is against international law. According to Kofi Annan, 'principles of sovereignty and non-interference offer vital protection to small and weak states.'[5] Without this protection, weaker states are left vulnerable to force if humanitarian intervention is legalised.

## The UN Charter governing the use of force

The UN Charter, through its provisions, protects and promotes the Principle of Sovereignty. Article 2(4) of the Charter specifies that UN member states should refrain 'from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations'.[6] This prohibition against the use of military force has only two exceptions - self-defence and collective security. Self-defence is 'regulated both by customary international law and by treaties, in particular the United Nations Charter'.[7] Focusing on the UN Charter, Article 51 establishes the right to self-defence 'if an armed attack occurs'. While the definition of 'armed attack' and considerations like, inter alia, the timing of the attack and who the perpetrators are, are highly controversial, it is important to note that the general principle is that such a right to self-defence exists.

[2] David Ott, *Public International law in the Modern World* (Pittman 1987) 48.
[3] Charter of the UN, (came into force 24 October 1945) art 2 (1).
[4] Aristotle, *Aristotle: Nicomachean Ethics* (Roger Crisp ed CUP 2000).
[5] Kofi Annan, UN Millennium Report, 2000.
[6] Charter (n 3) art 2 (4).
[7] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] ICJ Rep 14, para 34.

The UN Charter also operationalises the second concept of collective security by providing that 'effective collective measures' have to be taken to maintain international peace and security.[8] The fact that it is written in the very first provision implies that collective security could be a central purpose of the UN. The implication of this notion is that all States have a stake in International law; the only way in which these ideals will be realised is if they all worktogether collectively to maintain international peace and security. This also encourages them to act fairly and equally which significantly contributes to the idea of preserving and upholdingjustice internationally.

Through collective security, the use of force is authorised by the UNSC under Article 42. It states that the UNSC 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.' Article 24(1) also provides that the primary responsibility of the UNSC is the 'maintenance of international peace and security'. Together, these provisions clearly prohibit the use of *any* unilateral military force against another state, pursuant to Article 1(1).

However, some academics have argued that a narrow interpretation of the Charter would allow humanitarian intervention. Firstly, D'Amato argues that humanitarian intervention does not violate the territorial integrity or the political independence of a State and therefore complies with Article 2(4).[9] He uses the example of the Israeli raid on the Iraqi nuclear reactor in 1981 and noted that while it was a 'use of force, it arguably was not directed at Iraq's territorial integrity or political independence'.[10] Schachter rejects this interpretation by affirming that 'an invasion, however brief in duration, violates the essence of territorial integrity (the right of a state to control access to its territory.)' [11] The UK made a similar argument in the *Corfu Channel* case,[12] affirming that its military action did not threaten the territorial integrity or political independence of Albania. However, the International Court of Justice rejected this argument and declared that the narrow interpretation of Article 2(4) does not 'find a place in

[8] Charter (n 3) art 1 (1).
[9] Anthony D'Amato, *International law: Process and Prospect* (Transnational Publishers 1987), 58-59.
[10] Ibid 79.
[11] Oscar Schachter, *The Legality of Pro-Democratic Invasion* (American Journal of International law 1984), 649.
[12] *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 35.

International law', confirming that humanitarian intervention is not permitted under the Charter or CIL, discussed below.

Secondly, given that there are many references to the protection of human rights in the Charter, specifically Article 1(3), humanitarian intervention will not be inconsistent with the purposes of the UN.[13] This argument is weak since it does not consider other provisions of the Charter such as to settle 'international disputes by peaceful means' and it directly contradicts the rule against war put forth in Article 2(4).[14]

Furthermore, unilateral military force goes against the notion of collective security that is endorsed by the Charter. The UN General Assembly's 'Declaration on Friendly Relations' emphasises that 'no State has the right to intervene, directly or indirectly, *for any reason whatever,* in the internal or external affairs of any other State.'[15] (emphasis added). This clarifies that the Charter completely prohibits unilateral humanitarian intervention, advancing principles of justice and fairness by preventing loss of life caused by such intervention.

According to Gerry, both the right to territorial integrity (Article 2(4)) and the right to self-defence (Article 51) are derived from sovereign equality.[16] This implies that the current law on the use of force is fully justified by the principle of sovereign equality and amending it would be going against a fundamental principle of international law.

## The status of humanitarian intervention in customary international law

In addition to the UN Charter, another significant source of international law is CIL. Article 38(1)(b) of the Statute of the International Court of Justice states that 'general practice' and '*opinio juris*' are required to form CIL. General practice can be understood as the consistent practice of states,[17] and *opinio juris* is the sense of legal obligation they have to the practice.[18]

[13] Fernando Teson, *Humanitarian Intervention: An Inquiry Into Law and Morality* (2nd edn, Transnational Publishers 1997) 151.
[14] Charter (n 3) art 2 (3)
[15] UNGA Res 26/25 (XXV), 'Declaration of Principles of International law Concerning Friendly Relationships and Co-operation Amongst States in Accordance with the Charter of the UN', (1970).
[16] Gerry Simpson, *Great Powers and Outlaw States: Sovereign Unequals in the International Legal Order* (CUP 2016) 29.
[17] Yithia Simbeye, *Immunity and International Criminal Law* (1st edn, Routledge 2004), 37–38.
[18] Peter Malanczuk, *Akehurst's Modern Introduction to International law* (Routledge 1997), 44.

While general practice has been observed, *opinio juris* has been difficult to establish. A classic example of this is the Kosovo intervention in 1999, mentioned above. Although States such as Belgium and the UK supported this attack,[19] justifying it by a narrow interpretation of Article 2(4), the courts had already rejected this argument in cases like *Corfu Channel,* afore described. Many more States were against it and justified their stand through legal arguments. China described it as a 'blatant violation of the UN Charter' and Russia was 'profoundly outraged' by it.[20]

Other States like India and Cuba also expressed their disapproval in a following UN debate.[21] India's representative strongly condemned the attack by arguing that unilateral actions such as the disrespect of territorial integrity and the massive use of force in violation of the UN Charter would result in the decline of international cooperation in the promotion and protection of human rights. This is an interesting perspective since it considers how humanitarian intervention can, instead of ending human rights violations, implicitly promote them by creating tension in the international community.[22]

In *Legality of Use of Force,* Yugoslavia instituted proceedings before the International Court of Justice (ICJ) against ten States including the USA, UK, France, Spain, and Italy since they had committed 'acts by which [they] have violated [their] international obligation[s] not to use force against another State, not to intervene in [that] State's internal affairs.'[23] Yugoslavia also argued that if the ICJ does not adjudge them to 'stop immediately' there will be 'new losses of human life.' further destruction of civilian targets, and further physical destruction of the people of Yugoslavia'.[24] This reinforces India's argument at the Commission's debate about how unilateral intervention can create more violations of human rights instead of stopping them.

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[19] HC Deb 25 March 1999 vol 328 cc536-619.
[20] William Branigin, John Goshko, *'Legality of Airstrikes Disputed'* (1999) <https://www.washingtonpost.com/wp-srv/inatl/daily/march99/legal27.htm>, accessed 4th January 2021
[21] UN Commission on Human Rights, 'COMMISSION ON HUMAN RIGHTS HOLDS SPECIAL DEBATE ON KOSOVO', HR/CN/894, 1st April 1999.
[22] Ibid 11-12.
[23] *Legality of Use of Force* (*Yugoslavia v. Spain*), Provisional Measures, Order of 2 June 1999, 1. C. J. Reports 1999, p. 761
[24] International Court of Justice, 'Yugoslavia institutes proceedings against ten States for violation of the obligation not to use force against another State and requests the Court to order that the use of force cease immediately' (No. 99/17 29 April 1999).

Subsequently, humanitarian intervention was perceived as a violation of international law. It was formally rejected in the 'Declaration of the South Summit' produced by a group of 77, which is representative of 132 States including Asian, Latin American, Arab and African States.[25] China also signed this declaration. This symbolises a strong global rejection of humanitarian intervention across all the nations of the world.

Another significant event was when the UK stood as a lone advocate for unilateral humanitarian intervention during the Syrian chemical weapon attack in 2013. On 21 August 2013, President Assad's regime used chemical weapons against the civilians in the city of Ghouta, which resulted over 1,400 people being killed.[26] The UK stated that the doctrine of humanitarian intervention would be its legal basis to take measures in order to 'alleviate the scale of the overwhelming humanitarian catastrophe in Syria', provided that three conditions were met.[27] First, there is convincing evidence that the humanitarian distress is on a large scale and requires immediate relief; second, there is no practicable alternative to the use of force if lives are to be saved; third, the proposed use of force must be necessary and proportionate to the aim of relief and limited in time and scope to the minimum necessary to this aim.[28] In the subsequent paragraph, they established that these conditions were satisfied and therefore humanitarian intervention would be justified.[29]

However, the UK parliament voted against it soon after this. The fact that the only country who constantly favoured it ultimately rejected it too highlights the deep-rooted uncertainty the international community has towards humanitarian intervention. Therefore, 'neither the UN Charter nor customary norms allow for humanitarian intervention, which makes it illegal under contemporary International law.'[30]

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[25] Group of 77 South Summit, 'Declaration of the South Summit' (Havana, Cuba, April 2000), para 54.
[26] Joby Warrick, '*More than 1,400 killed in Syrian chemical weapons attack, U.S. says*', (August 30, 2013), <https://www.washingtonpost.com/world/national-security/nearly-1500-killed-in-syrian-chemical-weapons-attack-us-says/2013/08/30/b2864662-1196-11e3-85b6-d27422650fd5_story.html >, *accessed 18th July 2021.*
[27] Prime Minister's Office, Chemical weapon use by Syrian regime: UK government legal position (policy paper), para 4
[28] Ibid.
[29] Ibid para 5.
[30]Agata Kleczkowska, 'The Illegality of Humanitarian Intervention: The Case of the UK's Legal Position Concerning the 2018 Strikes in Syria' (2020) 35 *UJIEL* 35.

**Responsibility to Protect (R2P)**

Having discussed CIL, the development of R2P needs to be considered. It is significant when thinking about military force to protect human rights. A report published by the International Commission on Intervention and State Sovereignty panel established the R2P, which shifted the understanding of sovereignty to relative terms. The Holocaust and World War Two atrocities drew human rights violations into the spotlight which caused an evolution in the standards of human rights. In turn, there was a development of the perception of sovereignty to a less absolute one in which a State does not have unlimited power and autonomy under its belt.[31]

Such a shift to relative terms can be understood by virtue of the fact that States had to uphold certain standards of behaviour to benefit from the privileges of being sovereign. It placed a burden on sovereign states to protect their own citizens in cases of humanitarian crises. This will be explored later.

R2P was supported by the UN member-states in the *World Summit Outcome Document* (2005).[32] This set out the primary and secondary R2P in Articles 138 and 139 respectively. According to Article 138, 'each individual State has the R2P its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. Article 139 states the secondary R2P where collective action will be taken 'through the UNSC in accordance with the Charter…should peaceful means be inadequate and national authorities manifestly fail to protect their populations'.

The first time this principle was implemented in practice was during the uprisings in Libya. The UNSC authorised the use of force in its 1973 Resolution 'to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya'.[33] This emphasised the fact that while the primary R2P sits with Libya, the secondary R2P sits with the international community, represented by the UNSC in this context.

[31] Ibid.
[32] UNGA Res A/RES/60/1.
[33] UNSC Res S/RES/1973 (2011).

It is argued that this, in a way, reinforces what Article 42 of the Charter already provides on collective security (that the use of force only permitted when deemed appropriate by the UNSC).[34] Since then it has been questioned whether R2P is a new legal right or just existing international law put forward in a different manner. It is very likely that it is the latter, and considering that, the use of military force unilaterally is illegal.

## Towards a Doctrine of Sovereignty as Citizenship

An argument in favour of humanitarian intervention in relation to sovereignty revolves around the idea of citizenship. Citizens are 'owners of the sovereignty', according to academics like Grotenhuis.[35] A State is only a State because of its citizens, and it only remains sovereign if it protects them. This links back to the concept of the R2P. A State has a duty to protect its citizens and breaching that would justify humanitarian intervention. By contrast, 'a nation no longer can maintain that the treatment of its own citizens is exclusively within its own jurisdiction',[36] Nanda noted in a testimony. This too can be traced back to the notion of R2P and the increased relevance of human rights. A State's citizens are no longer the concern of that State, but of the whole international community. This justifies a strong and forceful response by other States in instances of human rights violations. By this logic, citizens are no longer protected under Article 2(4) of the Charter since they are not a part of the domestic and territorial nature of a State. Therefore, the principle of non-intervention will not apply to humanitarian intervention. While the views of Grotenhuis and Nanda are contradicting, they both support humanitarian intervention.

Furthermore, one may look at the afore-described views as in fact undermining the principle of sovereignty – even if one accepts that a State is only a State because of its citizens, the factthat this alone countenances humanitarian intervention and thus the violation of territorial integrity, only emphasises that the right to humanitarian intervention and respect for State sovereignty are not able to exist simultaneously.

[34] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre 2001).
[35] René Grotenhuis, '*Nation-Building as Necessary Effort in Fragile States'*, (2016) AUP 64.
[36] Ved Nanda, 'A United Nations Convention on the Right to Food, Humanitarian Intervention, and the UN Response to International Disasters: an International law Perspective', in *Decade of Disasters: The United Nations' Response: Hearing Before the House Select Committee on Hunger, House of Representatives, One Hundred Second Congress, First Session* (U.S. Government Printing Office 1991), 22.

Nonetheless, the arguments put forward by Grotenhuis and Nanda are weak since they do not consider the far-reaching implications of legalising humanitarian intervention. For example, factors like the role of the UN, abuse of power by States, and uncertainty considering elements such as new rules, threshold for action, among others, highlight reasons as to why humanitarian intervention should remain illegal.

**The Role of the UN**

Introducing humanitarian intervention as a third exception to Article 2(4) would be very problematic. The UNSC protects the sovereignty of all States, as mentioned above, promoting the idea of 'utilitarianism'. This morality concept advocates and promotes actions which maximise happiness and thus does this by ensuring all states are equally sovereign; every state is happy and secure in that aspect.[37] Allowing military force in another State without its consent would threaten its sovereignty severely.

An implication of legalising unilateral humanitarian intervention would be rendering the UNSC useless since it will have no role to play in the regulation of military action anymore. This would be counter-intuitive because it would not be able to give effect to one of the UN'smain purposes, namely to 'maintain international peace and security.'[38]

While it can be argued that all States disagree with the five permanent members of the UNSC possessing all the power in the UNSC, a strong counterargument would be that the small composition was designed '[i]n order to ensure prompt and effective action by the United Nations in securing its primary purpose.'[39]

However, limiting the role of the UNSC could be beneficial because the voting process is fundamentally unfair because of the veto powers the permanent members possess.[40] If one permanent member is allied with the state in which the use of force is being voted upon, they will veto it and override the rest of the 192 States on that decision.

[37] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (N.Y.: Hafner Pub. Co 1948).
[38] Charter (n 3) art 1 (1).
[39] Charter (n 3) art 24 (1).
[40] Charter (n 3) art 27 (3).

In contrast, Franck argues that 'the veto serves as the deliberate and valid purpose of ensuring that well-intentioned but untenable moves do not accidentally trip the world into the great abyss.'[41] While somewhat valid, this argument does not consider the fact that veto powers go against the principles of equality and fairness. However, it might be reasonable to consider a reform of the UNSC instead of the complete creation of a new right to humanitarian intervention.

Additionally, the UN already provides for collective security measures which sufficiently protect human rights, with the consent of States.[42] However, many critics argue that collective security has failed to prevent human rights violations in the past.[43] For example, when Serbia carried out an 'ethnic cleansing' of Muslims and Croats in Bosnia and Herzegovina by moving them into concentration camps.[44] To refute this, it may be more likely that strengthening and effectively enforcing the concept of collective security will be fairer and more fruitful than paving the way for humanitarian intervention 'because allowing the exception would open the door to unacceptable abuse' by states.[45]

**Abuse by States**

Orwell's *Animal Farm* analogy can be used to highlight this point: 'all *animals* are equal, but some *animals* are more equal than others.'[46] Applied here, in theory, all states are sovereign according to Article 2 (1) of the Charter, however some are more sovereign than others. The more sovereign states, therefore, have more ability and power to wield their influence.

Delbruck argues that if humanitarian intervention was to be legalised, there would be an overriding concern of 'potential abuse by stronger states seeking political gain to the detriment of weaker states.'[47] Consequently, 'the cost of the potential abuse of pretextual interventions

[41] Thomas Franck, Nigel Rodley, '*After Bangladesh: The Law of Humanitarian Intervention by Military Force'*, (1973) 2 AJIL 67.
[42] Charter (n 3) art 39.
[43] Jean-Pierre Fonteyne, '*The Customary International law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter'*, (1973) 4 CAL. W. INT'L L.J. 203.
[44] Stephen Engelberg, *Bosnians Provide Accounts Of Abuse in Serbian Camps*, (1992) N.Y. TIMES <https://www.nytimes.com/1992/08/04/world/bosnians-provide-accounts-of-abuse-in-serbian-camps.html>, accessed 4th January 2021.
[45] Comfort Ero, Suzanne Long, 'Humanitarian intervention: A new role for the United Nations?*'* in Roger Williamson (eds), *Some Corner of a Foreign Field* (Palgrave Macmillan 1998).
[46] John Griffin, George Orwell. *Animal Farm, George Orwell*. (Harlow: Longman 1989).
[47] Jost Delbruck, '*A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations'*, (1992) 67 IND. L.J. 887, 891.

would outweigh any benefit derived from altruistic interventions.'[48] 'States which desire to engage in war could too easily invoke the doctrine as a pretext for unlawful, selfish, or political goals.'[49] Rodley goes so far as to say that there was no intention 'to create rights that could be enforced unilaterally by the military force of stronger nations.'[50]

The current law on the prohibition of the use of force is an implementation of the sovereign equality norm in practice. It 'confirms the importance of state equality by mitigating the effects of superior military force and placing states on a level footing in relation to the unilateral use of force.'[51]

The ban on humanitarian intervention has been justified on the grounds of fairness, linking back to Rawls' theory where justice as fairness is seen through a veil of ignorance to ensure that nobody is more advantaged or disadvantaged by any natural or social chance.[52] It seeks to remove illegitimate advantages and create mutually acceptable outcomes for all. Legalising humanitarian intervention will do the opposite and create a ripple effect, such as leading to uncertainties regarding new rules.

**New Rules and Thresholds**

As discussed above, the UNSC would be rendered useless if humanitarian intervention were to be legalised. In the absence of the UNSC, there would be no rules for the international community to follow and the States' powers would be unregulated in this context. Adopting a liberalist approach, international rules and organisations are required to promote and foster peaceful relationships amongst the international community. Upon the legalisation of humanitarian intervention, amicable relationships might be difficult to maintain.

Questions such as who decides what a human rights issue is, and when it qualifies as a grave enough one to justify humanitarian intervention, and what the threshold for these 'grave violations' is, require serious consideration.[53] 'There has been considerable disagreement over what constitutes grave or major human rights violations', highlighting the fact that the

[48] Ian Brownlie, '*International law and the Use of Force by States*' (1963) AJIL 338.
[49] Franck, (n 41) 284.
[50] Ibid, 300.
[51] Djura Ninic, *The Problem of Sovereignty* (The Hague: Nijhoff 1970), 79.
[52] John Rawls, *Justice as Fairness: A Restatement* (HUP 2001) 6.
[53] Comfort, (n 45).

definition of human rights itself varies widely from State to State.[54] States attach different priorities to human rights so it will be extremely difficult to settle this neutrally. If new rules regarding humanitarian intervention are rooted in subjectiveness, there can be no formal equality. Being a significant factor of social justice, the lack of formal equality deems social justice unachievable.

## Conclusion

By way of conclusion, Brownlie summarises the current position of the international community regarding the use of military force for humanitarian purposes without the state's consent: 'the variety of opinions canvassed has not revealed even a substantial minority in favour of the legality of humanitarian intervention.'[55] Firstly, this has been evident in the current International law through the provisions in the UN Charter, norms in customary international law and the Principles of State Sovereignty and Responsibility to Protect. Secondly, humanitarian intervention has also been rejected by most countries in the world via the Declaration of the South Summit.

As emphasised throughout this article, this position should remain the same to ensure fairness. The sovereignty of every State should be protected by preserving the UNSC's role. The principle of sovereignty has already evolved through the notion of Responsibility to Protect and therefore this should remain preserved. Legalising humanitarian intervention would fail to do this, jeopardising current relationships in the international order.

Furthermore, the implications of legalising humanitarian intervention such as the international community facing uncertainties regarding new rules and the abuse of power are too far-reaching and therefore will cause more negative ripple effects than positive ones. This paper has acknowledged the various arguments in favour of legalising humanitarian intervention and where valid arguments have been put forward, new alternatives have been proposed to ensure that the idea of fairness, equality and most importantly, sovereignty are upheld by international law.

[54] Ibid.
[55] Brownlie, (n 48).

# The Modern Slavery Act 2015: A Failure for Sex Workers

*Eleanor Suthern*

**Abstract**

*The Modern Slavery Act 2015 sought to protect those who are victims of exploitation. Superficially this appear to be a positive change, yet in reality, the Act undermines the rights of sex workers. They are deemed to be victims of sexual exploitation only, not labour exploitation. With emphasis on female sex workers, the ideology of a 'vulnerable woman' will be explored. For sex workers' rights to be sufficiently protected there needs to be an acknowledgment of sexual and labour exploitation existing together. It is proposed that the UK ought to look to other countries for guidance. In particular, policy in New Zealand.*

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## Introduction

This article critically discusses the Modern Slavery Act 2015, with a specific focus on the sex trade and specifically, female sex workers. Firstly, the sex trade will be discussed, considering the reality of the trade versus arguably outdated social perceptions. Secondly, the article outlines the shortcomings of the Modern Slavery Act 2015. Thirdly, the increased risk of exploitation will be considered when conforming to the ideology of a vulnerable woman. Finally, turning New Zealand, a promising suggestion for reform will be made, considering the feasibility of fusing the sex trade with labour rights. This article will conclude that for sex workers' rights to be sufficiently protected there needs to be an acknowledgement that both labour and sexual exploitation co-exist.

Throughout this article there is deliberate theoretical discussion, influenced by compelling advocates of sex workers' rights. This influence is notable, especially when exploring the ideology of vulnerable women and suggestions for reform. One reason for this influence and subsequent focus is that arguments made are compelling, resilient and protrude in a field of conservative and outdated opinions of the sex trade. Instead, the chosen theoretical discussion offers a modern, rights-based approach when looking at sex workers, specifically females.

## The Sex Trade: What, When, Who and Why?

*What?*

The sex trade is a distinct occupational sector,[1] which is increasingly politicised[2] and expanding at an unprecedented rate,[3] partly due to the internet.[4] It is seen as a universal problem, rather than an opportunity.[5] Sex work is traditionally considered harmful and immoral, meaning those within the industry face stigmatisation and condemnation from society.[6] The route into the sex trade is complex and varied, but the resources to facilitate a route out are woefully lacking.[7] The Modern Slavery Act 2015 fails to protect sex workers because they are not considered workers per se. Sex workers are protected only from sexual exploitation.[8] In reality, they also face labour exploitation. As Munro states, the point at which tolerable conditions of work turn into objectifying and intolerable ones remains very uncertain in the context of sex work.[9] To mitigate this, it is proposed that sex workers ought to be recognised as workers, offering them labour rights that consist of both legal and human rights.[10] However, the distinction between different types of sex work will be outlined now.

*When*

It is important to draw a distinct difference between street prostitution and controlled, indoor sex work.[11] In the UK, soliciting on the street is illegal,[12] but keeping a brothel is not.[13] The issue arises when defining a brothel and determining when it becomes an offence to occupy one.[14] It is not illegal to sell sex at a brothel provided the sex worker is not involved in the

[1] Ronald Weitzer, Sociology of Sex Work, (2009) Annual Review of Sociology 35, 214.
[2] Ronald Weitzer, 'The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade' (2007) 35 Pol.& Soc'y 3, 447.
[3] ibid.
[4] Weitzer (n 2) 456.
[5] Ronald Weitzer, Researching Prostitution and Sex Trafficking Comparatively, Springer Science Business Media New York, (2014) 12 Sex Res Soc Policy 2, 81.
[6] Weitzer (n 1) 221.
[7] Weitzer (n 2) 468.
[8] Modern Slavery Act 2015 (MSA 2015), s 3(3).
[9] Vanessa E Munro, *'*Of Rights and Rhetoric: Discourses of Degradation and Exploitation in the Context of Sex Trafficking*',* (2008) 35 Brit.J.Law & Soc 2, 247.
[10] Weitzer (n 1) 229.
[11] ibid.
[12] CPS Guidance on Prostitution and Exploitation of Prostitution, Legal Guidance, Sexual Offences (January 2019) <https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution> accessed 9 December 2020; Policing and Crime Act 2009, s 16.
[13] CPS Guidance on Prostitution and Exploitation of Prostitution, Legal Guidance, Sexual Offences (January 2019) <https://www.cps.gov.uk/legal-guidance/prostitution-and-exploitation-prostitution> accessed 9 December 2020.
[14] ibid.

management or control of the brothel.[15] Therefore, unless a sex worker is working alone in a house, she may be liable.[16] This offence was introduced to reduce all forms of commercial sexual exploitation.[17] This is ironic; regulated brothels often provide a safer working environment.[18] If sex work is regulated and workers are offered labour rights, there will be greater means of protection.[19] However, presently, a sex worker's rights are determined by the degree of recruitment and subsequent control of her activities.[20] Unfortunately, without regulation, the most common form of exploitation, after labour, is sexual.[21]

*Who*

In the UK, the focus is on prosecuting those who force others into prostitution, exploit, abuse and harm victims.[22] This is highly influenced by the UK's immigration policy, with provisions relying on the undefined notion of exploitation.[23] Scrutinising the Modern Slavery Act 2015, there is a requirement of non-consent (this repealed Section 59 (a) of the Sexual Offences Act 2003).[24] Protection is only offered to those who have not consented to sex work.[25] But of course, a woman might legitimately consent to sell sex in some circumstances.[26] However, this is contingent upon the woman's level of autonomy, which is rarely evidenced in conditions of poverty, violence and exploitation.[27] This exploitation of course may undermine the entire concept of voluntary migration for sex work.[28] Because who would voluntarily consent to exploitative sex work? Except of course, the most vulnerable.

[15] CPS Guidance (n 13); *Palace Clarke v Standen* (1964) 48 Cr App R 30.
[16] CPS Guidance (n 13).
[17] ibid.
[18] Weitzer (n 1) 218.
[19] Weitzer (n 5) 83.
[20] CPS Guidance (n 13).
[21] UK Annual Report on Modern Slavery, HM Government, Home Office (October 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840059/Modern_Slavery_Report_2019.pdf > accessed 5 January 2021.
[22] CPS Guidance (n 13).
[23] Vanessa E Munro, 'New Coalitions against Trafficking in Women?' (2009) 76 CJM 1, 2.
[24] MSA 2015, s 8.
[25] ibid.
[26] Munro (n 23) 3.
[27] ibid.
[28] Weitzer (n 2) 452.

*Why*

As Weitzer states, there are multiple pathways into the sex trade.[29] Some are coerced, hired by pimps, drift gradually or encouraged by friends.[30] But for others, it is survival sex, leaving them with little recourse but to engage in criminal activity.[31] Whilst the Modern Slavery Act 2015 has aimed to mitigate exploitation, there is much scope for improvement.[32] There must be a political will to address structural and legal factors that create vulnerability to exploitation.[33] But we must now assess the Modern Slavery Act 2015 in more detail and identify what it means to be a truly 'vulnerable' woman.

## The Modern Slavery Act 2015 (the Act) and its shortcomings

Modern slavery in the UK is harmful, complex and a largely hidden crime.[34] The Act aimed to combat this, enacting provisions about slavery, servitude and forced or compulsory labour.[35] Mantouvalou notes that it is indisputable that severe labour exploitation is a grave wrong which causes serious harm to others[36] and the criminal law can be used to communicate this fact.[37] However, the Act is tokenistic in failing to bring sufficient prosecutions and providing sufficient attention to victim protection.

For example, the Act has failed to increase prosecution and provide sufficient protection to victims.[38] The latter failure is central to this article. There is an inherent lack of protection offered to sex workers who face exploitation. The protection offered is only for sexual exploitation, with labour exploitation being disregarded. Because those in the sex trade are not perceived to be workers,[39] they are void of any form of protection at all. Labour exploitation and sexual exploitation are dealt with independently.[40] Section 3 of the Act

[29] Weitzer (n 1) 217.
[30] ibid.
[31] Weitzer (n 1) 217.
[32] Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81 MLR 6, 1019.
[33] ibid.
[34] UK Annual Report (n 21).
[35] MSA 2015.
[36] Mantouvalou (n 32) 1019.
[37] ibid.
[38] Mantouvalou (n 32) 1022.
[39] Inga K. Thiemann, 'Beyond Victimhood and Beyond Employment? Exploring Avenues for Labour Law to Empower Women Trafficked into the Sex Industry' (2019) 2 ILJ 48, 220.
[40] MSA 2015.

comprises one offence for slavery, servitude and forced or compulsory labour,[41] and another for sexual exploitation.[42]

If the Government is serious in its commitment to tackling modern slavery, in all forms, more is needed.[43] It must support the victims and mitigate the factors which create vulnerability to exploitation.[44] The Act does not indicate willingness to strengthen workers' rights, nor does it address structural injustices which ultimately lead to exploitation.[45] This is problematic, bolstered by an unnecessary focus on the ideology of a woman's vulnerability which will be discussed now, followed by potential reform suggestions.

## The Ideology of a Woman's 'Vulnerability'

There has been an exponential rise in the use of the term 'vulnerability',[46] and it is commonly misused.[47] Carline suggests that the language of vulnerability runs through the government's rationale behind increasing the criminalisation of prostitution.[48] With Munro and Scoular noting that it has been used explicitly by law and policymakers for two main reasons.[49] Firstly, to advance specific political agendas.[50] Secondly, to construct offences of the sex trade and justify their existence in modern society.[51] Both reasons have had an unduly negative impact on sex workers' lives.[52]

Nonetheless, such vulnerability is not protected.[53] It is merely a descriptive device to increase the scrutiny to which the sex worker is subject.[54] Sex workers are socially represented as a vulnerable individual, simply by virtue of the type of work. While simultaneously, they are

[41] Modern Slavery Act 2015, s 3(2).
[42] MSA 2015, s.3(3).
[43] ibid.
[44] Mantouvalou (n 32) 1018.
[45] ibid.
[46] Sharron A. FitzGerald and Vanessa E. Munro, 'Sex Work and the Regulation of Vulnerability(ies): Introduction' (2012) Fem Leg Stud 20, 183.
[47] ibid.
[48] Anna Carline, 'Perspectives on trafficking and the policing and crime act 2009: Challenging notions of vulnerability through a Butlerian lens' in Sharon Fitzgerald (ed) *Regulating the international movement of women: From protection to control* (London Routledge 2011).
[49] Vanessa E. Munro and Jane Scoular, 'Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK' (2012) 20 Fem Leg Stud 189-206.
[50] Fitzgerald and Munro (n 46) 183.
[51] Munro and Scoular (n 49) 197; CPS Guidance (n 13).
[52] Munro and Scoular (n 49) 200.
[53] ibid.
[54] Munro and Scoular (n 49) 199.

perceived as a source of vulnerability for others (for example proximate residents), who are negatively and unduly impacted by the practice of sex work. This is conflating principle which undermines the reality of protection needed for those involved in exploitative sex work.[55] The concept of vulnerability per se, calls for a critical engagement to understand what it means to truly be vulnerable in the context of sex work.[56] More importantly, as aforementioned, we must be mindful of the point at which a tolerable working condition turns into one which is objectifying and intolerable.[57] To do so effectively there needs to be a union between sex trafficking and its labour counterpart.[58] Women in the sex trade must be considered workers for their so-called 'vulnerability' to be protected.

Assessing the 'vulnerability' of the women involved in sex work is important to guarantee that initiatives are dedicated to protecting victims of exploitation. Munro and Scoular note that this assessment should not have ulterior motivations of advancing political agendas or increasing prosecution.[59] If this was the case, an initiative implemented under the auspices of assisting a sex worker may ultimately render her more 'vulnerable'.[60] Without regulation and protection, sex workers may face a greater risk of encountering clients who make agreements hastily or seek out their services in less visible and less safe environments.[61] We must move beyond the traditional cultural and religious views which continue to taint the sex trade.[62]

## Reform

*Labour Law approach*

It has been cited throughout that women in the sex trade are not considered workers, rendering them void of any form of protection by way of rights. To mitigate this, it has been proposed that a labour law approach could make a meaningful contribution to combatting human trafficking into the sex industry.[63] Such an approach would protect voluntary sex workers from labour exploitation. The Modern Slavery Act 2015, focuses on the trafficked persons, in need of protection, discounting their rights as workers, migrants and above all, as

[55] ibid.
[56] Munro and Scoular (n 49) 197.
[57] Munro (n 9) 247.
[58] ibid.
[59] Munro and Scoular (n 49) 189.
[60] ibid.
[61] Munro and Scoular (n 49) 199.
[62] Weitzer (n 2) 451.
[63] Thiemann (n 39) 199.

the 'vulnerable' woman.[64] The Act has shied away from overtly acknowledging sex workers; this is hardly surprising considering the explicit distinction between sexual exploitation and labour exploitation.[65] This distinction excludes sex workers from protection against forced labour, denying their personhood.[66] The sex work industry lacks access to collective bargaining and formal contracts of employment.[67]

A move towards recognising sex work as labour would mean that any exploitation faced could be viewed as a violation of women's labour and human rights.[68] Reconceptualising sex work could better protect those who are actually vulnerable.[69] Using 'vulnerable' loosely, this reform would protect the sex workers' who consent but are still victims of labour exploitation. An example of this approach is by way of the Prostitution Reform Act 2003 enacted by New Zealand. The proposal is that the UK mirrors this approach, albeit with minor modifications.

**New Zealand and the Prostitution Reform Act 2003**

In most jurisdictions, forms of criminalisation of sex work continue to dominate, with decriminalisation remaining relatively uncommon.[70] Having said this, New Zealand decriminalised sex work with the passing of 'The Prostitution Act 2003'. This Act represents a shift in policy from a moralistic to a public health and human rights approach.[71] The rationale behind the Act was to improve sex workers' lives by affording them rights to challenge those who exploit them, whilst simultaneously improving their access to justice.[72]

By virtue of this Act, the sex trade is required to operate under the same health and safety regulations as any other New Zealand industry.[73] As well as this, businesses must promote safer sex, provide health information to workers, and restrict their advertisement of

[64] ibid.
[65] Thiemann (n 39) 199.
[66] ibid.
[67] Thiemann (n 39) 214.
[68] ibid.
[69] Thiemann (n 39) 224.
[70] Lynzi Armstrong, 'Decriminalisation of sex work in the post-truth era? Strategic Storytelling in neo-abolitionist accounts of the New Zealand model' (2020) 18 Criminology and Criminal Justice, 1.
[71] Gillian Abel, Lisa Fitzgerald and Cheryl Brunton, 'The Impact of Prostitution Reform Act on the Health and Safety Practices of Sex Workers' (Prostitution Law Review Committee, November 2007) <https://www.otago.ac.nz/christchurch/otago018607.pdf> accessed 20 December 2020.
[72] ibid.
[73] Abel, Fitzgerald and Brunton (n 71); Health and Safety in Employment Act 1992.

commercial sexual services.[74] It is proposed that the UK can and should adopt a similar legislative model to New Zealand. Afterall, sex trade laws in New Zealand were historically based on those of Britain.[75] A quasi-criminalisation of the sex trade in the UK[76] does not protect sex workers' rights sufficiently.

On the other hand, some may advocate for the legalisation of the sex trade, as is the case in Sweden and Germany. However, such an approach has complicated implications on sex workers' lives.[77] Instead, decriminalisation is the approach commonly favoured by sex workers as it advocates the rights of workers, creating conditions which are conducive to their safety, and above all, their wellbeing.[78]

Returning to consider the Prostitution Reform Act 2003, it is a progressive yet promising legislative model, aimed to minimise harm in the sex work trade safeguard the rights of sex workers.[79] The fundamental purpose was to challenge the exploitation and violence in the sex trade.[80] Whilst the decriminalisation of sex work has provided an open, transparent environment which prevents exploitation, unfortunately, this does not extend to all sex workers.[81] The disadvantage of the Act is that migrant sex workers are marginalised and excluded, even when they can lawfully undertake other forms of work.[82] If the UK were to adopt a similar legislative model to that of New Zealand, it is vital that migrant workers are protected. Migrant workers must be enabled to challenge exploitation without risking other legal repercussions.[83] The disclosure of sexual violence or exploitation can work against the credibility of women if in their home country and culture it would be shameful to discuss such revelations.[84]

[74] Abel, Fitzgerald and Brunton (n 71); Sections 16-18 Prostitution Reform Act 2003.
[75] Armstrong (n 70) 2.
[76] ibid.
[77] Armstrong (n 70) 2.
[78] ibid.
[79] Lynzi Armstrong, 'Decriminalisation and the rights of migrant sex works in Aotearoa/New Zealand: Making a Case for Change' (2007) 31 Women's Studies Journal 2, 69.
[80] ibid.
[81] Armstrong (n 79) 75.
[82] ibid.
[83] Armstrong (n 79) 75.
[84] Helen Bailott, Sharon Cowan, Vanessa E. Munro, 'Reason to disbelieve: evaluating the rape claims of women seeking asylum in the UK' (2014) 10 Int. J.L.C 1, 105-139.

It is important to give light to the sex workers' perspective. Some argue that decriminalisation would improve their living and working conditions, enabling them to exercise their rights more fully.[85] As well as this, the model adopted by New Zealand has brought positive effects. Whilst some stigma persisted, a study has concluded that legislation had achieved many of its objectives and that the majority of sex workers were better off than before the Prostitution Reform Act 2003 came into force.[86]

## Conclusion

To conclude, the Modern Slavery Act 2015 has many weaknesses which undermine its laudable initial objectives. Throughout this article there has been discussion around the sex trade and the ideology of a woman's 'vulnerability,' both of which have exposed the challenges faced by female sex workers. Ultimately, with sex workers' rights being undermined by the Modern Slavery Act 2015, adopting a legislative model similar to that of New Zealand's Prostitution Reform Act 2003 may be the answer. However, migrant sex workers' must also be safeguarded. For sex workers' rights to be sufficiently protected there needs to be an understanding of the complicit relationship between sexual and labour exploitation.[87]

[85] Nicola Mai, *'Migrant Workers in the UK Sex Industry',* (2009) London Metropolitan University.
[86] Ministry of Justice, 'Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003' (May 2008) < https://prostitutescollective.net/wp-content/uploads/2016/10/report-of-the-nz-prostitution-law-committee-2008.pdf> accessed 3 January 2021.
[87] Munro (n 9) 247.

# Transgender Children's Rights in Light of Bell v The Tavistock and Portman NHS Foundation Trust (2020)

*Emiko Seawright*

## Abstract

*Given the recent 2020 judgment in Bell v The Tavistock and Portman NHS Foundation Trust, the rights of transgender children and teenagers have been threatened. The decision to delay the availability of hormone treatment to the age of 17 can either be seen as protection against potential misjudgements or a violation of children's right to an identity. The acceptance and nurturing of transgender identities in today's society is a change that needed to be made. However, with acceptance comes challenge, and we are now facing a new wave of issues when it comes to the regulation of life-changing treatment for children. In this paper the judgment in the Bell case with be examined, and consideration made as to whether children with gender dysphoria are too immature and vulnerable to be able to make informed decisions about gender hormone treatment. The claim of this article is that the judgment in Bell was too restrictive, and that the already established framework in place by the NHS was enough to protect the best interests of young people.*

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## Introduction

Gender dysphoria is discussed in the Gender Recognition Act 2004, stating that it 'means the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism.'[1] This is clearly a lacking description. The NHS defines this condition as when 'a person experiences discomfort or distress because there's a mismatch between their biological sex and gender identity.'[2] This definition gives a better sense of, and medical recognition to, the inner turmoil faced by suffers of gender dysphoria, and what should be taken into account when debating whether a child should be given access to treatment that would ease their distress. Unfortunately, the reality is that most people know little or nothing about the condition,[3] even though the number of referrals in the UK to the national Gender Identity

[1] Gender Recognition Act 2004, s 25.
[2] NHS, 'Gender dysphoria' (*NHS*, 28 May 2020) <https://www.nhs.uk/conditions/gender-dysphoria/>
[3] Patrick J Gilmore, 'The Family Court and gender dysphoria' [2019] Fam Law 1418.

Development Service (GIDs) has risen exponentially since 2011.[4] This is not to say those suffering from gender dysphoria did not exist until ten years ago. Rather, gender ambiguity has always been a part of human history, but Western societies failed to recognise the condition until the last century.[5] It is this societal development which has both helped and hindered young people gain access to gender hormone treatment. The reaction to the recent case of *Bell v The Tavistock and Portman NHS Foundation Trust*[6] encapsulates society's view on gender hormone treatment in adolescents. On one hand it has reversed the work of years of activism[7] and infringes on a child's right to bodily integrity but on the other it protects children who have grown up in the digital age and may be influenced by the glamorisation of medical transition[8] to believe they are transgender. Therefore, it a balance must be struct between ensuring that the exploration of gender identity is a positive experience for all young people[9] whilst ensuring premature decisions are avoided to negate regret in the future.

It is essential to establish what gender hormone treatment entails in order to fully understand why this is a contentious issue. After a child has met a strict criterion, they may be referred to a hormone specialist[10] at either the Tavistock or Portman NHS Foundation Trusts to assess their eligibility for hormone blockers. This is offered in cases where gender dysphoria is diagnosed as profound and highly likely to persist.[11] If qualified, there are three stages, with increasing degrees of severity, available to the dysphoric child. The first is an almost wholly reversible intervention resulting in the temporary suspension of pubertal development.[12] It is recommended that adolescents experience the onset of puberty to at least Tanner Stage 2[13] before starting gender hormone treatment, this will typically be anywhere from the ages of 9

[4] Carl Heneghan and Tom Jefferson, 'Gender-affirming hormone in children and adolescents' (*BMJ EBM Spotlight*, 25 February 2019) <https://blogs.bmj.com/bmjebmspotlight/2019/02/25/gender-affirming-hormone-in-children-and-adolescents-evidence-review/>
[5] Simona Giordano, *Children with Gender Identity Disorder: A Clinical, Ethical, and Legal Analysis*, (1st edn, Taylor & Francis Group 2012).
[6] *Bell v The Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin).
[7] Heather Brunskell-Evans, 'The Medico-Legal 'Making' of 'the Transgender Child'', [2019] Med Law Rev 27.
[8] Stephanie Davies-Arai, 'Supporting gender non-conforming and trans-identified students in schools' (*Transgender Trend*, 2018) <https://www.transgendertrend.com/wp-content/uploads/2019/08/Transgender-Trend-Resource-Pack-for-Schools3.pdf>
[9] Stonewall, 'Supporting trans young people' (*Stonewall*, 2017) <https://www.stonewall.org.uk/our-work/campaigns/supporting-trans-young-people>
[10] *NHS* (n 2) 2.
[11] *Giordano* (n 5) 2.
[12] Kevan Wylie and others, 'Recommendations of Endocrine Treatment for Patients with Gender Dysphoria' (2009) Sexual and Relationship Therapy, 24:2.
[13] The World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th edn, WPATH 2011).

to 11.[14] This stage involves the administration of gonadotropin-releasing hormone analogues (GnRHa) which supress the production of either oestrogen or testosterone. The second stage is the partially reversible administration of masculinising or feminising hormones,[15] aptly considered the beginning of the 'transition' to the opposite sex. It is important to note that young people should be around 16 years of age to receive a prescription of these drugs,[16] meaning medical professionals already have safeguards in place to ensure this lifechanging treatment is safe and truly desired. These cross-sex hormones result in secondary sex characteristics, such as a deepened voice, growth of facial and body hair, and breast tissue.[17] This paper is primarily focused on these stages of hormone treatment, but it is worth noting there is a further third stage of reassignment surgery,[18] which is giving he or she the body in line with their innate gender identity.[19]

The statement suggests delaying intervention until adulthood, but what are the benefits of allowing children to make this decision when they feel ready? First and foremost, it immediately reduces the patient's suffering.[20] The Department of Health made a statement in 2007 stating that being transgender is 'not a mental illness'[21] therefore affirming that someone knows they are another gender because that is how they feel not only emotionally but also physically.[22] The suppression of puberty at an early age means children do not develop the distinctive characteristics of the birth gender that they do not identify with. Going through puberty is tough enough as it is, going through it in the wrong body is horrifying and unbearable,[23] and often leads to anxiety and depression.[24] Further to this, early intervention means less invasive surgery at a later date. The administration of GnRHa means that characteristics such as an Adam's apple or breast tissue would not have developed and would not have to be removed as part of reassignment surgery. Psychologically, gender hormone

[14] Mickey Emmanuel and Brooke R. Bokor, 'Tanner Stages' (*StatPearls*, 18 December 2020) <https://www.ncbi.nlm.nih.gov/books/NBK470280/>
[15] *Giordano* (n 5) 2.
[16] NHS England, 'Clinical Commissioning Policy: Prescribing of Cross-Sex Hormones as part of the Gender Identity Development Service for Children and Adolescents' [2016] NHS England: 16046/P.
[17] *Giordano* (n 5) 3.
[18] Richard Green, 'Gender Development and Reassignment' [2007] Psychiatry 6, 3.
[19] *Giordano* (n 5) 3.
[20] Peggy T Cohen-Kettenis and Friedemann Pfäfflin, *Transgenderism and Intersexuality in Childhood and Adolescence. Making Choices* (1st edn, Sage Publications 2003).
[21] Department of Health, 'Improving Access to Health and Social Care for Lesbian, Gay, Bisexual and Trans (LGBT) People' (2016) BMC International Health and Human Rights 16.
[22] *Gilmore* (n 3) 3.
[23] *Bell* (n 6) 3.
[24] *Giordano* (n 5) 3.

treatment administered earlier also leads to a better outcome. Similarly, in terms of physical appearance, early intervention makes being accepted as a member of a new gender much easier, compared with those who begin treatment in adulthood,[25] as there is a closer resemblance to the body shape of the affirmed sex.[26] Finally, allowing children to make the decision to receive gender hormone treatment would be a triumph for children's rights. It would be a respect to their bodily integrity and promote Article 24 of the United Nations Convention on the Rights of the Child (UNCRC) which states a child has the right 'to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.'[27] Furthermore, making gender hormone treatment accessible would-be respecting articles 6 and 8 of the UNCRC, the right to survival and development[28] and the right to forge an identity.[29] Arguably, not allowing children to make this decision would be infringing on these rights and moreover, it cannot be regarded as allowing children to participate in decision-making. The Lundy Model, which conceptualises Article 12 of the UNCRC, outlines that child should be given a space, a voice, an audience, and due weighted influence.[30] This recognises a child's autonomy and their ability to make decisions about their own life. After all, it is adults who are deeming children 'vulnerable' and 'immature' but if we were to give adolescents a voice, as Lundy suggests, it prioritises children's rights over adult opinion. As Freeman states 'in a world run by adults, there would otherwise be a danger that children's interests would be completely ignored.'[31]

Nevertheless, the benefits of delaying treatment are apparent also. Perhaps the biggest benefit is time, the longer a patient has to deliberate treatment, the more likely they are to come to a decision they would not regret in the future. There is some uncertainty about the risks of long-term cross-sex hormone treatment[32] and an adult may be more capable of grasping the importance of the information about hormone treatment and better understand the implications. Puberty blockers and cross-sex hormones will have future complex consequences, including

[25] Baudewijntje Kreukels and Peggy T Cohen-Kettenis, 'Puberty suppression in gender identity disorder: The Amsterdam experience' (2011) Nature Reviews Endocrinology 7.
[26] *Giordano* (n 5) 3.
[27] UNCHR, 'Convention on the Rights of the Child', (2 September 1990) Article 24.
[28] UNCHR, 'Convention on the Rights of the Child', (2 September 1990) Article 6.
[29] UNCHR, 'Convention on the Rights of the Child', (2 September 1990) Article 8.
[30] Laura Lundy, 'Voice' is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) British Educational Research Journal 33 6.
[31] Michael Freeman, *Article 3: The Best Interests of the Child* (1st edn, Martinus Nijhoff Publishers 2007).
[32] *NHS* (n 2) 4.

life-long medical care[33] and temporary or even permanent infertility.[34] Many would go as far as to regard this procedure as 'experimental' due to the lack of sufficiently robust evidence around efficacy and safety.[35] Arguably, it would not be fair to subject children to 'experimental' treatment at the risk of damaging their futures. Traits of gender dysphoria are not uncommon in children, but it is also not uncommon for such traits to dwindle with age. Around 80% of children who meet the criteria for gender dysphoria in childhood have the condition recede with puberty.[36] Whilst there are not a huge number of statistics on the topic, detransitioning is a very real issue that many young adults face who have gone through gender hormone treatment at a young age. In 2016-17 a study was conducted on NHS patients who went through gender transitioning, and it found that 0.47% expressed transition-related regret or had detransitioned.[37] Whilst delaying treatment until adulthood may eradicate this figure altogether, the benefits of early intervention seem to outweigh this notably low percentage.

Detransitioning is one of the key factors that brought about the *Bell*[38] case. The claimant, Keira Bell, was referred to GIDs at 15, started puberty blockers at the age of 16 and commenced testosterone at 17. After 3 years she began to have doubts about her transition as she felt there were a lot of experiences she could not relate to as a transgender man despite having testosterone in her body.[39] In spite of this she had a double mastectomy at the age of 20 but could not see herself for anything more than a woman with a beard.[40] In January 2019 she stopped taking testosterone, she now identifies as a woman and sees her choice to go through the transition process as a 'brash' decision she made as a teenager.[41] This case induced a judicial review of the NHS's policy of prescribing GnRHa to under 18s with gender dysphoria.[42] It should be noted, that a patient must satisfy the NHS's Eligibility and ReadinessCriteria[43] before hormone treatment is even considered, and that Kiera Bell was given the

[33] *Brunskell-Evans* (n 7) 4.
[34] *NHS* (n 2) 4.
[35] Simona Giordano and Søren Holm, 'Is puberty delaying treatment 'experimental treatment'?' (2020)
International Journal of Transgender Health 21 2.
[36] Jiska Ristori and Thomas D Steensma, 'Gender dysphoria in childhood' (2016) International Review of Psychiatry 28 1.
[37] Skye Davies, Stephen McIntyre and Craig Rypma, 'Detransition Rates in a National UK Gender Identity Clinic' [2017] FOYER.
[38] *Bell* (n 6) 5.
[39] ibid
[40] ibid
[41] ibid
[42] David Locke, 'Age of consent' [2021] 171 NLJ 7916.
[43] *NHS* (n 16) 5.

fullest possible information after at least 10 consultations.[44] Gender hormone treatment has never been easily accessible and patients also have to prove that they are *Gillick*[45] competent. This is the test for under 16's to be assessed regarding their capacity to consent to medical treatment and was regarded as the landmark of adolescent autonomy in healthcare.[46] Lord Scarman, in this case, stated that the law does not exclude a child from giving consent, but the child must achieve a significant understanding and intelligence to enable him or her to understand fully what is proposed.[47] Emma Cave describes the *Gillick* test as ambiguous and having the ability to enable judges to raise the threshold to arguably unattainable levels[48] and this view is affirmed by the *Bell* judgment. The court in *Bell* gave an eight-point list of 'relevant information that a child would have to understand, retain and weigh up in order to have the requisite competence in relation to puberty blockers.'[49] This included the impact on sexual function and fertility as well as the unknown physical consequences of puberty blockers. A witness for the defence, who was on the waiting list for GIDs, described the long-term elements of this criteria as 'just not things that are really on my radar at the moment.'[50] The court went on to say it is highly unlikely that a child aged 15 or under would be found to be competent enough to consent to treatment and those who are 16, and presumed to have capacity,[51] would have to seek 'authorisation from the court'[52] due to the 'experimental' nature of gender hormone treatment. Whilst the application of the concept of *Gillick* competence was specifically retained[53] the court in *Bell* took a stance closely aligned with the statement, essentially ruling that, on the whole, children are unable to make informed decisions on this topic. This leaves many questions for young people who can no longer access treatment, and the 'watch and wait' approach prevents truly dysphoric children from transitioning which will likely result in increased rates of depression and anxiety.[54]

One interesting takeaway from the *Bell* case is when the claimant stated that from the age of 14, she started to look at YouTube videos and do research on the internet about gender identity

[44] *Bell* (n 6) 5.
[45] *Gillick v West Norfolk and Wisbech AHA* [1985] 3 All ER 402.
[46] John Eekelaar, 'The Emergence of Children's Rights', (1986) O.J.L.S 8.
[47] *Gillick* (n 44) 6.
[48] Emma Cave, 'Goodbye Gillick? Identifying and resolving problems with the concept of child competence' (2014) L.S. 34(1).
[49] *Bell* (n 6) 6.
[50] Ibid.
[51] Mental Capacity Act 2005, s 1(2)
[52] *Bell* (n 6) 6.
[53] *Locke* (n 41) 6.
[54] *A local authority v TP and others* [2019] EWFC 30.

disorder and the transition process.[55] This highlights society's evolvement into the digital age, where there is access to materials that allow for self-diagnosis. Lisa Littman conducted research on 'rapid onset gender dysphoria' in adolescents which showed peer groups where multiple friends had become gender dysphoric and transgender-identified during the same timeframe.[56] Interestingly, increased exposure to social media and the internet often preceded a child's announcement of a transgender identity.[57] This shows how susceptible young people are to both social and peer contagion.[58] Often adolescents believe medical transition must be undertaken immediately[59] therefore, the *Bell* judgement, will help to protect children who believe they are gender dysphoric, solely because of the social situation they are currently in or what they have read online.

However, the rise in the number of children presenting as transgender in recent years also signifies a more tolerant, humane, and open society;[60] a judgment like this may hinder further progress. Making a 16-year-old plead before a court, to convince a judge that they deserve treatment and are competent enough to understand the consequences, is arguably extremely degrading. The precautions already set-in place by the NHS, such as age limits on the different stages of treatment, an extensive diagnosis process and the *Gillick* competence test, should have been enough without the need to delay the decision until adulthood. The court with this decision failed to appreciate the severity of mental anguish young transgender people go through without this treatment. They may have unfortunately pushed many adolescents to seekthis treatment elsewhere, in potentially unregulated and unsafe environments as that is now theonly way for them to gain access to necessary care.

In conclusion, the generalisation of children being 'too immature' is detrimental to the care and wellbeing of the younger generation. There is no physical manifestation[61] of gender dysphoria so it is easy for adults to perceive a young person's valid feelings about their identity as 'immaturity.' However, it is essential to handle this matter in a sensitive and child

[55] *Bell* (n 6) 6.
[56] Lisa Littman, 'Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria' [2018] PLoSONE 13(8).
[57] ibid
[58] ibid
[59] Lisa Marchiano, 'Transgenderism and the Social Construction of Diagnosis' (*Quillette,* 1 March 2018) <http://quillette.com/2018/03/01/transgenderism-social-construction-diagnosis/>
[60] Jay Stewart, 'We Are Living on the Cusp of a Gender Revolution' (*TEDx Talks,* 23 February 2015) <https://www.youtube.com/watch?v=UpQd-VrKgFI>
[61] *Locke* (n 41) 7.

focused way,[62] but, since the *Bell* judgment's introduction of a practically unattainable threshold of capacity, we cannot be regarded as doing so. Whilst the courts desire to defend 'vulnerable' children is understandable, labelling them as such will feed into the idea that cross-gender behaviour is a type of deviance[63] that they need to be protected from. However, this connotation just further alienates those who genuinely require treatment and diminishes a community that have worked so hard to be accepted into society. I would not go as far to say that there should be no eligibility criteria, or no minimum age[64] limit for gender hormone treatment rather, the system already in place by the NHS was effective in treating genuine cases of gender dysphoria. As with any medical procedure there is no right to demand treatment, as per *R (Burke) v General Medical Council*,[65] and those children who identify as transgender because they were influenced by social media were already protected against making uninformed decisions. The *Bell* judgment reinforces assumptions about children as being too 'vulnerable' or 'immature' to make such decisions. The court's ruling has essentially delayed all gender hormone treatment to the age of 17 (possibly younger with a court order) and in turn they have infringed on a child's right to bodily autonomy.

[62] *TP* (n 53) 7
[63] *Giordano* (n 5) 8.
[64] Yogyakarta, 'Principle 31' (*Yogyakarta principles*, 2016) <https://yogyakartaprinciples.org/principle-31-yp10>
[65] *R (Burke) v General Medical Council* [2005] EWCA Civ 1003.

# SHAPING SOCIAL JUSTICE

2021