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Editorial Note

Of the several changes we have made for this Spring 2009 issue, perhaps the most significant is the creation of this full pdf copy, allowing us to standardize certain key elements across the journal, especially pagination. Feel free to save a copy and pass it along to your contacts, as we are fully committed to the principles of open access and broad participation in scholarship.

Like all interdisciplinary fields, peace and conflict studies is characterized by the interplay of theoretical perspectives and academic conventions -- the overall effect of which, we hope, is a dialogue unconstrained by the traditional boundaries of academia, flexible enough to forward meaningful analyses for the improvement of human society through peace and justice. In addition, the point of intersection between theory and practice has become particularly important to the field, and to the work we do at the University for Peace, as theoretical discussions between disciplines are increasingly tested and developed by the work of peace practitioners.

Our Spring 2009 issue of the *Peace and Conflict Review* reflects this interaction between theorists and practitioners, addressing philosophical issues of methodology and socio-political analysis as well as practical ways for protecting human rights and facilitating sustainable and equitable development on the ground.

Eric Brahm's conceptual review of Truth Commissions, described as a "brush clearing contribution to the field" by one reviewer, is a theoretical piece written with an ease and accessibility that is rare among legal scholars. To this effect, Brahm's article offers a thoughtful discussion of the confusion around various processes claimed to be "truth commissions", the interests behind such claims, and some helpful suggestions for clarifying scholarship on the issue.

Continuing the legal discussion, and addressing specific questions about how national legislation can be used to protect human rights beyond national boundaries and the responsibilities on states imposed by international law, Craig Brannagan presents a tightly researched and practical argument for using Canadian civil law to answer allegations of human rights abuses facilitated by the actions of Canadian corporations abroad. Brannagan illustrates his argument with an ongoing suit in the Quebec Superior Court, filed on behalf of citizens in the Palestinian village of Bil'in who have been negatively affected by the Israeli separation barrier in the West Bank.

Swinging the pendulum even further towards the practical, Shastry Njeru speaks to the immense potential of information and communication technology for connecting and empowering segments of society that have been divided and displaced by conflict -- focusing especially gender and peacebuilding in Africa. Challenging the gender stereotypes that have complicated women's access to information technology in the past, Njeru calls for greater equality of access and education so as to coordinate and support the efforts of all peacemakers, regardless of sex or location.

Our final article of this issue, Daniela Corti and Ashok Swain's analysis of the entangled US-led wars on drugs and terror in Afghanistan, challenges the logic behind forced eradication policies in that country and argues persuasively for an informed policy of illicit drug control that recognizes the livelihood concerns of Afghans and the broader security dynamics of the region.

As always, submissions and feedback from our readers are highly encouraged, and should be directed to editor@review.upeace.org.

Ross Ryan
Managing Editor

What is a Truth Commission and Why Does it Matter?

Eric Brahm*

There is a growing body of comparative research that seeks to produce empirical evidence and, thereby, contribute to policy debates on the relative merits of truth commissions. However, these efforts have been plagued by a lack of attention to case selection. The lack of consensus on what constitutes the universe of truth commission cases has contributed to a pattern of inconclusive, inconsistent findings. This article reviews the empirical literature and finds over 70 potential truth commission cases. After examining some of the reasons behind such disagreement, I offer Freeman's (2006) typology of investigative commissions as the best suited to advance research in the field.

Introduction

One of the most often noted human rights developments since the early 1980s has been the emergence of the truth commission as a common mechanism to address a history of human rights abuses. Yet, for all the attention paid to this trend, basic questions such as “under what circumstances are truth commissions likely to emerge?” and “what consequences are such investigations likely to have?” continue to be subjects of intense debate. In fact, it is not entirely clear how widespread the truth commission has become. This issue is particularly glaring for the growing number of quantitative comparative studies that attempt to study all examples of the phenomenon. Even allowing for the fact that studies conducted earlier will miss more recent cases, the range of potential truth commission cases identified by different researchers varies tremendously. Of the broad surveys and quantitative studies conducted within the past ten years, the alleged number of cases worldwide varies from less than two dozen to nearly 75. This is partially the result of the fact that some investigations have failed to attract significant international attention. Just as important, however, is the fact that researchers have defined truth commissions in different ways.

Why does it matter that the truth commission label is used in different ways? For the average citizen, it matters little whether or not the investigation his or her government creates is formally called a truth commission. Rhetorically, the term has intuitive appeal – it generates expectations that sordid deals will be brought to light and official lies exposed. Whether investigating human rights violations, corruption, the manipulation of intelligence or any other events about which details are murky, the “truth” is a welcome antidote. The semantics of how the investigation is labelled will matter little to most individuals. As academics, activists, and

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policymakers, however, we should care about the meaning behind the label. It would be beneficial if a common language was adopted to better facilitate truth commission research and clarify policy discussions.

Following important early case studies of individual truth commissions, there is a growing body of comparative research that seeks to answer questions about the circumstances in which truth commissions are likely to emerge and the effects that these bodies have on individuals and societies. However, this research program is hampered by a lack of consensus on what should be studied. Scholars are employing more empirically-oriented, methodologically sophisticated tools for evaluating truth commission-related claims. Yet, virtually no two compilations of global truth commission experience are the same. Although other methodological factors also contribute, the lack of agreement on what cases are truth commissions is likely to be at least partially responsible for the inconsistent findings produced thus far. Ideally, it would be beneficial to settle on a typology of investigative commissions in order to advance empirical research. At a minimum, researchers need to be more explicit as to what criteria they use in identifying cases for study. Only then will this research better enable policymakers to effectively weigh the relative merits of the growing body of transitional justice research and develop transitional justice strategies.

In this article, I trace how the growing literature has treated the truth commission. On the surface, there appears to be relative consensus on truth commissions being temporary bodies that are officially established to investigate a pattern of human rights abuses that occurred in a country's past. Yet, as we shall see, recent research has produced divergent, contradictory findings. In practice, identifying the appropriate universe of cases has been less straightforward. I proceed to explore the various ways in which truth commissions have been defined and how these definitions have been applied empirically. I conclude by offering Mark Freeman's (2006) typology of human rights investigations as the definition offering the most analytical clarity and the strongest potential to move the field forward.

The Growing Comparative Truth Commission Literature

In recent years, a growing number of researchers have undertaken ambitious projects that compare all truth commission cases in order to attempt to answer important transitional justice questions, namely: "under what conditions are various forms of transitional justice likely to emerge?" and "what effects are these mechanisms likely to have on transitional societies?" In particular, several have employed statistical techniques toward these ends. This is partially a reaction to the fact that many of the claims regarding the beneficial properties of transitional justice are built upon shaky theoretical and empirical foundations (Mendeloff, 2004, Forthcoming). Thus far, however, progress has been stymied by the twin challenges of identifying the statistical technique best suited to test for causation and adequately measuring key concepts. The truth commission is one such concept.

Existing quantitative truth commission research has reached divergent, contradictory conclusions. Studies that examine the circumstances surrounding truth commission creation do not necessarily agree on what factors make truth commissions more or less likely to occur. Kim (2005) finds that countries in the same region or with the same dominant religion as countries that have utilized a truth commission are less likely to establish a truth commission. However, countries that share both of these traits with another country that has created a truth commission are more likely to create a truth commission of their own. Dancy and Poe (2006) find evidence for regional diffusion, but not global diffusion of a truth commission norm. In addition, Kim finds that wealthier countries and those with more highly educated populations are less likely to create truth commissions. Conversely, Dancy and Poe's analysis concludes that national wealth does not have an effect. However, their study concludes that more democratic states are more likely to establish a truth commission. Truth commissions are also more likely to be established surrounding presidential elections. Although the results do not achieve statistical significance, Kim interprets the signs of the

coefficients and contrary to much of the qualitative research on the subject, concludes that states with stronger outgoing regime are more likely to adopt truth commissions. By contrast, Dancy and Poe find that UN mediation, which though they do not test might be less likely when the outgoing regime is strong, is positively associated with the creation of a truth commission. Also going against the conventional wisdom of earlier case study work, Kim finds that countries that have created other transitional justice measures are more likely to adopt truth commissions.

Studies of the effects of conducting truth commissions have also yielded inconsistent results. For instance, one study finds weak evidence that truth commissions are beneficial for future human rights practices (Brahm, 2006). Contradicting this is another study that finds some evidence to suggest human rights are worsened by truth commissions (Payne, Olsen, & Reiter, Forthcoming). Another study, confined to Latin America, finds that human rights are better protected in countries that have employed truth commissions *and* trials than in countries that have used other transitional justice strategies (Sikkink & Walling, 2007). With respect to potential democracy-promoting properties, in Latin America, truth commissions appear to be a positive force (Kenney & Spears, 2005). Studies that consider truth commission experience globally, however, find no statistically significant relationship (Brahm, 2006; Payne et al., Forthcoming). Finally, truth commissions appear to be largely irrelevant for peace building (Lie, Binningsbø, & Gates, 2007). To be sure, these varying and contradictory results are largely the result of researchers employing different statistical models and measures of key independent and dependent variables. Of equal importance is the fact that these studies have identified vastly different numbers of truth commissions as a basis for their analysis. There are important differences in the ways in which these studies have defined their populations.

Defining the Truth Commission

The most widely used truth commission definition comes from transitional justice expert Priscilla Hayner. She describes them as “bodies set up to investigate a past history of violations of human rights in a particular country – which can include violations by the military or other government forces or armed opposition forces” (Hayner 1994: 558). Elsewhere, Hayner (Hayner, 2001b, 14) elaborates on this basic definition. First, truth commissions investigate *past* human rights abuses. They do not focus on on-going human rights abuses like a human rights ombudsman might. Second, truth commissions examine a *pattern* of human rights abuses over time rather than a specific event. Third, truth commissions are *temporary* bodies. Finally, truth commissions are *official bodies* sanctioned, authorized, or empowered by the state. As we shall see, Hayner is not always consistent in her application of the definition. Nonetheless, it is possible to overstate these inconsistencies. Her purpose is to describe the investigative trend in international human rights rather than undertake a rigorous comparative analysis. However, several subsequent researchers have taken her work at face value.

Several others have adopted definitions that generally closely resemble Hayner’s characterization. Some examples include:

an official body, often created by a national government, to investigate, document, and report upon human rights abuses within a country over a specified period of time. (Teitel, 2003)

an investigatory body established by the State or by a dominant (and often dissenting) faction within the State, to determine the truth about widespread human rights violations that occurred in the past, and to discover which parties may be blamed for their participation in perpetrating such violations over a specified period of time. (Quinn, 2001)

a *temporary* body, set up by an *official authority* (president, parliament) to *investigate a pattern* of gross human rights violations committed over a period of time in the past, with a view to issuing a *public report*, which includes *victims' data* and *recommendations* for justice and reconciliation. (Bronkhorst, 2003, emphasis in original)

[a body] created in a postconflict situation to examine past atrocities, issue findings of responsibility, and make future-oriented recommendations designed to foster and consolidate democracy and a human rights culture. (Borer, 2005)

[an] officially sanctioned, temporary, non-judicial investigative bod[y]—... granted a relatively short period for statement-taking, investigations, research and public hearings, before completing their work with a final public report. (Office of the United Nations High Commissioner for Human Rights, 2006)

An *ad hoc*, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention. (Freeman, 2006, emphasis in original)

Few of these authors attempt to apply their definition to the various commissions conducted around the world to identify how many truth commission cases have actually existed.

Empirical studies frequently do not dwell on definitional issues. To be sure, because much of the truth commission literature is made up of individual case studies, the definitional question is often sidestepped entirely by simply labelling the case as an example of a truth commission. Many small-N case study researchers Hayner's adopt definition (Chapman & Ball, 2001; Kaye, 1997). Large-N studies also frequently follow Hayner (Brahm, 2006; Dancy & Poe, 2006; Kim, 2005; Sikkink & Walling, 2007) and have updated her work with news searches and reports from NGOs like Amnesty International and the International Center for Transitional Justice to build their core list of truth commission cases. However, most do so without explicitly discussing why some cases were accepted or rejected. Others cast the net wider to include any "newly established, temporary body officially sanctioned by the state or an international governmental organization to investigate past human rights abuses" (Payne, Olsen, and Reiter Forthcoming: 43). Still others, seeking to protect unpublished data, do not provide a list of cases at all (Binningsbø, Elster, & Gates, 2005; Lie et al., 2007).

Across the literature, there is often a disconnect between the truth commission definition adopted and its empirical application. Definitional ambiguities have allowed researchers to reach different conclusions on whether to include a particular case. In addition, where searches of news sources have been used to update data, potential new cases have sometimes not been scrutinized beyond matching keywords. As a result, some commissions have been included simply because they have "truth," "reconciliation," or "human rights" in their names without a careful look at the case itself. There has also often been a failure to explicitly state when a truth commission is said to exist. For various reasons, it may not fully develop. Table 1 contains the truth commission cases identified by several recent broadly cross-national studies.

Table 1: Compilation of Truth Commission Cases

Potential Cases	Year*	Hayner 2001	Kim 2005	Kenney and Spears 2005	Brahm 2006	Dancy and Poe 2006	Freeman 2006	Paynet et al. Forthcoming
Pakistan	1971-4							X
Uganda	1974	X	X			X		X (1974-5)
Zambia	1975							X
India	1977		X					X
Bolivia	1982-4	X	X	X	X	X	X	X
Argentina	1983-4	X	X	X	X	X	X	X (1983-5)
Kenya	1983-4							X
Honduras	1984							X
Uruguay	1985	X	X	X	X	X		X
Zimbabwe	1985	X	X			X		X
Philippines	1986		X		X	X		X (1986-7)
Uganda	1986-95	X	X		X	X	X	X (1986-1994)
Ghana	1989							X
Chile	1990-1	X	X	X	X	X	X	X
Czech Republic	1990							X
Nepal	1990-1	X	X		X	X	X	X
South Africa	1990							X
Chad	1991-2	X	X		X	X	X	X (1990-2)
Lithuania	1991							X
South Africa	1991-2							X
El Salvador	1992-3	X	X	X	X	X	X	X
Germany	1992-4	X	X			X	X	X
Rwanda	1992-3		X			X		
South Africa (ANC)	1992	X						
Honduras	1993		X	X (1992)				
South Africa (ANC)	1993	X	X					
Zambia	1993							X
Sri Lanka	1994-7	X	X			X	X	X
Sudan	1994							X
Brazil	1995-2007							X
Burundi	1995-96	X	X		X	X		X
Haiti	1995-	X	X	X	X	X	X	X (1995-7)

	96							
Mexico	1995							X
South Africa	1995-							
	2000	X	X		X	X	X	X
Ecuador	1996-	X						
	97		X	X	X	X	X	X
Guatemala	1997-9	X	X	X	X	X	X	X
Liberia	1997-8					X		
Sweden	1997-9							X
	1997-							
Tajikistan	2000					X		
Burkina Faso	1998							X
Lithuania	1998							X
Indonesia	1999-							
	2000		X					X
Nigeria	1999-							
	2002	X	X		X	X	X	X
Rwanda	1999-							X
Rwanda	1999-							
	2000							X
Lebanon	2000-1							X
Lesotho	2000-2					X		
Malaysia	2000-1							X
Poland	2000-							X
South Korea	2000-2							X
South Korea	2000-4				X			
					(2001-			
			X		4)		X	X
Uruguay	2000-3		X	X	X	X	X	X
Grenada	2001-6		X					
			(2000-					
			6)				X	
Jamaica	2001-2							X
Lebanon	2001-2							X
Mexico	2001							X
Panama	2001-2		X	X	X	X	X	X (2000-2)
Peru	2001-3		X	X	X	X (2000-	X	X
						3)		
Sri Lanka	2001-2							X
Thailand	2001-4							X
Zambia	2001							X
East Timor	2002-3		X					
			(2001-					
			3)		X	X	X	X (2001-5)
Ghana	2002-3		X		X	X	X	X (2002-4)
Serbia and	2002-3		X					
Montenegro			(2001-				X (2001-	
			3)		X	X	3)	X
Sierra Leone	2002-3	X	X					
		(2000-	(2000-		X	X	X	X (2002-4)

		3)	3)			
Central African Republic	2003		X (2002)	X		X
Chile	2003-4					X
Paraguay Democratic Republic of the Congo	2003-	X	X		X (2004-)	X (2003-6)
Lebanon	2004-	X (2003-)	X (2003-)		X	X
	2004			X (2004-6)		X
Morocco	2004-5	X	X		X	X
Colombia	2005-					X
Fiji	2005-			X		
Indonesia	2005-				X	
Indonesia-East Timor	2005-					X
Lebanon	2005					X
		X				
Liberia	2005-	(2003-)	X	X (2003-)	X	X
Solomon Islands	2005-			X		
Bosnia and Herzegovina	2006-					X
Sri Lanka	2006					X

* Where no end date is listed, it is unknown whether the truth commission is still in operation. Discrepancies in dates are listed under the respective source.

Variation in Application

A number of the differences one observes in compilations of truth commission cases arise due to definitional ambiguity. First, scholars and activists have varied in their interpretation of official sanction for the commission. Second, lists differ in the interpretation of what constitutes a pattern of abuses. Third, there is some disagreement on whether a truth commission must be an entirely new institution – in other words, what does temporary mean? A fourth type of problem arises due to excessive elaboration on Hayner's definition. For instance, some of the example definitions listed above presume the ends of truth-seeking such as consolidating democracy or promoting reconciliation. Not all commissions have had these goals in their mandate and, as we have seen, empirical research has not yet concluded whether these, or others, are plausible goals. In addition, many definitions are overly specific in prescribing particular powers or properties, such as public hearings, that are not characteristic of all bodies that would otherwise qualify as truth commissions. What is more, some variation in lists of truth commissions is a result of different, often implicit, criteria for marking when a truth commission should be counted. Finally, some explicitly reject some elements of Hayner's original characterization.

What Constitutes Official Sanction?

There have been a number of cases in which a legacy of human rights violations have been investigated by civil society groups when government action has not been forthcoming. In Uruguay, for example, Servicio Paz y Justicia (SERPAJ), a network of activists and church organizations, documented the country's history of human rights violations in *Uruguay: Nunca Mas*. The

Paraguayan Committee of Churches' Proyecto Nunca Mas (Never Again Project) did much the same in that country. The Russian organization Memorial has chronicled government human rights abuses dating back to the Russian revolution. Perhaps most well-known of the NGO truth commission-like investigations is the *Brazil: Nunca Mais* project. Beginning in 1979, the Archbishop of Sao Paulo and the World Council of Churches sponsored a clandestine nongovernmental investigation of human rights abuses by the Brazilian military government. Lawyers connected to the Catholic Church made copies of documents related to hundreds of cases before military courts and sent them abroad for safekeeping. The final report, published in August 1985, outlined allegations of torture and murder by government forces since the military takeover in 1964.

These cases may amount to a truth commission depending on what definition one adopts. Teitel and Quinn go furthest in articulating a definition in which NGO investigations could be included. Teitel's use of "often" suggests a truth commission does not necessarily need to be a creation of a national government. Quinn allows for "factions" to create truth commissions. Hayner includes the African National Congress' investigations into its own behavior in its camps during apartheid, despite the fact that the ANC is clearly not a state. However, because her definition simply requires authorization by the state, it creates the possibility that rhetorical governmental support of an NGO investigation may be sufficient to satisfy the "official" element of the definition.

In fact, of the definitions discussed above, only Bronkhorst and Freeman explicitly identify truth commissions as the product of state action. However, of the empirical comparative truth commission research, rarely have NGO investigations been considered part of the truth commission universe. If mentioned, these NGO investigations are characterized as "quasi-truth commissions" or "truth commission-like." Analytically, they are best considered different phenomena. Commissions that are not the product of government action cannot have the same powers and access to information nor place the same obligations on the state.

One problematic case in this regard is Rwanda. Prompted by domestic NGOs, representatives of a number of international NGOs investigated human rights violations in the aftermath of the Arusha Accords. While the two week investigation was not appointed by the Rwandan government, the government gave its official blessing to the process (Hayner, 1994). Hayner's own classification of this case shifts over time from including it in her 1994 article based on government consent to later describing it as a "quasi-truth commission" (Hayner, 2000). There is some ambiguity in this case, but if one were to generalize the logic, one could argue that some Amnesty International fact-finding missions might also be truth commission candidates. Therefore, it is prudent to omit it as a truth commission case.

What is a Pattern of Abuses?

A second source of variation relates to how broad of a pattern of human rights abuses is deemed necessary to constitute a truth commission. While many bodies considered truth commissions investigated events that occurred over the span of multiple years, some include investigations of individual events in addition to a pattern of abuses (Payne et al., Forthcoming). Bronkhorst (1995, 2003) includes several narrower investigations, which he often refers to as commissions of inquiry, but it is not clear whether he also considers them to be truth commissions. It is also unclear whether or not Payne et al. have considered the cases he mentions. For her part, Hayner (2001) includes the 1995 international inquiry in Burundi, despite the fact that it focused on one event, the 1993 assassination of President Melchior Ndadaye.

In reality, there is no specific length of time to select to distinguish truth commissions from other related bodies that would not be somewhat arbitrary. However, of the truth commissions about which there is general consensus on their inclusion, the vast majority looked at human rights violations stretching over several years, what Freeman (2006) refers to as a "broad" pattern of abuses. Truth commissions are often charged with investigating human rights violations across all of, or at least a substantial portion of, a civil conflict or a particular regime's existence. While not

stipulating a specific number of events that amount to a pattern of abuses, the strategies, resources, and goals of investigating a single event or a concentrated episode versus a broad historical period are sufficiently different to warrant considering these types of investigation as distinct phenomena.

The Temporary Nature of Truth Commissions

Differences in truth commission compilations are also driven by whether investigations by existing government organs are included. Rather than create special, temporary commissions to investigate a history of human rights violations, some governments have empowered existing state institutions, like special prosecutor's offices, to do the job. While the institution is not temporary, the investigation is. As a result, some have concluded that these are also truth commissions. In fact, Teitel, Quinn, and Borer do not specify a temporary nature in their respective definitions at all. However, most conclude these are not truth commissions.

Two cases, in particular, epitomize this controversy. One is Honduras where, in 1993, the National Commissioner for the Protection of Human Rights investigated over one hundred cases of disappearances from the 1980s. In many respects, the commissioner's investigation conforms to the truth commission model in that it sought to uncover details of past human rights abuses. The commissioner, however, took on the task along with his other duties. While some assert that the case is a truth commission (Bronkhorst, 1995; Kaye, 1997), other observers describe it as being close to, but not quite, a truth commission (Hayner, 2000) p. 348.

A second prominent example in this regard is Ethiopia. After the overthrow of the Derg in the early 1990s, the Ethiopian Chief Special Prosecutor's Office was charged not only with trying members of the Mengistu dictatorship but also with assembling a historical record of the crimes that occurred during the period. One observer found the Special Prosecutor effective in separating these two tasks (Mayfield, 1995). However, while this may have been true early on, ultimately it was not. While Hayner includes the case in her 1994 article, Ethiopia is not included in her 2001 book, a change that appears to be due to the decision of the Chief Special Prosecutor's Office to drop the truth report that had earlier been planned (Hayner, 2000: 348). Here, the truth commission aspect of the prosecutor was explicitly sacrificed in meeting other duties of the office.

Because investigations by existing government organs differ in significant ways from truth commissions, they should be treated separately. They often lack the high profile of truth commissions because the investigations are buried amidst the office's other duties. Standing government ministries also have responsibility for investigating and preventing ongoing human rights violations to say nothing of other crimes. Truth commissions, by contrast, have frequently been prominent national events that have actively engaged the public and focus on human rights violations. What is more, investigations by existing government entities often have limited independence from politics and government. The civil servants or political appointees conducting the investigations are likely to be far from impartial. This is not to suggest that truth commissions cannot be partial, but the permanent nature of government institutions means that investigators will likely have a strong incentive to keep their jobs, which may influence the investigation. Commissioners and staff of truth commissions may be chosen for their political views, but the body is still autonomous. In the interest of analytical clarity, therefore, only bodies that enjoy relative independence from the state should be considered truth commissions (Freeman, 2006).

The Nature of Crimes

Some investigations described as truth commissions stray from human rights as a central concern. For example, some Venezuelan NGOs have called for an independent investigation into the aborted 2002 coup attempt because they do not trust government organs to do so fairly, a proposal some have characterized as a truth commission (Mendez & Mariezcurrena, 2003). In addition, Bronkhorst lists as a truth commission Niger's 1992-3 Human Rights Commission of the National

Conference (Bronkhorst 1995: 86-89). However, it looked only at corruption cases. Furthermore, Tajikistan's Commission on National Reconciliation, which appears on some lists (Dancy & Poe, 2006), was a transitional governing body rather than specifically human rights-oriented. More recently, Bangladesh's Truth and Accountability Commission was also a corruption body. By contrast, while the Chadian truth commission was also charged with investigating corruption charges, it was in addition to gross human rights violations.

While there is general consensus that truth commissions investigate human rights violations, there is less definitional agreement on other areas. Even with respect to human rights, the definitions by Bronkhorst and Borer emphasize gross violations and atrocities respectively, while Freeman describes severe violations and repression. Although opening the secret police files in Eastern Europe communism might have similarities to truth commissions (Kaminski & Nalepa, 2006), the former's concern with sorting out fact from fiction in secret police files to screen individuals for public office makes them qualitatively different. Although countless events in the world cry out for a more complete truth, labelling any sort of investigation a truth commission stretches the concept beyond utility. Truth commissions have typically focused on core human rights violations such as murder, disappearance, torture, and illegal detention.

The Attributes and Goals of Truth Commissions

Some definitions privilege particular truth commission attributes. The UNHCHR, for instance, specifies statement-taking and public hearings as key elements. Over time, truth commissions have tended to increasingly engage victims through widespread statement-taking. In addition, public hearings have frequently been used in African truth commissions and have increased in global popularity since South Africa's TRC employed them. However, neither is necessary for the investigation of past human rights violations. Freeman's definition provides the essential tasks: investigating, reporting, and making recommendations. For reasons he does not fully explain, Freeman (2006) excludes the Philippines, Uruguay 1985, and Zimbabwe. What unites these three cases is that none completed their investigation or issued a report. In other ways, the bodies conform to his definition. In fact, in accordance with Freeman's definition, one of their primary purposes was reporting and making recommendations. However, political circumstances brought their work to an early end. Therefore, it would be prudent to include them.

Several truth commission definitions suggest specific ends for the truth commission exercise. Bronkhorst, for example, sees justice and reconciliation as a truth commission's ultimate goal. Borer argues they are designed to promote democracy and a human rights culture. Quinn, too, suggests accountability, or at least placing blame, is a desired end. The cause-effect relationships posited about conducting truth commissions, however, rest on weak theoretical and empirical foundations (Mendeloff, 2004). There are a multitude of possible motivations behind establishing a truth commission, and relatively little empirical investigation into its effect, whether intentional or not. Therefore, including presumed ends in the definition risks omitting some cases.

When Should a Truth Commission Be Counted?

There is disagreement in the truth commission literature as to when a truth commission should be counted. Some of the confusion with respect to truth commission cases arises due to the promotional role much of the literature serves. When some truth commissions are not counted, it sometimes is due to the fact that the cases lack international visibility. Truth commission cases have varied in the degree to which national governments and local civil society have consulted with international experts. As a result, some more purely domestic efforts like South Korea's have failed to attract much attention outside the country, at least until much later. Therefore, these local truth-seeking experiments may fail to appear on lists of truth commission cases.

At the same time, other cases may be included prematurely. Much of the writing (including this article) emphasize the dramatic rise of the truth commission phenomenon. In so doing, writers often mention countries where truth commissions are in the proposal stage to illustrate that they are not a fad. For instance, Hayner (1994) mentions Malawi and Mexico and Chapman and Ball (2001) point to Cambodia and Colombia as places where truth commission discussions had progressed to varying degrees. For a variety of reasons, the proposals have not come to fruition. Many proposals remain on the drawing board indefinitely. For example, Mexico still awaits a truth commission more than a decade later amidst parallel judicial processes. While there is nothing in principle wrong with reporting on truth commission proposals, the compiler of truth commission experience needs to utilize caution in accurately describing the incidence.

The various lists of truth commission cases at least implicitly adopt different criteria for marking a commission's existence. Some identify cases when truth commissions have been proposed by local or international NGOs, by governments, or in the context of peace negotiations. Until they actually come into existence, however, obstacles may result in the commission not becoming a reality. Civil society may lack the ability to pressure the government, peace talks may dissolve, or governments may lack the resources to follow through. Others, by contrast, appear to include a commission as a case when there is an agreement on creating a truth commission. For instance, it may be added to the list if a government agrees to a truth commission by issuing an executive order, the legislature passes a bill to create one, or a peace treaty contains provisions for a commission. At this stage, a range of issues, including selecting commissioners and allocating resources, may still derail the investigation before it gets off the ground. Finally, one might use the commission's inauguration or its first day of investigative work as the relevant cut-off point. Even at this point, a lack of resources and/or political support may bring the truth commission to a premature close. Regardless of the selection criteria chosen, they are often not explicitly articulated. Even for bodies that are widely considered to be truth commissions, it is not always explicit what date is being marked. Hence, the dates in Table 1 are not always consistent. Particularly for empirical analysis, these differences can be significant.

A number of examples illustrate this problem. For example, progress on a long-discussed UN-sponsored truth commission in Burundi appears to have stalled, perhaps permanently, due to disagreements between the Burundian government and the UN. Other potential recent cases have stalled further along, but before significant investigation got started. In Fiji, for instance, legislation for a truth commission was crafted before progress was disrupted by the 2006 coup. As a result, depending on a researcher's research question, it may or may not be appropriate to include the case. Similarly, the Indonesian parliament established a truth commission in 2004, but it was struck down as unconstitutional after some human rights groups challenged some of its provisions in court. To increase the validity of their findings, it is crucial that empirical researchers explicitly outline theoretically-grounded case selection criteria.

Truth Commissions as a Transitional Justice Tool

The field of transitional justice got its name due to the fact that its focus is on opportunities to pursue justice for human rights violations that are afforded by political transitions (often, but not always, toward democracy). Circumstances may dictate that the investigation not happen immediately after the transition, but that break with the past that is the transition is still key to creating the opportunity. Seeing truth commissions as a product of the post-conflict environment helps to further separate them from related phenomena.

Most lists of truth commissions contain a mix of investigations that are either created in the midst of conflict or in the course of building a fragile peace. One country commonly on truth commission lists is Sri Lanka. Throughout the 1990s, a number of investigations were conducted in Sri Lanka of government and military misdeeds during the fight against the Tamil Tigers. The investigation most often identified as a truth commission is the three regional Commissions of

Inquiry into the Involuntary Removal or Disappearance of Persons, which were established in 1994 to look at human rights violations as far back as 1988. The different ways in which this case has been treated reflect divergent views of what constitutes a transition. The 1994 Sri Lankan commission emerged not after a sharp break with the past, but after elections brought a new government to power in 1994. No definitions specify that a truth commission must necessarily be connected to a transition. To do so would be to unnecessarily restrict the universe of cases.

Germany is a frequently mentioned truth commission case from the 1990s, but has been treated unevenly due to the uniqueness of the transition. The German commission was an historical study of human rights violations in the communist East. This case was unusual in that essentially only half of the country was undergoing a transition. The West absorbed the East and past events in West Germany did not figure in as a subject of study. Therefore, the investigation was not a truly national project. What is more, although violations of physical integrity rights certainly occurred in East Germany, bureaucratic abuses were more common. Overall, it more closely resembled a parliamentary commission and even included a number of MPs as commissioners. This makes it a bit less independent than other truth commission cases. At the same time, it did investigate human rights violations, provided a venue for victims, and produced recommendations (Beattie, Forthcoming). On balance, therefore, I find no compelling reason to exclude the case.

Conclusion: The Place of Truth Commissions in a Universe of Investigative Commissions

Freeman (2006) provides a useful typology of how the field can distinguish truth commissions from other forms of ad hoc national human rights commissions of inquiry. He distinguishes truth commissions from investigative commissions that are event-specific, thematic, institutional, and sociohistorical in orientation. Event-specific investigations examine a concentrated episode of human rights violations. A particular massacre or repression surrounding an election may be the topic of an investigation. Frequently, these bodies are a precursor to legal proceedings. Thematic commissions focus on the analysis of public policy. Institutional investigations, which may be prompted by internal or external authorities, examine events within a particular institution.

Sociohistorical investigations address historical wrongs, which may have occurred in the distant past, a generation or more prior. As such, the goal of the investigation is typically to determine what the lasting political and socio-economic consequences of past misdeeds. The investigations are often a precursor to an official apology, reparations, or other affirmative measures to provide redress. They have usually occurred in well-established democracies where human rights ideas sit uncomfortably with a brutal history of slavery and the subjugation of indigenous populations. Canada's recently established Truth and Reconciliation Commission is a prime example of this. The fact that they are far removed from the immediate post-conflict period makes historical commissions qualitatively different. Sociohistorical commissions are most commonly confused with truth commissions. In an interview, Priscilla Hayner describes the Canadian Royal Commission on Aboriginal Peoples, Canada's first investigation of the treatment of First Nations, as an example of a truth commission (Hayner, 2001a). At another point, however, Hayner describes the Australian Human Rights and Equal Opportunity Commission's 1997 report on the practice of forcibly removing Aboriginal children from their families, as being a quasi-truth commission (Hayner, 2000: 348). The 1982 US Commission on Wartime Relocation and Internment of Civilians which looked at the treatment of Japanese-Americans during WWII is an example of a similar investigation. Do such episodes amount to truth commissions, however? While these investigations have sought to uncover details of past wrongdoing, because these historical commissions took place decades after the events in question and current generations are often not the direct victims of human rights violations, they amount to qualitatively different phenomena. Sociohistorical commissions are often the product of changing norms rather than political transition.

Specifying a truth commission definition is not intended to impose an arbitrary label or to restrict popular usage. If Greensboro finds it symbolically powerful to label its investigation of its

troubled past the Truth and Reconciliation Commission, I see nothing wrong with this. However, the act of naming does not necessarily make it analytically equivalent to a nationwide investigation of a pattern of human rights abuses. Researchers need to give careful consideration to case selection in order to produce more consistent, policy-relevant knowledge, which is a primary motivation for many in the field. I have made the case for why a uniform definition is important and why Freeman's definition offers the field the best way forward. The cases in bold in Table 1 appear most clearly to be truth commission cases that actually began their investigations. Depending on the nature of one's research question, it may be prudent to include abortive cases in a broadly cross-national study. Regardless of whether or not any truth commission definition becomes widely adopted, it is imperative that researchers be more explicit in outlining their case selection criteria to better allow their research to be evaluated and compared with others. Ultimately, the choice should be driven by the research question. However, classifications should be based on both internal validity (the commission conforms to the definition adopted) and external validity (the commission is widely considered to be a truth commission) (Freeman 2006: 21).

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Corporate Complicity in International Human Rights Violations: The Tort of Negligence as a Civil Remedy in Canadian Courts

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There is currently no Canadian legislation which addresses the commission or complicity of human rights violations abroad by Canadian businesses. The main issue under consideration in this article is whether the potential exists for establishing a body of jurisprudence in Canada through the civil process of tort law that would fill this legislative void and, if so, under what legal pretext such a case might be brought before a Canadian court. This article also examines Canada's legal obligations under international law to discover whether the State is required to bring legal accountability to Canadian businesses that have allegedly committed or have been complicit in human rights violations abroad. These issues are then considered in light of a case that has been brought before the Quebec Superior Court by a Palestinian village that has been adversely affected by the Israeli Wall and related development of the land adjacent to it.

Introduction

“If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.”¹

The purpose of tort law, or the law of civil remedies, is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.² “But even more fundamentally,” reasons Supreme Court of Canada Chief Justice Beverly McLachlin, “it is about recognizing and righting wrongful conduct by one person or a group of persons that harms others. If tort law becomes incapable of recognizing important wrongs, and hence incapable of righting them, victims will be left with a sense of grievance and the public will be left with a feeling that justice is

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¹ Holt C.J., *Ashby v. White* (1703) 1 Sm LC (13th edn) 253 at para. 273, cited in *Watkins v. Secretary of State for the Home Department and others*, [2006] UKHL 17, [2006] 2 AC 395, [2006] 2 All ER 353 at ¶ 13.

² *Athey v. Leonati* [1996] S.C.J. No. 102, [1996] 3 S.C.R. 458 at ¶ 20 [*Athey*].

not what it should be.”³ In order for tort law to continue to serve legal subjects as a legitimate utilitarian instrument, therefore, it must in both principle and in practice respond to the ever-changing dynamics and demands of modern society. “The law and justice system”, it has been said, “are servants of society, not the reverse.”⁴

Arguably the most potent force shaping modern society today is the phenomenon of globalization, and economic globalization in particular. One of the defining characteristics of economic globalization is the internationalization of commercial affairs⁵ – a development maneuvered by the principal agent of economic globalization, the transnational corporation (“TNC”). The global activities of TNCs are constituted by a series of complex relationships between the corporation itself and individuals, communities, governments, and even other corporations, across various jurisdictions throughout the world, and invariably impact the lives and rights of human beings.⁶ Undoubtedly, the transnational actions of these corporate entities “can affect virtually all internationally recognized rights.”⁷ It is the intersection of these concepts – of transnational corporate activity and its impact on international human rights law – which this article considers in the context of Canadian tort law as a possible avenue for victims of gross human rights abuses to pursue civil remedies.

Specifically, this article is concerned with the fact that there is currently no legislation or common law cause-of-action in Canada that addresses directly the commission or complicity of gross human rights abuses abroad by Canadian-based corporations. The issue is whether there is potential to fashion a body of jurisprudence in Canada that would allow for foreign victims of gross human rights abuses to seek civil redress in tort and, if so, under what legal pretext such a case might succeed within the Canadian justice system.

Part I of this article provides a brief background of the relevant international human rights instruments to which Canada is a party, and suggests that these international legal obligations should govern Canada’s actions with respect to the provision of human rights protections, to both Canadian and foreign claimants alike. Part I also provides a summary of a civil suit that was recently brought forth in Montreal, Quebec, which involves two Canadian-based TNCs that are alleged to have been complicit in the commission of human rights violations in the Occupied Territories of Palestine; the case is called *Bil’in (Village Council) et al. v. Green Park International Inc. et al.*⁸ Part II discusses the contemporary tort law of negligence in Canada, and considers how the case of *Bil’in* (or a case with a fact pattern similar to it) could make use of the existing common law jurisprudence in order to realize a civil remedy in Canada through the tort of negligence. The article concludes by suggesting that, despite the absence of legislation and the non-existence of a nominate tort addressing human rights violations, Canadian law as it currently stands affords the jurisprudential tools necessary for the adjudication of the extraterritorial commission or complicity by Canadian-based TNCs of gross human rights abuses in Canadian civil courts.

³ Chief Justice Beverly McLachlin, “Negligence Law – Proving the Connection”, in Mullany and Linden, *Torts Tomorrow, A Tribute to John Fleming* (1998), as cited in Linden, Klar & Feldthusen, “Canadian Tort Law – Cases, Notes & Materials, 12th Edition” (Markham: LexisNexis, 2004) at 262, n. 2.

⁴ Deschamps J., *Pro Swing Inc. v. Elta Golf Inc.*, [2006] S.C.J. No. 52, [2006] 2 S.C.R. 612, at ¶ 1.

⁵ Trevor C.W. Farrow, “Globalization, International Human Rights, and Civil Procedure” (2003) 41 Alta. L. Rev. at ¶ 12, 13.

⁶ International Commission of Jurists, “Corporate Complicity & Legal Accountability, Volume 1: Facing the Facts and Charting a Legal Path” in *Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes* (2008) at 2 [ICJ Report, Volume 1].

⁷ Professor John Ruggie, UN Secretary-General’s Special Representative on Business & Human Rights, *Protect, Respect and Remedy: A Framework for Business and Human Rights* (Advanced Edited Version), UN HRC, 8th Sess., Agenda Item 3, UN Doc. A/HRC/8/5 (7 April 2008) 4 at ¶ 6 [Ruggie Report].

⁸ Court No. 500-17-044030-081 (Qc. Sup. Ct.) [*Bil’in Village*].

I. The Possibility of Transnational Human Rights Litigation

A. International Human Rights Law & the Call for Effective Remedies

International human rights law transcends State boundaries.⁹ Its application has moved well beyond the provincialism of the first-half of the twentieth century, and it is now commonly accepted as a “universal political ideology”.¹⁰ The incarnate form of its genesis resides most prominently within the *Universal Declaration of Human Rights* of the United Nations.¹¹ Together with the *International Covenant on Civil and Political Rights*¹² and the *International Covenant on Economic, Social and Cultural Rights*¹³, these international instruments are collectively known as the “International Bill of Rights.”¹⁴ The International Bill of Rights has been called “a veritable Magna Carta marking mankind’s arrival at a vitally important phase: the conscious acquisition of human dignity and worth.”¹⁵ Significantly, the International Bill of Rights provides that each of its States Parties undertake to “respect and ensure” that “everyone has the right to an effective remedy...”¹⁶ and that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...”¹⁷ In addition to and in conjunction with the International Bill of Rights, various articles of the *Charter of the United Nations*,¹⁸ the growing body of recognized principles and peremptory norms (*jus cogens*) of customary international law,¹⁹ and the multilateral conventions that crystallise them,²⁰ all support the position that the international recognition of and global respect for the *international human rights regime*²¹ is well founded and binding upon States under international law. And though States generally do not dispute the authority of the international human rights regime *in principle*, the enforcement of human rights principles by States has been less auspicious in the practice of transnational human rights litigation.

Broadly speaking, transnational human rights litigation is “the use by transnational human rights advocacy networks of international legal instruments for the protection of human rights.”²²

⁹ Lori F. Damrosch *et al.*, *International Law: Cases and Materials*, 4th ed. (St. Paul: West Group, 2001) at 590, n. 6.

¹⁰ *Ibid.* at 586.

¹¹ G.A. Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [UNDHR].

¹² 19 December 1966, 999 U.N.T.S. 171, Can T.S. 1976 no. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

¹³ 16 December 1966, 993 U.N.T.S. 3, Can T.S. 1976 no. 46 (entered into force 3 January 1976, accession by Canada 19 May 1976) [ICESCR].

¹⁴ Damrosch, *supra* note 9 at 591.

¹⁵ Office of the High Commissioner for Human Rights, “Fact Sheet No. 2 (Rev. 1), The International Bill of Rights”, Fact Sheet, (June 1996) OHCHR.

¹⁶ UNDHR, *supra* note 12 at Art. 8 [emphasis added].

¹⁷ ICCPR, *supra* note 13 at Art. 3(a) [emphasis added].

¹⁸ 26 June 1945, arts. 55-56, Can. T.S. 1945 no. 7 (entered into force 24 October 1945, accession by Canada 09 November 1945) [UN Charter].

¹⁹ The following acts are, for example, largely undisputed as general principles and/or peremptory norms of customary international law: apartheid and other forms of systematic racial discrimination; genocide; slavery; piracy; forced disappearance of persons; torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; etc. See Damrosch, *supra* note 9 at 602.

²⁰ Many of the peremptory norms of customary international law mentioned in note 16 (*supra*) have been captured and crystallised in a number of international treaties and conventions, which mostly serve a declaratory function. See, for example: *International Convention on the Elimination of All Forms of Racial Discrimination*; *Convention on the Prevention and Punishment of the Crime of Genocide*; *Slavery Convention*; *International Convention for the Protection of All Persons from Enforced Disappearance*; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; *Geneva Conventions and their Additional Protocols*; *Rome Statute of the International Criminal Court*; etc.

²¹ In this article, the term “international human rights regime” is used as a blanket term referring to the “principles, norms, rules and decision-making procedures around which actor expectations converge” in the area of international human rights. Stephen D. Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening Variables” (Spring 1982) 36 *International Organization*, as cited in Jack Donnelly, “International Human Rights: A Regime Analysis” (Summer 1986) 40:3 *International Organization* 599, n. 3.

²² Cecilia Santos, “Transnational Human Rights Legal Activism and Counter-Hegemonic Globalization: The Case of Brazil and the Inter-American Human Rights System” (Paper presented at the annual meeting of the Law and Society Association, 06

Moreover, it is “a type of activism that focuses on legal action engaged with [courts] to make domestic legal changes, to reframe or redefine rights, and/or to pressure States to enforce domestic and international laws.”²³ Transnational human rights litigation is, therefore, largely concerned with bringing international human rights law to bear on the States whose obligation it is “to respect and ensure” that such rights are protected and enforced at the domestic level, through the guarantee of effective remedy.²⁴

Despite a thin track record thus far,²⁵ the importance of transnational human rights litigation cannot be understated. Canadian Supreme Court Justice Ian Binnie recently acknowledged that “the enforcement mechanisms for human rights have lagged”.²⁶ Citing the “governance gaps”²⁷ created by economic globalization at the core of a “dis-integrated judicial system”, Justice Binnie argued that “you cannot have a functioning global economy with a dysfunctional global legal system: there has to be somewhere, somehow, that people who feel their rights have been trampled on can attempt redress”.²⁸ In addition, Justice Binnie noted that the U.S. *Alien Tort Claims Act*²⁹ has proven to be “a very effective mechanism” for addressing allegations of human rights violations by TNCs against foreign plaintiffs, and suggested that a new cause-of-action in Canadian tort law might be an important way for such disputes to find resolve in Canada.³⁰ This suggestion in mind, Justice Binnie noted that “Superior courts would deal with it, and they would have to deal with the question as to whether they are the most appropriate court to deal with it [as opposed to other possible fora]. It would depend on the degree of connection to Canada of the fact situation they are dealing with.”³¹ It is in the context of Justice Binnie’s comments therefore, that we consider the civil suit of *Bil’in Village*.³²

July 2006 [unpublished, abstract available at <http://www.allacademic.com/meta/p_mla_apa_research_citation/0/9/5/5/1/p95510_index.html>].

²³ *Ibid.*

²⁴ Damrosch, *supra* note 9 at 597, n. 2.

²⁵ Beth Stephens has found, for example, that of the 185 cases that have arisen in the United States under the *Alien Tort Claims Act* since 1980, 123 of them have been dismissed, while the majority of those cases which have not been dismissed have usually resulted in default judgments. Beth Stephens, “International Experience with Civil Remedies: The American Experience” (Second Panel Lecture by Beth Stephens, *Universal Jurisdiction and Canadian Civil Courts: Strategic Directions*, delivered at the University of Ottawa, 7 November 2008).

²⁶ Cristin Schmitz, “Binnie calls for corporate accountability” *The Lawyers Weekly* (29 August 2008), online: The Lawyers Weekly <<http://www.lawyersweekly.ca/index.php?section=article&articleid=745>>.

²⁷ In the *Ruggie Report*, Professor John Ruggie states that “The root cause of the business and human rights predicament today lies in the governance gap created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.” See *Ruggie Report*, *supra* note 7, 3 at ¶ 3.

²⁸ Schmitz, *supra* note 23.

²⁹ 28 U.S.C. § 1350 [ATCA]. The ATCA states that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations...”

³⁰ *Ibid.* It should also be noted that on 10 December 2007, M.P. Peter Julian introduced Bill C-492 “An Act to amend the Federal Courts Act (the *International Promotion and Protection of Human Rights Act*, or the IPPHRA)”. According to Professor Nick Milanovic of Carleton University, the proposed Bill is “explicitly modeled on the ATS in the United States. Like the ATS, the IPPHRA would allow the federal courts to hear and decide claims for violations of international law that occurred outside of Canada. Specifically, the legislation would allow non-citizens to sue for gross violations of basic human, environmental or labour rights when these injuries were committed outside the country.” See Nick E. Milanovic, “A Canadian Alien Tort Statute? A Brief History of the *International Promotion and Protection of Human Rights Act*” (Paper presented to the *Universal Jurisdiction and Canadian Civil Courts: Strategic Directions* Conference, University of Ottawa, 7-8 November 2008) [unpublished] 5.

³¹ Schmitz, *supra* note 23.

³² *Bil’in (Village Council) and Ahmed Issa Abdallah Yassin v. Green Park International Inc., Green Mount International Inc., and Annette Laroche*, (2008) Court No. 500-17-044030-081 (Qc. Sup. Ct.) [*Bil’in Village*].

B. The Case of Bil'in Village

On 7 July 2008, Toronto lawyer Mark Arnold filed a Motion Introducing a Suit with the Quebec Superior Court, on behalf of a Palestinian village called Bil'in and as against two Canadian corporations domiciled in the Province of Quebec (Green Park International Inc. and Green Mount International Inc.).³³ The following sections describe the fact pattern of this case in more detail, and consider the legal arguments which Mr. Arnold has chosen to proceed with as a means for seeking an effective civil remedy for plaintiffs whose rights have allegedly been violated by the two Canadian defendant corporations.

i. The Plight of Bil'in Village

Bil'in is a Palestinian village located close to the Green Line³⁴ that separates the occupied West Bank from Israel.³⁵ It is one of many communities in the West Bank that Israel's Barrier³⁶ (also referred to as "Wall" or "Fence") cuts through, resulting in the effective annexation by the State of Israel of land that constitutes part of "the heart of the West Bank."³⁷ According to *Al-Haq* – an affiliate of the International Commission of Jurists and an NGO in consultative status with the Economic and Social Council of the United Nations – the private Palestinian land (including parts of Bil'in Village) that has been annexed by Israel has been used for the purposes of Israeli settlement construction, including in the construction of the Modi'in Illit settlement in 1996.³⁸ As Modi'in Illit is "now the most populated Israeli settlement in the West Bank outside of East Jerusalem, with a current population of almost 40,000",³⁹ the Israeli Civil Administration approved in 2007 a planning scheme for the expansion of a neighbourhood in the Modi'in Illit settlement that would be known as Mattiyahu East.⁴⁰ With respect to the tracts of land annexed from Bil'in Village for the purpose of constructing Mattiyahu East, the Supreme Court of Israel, acting as the High Court of Justice ["HCJ"], has stated that:

Constructing a fence on a part of the lands of Bil'in, and restricting the access of the residents of Bil'in to other major parts of their lands, by establishing check points and a farming gate for permits holders only, creates significant difficulties to the residents of Bil'in and significantly damages their way of life. [...] Therefore, the determined route [of the Barrier] deviates from the balance between the security needs and the needs and welfare of the residents of Bil'in.⁴¹

³³ Hereinafter "Green Park" and "Green Mount".

³⁴ The "Green Line" refers to the internationally-recognized 1949 Armistice Demarcation Line that was drawn to separate Israel from its neighbours, after the 1948 Arab-Israeli War (which included Israel, Egypt, Jordan, Lebanon and Syria). See *Resolution of 16 November 1948*, SC Res. 62, UN SC, 381st Mtg. UN Doc. S/1080 (1948) 30.

³⁵ Al-Haq, Communiqué, "From Palestinian Olive Groves to Canadian Courtrooms: Resisting Israel's Land Annexation Policies in the West Bank" (28 October 2008) 1.

³⁶ The International Court of Justice has concluded that "by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated regime, Israel has violated various international obligations incumbent upon it". See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at ¶ 143.

³⁷ Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory, "The West Bank Barrier" *OCHA-oPT*, online: Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory <http://www.ochaopt.org/?module=displaystory§ion_id=130&story_id=1456&format=html>.

³⁸ Al-Haq, *supra* note 35 at 1, n. 2.

³⁹ *Ibid.* at 1.

⁴⁰ *Ibid.*

⁴¹ *Ahmed Issa Abdallah Yassin, Head of Bil'in Village Council v. the Government of Israel et al.*, [2007] HCJ 8414/05, as cited in Israel, Ministry of Justice – Department for Human Rights and Foreign Relations, *The Security Fence*, 5 at ¶ 15, online: <<http://www.justice.gov.il/NR/rdonlyres/8FE32643-48F4-4FD5-BC15-F35ED83B232B/0/AnswerSecurityFence.pdf>>.

In the same case, the HCJ held that:

...the future intention to develop the eastern part of “Mattiya East” is not at all a consideration to be considered currently. In these circumstances, we were not convinced that it is essential, due to military-security considerations, to keep the current route which passes on the lands of Bil’in.⁴²

Despite these rulings of the Israeli High Court, however, the defendant Canadian corporations Green Park and Green Mount, which began construction on the annexed lands in 2005, have continued to construct some 250 residential units in Mattiyahu East, pursuant to rights purchased through contracts of sale for the individual units with Jewish-Israeli purchasers.⁴³

ii. The Motion Introducing a Suit

The case of *Bil’in Village* is unique in that it is among the first civil suits brought forth in a Canadian court, by a foreign plaintiff, in which the plaintiff claims that its rights have been violated by a Canadian corporation, and that civil liability for said violations are to be found under the aegis of international law.⁴⁴ The potential legal corollary that would result from a successful litigation of this type is therefore immense for moving Canadian civil courts towards accepting universal jurisdiction⁴⁵ over Canadian legal persons alleged of committing or being complicit in the violation of internationally recognized rights.

Taking as its factual starting point that the Village of Bil’in is a part of the West Bank, which forms a part of the Occupied Palestinian Territories (“OPT”) that is and has been occupied by the State of Israel through an act of war, the Motion Introducing a Suit [hereinafter, the “Motion”] claims that the Village’s situation is subject to “the rules and obligations of international law, including international humanitarian law.”⁴⁶ Specifically, it is claimed that:

...the defendants, and each of them, on their own behalf and as *de facto* agents of the State of Israel, are, and have been illegally constructing residential and other buildings and marketing and selling condominium units and/or other built up areas on the land, to the civilian population of the State of Israel, thereby creating a new dense settlement neighbourhood on the lands of the Village of Bil’in. In so doing, the defendants are aiding, abetting, assisting and conspiring with the State of Israel in carrying out an illegal purpose.⁴⁷

⁴² *Ibid.* at ¶ 14.

⁴³ Al-Haq, *supra* note 35 at 2.

⁴⁴ Perhaps the only other civil lawsuit related to human rights violations which has been brought against a TNC is the case of *Recherches Internationales Quebec v. Cambior Inc.*, [1998] Q.J. No. 2554 (Qc. Sup. Ct.) [*Cambior*]. *Cambior* involved what Maughan J. referred to as “one of the worst environmental catastrophes in gold mining history”, wherein the dam of an effluent treatment plant of a gold mine in Guyana ruptured, releasing some 2.3 billion litres of liquid containing cyanide, heavy metals and other pollutants into Guyana’s main waterway, the Essequibo. See *Cambior* at ¶ 1. This suit was ultimately granted *Cambior* its request for declinatory exception on the basis of a *forum non conveniens* argument.

⁴⁵ While the term “universal jurisdiction” has mostly been used in reference to the administration of criminal law, there is a growing movement among lawyers, activists and academics to extend the realm of universal jurisdiction to civil courts, which would allow for victims of gross human rights abuses to seek civil remedies in national courts. The Ottawa-based Canadian Centre for International Justice (CCIJ) is one such organization. An operable definition of “universal jurisdiction” in the context of this article is: the exercise of jurisdiction by a nation’s courts over internationally wrongful acts committed either abroad by its nationals, or against its nationals, or against its national interests, and where such internationally wrongful acts are similarly proceeded against. See Stephen Macedo, ed., *The Princeton Principles on Universal Jurisdiction* (Princeton: Program in Law and Public Affairs, 2001) 23.

⁴⁶ *Bil’in Village*, *supra* note 32 (Further Amended and Particularized Motion Introducing a Suit of 6 November 2008, at ¶ 11 and 12) [*Bil’in Village Motion*].

⁴⁷ *Ibid.* at ¶ 9.

The case of *Bil'in Village* may very well be the first civil suit in Canada where a claim is based on the complicity of a Canadian TNC in violating the laws of war, or international humanitarian law, and that Canada is the appropriate forum in which to pursue an effective remedy for such international wrongs.

C. Canada's International Human Rights Obligations

Though it has not yet been expressly declared by the Supreme Court of Canada, the international legal instruments to which Canada is party require it to make available domestic civil remedies for victims of international wrongs.⁴⁸ And despite the Parliament of Canada's failure to adopt legislation to that effect, as it is required to do under Article 2(2) and (3) of the *ICCPR*,⁴⁹ the Supreme Court has, nevertheless, made specific declarations about the binding nature of customary international law vis-à-vis Canadian domestic law. In *R. v. Hape*,⁵⁰ for example, the majority of the Supreme Court held that:

...international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. [...] Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.⁵¹

Furthermore, with respect to the "presumption of conformity" of domestic law with international law, which "applies equally to customary international law and treaty obligations",⁵²

...the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them.⁵³

Beyond the fact that courts will look to international law as an interpretive aid, and that Canadian domestic law is presumed to conform to international law, the reality of Canada being a dualist jurisdiction is also relevant to the relationship. In particular, while the Executive Branch of the Federal Government retains the authority to bind the State to international obligations, it is

⁴⁸ Jennifer Besner and Amir Attaran, "Civil Liability in Canada's Courts for Torture Committed Abroad: The Unsatisfactory Interpretation of the State Immunity Act 1985 (Can)" (Paper presented to the *Universal Jurisdiction and Canadian Civil Courts: Strategic Directions* Conference, University of Ottawa, 7-8 November 2008) (2008) 16 Tort L. Rev. 1 at 2,

⁴⁹ Article 2(2) of the *ICCPR* states that "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Article 2(3) of the *ICCPR* provides that where persons whose internationally recognized rights are violated, States Parties to the Covenant must ensure that: (a) they are provided an effective remedy; (b) the person's effective remedy shall include the determination of the right thereto by a competent judicial, administrative or legislative authority, with an eye to developing the possibilities of judicial remedy; and (c) that such competent authorities shall enforce such remedies where granted. See *ICCPR*, *supra* note 13 at Art. 2(2) and (3)(a),(b),(c).

⁵⁰ [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292 [emphasis added] [*Hape*].

⁵¹ *Ibid.* at ¶ 39.

⁵² *Ibid.* at ¶ 54.

⁵³ *Ibid.* at ¶ 53.

incumbent upon the Legislatures to incorporate treaties into domestic law where they are affected with the appropriate constitutional jurisdiction.⁵⁴ Incorporation, therefore, also plays a role in determining whether Canada is duty-bound to fulfill particular international legal obligations. In the pleadings of *Bil'in Village*, the plaintiffs have claimed that the corporate defendants are in violation of international human rights and international humanitarian law, as found in the *Fourth Geneva Convention*⁵⁵ and the *Rome Statute of the International Criminal Court*.⁵⁶ Even though the Supreme Court of Canada has presumed conformity of domestic law with international law, both the *Geneva Convention* and the *Rome Statute* have been domestically incorporated through the *Geneva Conventions Act*⁵⁷ and the *Crimes Against Humanity and War Crimes Act*,⁵⁸ respectively, thereby ensuring that Canada is domestically and internationally obligated to “respect and ensure” that it recognises and enforces the rights enumerated therein.

II. The Contemporary Tort Law of Negligence in Canada

Since Lord Macmillan famously declared that “the categories of negligence are never closed,”⁵⁹ the creative power of tort law and its ability to innovate within the common law system has prompted the ingenuity of lawyers and plaintiffs alike to explore the waters of this potentially boundless basis of liability. While in practice the boundaries of negligent liability are limited,⁶⁰ at the very least “...a cause of action can always be brought for the negligent infliction of harm in cases of harm to life, liberty, physical and mental integrity and property.”⁶¹ In addition, “a company can potentially be held legally responsible for negligence, if it does not take the care required of it by the law of civil remedies.”⁶² Indeed, the Government of Canada itself has stated that to the extent that corporate wrongs

...committed outside of Canada also constitute claims of the sort cognizable as a tort, civil law remedies **may** be available to the foreign plaintiff in Canadian courts. As such, Canadian corporations or their directors and employees **may** be pursued in Canada for their wrongdoing in foreign countries. Generally, if the defendant is a Canadian corporation incorporated under the laws of Canada, the Canadian court located in the jurisdiction of the defendant would be competent. The plaintiff does not need to be a Canadian resident or citizen.⁶³

⁵⁴ Grégoire C. N. Webber, “Canada” in *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, Oxford Pro Bono Publico (3 November 2008) at 35.

⁵⁵ *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, U.N.T.S. 75/287 at article 49(6) (which states that “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”), Can. T.S. 1965 No. 20 (entered into force 21 October 1950, accession by Canada 14 May 1965) [*Fourth Geneva Convention*].

⁵⁶ *Rome Statute of the International Criminal Court*, 18 December 1998, art. 8(2)(b)(viii) (which defines as a war crime and prohibits “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies...” (Can. T.S. 2002 No. 13 (entered into force 01 July 2002, accession by Canada 07 July 2000) [*Rome Statute*]).

⁵⁷ R.S.C. 1985, c. G-3, s. 3(1) (provides that “every person who, whether within or outside Canada, commits a grave breach referred to...is guilty of an indictable offence”), Schedule V Protocol 1, Part 1, Article 1(1) (the State undertakes to “to respect and to ensure respect for this Protocol in all circumstances”), and Schedule V Protocol 1, Part V, Section 11, Article 85(4)(a) (includes the transfer by the occupying Power of parts of its own civilian population into the territory it occupies)

⁵⁸ S.C. 2000, c. 24, s. 6 [CAHAWCA]. The CAHAWCA effectively incorporates the crimes outlined in the *Rome Statute* (crimes against humanity, genocide, and war crimes) into Canadian law.

⁵⁹ *McAlister (or Donoghue) v. Stevenson*, [1932] A.C. 562, 101 L.J.P.C 119 [*Donoghue v. Stevenson*].

⁶⁰ Either through statutes of limitations or through judicial discretion.

⁶¹ International Commission of Jurists, “Corporate Complicity & Legal Accountability, Volume 3: Civil Remedies” in *Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes* (2008) at 14 [*ICJ Report, Volume 3*].

⁶² *Ibid.* at 15.

⁶³ Canada, Government Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade, Mining in Developing Countries and Corporate Social Responsibility (Ottawa: House Publications, 17 October 2005)

In Part II, I will explore the contemporary tort law of negligence in Canada, and consider how a civil suit with a fact pattern similar to that of *Bil'in Village* could make use of the existing common law jurisprudence in order to realize a civil remedy in Canada through the tort of negligence.

A. Negligence as a Cause-of-Action in Canada

While the tort of negligence exists virtually throughout the common law jurisdictions of the world,⁶⁴ there is no general consensus among jurisdictions about the distinct elements of negligence as a cause-of-action.⁶⁵ For the purposes of this article, and for simplicity's sake, negligence as a cause-of-action has been divided into six parts, of which each will be examined briefly in turn, and with reference to the *Bil'in Village* fact pattern.⁶⁶

i. Legally Recognizable Loss

In order for negligence law to be invoked in a given situation, the plaintiff must establish that they have suffered some kind of loss which is recognized by law. While "the categories of recoverable loss are not closed and new ones may emerge as different cases arise",⁶⁷ the law explicitly recognizes various types of harm including, but not limited to, life, liberty, physical harm, psychological harm, the loss of property, economic loss, and the loss of reputation. In the case of *Bil'in Village*, the legally recognizable losses that the plaintiffs have pleaded include loss of use of personal and communal property, and the resulting loss of income,⁶⁸ as well as loss of liberty through a violation of their right to freedom of movement.⁶⁹ Within the aegis of legally recognizable losses, therefore, *Bil'in Village* appears to have a valid claim as to damages suffered as a result of the defendant corporations "negligently aiding, abetting and assisting the State of Israel in carrying out an illegal purpose."⁷⁰

ii. Is There a Duty of Care?

Albeit the common law tort of negligence predated the well-known case of *Donoghue v. Stevenson*,⁷¹ it is still undoubtedly one of the most important cases concerning the tort of negligence. Alongside Lord Macmillan's famous quote,⁷² Lord Atkin has also made a name for himself in the same case. With respect to the issue of whether a duty of care exists, Lord Atkin asks and answers:

Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in

at Recommendation 4, (emphasis original) online:

<<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=2030362&File=0>>

⁶⁴ *Ibid.* at 11.

⁶⁵ Linden, Klar & Feldthusen, *supra* note 3 at 155.

⁶⁶ Recognising that the *Bil'in Village* suit has been brought forth in Quebec, which is Canada's only provincial civil law jurisdiction, for the sake of argument this article assumes that a case with a fact pattern analogous to that of *Bil'in Village* could originate within a common law jurisdiction of any province other than Quebec, in which the law of torts, and not delicts, would apply. Nevertheless, for the facility of maintaining continuity of substance (i.e. retaining facts already set out), I will continue to refer to this analogous fact pattern hypothetical as *Bil'in Village*.

⁶⁷ *Martel Building Ltd. v. Canada*, [2000] S.C.J. No. 60, [2000] 2 S.C.R. 860 at ¶ 42.

⁶⁸ *Bil'in Village Motion*, *supra* note 46 at ¶ 33.

⁶⁹ *Ibid.* at ¶ 34.

⁷⁰ *Ibid.* at ¶ 28.

⁷¹ *Supra* note 59.

⁷² *Ibid.*

contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question...⁷³

So what, then, is a duty? According to Lord Atkin, a duty focuses on relationships. Fundamentally, a duty is a legally sanctioned obligation, the breach of which results in the liability of the person owing a duty. It is a question of law in which the judge is required to determine if the defendant is *de jure* obliged to exercise a reasonable standard of care in favour of the plaintiff. At common law, the Supreme Court has developed and modified a duty test that originated with the case of *Anns v. Merton London Borough Council*,⁷⁴ through the more recent case of *Cooper v. Hobart*.⁷⁵

Where a novel case proclaiming duty arises, it is necessary to perform the modified *Anns/Cooper* test. The test has been established as follows:

(1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?⁷⁶

For the first part of the test, the Court considers two branches for determination: reasonable foreseeability, and proximity. With respect to the first branch, the Court asks whether the relationship between the plaintiff and defendant was such that the latter could have reasonably foreseen the risk of harm to the former.⁷⁷ However, in addition to the question of reasonable foreseeability of harm, the Court then considers the supplementary issue of proximity. In reference to Lord Atkin's "neighbour" principle (established in *Donoghue*), McLachlin C.J. and Major J. define "proximity" as "necessary to grounding a duty of care"⁷⁸ between the plaintiff and the defendant such that "the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs."⁷⁹ The factors that a court would have to consider in determining proximity include "expectations, representations, reliance, and the property or other interests involved."⁸⁰ Where a reasonably foreseeable risk of harm, supplemented by a proximate relationship, is found, "a prima facie duty of care may be posited."⁸¹ With reference to *Bil'in Village*, the plaintiffs would have to satisfy the Court that, (1) the defendant corporations should have reasonably foreseen the risk of harm that was involved in building condominiums on land that was appropriated by the State of Israel through an act of war, and (2) bearing in mind the fact that the villagers of Bil'in had their property appropriated by the State of Israel, the defendant corporations should have recognised the villagers' legitimate interests by refusing to contract with the State of Israel and/or its citizens, or should have compensated the villagers for the land, accordingly.

At the second part of the *Anns/Cooper* test, the Court considers the broader questions of policy as they relate to "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally."⁸² These broader policy questions are concerned with, for example, jurisdictional issues, and in particular with the distinction between government policy and execution of policy. Specifically, the Court states that "government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that

⁷³ *Ibid.*

⁷⁴ [1978] A.C. 728, [1977] 2 All E.R. 492 [*Anns*].

⁷⁵ [2001] 3 S.C.R. 537, [2001] S.C.J. 76 [*Cooper*].

⁷⁶ *Ibid.* at ¶ 30.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at ¶ 32.

⁷⁹ *Ibid.* at ¶ 33, citing LaForest J. in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at ¶ 24.

⁸⁰ *Ibid.* at ¶ 34.

⁸¹ *Ibid.* at ¶ 36.

⁸² *Ibid.* at

policy is the prerogative of the elected Legislature” and it is “inappropriate for courts to impose liability for the consequences of a particular policy decision.”⁸³ This policy implication may cause difficulty for a case like that of *Bil’in Village*. Whereas the foreign policy of a State is generally within the purview of the Executive Branch of government, such as in Canada where this authority lies with the Federal Government,⁸⁴ likewise the foreign policy decisions of the Government would not be subject to tort liability. In the context of *Bil’in Village*, though Canada is subject to all the principles and norms of customary international law, as well as the relevant international instruments noted above, a *policy decision* of the Department of Foreign Affairs and International Trade [hereinafter “DFAIT”] not to recognize the rights of Bil’in villagers as against Green Park and Green Mount (which would, by extension, be seen as chastising the State of Israel for its policies towards the OPT) could potentially bar the plaintiffs from ever having their case heard on its merits.

iii. The Standard of Care and the “Reasonable Person”

Perhaps the central aspect of a negligence action is the issue of whether a defendant deviated from the standard of care expected of a reasonable person.⁸⁵ In other words, where an actor’s conduct falls short of a standard which society could have legitimately expected them to adhere to, liability may be incurred by that actor.⁸⁶ But who is the “reasonable person”, and what is the standard of care expected of them? At its most basic, the standard of care of a reasonable person requires “a certain average of conduct” that should be maintained in order for people to live harmoniously (or, at least, civilly) together in society.⁸⁷ In a discussion of the standard of care of “a reasonable and prudent man”, Laidlaw J.A. had this to say about who the “reasonable person” is:

I simply say he is a mythical creature of the law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time. He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not omit to do anything a prudent man would do. He acts in accord with general and approved practice. His conduct is guided by considerations which ordinarily regulate the conduct of human affairs. His conduct is the standard “adopted in the community by persons of ordinary intelligence and prudence.”⁸⁸

For the purposes of this article, it must be recalled that, at law, the term “person” does not apply only to natural persons (i.e. human beings), but also to corporate entities, which are recognized in Canada as having all “the rights, powers and privileges of a natural person.”⁸⁹ Among other things, this legal capacity allows for corporations to both sue and be sued. A corporation, therefore, must also live up to the standard of care of a “reasonable person”, as “each legally distinct corporate

⁸³ *Ibid.* at ¶ 38.

⁸⁴ “The Parliament and Government of Canada shall have all the Powers necessary or proper for performing the Obligations of Canada...towards Foreign Countries...” *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 132, reprinted in R.S.C. 1985, App. II, No. 5.

⁸⁵ Linden, Klar & Feldthusen, *supra* note 3 at 167.

⁸⁶ *ICJ Report, Volume 3, supra* note 61 at 12.

⁸⁷ Oliver Wendell Holmes, “The Common Law” (1881), as cited in Linden, Klar & Feldthusen, *supra* note 3 at 176, n. 4.

⁸⁸ *Arland and Arland v. Taylor*, [1955] O.R. 131, [1955] O.J. No. 544 (C.A.). See also, the judgment of Tindal C.J. in *Vaughan v. Menlove*, Common Pleas. (1837), 3 Bing. N.C. 467, 132 E.R. 490.

⁸⁹ *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 15(1); *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 15; *Quebec Companies Act*, R.S.Q. c. C-38, s. 123.29.

entity is subject to the laws of the countries in which it is based and operates”,⁹⁰ including the law of civil remedies.

The discussion of a reasonable standard of care includes a discussion of unreasonable risk of harm or injury that may occur. There are a number of factors that courts may take stock of in determining whether a person has acted reasonably in the circumstances, including: the magnitude of the risk involved in certain conduct,⁹¹ the gravity of the potential harm,⁹² the purpose of the potential harm,⁹³ avoidance,⁹⁴ custom,⁹⁵ and statutory standards, which is discussed below. In addition, the Supreme Court of Canada in *Reibl v. Hughes*,⁹⁶ has established a form of a “modified objective standard” that relates to the conduct of the defendant, and asks what a reasonable person (the objective element) in those particular circumstances (the subjective element) would have done. To assist in determining what is reasonable in a particular circumstance, the International Commission of Jurists – of which Supreme Court Justice Ian Binnie is a jurist – has set out two questions which it believes a corporation should consider to help delineate whether it is acting within the standards of care required by a particular circumstance. First, did the company know, or should it have known, about the risk of harm that was involved in its conduct? And second, did the company take sufficient measures in order to prevent that risk from materialising?⁹⁷ Essentially, TNCs must act with *due diligence*, which “is determined by the context in which a company is operating, its activities, and the relationships associated with those activities.”⁹⁸

With respect to the question of *where* standards of care are to be found, it is generally understood that custom, legislation, and common law may each be indicative of the factors to be considered in a specific case. As the Village of Bil’in has pleaded in its case against Green Park and Green Mount, statute may provide such a standard. While there is no recognized nominate tort of statutory breach at common law in Canada, the Supreme Court has followed the lead of the United States in simply subsuming statutory breach into the civil law of negligence.⁹⁹ In *Saskatchewan Wheat Pool*, Dickson J. stated that “to be relevant at all, the statutory breach must have caused the damage of which the plaintiff complains. Should this be so, the violation of the statute should be evidence of negligence on the part of the defendant.”¹⁰⁰ This is precisely the approach that the plaintiffs have taken in *Bil’in Village*, where they have pointed to the *Fourth Geneva Convention*, the *Rome Statute of the International Criminal Court*, the *Geneva Conventions Act* and, *inter alia*, the *Crimes Against Humanity and War Crimes Act*, as evidence of statutory breach, and therefore also of negligence (or *delict*, as it is called in Quebec).¹⁰¹ Specifically, the standard of care that is required by these statutes, the breach of which Bil’in Village is arguing that the damages incurred by them have flowed from, is that in times of war an occupying Power (Israel) shall not transfer its own population into the territory it occupies (the OPT, and the Village of Bil’in, in particular). In this case, therefore,

⁹⁰ *Ruggie Report*, *supra* note 7, 6 at ¶ 14.

⁹¹ *Bolton & Others v. Stone*, [1951] A.C. 850, [1951] 1 All E.R. 1078, Judgment 4 by Lord Reid (H.L.), where it is stated that “the test to be applied here is whether the risk of damage...was so small that a reasonable man in the position of the appellants...would have thought it right to refrain from taking steps to prevent the danger.”

⁹² *Paris v. Stepney Borough Council*, [1951] A.C. 367, [1951] 1 All E.R. 32 (H.L.), where it was stated that “The greater risk of injury is not the same thing as the risk of greater injury.”

⁹³ For example, where a police officer is required to fire his weapon in the exercise of his authority, the social utility of the action may be considered against the potential harm caused by the firing of the weapon. See *Priestman v. Colangelo and Smythson*, [1959] S.C.R. 615.

⁹⁴ Considering the cost or burden on the defendant to eliminate or minimise the risk involved, it has been decided that reasonable, affordable, and practical safety measures should be available to combat foreseeable risks wherever possible. See, generally, *Law Estate v. Simice*, [1994] B.C.J. No. 979, 21 C.C.L.T. (2d) 228.

⁹⁵ See, generally, *Waldick v. Malcolm*, [1991] 2 S.C.R. 456, [1991] S.C.J. No. 55, where it was held that “no amount of general community compliance will render negligent conduct ‘reasonable...in all the circumstances’” at ¶ 35.

⁹⁶ [1980] 2 S.C.R. 880, [1980] S.C.J. No. 105

⁹⁷ *ICJ Report, Volume 3, supra* note 61 at 16.

⁹⁸ *Ruggie Report, supra* note 7, 9 at ¶ 25.

⁹⁹ *Canada v. Saskatchewan Wheat Pool*, [1983] S.C.J. No. 14, [1983] 1 S.C.R. 205 [*Saskatchewan Wheat Pool*].

¹⁰⁰ *Ibid.*

¹⁰¹ *Bil’in Village Motion, supra* note 46 at ¶ 26

the standard of care of a reasonable person is respecting the laws of war as they exist under international humanitarian law.

iv. Causation between Wrongful Act and Damage Incurred

In addition to the aforementioned, a plaintiff must establish on a balance of probabilities (i.e. 50% + 1) that a causal link exists between the wrongful act of the defendant and the damage(s) incurred by the plaintiff. In *Snell v. Farrell*,¹⁰² Sopinka J. defined causation as “an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former.”¹⁰³ The test that is generally applied to issues of causation is the “but for” test, which has most recently been reaffirmed by the Supreme Court in *Resurfice Corp. v. Hanke*,¹⁰⁴ in which McLachlin C.J., citing Major J. with approval, held that “the general, but not conclusive, test for causation is the ‘but for’ test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant.”¹⁰⁵

However, the Chief Justice also reinforced the “material contribution” test in *Resurfice*, which fills in the gaps where the “but for” test fails. To satisfy the “material contribution” test, two requirements must be met. First, “it must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test.”¹⁰⁶ And second, “it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered from that injury.”¹⁰⁷

For *Bil’in Village*, the plaintiffs would therefore have to prove that the damages they have incurred are a *direct result* of the corporate defendants’ actions (under the “but for” test), or show that it is impossible for them to show that the harms sustained would not have occurred but for the negligence of the defendants (i.e. that the Government of Israel’s actions somehow prevent the plaintiffs from proving this), and then prove that the defendants nevertheless owed a duty of care to the Village of Bil’in. It seems likely that the latter of the two tests – the “material contribution” test – would be applicable in a common law court.

v. Proximate Cause and Remoteness

Proximate cause, or remoteness, is another means by which courts may limit liability for negligent conduct.¹⁰⁸ According to Allen M. Linden, “the remoteness problem is concerned with whether the defendant, whose conduct has fallen below the accepted standard of the community, should be relieved from paying for damage that his conduct helped to bring about.”¹⁰⁹ The main function of this stage is to draw a line in cases where strange or bizarre consequences of a series of events have resulted, in which it would be inappropriate to attach blame to the defendant. It appears unlikely, considering the relatively straightforward fact pattern of the case as described above, that any meaningful issue of remoteness would arise in the case of *Bil’in Village*. Nevertheless, if some issue of remoteness or proximity was to arise, the due diligence required by TNCs acting abroad would be greatly encouraged. In the words of Professor Linden, “if there remains any prophylactic power in tort law, it would be strengthened by forcing entrepreneurs to

¹⁰² [1990] 2 S.C.R. 311, [1990] S.C.J. No. 73.

¹⁰³ *Ibid.* at ¶ 26.

¹⁰⁴ [2007] 1 S.C.R. 333, [2007] S.C.J. No. 7 [*Resurfice*].

¹⁰⁵ *Ibid.* at ¶ 22, citing Major J. in *Athey*, *supra* note 2, at ¶ 14.

¹⁰⁶ *Ibid.* at ¶ 25.

¹⁰⁷ *Ibid.*

¹⁰⁸ Linden, Klar & Feldthusen, *supra* note 3 at 343.

¹⁰⁹ *Ibid.* at 370.

pay for all the costs of their negligent activities, including the unforeseeable results, so that they will be stimulated to exercise greater care.”¹¹⁰

vi. Availability of Defences to the Defendant

Perhaps the most easily recognizable defence for the corporate defendants in *Bil'in Village* is that of *forum non conveniens*. Simply put, the doctrine of *forum non conveniens* addresses whether another court is a more appropriate forum in which to hear a claim.¹¹¹ The test for this doctrine is set out in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*¹¹² by Sopinka J., where

[it is necessary to] determine whether the domestic forum is the natural forum, that is the forum that on the basis of relevant factors has the closest connection with the action and the parties. [...] Under this test the court must determine whether there is another forum that is clearly more appropriate. [...] In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to *forum non conveniens* outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed.¹¹³

Like *Cambior*,¹¹⁴ therefore, *Bil'in Village* will almost inevitably face a *forum non conveniens* argument by the defendants. However, as per the Israeli High Court of Justice's decision in *Bargil v. Government of Israel*,¹¹⁵ the issue of Israeli settlements is “unjusticiable” as “intervention in questions of policy that are in the jurisdiction of another branch of Government” are inappropriate, in conjunction with the “predominantly political nature of the issue.”¹¹⁶ Because the HCJ is unwilling to adjudicate on matters related to the Israeli settlement policies, it appears as though the only effective recourse to remedy for the Bil'in villagers would be that of Canadian courts, where the corporate defendants are domiciled. Whether this approach will be seen as acceptable to Canadian judges, however, will depend on a number of factors, not least of which will include the political leanings of the Federal Government of the day and its relationship with Israel.

IV. Conclusion

Undoubtedly, economic globalization and the proliferation of TNCs have affected most aspects of human life. Whereas a Canadian corporation would once produce goods or provide services strictly within Canada, and sometimes only within a single province, the liberalization of economic policies, the growth of high technologies, and innovations in the corporate structure have all combined to shape a brave new world in which States' borders seem to be a thing of the past. TNCs can now and do move freely, investing and divesting capital at their whim and, at times, working with foreign governments to achieve common ends. However, it is in this context that internationally recognized rights must now, more than ever, be recognized, protected, and enforced by States which are host to the transience of the globalized corporate structure. This burden weighs most heavily on those States which boast a strong foundation for the rule of law, where legal

¹¹⁰ *Ibid.* at 371.

¹¹¹ Jonathan Horlick, *et al.*, “American and Canadian Civil Actions Alleging Human Rights Violations Abroad by Oil and Gas Companies” (2008) 45 *Alta. L. Rev.* 653 at ¶ 71.

¹¹² [1993] 1 S.C.R. 897, [1993] S.C.

¹¹³ *Ibid.* at ¶ 53.

¹¹⁴ *Supra* note 44.

¹¹⁵ HCJ 4481/91, 25 August 1993 [*Bargil*].

¹¹⁶ *Ibid.* at ¶ 3.

systems are largely fortified against corruption and are mostly insulated from the influence of political elites. And yet, Canada – as a legally advanced society – has not yet taken the appropriate steps to realizing avenues for victims of human rights abuses to seek civil remedies for harms committed against them.

In the case of *Bil'in Village*, which has briefly been discussed in this article, the possibility for Canadian courts to act in honour of the State's international obligations is available. Though the *Bil'in* case is being brought forward in the civil law jurisdiction of Quebec, *Bil'in* would have a chance of success in common law Canada, as well. Based on the considerations of the common law tort of negligence cited above, it appears as though *Bil'in's* most difficult hurdle would relate to the foreign situs of the plaintiffs. The policy considerations of the *Anns/Cooper* test would likely work to the advantage of the defendants, as the courts would be reluctant to step on the feet of elected legislators, while judges themselves may be weary to hear the merits of a case which may be better served in another jurisdiction. Despite these potential drawbacks, however, Canadian courts should strengthen their capacities to hear such complaints, and to become advocates for the kind of access to justice that victims of gross human rights violations deserve.

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Information and Communication Technology (ICT), Gender, and Peacebuilding in Africa: A Case of Missed Connections

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This paper posits that marginalizing women is retrogressive in the peacebuilding process, and that information and communication technology (ICT) can be used to mitigate this problem in Africa. In most of the African continent, women constitute the majority of the population, yet they remain marginalized in knowledge, networks, and economic and political matters. As a result, a lot of energy is left out of the processes of national healing and peacebuilding in post-conflict societies. Peacebuilding processes could be strengthened if organizations, people, and regions connect in effective multi-sectoral and peace building networks, and are provided with active and open knowledge banks. The inter-operability and use of ICT can provide such connections, bridging communication gaps between peace process stakeholders. ICT can be used to facilitate women's participation in this process, from the grassroots upwards.

Introduction

United Nations Resolution 1325 dealing with “Women, Peace and Security”¹ was ground breaking for women’s peace activism in the sense that it provided a coherent policy framework for promoting women’s involvement in the wide array of issues related to peace and security (Crisis Group 2006). However, the impact of this resolution has been more limited in countries where leadership remain hostile to a greater role for women in peacemaking and peacebuilding. What can be done to dismantle the barriers that prevent women from greater participation in conflict prevention, conflict resolution, peacebuilding and post-conflict governance? Yet, women peacebuilders, often without formal support, are trying to bring security to their communities, countries and regions. What can be done to recognise and support the role and capacities of women in preventing and mitigating conflict so that it does not remain an afterthought? Against a backdrop

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¹ The UNSC resolution 1325 provides “the important role of women in the prevention and resolution of conflicts and in peace-building, and ... the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security”. It also mandates that states “ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict”.

of persistent violence, exclusion and decaying social services, many see improving the status of women as an issue to be addressed further down the road, in a time of peace. Consensus is not strong around the view that women in Africa need to be empowered through gendered information and communication technology, which would enable them to be involved confidently in their nations' peacebuilding programmes.

Just like many institutions in Africa, ICT has not escaped the problems of gender discrimination. The belief that technology knows no gender is openly challenged in Africa where technology is not only framed in a masculine way but is refusing to change. Women have watched the benefits of technology accruing to men for a long time from a distance. Even in economies like South Africa, only "17% of women have access to ICT related services" (Huyer and Sikoska 2003). In the majority of cases, women have been left out as a result of their gender rather than supposed incompatibility with ICT. There is a group of critics who argue persuasively that in Africa women need clean water, adequate food, health rather than worry about ICT. They do not see the connection between these necessities and ICT.

On daily basis, in a normal, peaceful African state, structural conditions are pitted against the empowering of women. During times of war, women suffer all kinds of violations, and in post-conflict peace times the cultural stakes are set against them. Some women are married off early in their lives to cover family debts, they are forced out of school to give way to sons, and they are enslaved and kept illiterate because they are women. In violent conflicts that have taken place in modern times in Africa, women have suffered more than their male counterparts because of their "biological fate" or what has been called the "anatomy of destiny", despite their numeral superiority. One example is Zimbabwe where women constitute 52% of the population (CSO 2006). They have suffered the discomfiture of poverty, drought, hunger, imprisonment and degradation.

The inclusion of women in the ICT spheres is necessary for national growth and prosperity (Chamberlain 2002). Yet again they remain marginalized in knowledge, networks, and economic and political matters. Closing and making inaccessible the information management and frameworks to key all stakeholders, particularly women, undermines the ability of ICT to save lives in a crisis situation. Women need to know where they can get information, food, medicines, protection, and networks. ICT can help in this. By inter-operability of information, access will be made possible to all as digital barriers are pulled down by availability of information. Guarantees that systems, tools and mechanisms to exchange information seamlessly, securely and sustainably, need to be put in place.

Those in power must have the political will to achieve peace and to share the information that can be used in peacebuilding and in meeting everyday life challenges. The politicians in Uganda have recognized the importance of ICT in curbing the rural-urban migration and gave it the attention it deserves. They believe that ICT will not only provide rural employment but will stem the urge to migrate into major towns by the youths. The Ugandan government has been very instrumental in setting up telecentres in rural areas under the Rural Communications Development Fund (RCDF). However, despite this effort, the rural communities are yet to benefit fully from this movement. In many places, Internet access and call centres are unavailable because of lack of electricity (Nabwowe 2008). This is a challenge in most of Africa, and it is women who have suffered the worst, since the technology that is available is often monopolized by their male counterparts who have craft competences and literacy to use it. Women have little exposure to education to find this technology of any use to them.

Unfortunately, the ICT revolution has left out many in Africa given the absence of basic infrastructure, high costs of ICT deployment, unfamiliarity with ICTs, dominance of the English language in Internet content, and indeed, the lack of demonstrated benefit from ICTs to address ground-level development challenges. Where ICT is provided, it is heavily barricaded by masculinity in ways that I now seek to explain. These barriers pose problems for women, who are more likely to be illiterate, unfamiliar with English, and lack opportunities for training in computer skills (Gurumurthy 2004). Masculinity is writ large when parents have to choose male children over females to send to school when resources are limited. Domestic responsibilities, cultural restrictions

on mobility, lesser economic power as well as lack of relevance of content to their lives, further marginalise them from the information sector.

Supporting ICT for peacebuilding and conflict transformation is premised here on its ability to facilitate “virtual collaboration” (Hattotuwa, ud) or alternative public space for women. Women can meet and discuss issues and solutions collaboratively on the World Wide Web. ICT can augment this socio-political process and explore further networking options, although virtualisation of peacebuilding is not the final panacea. Peacebuilding still exists within the emotions and problems of the real world, but problems discussed are problems half-solved. Women are naturally disposed to discussing intimate issues with their confidantes, and ICT can allow such discussions to include a wider group of women. Further, ICT for peacebuilding can address gaps in communication within and between multiple tiers of the fabric of society and polity that are party to the peacebuilding process. To succeed, ICT should connect progressive elements of the socio-political fabric that under-gird sustainable peacebuilding including, but not limited to women, children, youth, grass-root communities and rural peace activists, while being careful to avoid extremist and corrosive elements that are detrimental to peacebuilding and conflict transformation.

It is important to note, however, that ICTs can only help in crisis management and peacebuilding if they are based on open standards and are interoperable, facilitating use even in difficult conditions and engendering staff by-ins (ICT4Peace Foundation 2008). The peacebuilding processes could be strengthened if organizations, people and regions connect “in effective multi-sectoral and peace building networks and provided with active and open knowledge banks – with instant access to effective peace building approaches and case studies” (Hattotuwa, 2004). The public, including women, can participate in this process from the grassroots upwards.

This paper argues that sharing information provides women with a platform to engender a culture of open information sharing, where the approach to conflict transformation is one that is holistic, inclusive, and participatory. By supporting the creation of “shared spaces”, a gendered ICT initiative will help the process of conflict transformation.

A Gendered Approach to Information Technology

As inanimate, technology has been viewed as gender and value neutral (Gurumurthy 2004) and having the ability to traverse human cultural barriers. Yet this is not always the case. Feminist literature reflects that women have been “excluded from science, creation, design and use of technology” (ibid: 4). Women are socialized toward non-technical careers (Huyer and Sikoska 2003). Thus, it is patently dangerous to accept that technology works everywhere and provides solutions to development challenges by itself. The effectiveness of technology is dependent on the culture under whose frames it was negotiated and can be transformed.

Women are cultural as well and have multiple identities that interact with gender to define their access to technology. To undo unequal gender relations depends largely on understanding the complex gender interactions and the will to transform them for the better. It is easy for a well to do sophisticated woman to have easy access to the Internet, but unthinkable for the feudal rural woman to have that access to the public telephone, yet they are all women who are driven by different socio-historical circumstances that dictate their daily factors of existence. Such realities are at the heart of the gender and technology discourse. Gurumurthy (2004) reminds us that men and women from the same social context may not have equal access to technology. For instance, if household assets may have unequal ownership, what guarantees that ICT can stand unaffected by gender? Simple technology like a radio may be fully masculine. I remember my father had a tiny radio in the 1970s that my mother had no leisure to listen to, nor was she allowed to join to sit around as men did outside the house. When he left for the city he took it with him or it was safely tucked somewhere waiting for his eventual return. He joined the guerrilla movement for a long time and his radio waited for his long return. By hindsight, it made me think that radios, TVs and computers are masculine assets and microwaves and cookers are feminine.

Historically, technology has been a male preserve, suggesting that the appropriation of the technology by women is a political project that they must fight for with their blood and sweat. Over the decades it has been shown that without explicit attention to gender in policy, gender issues are not considered in implementation (Hafkin 2002:3). Governments argue that they already have gender policies in place and this should obviate the explicit mentioning of gender in every project. To the contrary, evidence shows that, in the technological fields, “policy making ignores the needs, requirements and aspirations of women and girls unless gender requirements are included” (Marcelle 2002: 39). Without specific attention and action, women and girls are always left out (Hafkin, op cit).

The presence of gender issues rarely extends to information and communication technologies. Unlike fields such as health, education, economics, agriculture and rural development, where it is rare to find projects that fail to take into account gender issues, the ICT sector has yet to open to a gender perspective. A recent study of hundreds of development projects, with either ICT as the major sector or with substantial ICT components, showed that more than one-third of all projects had a high degree of awareness of gender issues, but that the gender-sensitivity carried over to the ICT components is only 10 percent of the projects (Ibid: 4).

Persistent gender specific structural inequalities constitute barriers to women’s access to technology. Such barriers are imbedded in education, tradition, economic inequalities, etc (Huyer and Sikoska 2003). In fact, ICTs are designed and created within the male dominated environments and therefore do not necessarily correspond to specific needs of women (ibid.). This is the “gender digital divide”.

Technological Barricades

ICT has become a potent force in transforming social, political and economic life globally. It is viewed as an “intrinsic part of nation building” (Hattotuwa 2003), and has the potential to carry “the new global knowledge based economy” (Huyer and Sikoska, op cit). ICTs “may reshape, reorganize, and restructure working methods” through its “generic advantages of efficiency, information sharing, storage, faster knowledge accumulation, dissemination [which] can permit new and collaborative work methods” (ibid.). Further, ICT can improve “the quality of human life” and can afford “new types of education modalities such as distance learning and online training” (ibid.). ICT is a tool for the transformatory empowerment of women.

Development strategists are encouraging the developing countries to embrace ICTs to avoid further social and economic marginalisation (Ahmed et al, ud.). The uneven distribution of the use of information technologies across the societies is called the “digital divide” and reflects a division between the information “haves” and “have-nots” between and within countries – structured along lines of race, ethnic group, class, age, region, and gender – separating those who have access to abundant information resources from those who do not.

Women within developing countries are in the deepest part of the divide. They are further removed from the information age than are the men whose poverty they share. Bisnath (2005) attributes the barriers in the path of women to gender inequality and technical. These are resource endowments, infrastructure, telecommunication policies, skills and educational levels, socio-cultural norms, positions of men and women in production and reproduction, and digital preparedness of the country in question. Huyer and Sikoska (2003) reiterate that the same problems always stand in the way of women’s progress: unequal educational access, glass ceilings in industry and research, lack of financial resources resulting from the women themselves or choices made by their families.

The gender gap in the digital divide is of increasing concern; if access to and use of these technologies is directly linked to social and economic development, then it is imperative to ensure that women in developing countries understand the significance of these technologies and use them (ibid.). The lack of access to information and communication technologies is a significant factor in the further marginalization of women from the economic, social, and political mainstream of their

countries and of the world. Without full participation in the use of information technology, women are left without the key to participation in the global world of the twenty-first century (ibid.). Due to these problems, it is important to challenge the apparent lack of visibility of women as users and developers of ICT. The starting point is to pull down perceptions that “women are less suited to or interested in working with technology” (Huyer and Sikoska 2003). The truth is that women’s lack of engagement is due to gender inequality than “women’s lack of compatibility with technology”.

ICT and Peacebuilding in Divided Societies

Boutros-Ghali (1995) defines peacebuilding as “comprehensive efforts to identify and support structures which will consolidate peace and advance a sense of confidence and well being among people”. It is hard work, demanding everyone’s contribution in disarming, repatriating refugees, restoring institutions, retraining security personnel, monitoring elections, reengineering political institutions for democratic governance, and protecting civil liberties and human rights. Of course, this requires more than men’s contributions. Women need to take part because they were involved actively in the conflicts as combatants, victims or supporters. Leaving them out is an opportunity cost, yet they face barriers to full participation ranging from the physical to the social.

In Africa as elsewhere, peacebuilding must go beyond sorting “political and institutional deficits” (Llamazares 2005) to healing lives damaged by protracted conflicts. Many people have had their sense of self-respect and esteem violated by conflict and have been left scattered across the rural areas as Internally Displaced People (IDPs) and left in refugee camps. Cognizant of the geo-location of most women in Africa in rural settings, the use of ICT can enable them to be reached and participate in peacebuilding efforts without having to relocate them to urban areas.

Women in post-conflict societies share common issues that they can creatively transform through ICT platforms. ICT coffers a great deal of potential to connect women that are separated by language, stereotypes, distance and mistrust, even though they still share fears and hopes for peaceful futures. If ICT is neutral as suggested by some, then it can catalyse intra- and inter-communal dialogues, create powerful people-led foundations that can act as a bulwark against regression. Yet this is not the case when it comes to involving women in real issues of peace and nation building, as ICT has been kept as a male preserve.

Peacebuilding has become profoundly multidimensional, taking in humanitarian workers, Non Governmental Organisations, United Nations bodies, governments, global financial institutions, and from the bottom up, peace activists, women and children. This requires “multilevel approaches” to increase inter-connectedness (Lederach 1997). ICT can be used to reach out to all forces in peacebuilding including women, and embraced for its potential in advocacy and dissemination of information and policy alternatives. However, this potential can be seriously hampered by the usual “lack of funding to purchase equipment or services, lack of skilled staff, little time and interest” (Hattotuwa 2003:3). But despite the challenges, in Zambia, mobile phone networks are used to advocate women’s rights; in Douala the Internet is available to women entrepreneurs in textile industries; in Uganda, ICT and mobile phone businesses are used as instruments of change by rural women; and even professional women in Kenya are fast reaping the ICT benefits.

In some cases, available websites are carelessly designed to be of little use to rural women. Some lack the content that can capture the attention of these women and in most of the cases they are written in a language that is difficult to understand. A good site is the Centre for Women Research (CENWOR) of Sri Lanka www.cenwor.lk that serves as an information source for the Sri Lankan women. The site is interactive and provides critical information facing women, and action taken by the government and other agencies. It also provides a communication platform transcending all types of boundaries for women and women’s organizations striving to realize women’s rights (ibid.). This platform is effectively eroding the gender barriers pitted against women in the country.

The corpus of conflict resolution literature proffers that it is possible to transcend conflict if parties can be helped to analyse, explore, questions and then reframe their interests and positions (Hottotuwa 2004). ICT can energise the creative dynamics of societies to fully engage with paradigm shifts necessary for envisioning a state without protracted conflicts. ICT fertilizes the process of peacebuilding itself (ibid.) by engendering subtle changes in the socio-political relations through interacting protagonists who may not be able to meet face to face in the “real world” through virtual spaces. INSTRAW virtual seminars demonstrate the potential of ICT in engaging women (Huyer and Sikoska 2003) in e-democracy.

Recommendations and Best Practices

ICT for peacebuilding should form the repository for documents, press releases and other information related to the peace process. Hattotuwa (2006) suggests ICT instruments that can be used to embrace all. He identifies community podcasting and Internet radios, Skypecasts, micro-grants for blogging, cheap digital cameras, oral histories, and establishing women, children and youth media houses as instruments that can be profitably used by rural women in Africa for peacebuilding. Community podcasting and internet radios are often required in conflict to capture the voices and hope of people in support of peace.

Through “new media such as digital audio / video / mobile video / MMS, it is possible to link community driven production of media that addresses local issues. Community radio stations often find that they are prey to legislation that often restricts their freedom to broadcast issues seen as too sensitive by the incumbent government. Internet radio and websites by-pass these restrictions” (ibid). Internet radio for grassroots involves those who cannot read or write. Literacy is not a requirement for digital media production that seeks to capture the views of those who may not be able to read and write, but through their life experiences may have valuable insights into conflict transformation and related issues such as reconciliation, transformative justice and co-existence.

This technology is sustainable as long as existing technology (such as mobile phones) is thoroughly exploited, rather than creating a whole new technology for reaching out to the marginalised women and communities. The ICTs can help to revitalise stagnant dialogues and sustain difficult processes of peacebuilding by providing spaces for sustained dialogue even when Track One processes have run aground (Hattotuwa 2006). Through the internet and radio broadcasts, the efforts of peacebuilders are augmented by enhanced channels, avenues and possibilities for communication, information and knowledge sharing, collaboration, empowerment and discussion in virtual spaces, even when physical, real world meetings are impossible on account of geographical distance or political sensitivities.

The skypecasts allow a large audience to participate, using Skype as well as PSTN phones, in discussions that can be on any topic. Skype is free, Skype to Skype calls are free, and for Skype to work, all that is required is a decent ISDN connection. Rural women may only need to purchase the ISDN connection and the equipment for them to broadcast. Donors need to be motivated to support women’s projects that can enable their voices to be heard. In areas which are not on national electricity grid, solar energy driven with rechargeable batteries need to be made available for easy access for women.

Women can exploit their access to these technologies to “create Skypecasts on peace from the grassroots itself” – say a village meeting with a global audience including members from the diaspora chipping in. Such a series of recorded Skypecasts can be a useful way to capture community driven ideas for peace with international and regional voices in support of such ideas. Shared and borderless sources of ideas will not only improve the quantity and quality of information the women may have, but even their self-esteem. If women knew that people were listening to their arguments across the globe, it would empower and engender in them a new spirit.

There is need to provide women micro-credit for blogging in Africa. Blogging is an urban phenomenon and there is need to take to the rural areas where the majority of women live. If

blogging engenders democratic dialogue, it needs to go into places outside of the cities. Blogs that are based in the grassroots itself, and can promote voices of the community, can be a useful way of capturing voices in support of peace. The emphasis here should be on blogs that promote a multiplicity of voices, particularly that which ensures diversity and gender participation.

Women need also to be provided with digital cameras to capture the world around them as they see it along with their thoughts on the challenges of peacebuilding. CD-ROMs based on the lives of an activist in conflict zones, an activist in an urban centre, a web based activist and an activist in the diaspora may be produced as reference material for the people in bureaucratic decision levels to fall back on when crafting nation and peacebuilding policies. The Ugandan CD-ROM project based on the Nakaseke and Buwama telecentres explained by Mijumbi (2002) provides a good starting point for African women. The women who used the CD-ROM have become more confident, knowledgeable, prepared to experiment with new approaches, and more willing to compare situations for joint solutions (Huyer and Sikoska 2003). Further, women emerged not only with greater knowledge but also with enriched self-esteem.

Oral histories need to be recorded from the people who participated in making that history. However, conflicts often erase voices. Peace needs to preserve voices. However, when voices are captured, only the voices of those with power are captured. Poor women's voices, those who suffered the tragedies of the conflict are left out. Digital media offers unique ways through which voices that are important and most vulnerable, can be captured and promoted, so as to protect valuable ideas for social change even if their authors are killed. Simple recording devices can be given to communities (keeping in mind gender, age, ethnic, economic, class, caste, religious diversity) and capture their voices that support peace.

Women, youth and children need to be supported in setting up their own small media production houses. National regulations may need to be relaxed, particularly in Africa where alternative sources of information are viewed by the governments with scepticism. With the help of donor financial support, acquisition of new technology would make setting up the houses reasonably inexpensive. Women and youth media bring very different perspectives to peace and conflict reporting as well as general programming. Children and youth have much more access to political leaders than do adults and can get away with asking some seemingly simple but precise questions that go to the heart of peacebuilding.

Innovative websites need to be created in vernacular languages to reach women who are often not educated in foreign languages like English and French. Since most women are impeded by lack of education to engage effectively with ICTs, there is a need to ensure "soft access" to the less literate and educated by developing appropriate software applications and content. For example, Web 2.0 mash-ups that tell the narratives of those involved in peacebuilding through the use of Flickr photos, audio / podcasts, GIS (Google Maps), blogs, mobile video, MMS or SMS (like myspace.com, but geared for peacebuilding) can be used. Projects such as www.witness.org use digital media to record human rights violations. When all these are made accessible to women, great strides may be made in solid peacebuilding in Africa.

There is no need to continually blame the victims by feeling "that women are reluctant to invest either their time in learning how to use the technology or financial resources needed for access" (Huyer and Sikoska 2003). Women have been too severely battered by the weight of masculinity to take further blame for their problems. They have been frequently disadvantaged by culture and inequitable access to all kinds of resources.

Challenges

There are challenges for ICT in peacebuilding in spite of its phenomenal potential to augment the interventions of individual women in many areas of peacebuilding process like rebuilding trust between communities, creating dialogues within and between ethnic groups, giving voice to the marginalized women and youth, and enabling grassroot participation in the dialogues

related to peacebuilding. What discourages wide and regular use of ICT are the high capital and recurrent costs which most of the women and their organizations cannot meet. This dovetails into the problem of access. By elbowing women out of ICT through bad policies, this disempowers them from having a voice in the peacebuilding processes when in fact, ICT must be able to facilitate the building of social capital that can empower women and “local communities to grapple with conflicts in a non-violent way” (Hattotuwa 2004).

The other challenge is the trust that people can conduct critical discussion in virtual spaces while being assured of confidentiality of shared content. This is important in countries where terror and violence is heavily embedded and people cannot afford to trust the next person. How would it be possible to trust a worldly technology that one does not control? Next is sustainability of the ICT in a world where equipment can be novel today and obsolete the next day. The question of compatibility is important as well. There are the issues of breakdowns and back up the problems; of viral invasions and proper software to clean may be discouraging challenges for women who are financially weak due to structural gender imperatives. Further challenges like vernacular content/interface/questions of accessibility, connectivity/infrastructure/ bandwidth, lack of IT knowledge and lack of finance to buy the hardware and software remain prominent. While some of the challenges may be addressed by donor funds, the question of sustainability needs more than donor support but the strengthened arm of the beneficiary.

Finally, the lack of technological ownership by women is a huge challenge to be overcome if women are going to take a lead in peacebuilding. A sense of ownership is an important precondition for overcoming the barriers to women’s access to and use of ICTs. To achieve this fullness of ownership, “it is important that ICT tools are tailored to the specific needs of women” (Huyer and Sikoska 2003) and this feat can only be overcome by serious advocacy by the women themselves for other women. Women need to curve inroads into the realm of policy making to influence the ICT policy making for a gender perspective.

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War on Drugs and War on Terror: Case of Afghanistan

Daniela Corti and Ashok Swain*

The drug trade is a very important component of Afghanistan's economy. In the post 9/11 period, the United States has put a high priority to its war against drugs policy in Afghanistan after linking the drug trade to the financing of the Islamic terrorist groups. The basic strategy of US war on drugs policy in Afghanistan is forcible eradication of opium (poppy) cultivation, which has somewhat failed in controlling the production of illicit drug, rather it has brought further miseries to a large number of poor "poppy" farmers and their families. This article argues for a review of the present US policy of war on drugs in Afghanistan, and calls for working towards providing other sources of livelihood to the Afghan population.

The US policy of War on Drugs in Afghanistan

The traditional security concept has come under serious scrutiny these days for its inability to address the newly emerging challenges. Following the end of the Cold War, there is a greater demand from the research and policy communities for a broader concept of security, not only focused on the military-political dimension. New threats and emerging challenges to state security posed by the current context – increasing internal conflicts, explosion of ethnic rivalries, major economic interconnection – have imposed the necessity to consider security as a multidimensional issue. In this backdrop, drug production and trafficking have started to be considered a serious security problem with social, political, and economic implications at local, national, and transnational levels.¹

At the societal and national level, drugs revenues can increase corruption and undermine the political stability of the legitimate government, particularly in relatively weak and poor countries in the South. The danger is embodied by the negative spiral of economic and political instability generated in states, which are vulnerable to drugs business. On the other hand, social and political chaos contributes to the thriving of the narcotics industry.² Drugs may not be responsible for the

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¹ Swanstrom, 'The Narcotics Trade: A Threat to Security? National and Transnational Implications', 1-6.

² Ibid., 3-4, 11.

commencement of the conflict; there is, however, a positive correlation with conflict duration, as it could lengthen the life cycle of conflicts.³

Drug related crime also has important consequences at the transnational level. The existing prohibition system has made the narcotics trade one of the most lucrative businesses in the world, second only to the weapons sector. According to the International Monetary Fund (IMF), US \$ 500 billion – US \$ 1.5 trillion are channeled through the international banking system⁴. Funds generated by illicit drug economy can be used to fuel ethnic rivalries, separatism and religious extremism.

Drugs also pose a threat to the security of human health. The production and transit regions have experienced a dramatic growth of HIV-AIDS and Hepatitis C. The Central Asian countries are particularly affected by these problems.⁵ In the eyes of traditional security analysts, the illicit drug industry and the mafia pose challenges to state interest and security. The production and trafficking of illicit drugs can represent a threat to the political sovereignty, undermining the legal authorities and the fundamental institutions of the state.⁶

TABLE 1: Countries who are Major Sources of Illicit Drugs

Type of Illicit Drug	Continent	Countries and their share of Global production	
Coca leaf	South America	Colombia	60%
		Peru	29%
		Bolivia	10%
Opium	Asia	Afghanistan	92%
		Burma/Myanmar	5%
Hashish (Resin cannabis) ⁷	Africa	Morocco	26.9%

Table 1. Source: UNODC Report 2008.

In recent years, terrorism is increasingly being considered as a very serious threat to state and global security. Narcotics trade and terrorism have traditionally been treated as two separate and distinct threats within security discourse.⁸ In the 1990's, however, researchers and scholars have started to focus on the increasing association between organized crime and terrorist organizations. Particularly after the 9/11 attacks, the international community is increasingly considering illicit drug trade and terrorism as two interconnected phenomena. The major concern is the possibility that terrorist organizations can make use of drug trafficking networks to generate funds for their arms and equipments.⁹ According to the US Department of State, fourteen out of thirty-six foreign terrorist organizations are now involved in trafficking narcotics.¹⁰

Pragmatically, terror outfits look for financial opportunities to support their operations. This effort has become acute in the post Cold War era, as there has been a significant drop in material and logistic support from the superpowers. Most recently, the global war on terrorism – pursued by the West – has made it more difficult for terrorist groups to finance their activities. They thus seek a source of income in drug trafficking, as in other illicit trades. This transformation has brought serious

³ Cornell, 'Narcotics and Armed Conflict: Interaction and Implications', 207-208.

⁴ Swanstrom, 'The Narcotics Trade: A Threat to Security? National and Transnational Implications', 3-4; US Department of State, *International Narcotic Control Strategy Report 2008*.

⁵ Swanstrom, 'The Narcotics Trade: A Threat to Security? National and Transnational Implication', 11-13.

⁶ Dupont, 'Transnational Crime, Drugs, and Security in East Asia', 435-436.

⁷ Cannabis as herb (marijuana) is produced all over the world: North America 31%, South America 24%, Africa 22%, Asia 16%, Europe 6% and Oceania 1%. UNODC Report 2008, p. 97

⁸ Björnehed, 'Narco-Terrorism: The Merger of the War on Drugs and the War on Terror', 305.

⁹ Ibid., 305.

¹⁰ Sanderson, 'Transnational Terror and Organized Crime: Blurring the Lines', 50.

worries for the analysts and policy makers of the West, and there is an increasing agreement for greater coordination between war on drug and war on terror.¹¹

In the global war of terror after 9/11, Afghanistan became the first country to receive serious attention, and with the help of armed intervention by US led international forces, a regime change was brought in. America’s subsequent engagement in Iraq diverted the focus from this country for some time. The increasingly deteriorating security situation and massive opium production in recent years have forced the US and Europe to seriously reengage in Afghanistan. The Obama administration has already declared its military priority to be focused in Afghanistan.

Table 2: Opium Cultivation and Production in Afghanistan

AFGHANI STAN	199 6	199 7	199 8	199 9	200 0	200 1	200 2	200 3	2004	2005	2006	2007
Cultivatio n (hectares)	56.8 42	58.4 16	63.6 74	90.5 83	82.1 71	7.6 06	74.1 00	80.0 00	131.0 00	104.0 00	165.0 00	193.0 00
Potential productio n (metric tons)	2.24 8	2.80 4	2.69 3	4.56 5	3.27 6	185	3.40 0	3.60 0	4.200	4.100	6.100	8.200

Table 2. Source: UNODC Report 2008.

According to the United Nations Office on Drugs and Crime (UNODC) and the International Narcotics Control Board (INCB), Afghanistan is the world’s main producer of illicit opium, with 193,000 hectares of land under poppy cultivation and an estimated opium production of 8,200 tons in 2007.¹² The latest Afghan Opium Survey of the UNODC estimates that in 2008 there was a decrease to 153,000 hectares of land used for this illicit poppy cultivation, which is a 19 per cent drop from the previous year, and a corresponding opium production potential of 7,700 tons, which is six per cent less. Nonetheless, the influence of this country in the global production remains unchanged: as it continues to account for 93 per cent of the global share.¹³ Despite the reductions in potential production, therefore, there is a growing anxiety about the continued and widespread cultivation and subsequent opium smuggling via neighbouring countries to Europe.

Drugs from Afghanistan rarely reach the American market; the main concern of the United States seems to be the existing and potential links between the drug trade and terrorism. The United States strongly underlines the connection between the narcotics trade and the anti-government insurgency spearheaded by the Taliban: the lucrative opium business provide funds to the terror group for arms and sustains their insurgency against Karzai regime and international forces. In a policy response, the US has made counter-narcotics as much a priority as its counter-insurgency policies. The US State Department’s International Narcotics Control Strategy Report (INCSR) argues that during recent years, poppy fields have thrived in provinces where the Taliban are most active.¹⁴ Thus, Taliban, drug traffickers and poppy farmers are being measured in the same yardstick and the strategy for addressing the issue has been mostly law enforcement in nature. However, drug production in Afghanistan has deep and complex roots, and hoping for quick solutions to this problem is counterproductive and illusory.¹⁵ Thus, it is important to understand the relationship

¹¹ Björnehed, ‘Narco-Terrorism: The Merger of the War on Drugs and the War on Terror’, 305.

¹² INCB, *Annual Report 2007*, 8.

¹³ UNODC, *2008 Annual Opium Poppy Survey*, 1.

¹⁴ United States Department of State, Bureau for International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy Report (INCSR) 2008*, 235.

¹⁵ Jelsma, Kramer, Rivier, *Losing Ground: Drug Control and War in Afghanistan*, 3.

between drug networks and Taliban forces in order to examine the effectiveness of counter-narcotics policy pursued in Afghanistan.

The current US-led strategy against drug production in Afghanistan is somewhat inspired by its *war on drugs* policy, pursued from the 1970's, which involves attempts to reduce the availability of narcotics from foreign sources with the intended result of reducing domestic levels of drug addiction. The US policy against drug trafficking can truly be seen as a crusade. According to Pierre Arnaud Chouvy,¹⁶ the overall US policy against illegal drugs is not a coherent or practical one, but rather is ruled by a strong and unquestionable ideology grounded in a repressive approach towards some drugs.¹⁷ The main objective of the US counter-narcotics strategy is to achieve a reduction of drug availability through repressive policy. It aims to reduce drug addiction by eradicating the international supply, especially the cultivation in the South. According to Alfred McCoy, the pillars of this approach are: (a) reduction in foreign supply, (2) global prohibition, (3) inelastic global drug market dynamics (this model does not consider drugs as subject to the complexities of market supply/demand dynamics in the same way as other commodities), and (4) existing axiomatic correlation between repression and positive outcome of lower drug supply.¹⁸

Unfortunately, this policy suffers from severe drawbacks. To begin with, the international heroin trade is elastic and has the ability to suddenly respond to repressive policies in a specific region through delocalizing cultivations. Forced eradications, increasing narcotic seizures, and repressive operations have little effectiveness because of the potentially infinite spatial opportunities of a globalized narco-cultivation network. Crop eradication only shifts opium fields, it does not eliminate them. This strategy can produce unintended effects, such as raising the price of drugs and therefore stimulating illicit production.¹⁹

The Nixon administration initiated this America's so-called *war on drugs* policy in the early 1970s.²⁰ In his speech of 17 June 1971, Nixon declared the abuse of illicit substances as "public enemy number one in the United States." His special target was Turkish production, which he asked for a policy to impose a total ban of opium production with massive eradication programs. This policy had some initial success. However, after some time, the global market responded to this new situation, as the constant demand coupled with a decreasing supply (due to the eradication in Turkey) stimulated the rise of prices and, consequently, the increase opium production in other regions, particularly in other parts of Asia.²¹

The fight against drugs is characterized by a progressive militarization of the issue, as seen by the various interventions, military agreements on no fly zones, strong investments in the armed forces (especially in South America, e.g. Colombia). The drug issue was in fact considered to be a national security issue by the US, in the framework of the *Low Intensity Conflict* theory elaborated by Pentagon in the 1980's. President Reagan officially added drug trafficking to the list of threats to national security with his secret directive number 221, signed on April 1986.²² This directive authorized the US military to intervene abroad in order to fight against drug production.

In the pursuit of the eradication of the international supply of illicit drugs, the US has spent billions of dollars and has repeatedly used its military might in many parts of the world, but the war is far from being won. Opium production is particularly thriving in South West Asia, especially in Afghanistan where worldwide supply is almost totally concentrated; drug trafficking is developing in this region, and is now affecting neighbouring countries as well.

¹⁶ Pierre Arnaud Chouvy is a geographer and a Research Fellow at the Centre National de la Recherche Scientifique (CNRS). He is a specialist on geopolitics of drugs, in particular on the history and production of opium in Asia. He is also the author of the web site: www.geopium.org.

¹⁷ Aubron, 'L'éradication précipitée du pivot peut avoir un coût humain catastrophique', *Liberation*, 13 March 2005, 46.

¹⁸ McCoy, 'From Free Trade to Prohibition: a Critical History of the Modern Asian Opium Trade', 307-311.

¹⁹ *Ibid.*, 312.

²⁰ Chouvy, 'Afghanistan's Opium Production in Perspective', 23.

²¹ McCoy, 'From Free Trade to Prohibition: a Critical History of the Modern Asian Opium Trade', 330-333.

²² Del Olmo, 'Drogues et conflits de faible intensité en Amérique latine', 303-315.

Afghanistan and its History of Drug Production

As its history demonstrates, opium production and its trade have long played a central role in the politics and geopolitics of Afghanistan. It is not a new trend. As part of the Golden Crescent Region, Afghanistan, together with Iran and Pakistan, have positioned themselves as the main source of opium since the early 1970s, as documented by Catherine Lamour and Michel Lamberti (1972) in their famous work "*Les grandes manoeuvres de l'opium*". Their study paid attention to the border region of Pathanistan²³ where traditional Pashtun tribes live in the absence of formal state control, governed by their local chiefs. Under the Colonial British administration and then in Pakistan, Pashtuns enjoyed a greater degree of autonomy, and received conspicuous subsidies from state. This particular state of affairs provided a very fertile ground of all sorts of illicit activities. Beyond the smuggling of phones, electrical goods or other household commodities, the local population proved to be highly skilled in trading and producing arms, ammunitions, and of course trafficking lucrative illicit drugs. Phatanistan, for a long period remained as the main source of opium supply to the world: poppy fields producing high quality opium were concentrated on both sides of the Afghan-Pakistani border. In the 1980s, Pakistan had a 70 per cent share of worldwide opium production.²⁴

The Cold War helped the narco-economies to thrive in South-West Asia – and heroin production in particular – at the time of the Soviet-Afghan conflict of 1979. An intense narcotic smuggling network developed thanks to the covert operations of the Pakistani Inter Service Intelligence (ISI) and the American Central Intelligence Agency (CIA). The US intelligence officials closed their eyes to drug trafficking as their main goal was after all to defeat the Soviet Union in Afghanistan. Americans provided arms and other logistical support to Mujhaideens, describing them as freedom fighters.²⁵ While initially narco-trafficking was directly promoted by the US and Pakistani intelligence services for raising funds to purchase the Mujhaideen's war accessories, once the Soviet Union pulled out of Afghanistan, the absence of the rule of law further intensified it. In the aftermath of Soviet withdrawal, Afghanistan experienced a bloody civil war, which completely destroyed central authority and reinforced the tribal leadership in various parts of the country, allowing various warlords and druglords to prosper in a system of civil chaos and anarchy.²⁶

With the onset of anarchy in the country in the post-Soviet period, a remarkable increase of opium production was registered in 1990s. Several thousand refugees returned after years of war, taking their lands and beginning to cultivate the only profitable crop: the opium poppy. In fact, by 1991, Afghanistan surpassed Burma in becoming the largest narcotics producer. Not only the opium production but also its refining process to make morphine and heroin²⁷ boomed whilst banditry and civil war affected the country. Taking political advantage of the lawlessness, a fundamentalist Islamic movement, the Taliban, captured state power with the help of Pakistani ISI and Saudi financial support.²⁸ By 1996, they controlled 80 per cent of the country and brought order to the countryside. After the defeat of several tribal war-lords, the Taliban reopened the country's drug routes to enable highly profitable smuggling between Pakistan, Iran and Central Asia.

Ideologically, the Taliban were against drug production and consumption; however they recognized the importance of this crop to Afghanistan's fragile economy. While drug consumption was strictly forbidden, the production and trade of narcotics was considered inadvisable but

²³ This region, like Baluchistan, was divided between Afghanistan and Pakistan by the *Durand Line* (1878) at the time of English colonialism.

²⁴ Del Olmo, 'Drogues et conflits de faible intensité en Amérique latine', 303-315.

²⁵ Chandra, 'Warlords, Drugs and the "War on Terror" in Afghanistan: Paradoxes', 77.

²⁶ *Ibid.*, 68.

²⁷ Heroin is synthesized from the raw opium. The procedures are relatively uncomplicated and cheap. The German pharmaceutical company Bayer produces it for the first time in 1989. Heroin is a strong painkiller and sedative used for medical and recreational purposes: it has euphoric and analgesic effect. In case of overdose, heroin is lethal.

²⁸ Taliban usually do not bring out press releases nor grant interview to journalists. In the line of Red Khmer regime of Cambodia, they represent one of the most secret politic movements in the world.

undertaken due to necessity. The Taliban allowed the cultivation of opium poppies with religious authorization; poppy fields were tolerated, especially in Helmand and Nangarhar provinces where the loyal Pashtun tribes represented the majority and opposed Tagik or Hazar tribal organizations.²⁹ The opposition to the Taliban was formed by a heterogeneous coalition centered around the Northern Alliance, created by different ethnicities living in Afghanistan and in other neighbouring countries (Iran, Turkey, India, Russia, Uzbekistan, Kazakhstan, Kyrgyzstan, and Tajikistan). The Taliban, coming from the Pashtun tribes, were instead backed at the international level by few nations: only Pakistan, Saudi Arabia, and United Arab Emirates had recognized them as the legitimate government of Afghanistan.³⁰

Opium production was allowed by the Taliban regime because this drug was consumed mainly by *Kafir* (faithless) and less so by Muslims. The leader of the Taliban, Mullah Mohammed Omar, presented his position in a rare interview with Bizhan Torabi of Death Press Agentur and then published by the French review *Politique Internationale*. He argued that although the fight against drugs is a long-term objective, it is not possible to destroy the opium cultivation quickly since the livelihoods of thousands of farmers dependent upon the revenues it generated. He firmly asserted that the Taliban regime would not have allowed the farmers to cultivate poppy if that opium and heroin were destined to the Afghan market. He reasoned that it was not a duty of the Taliban to be responsible for the drug addictions of non-Muslims, their only duty being to protect the Afghan Muslim youths from developing the same addictions.³¹

The Taliban administration applied the *zakhat* tax on any income, normally equivalent to 2.5 per cent of total income, but inflated to as much as 20 per cent in the case of profits from opium trade.³² Opium production was also subjected to the *ochor* system that assigned one third of the profits to impoverished, blind, and disabled persons.³³

Except for the extraordinary harvest in 1994, national opium production levels remained unchanged until 1998, with an annual average of 2500 tons. Then, in 1999, a strong increase was registered with 4500 tons. Overall, the land devoted to opium poppy grew from 64,000 to 91,000 hectares under the Taliban regime.³⁴ In September 1999, Mullah Omar for both political and economic reasons, issued a religious decree (*fatwa*) calling for the reduction of opium production by one third, followed by a total ban in the next year. Accordingly, opium production decreased from 3300 tons to only 185 tons, 180 of which came from the region controlled by the Northern Alliance (Badakshan province). The areas under Taliban control were able to almost completely eradicate all opium production.³⁵

The cultivation ban imposed by the Taliban in 1999/2000 served a dual purpose for the regime: it demonstrated their willingness to placate western concerns over opium, while it also substantially raised the price of opium in world market, from US\$ 40-60 to US\$ 400-600 per kilogram.³⁶ Given the massive amount of stockpiled opium that the Taliban controlled, there was obviously a great economic incentive for this eradication effort. Mullah Omar again imposed a *fatwa* calling for a total ban on opium cultivation, but the events of the following months did not allow examining its real motive. The 9/11 attacks brought serious repercussions for the Taliban in Afghanistan from the international community.

Their refusal to hand over Al Qaeda leaders led to US-led military intervention, which brought the downfall of the regime. Their departure left the question open as to whether their decree on banning opium production in 1999/2000 was a fundamental policy shift or merely an opportunistic political/economic action. Since the late 1990s, the US policy has linked its

²⁹ Labrousse, *Géopolitique des drogues*, 95, 97-98.

³⁰ Mansfield, *Briefing Paper: The displacement of Opium Poppy Cultivation: A Shift in the Regional Threat?*, 10.

³¹ Labrousse, *Géopolitique des drogues*, 99-100.

³² Rashid, *Taliban. Islam, Oil and the New Great Game in Central Asia*, 118.

³³ Labrousse, *Géopolitique des drogues*, 98.

³⁴ *Ibid.*, 29.

³⁵ Labrousse, *Dictionnaire géopolitique des drogues: la drogue dans 134 pays. Productions, trafics, conflits, usages*, 25-26.

³⁶ Rubin and Sherman, *Counter-Narcotics to Stabilize Afghanistan: The False Promise of Crop Eradication*, 27.

counternarcotics policy with counterterrorism policy in Afghanistan. However, there is modest proof of a direct involvement by Al Qaida in the international drug trafficking network. The 9-11 Commission found little evidence to confirm this accusation. Groups known to be involved in the illicit drug economy were rather the Sunni Hizb-i Islami group of Gulbuddin Hekmatyar and the Taliban.³⁷ However, according to the World Bank and UNODC, the Taliban derived more income and foreign exchange in the period 1996-2000 from taxing smuggled goods from Dubai to Pakistan than from the drug industry. Even now, the Taliban have several sources of income and they are not economically dependent on the narcotics trade only.³⁸ This reality, however, has not stopped the United Nations Office on Drugs and Crime to argue that “fighting drug trafficking equals fighting terrorism”.³⁹ The UNODC and other international agencies specialized in drug issues are supporting the US strategy that emphasizes links between the opium economy and insurgency. As a result, it is usually perceived that the main security threat in Afghanistan is the opium production, which is assumed to primarily support and sustain the Taliban and Al Qaeda.

While the Western media has regularly repeated the theory that illicit opium production is the main source of financial support for the Taliban, the Taliban are not currently the only factions involved in drug trafficking. After the fall of the Taliban, the various Mujahideen actors re-established themselves and quickly filled in the power vacuum.⁴⁰ Despite the election of Hamid Karzai as President in 2004 and parliamentary the elections in 2005, Afghan democracy is still very shaky. The central government authority still remains confined to Kabul. President Karzai needs the cooperation and the backing of the Mujahideen/warlord factions to stay in power. Many of Karzai’s political allies are in fact warlords directly involved in the narcotics production and trafficking.⁴¹ Moreover, since the Bonn agreement in December 2001, drug trafficking has had a marginal relationship with the Taliban and Al Qaeda; the profits of the drug trade, it seems, are associated more so with the people and groups in power.⁴²

Growing Drug Economy in Afghanistan: Its Regional and International Implications

The growing illicit drug market in Afghanistan has dangerous consequences for both regional and international security. The large scale trafficking of drugs destabilizes neighbouring states by encouraging crime, violence, and corruption – especially if those states are already economically and politically unstable. It also increases insecurity in the form of drug addiction (especially of heroin) and the spread of HIV and AIDS in the region.⁴³ These effects are not limited solely to the region, however, as illicit drugs from Afghanistan also regularly reach distant markets.

While the Northern American market is provided with Mexican and Colombian heroin, European consumption is supplied in a large part by heroin from South-West Asia, mostly from Afghanistan. Afghan opiates reach the European markets through two main routes. One is the traditional “Balkan Route” (the dominant one in the 1990’s) via Pakistan, Iran, and Turkey. Turkey has become the main staging post from where narcotics take either the direction of the Central European route (Bulgaria, Romania, Hungary, and Czech Republic) or can be smuggled through Albania and the former Yugoslav republics.

³⁷ Graubner, *Drugs and Conflict: how the mutual impact of illicit drug economies and violent conflict influences sustainable development, peace and stability*, 11-12.

³⁸ Rubin & Sherman, *Counter-Narcotics to Stabilize Afghanistan: The False Promise of Crop Eradication*, 11.

³⁹ Chouvy, ‘Afghanistan’s Opium Production in Perspective’, 21.

⁴⁰ Chandra, ‘Warlords, Drugs and the “War on Terror” in Afghanistan: Paradoxes’, 66.

⁴¹ *Ibid.*, 73.

⁴² Even the possible involvement of president Karzai’s brother in drug trafficking was recently reported in the *New York Times*, James Risen “Reports Link Karzai’s Brother to Afghanistan Heroin Trade”, 4 October 2008.

⁴³ Chouvy, ‘Afghanistan’s Opium Production in Perspective’, 23.

The other main trafficking route is known as the “Silk Road” which runs from Afghanistan through post-Soviet Central Asia to Russia.⁴⁴ From there, Afghan heroin can also make its way to Europe.⁴⁵ According to one UNODC estimate in 2004, one quarter of total Afghan opiate exports (500 tons of morphine and heroin, and 1,000 tons of opium) were smuggled through Central Asia; suggesting that the majority of narcotics exports still reach Europe through the traditional route via Turkey. In the recent years, however, the importance of the “Silk Road” has steadily risen.⁴⁶ The trafficking along this route is due to the failing border controls in the Central Asia and Caucasus. Turkmenistan, Tajikistan, Uzbekistan, Kazakhstan, and Kyrgyzstan are easy targets for drug traffickers. They are young states, still facing various problems associated with nation-building in the post-Soviet transition period, affected by weak democratic institutions, slow economic growth, and galloping inflation. The spread of the illicit drug trade has had serious negative implications for these Central Asian countries. It expands organized crime, exacerbates political and social instability, encourages corruption, and contributes to institutional decay. The significant drug related informal economy undermines the democratic process in Central Asia and causes serious law and order challenges. It is even argued that the drug trade has fomented ethnic rivalries and armed conflict in the region.⁴⁷ Some go so far as to suggest that the drug trade had a role to play in the 2005 revolution in Kyrgyzstan.⁴⁸

According to the US Department of State, Tajikistan represents a particularly attractive transit route for illegal narcotics. Every year 80-120 tons of Afghan heroin are smuggled through this country.⁴⁹ Several factors could explain why this country has become one of favoured transit routes of Afghan narcotics. The civil war in this country in the early 1990s severely affected its social and the economic situation, and they continue to suffer from rampant corruption, political instability, few economic opportunities and high unemployment rates. Tajikistan is in fact the poorest of the former Soviet Republics. Geographically, it shares more than 1,000 kilometres of porous borders with Afghanistan. The International Narcotics Control Strategy Report (INCSR) details that significant quantities of drugs are smuggled across the Pyanj River that forms large part of the Afghan-Tajik border, which can be easily crossed at numerous points without inspection due to the lack of adequate border control.⁵⁰

The US Department of State also identifies Kazakhstan as a major transit country for opiates from Afghanistan to Russia and Europe. This is principally due to its geographic location and the openness of its borders. According to the INCSR report, drug related crime has increased tremendously in this country.⁵¹ The other Central Asian Republic directly involved in this illicit narcotics trade, similarly identified in the INCSR report, is Uzbekistan.⁵²

In response, the neighbouring countries most affected by the regional drug trafficking networks have sought to create a security belt around Afghanistan, in order to fight against the spreading regional opium trafficking. As part of this effort, a regional institution – the Central Asia Regional Information Coordination Center (CARICC) – was created in 2002. The CARICC represents an operative but largely ineffective base for communication, analysis, and exchange of information on transnational crime. To date, it has achieved very limited success in coordinating the counter-

⁴⁴ Approximately 40 percent of the narcotics smuggled through the Northern Route (via Central Asia) reach Russia; 30 percent goes to Europe.

⁴⁵ Graubner, *Drugs and Conflict: how the mutual impact of illicit drug economies and violent conflict influences sustainable development, peace and stability*, 4.

⁴⁶ UNODC, *World Drug Report 2005*, 49.

⁴⁷ Fenopetov, “The Drug Crime Threat to Countries Located on the “Silk Road”, 6-9.

⁴⁸ Graubner, *Drugs and Conflict: how the mutual impact of illicit drug economies and violent conflict influences sustainable development, peace and stability*, 13.

⁴⁹ US Department State, *International Narcotics Strategy Report (INCSR) 2008*.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

narcotics policy among the member countries: Azerbaijan, Kyrgyzstan, Russia, Tajikistan, Turkmenistan, Uzbekistan, and Kazakhstan.⁵³

The Drug Economy and Afghanistan's Domestic Realities

The US policy aims at eradicating the opium cultivation in Afghanistan as soon as possible, which, it is argued, will have the additional effect of depriving the Taliban of their main source of income. However, the implementation of this policy has not been successful, and will continue to be ineffective if the root causes of the drug economy in Afghanistan are not properly addressed. The US strategy is based on an overly simplistic view, emphasizing forced eradications of poppy fields on the ground (manual or mechanical eradications) or from the air (aerial spraying of chemical products).⁵⁴ The basic premises of the US forced eradication plan are: (a) Opium poppy cultivation in Afghanistan is no longer associated with poverty: currently the poppy fields are concentrated in the richest southern provinces; and (b) Insurgents, motivated by greed or corruption, have turned orchards, wheat and vegetables fields into poppy fields.

Rubin and Sherman (2008) contest these premises and argue instead that political insecurity and social chaos in Afghanistan create conditions for the illicit drug industry and not vice versa.⁵⁵ Opium cultivation is undesirable, but it is inevitable in a situation of dire poverty and insecurity. In the Afghan setting there is no other crop that provides the same benefits. In 2003-04, 131,000 hectares of opium generated 46 million labour days.⁵⁶ Afghan farmers are thus dedicated to poppy cultivation for economic reasons; it provides access not only to incomes but also to land, water, credit, and employment. Following the destruction of the public sector and employment opportunities, private and, in several cases, criminal groups have assigned themselves the task of providing public goods.⁵⁷

The opium industry plays a central role in the Afghan economy as a whole, representing more than half of the country's Gross Domestic Product – of the total GDP of US\$ 7.5 billion, the export earning of opium is US\$ 4 billion.⁵⁸ A significant portion of the local population is employed in this sector. In 2007, 3.3 million people were directly involved in the poppy cultivation, which is nearly 15 per cent of total population of the country.⁵⁹ Moreover, a large section of the population is involved in trafficking, trade, and others activities dependent on narcotics revenue.⁶⁰

The opium poppy features prominently in the cultural life of Afghan people. Historically, its cultivation was promoted by the traditional credit system (*salaam system*) based on advance payment on a future crop. Moreover large landowners often rent land to sharecroppers and poor farmers through this system. Eradication plans therefore represent a serious threat to the economic stability of households as landowners require the debt payment even if the crop is eradicated. The risk burden is placed on the poor farmers.⁶¹ After crop eradication, many families, for example in Helmand, have had to sell their children (especially daughters) in order to pay their so-called opium debts.⁶² From the point of view of Afghan farmers, eradicators of poppy cultivation are the main source of their insecurity. Immediate opium eradication certainly poses a greater threat to human security than the existing drug economy.⁶³

⁵³ Ibid.

⁵⁴ The Afghan government has rejected herbicides aerial spraying, a strategy adopted by out by DynCorp in Colombia. However, the US Congress instead considers it as an appropriate and efficient strategy.

⁵⁵ Rubin and Sherman, *Counter-Narcotics to Stabilize Afghanistan: The False Promise of Crop Eradication*, 9-11. See also Appendix C: *Open Letter to UNODC: Is Opium Poppy Cultivation Related to Poverty? With Reply from UNODC*, 50-56.

⁵⁶ David Mansfield and Adam Pain, *Briefing Paper. Alternative Livelihoods: Substance or Slogan?*, 3.

⁵⁷ Rubin and Sherman, *Counter-Narcotics to Stabilize Afghanistan: The False Promise of Crop Eradication*, 33.

⁵⁸ UNODC, *Afghan Opium Survey 2008*, 1.

⁵⁹ Ibid.

⁶⁰ Rubin and Sherman, *Counter-Narcotics to Stabilize Afghanistan: The False Promise of Crop Eradication*, 13.

⁶¹ Ibid., 28-29.

⁶² Ibid., 12.

⁶³ Ibid., 20.

After years of war, Afghanistan is desperately trying to transition from a war economy to a peace economy. Measures are needed to manage this transition in a more humane and considerate manner by the international community. The Afghan situation has to be approached within the context of broader development goals, by creating effective democratic institutions, promoting a vibrant civil society, and introducing reliable social protection mechanisms.⁶⁴ A drug control policy based solely on forced eradication is destined to bring adverse consequences. Eradications without a proper development plan deprive poor Afghan people of their source of income and thus fuel the insurgency. This approach also contributes to increases in opium prices and cause migrations of the poppy fields to more remote regions. Opium production – as all other illicit crops, including coca and cannabis – thrives in territories characterized by conflicts, disintegration of the state, ethnic war, religious strife, and lack of economic development projects.⁶⁵ Afghanistan at presents provides that fertile environment.

The counternarcotics strategy carried out in Afghanistan is further complicated and made controversial because of the involvement of several other factors. For instance, there is a lack of unified vision within the international community, reflected in some key differences between the EU and US strategies. Generally, the global prohibition policy is unquestionable and almost holy at the international level, however, the European Union consistently points out the high human costs of forced opium poppy eradications. The US, on the other hand, continues to insist on a sharp decline in the opium-cultivated area as soon as possible.

Historically, only authoritarian regimes like China in the 1950's and Afghanistan of the Taliban in 2000-01 have been able to eliminate illicit crops in a very brief time, and their success came at very high human costs. Similar efforts by Laos and Burma have not been so successful.⁶⁶ In Afghanistan, NATO and UN agencies (UNODC, INCB⁶⁷) have concentrated their efforts in a war on narcotics without considering the long-term impact on local economies, ignoring the reality that opium production is nothing but a simple choice for survival by Afghan farmers. The opium poppy represents a low-risk and high-value crop in the current Afghan setting.

Winning the counter-narcotics war is not dependent upon the quality of the force and power of military intervention, rather it requires provision for real economic opportunities and basic human security on the ground. Where communities are confident in finding alternative livelihoods, they will be more likely to agree with the eradication programs. The elimination of drug production has to be accompanied by broader development measures. Despite seven years of military and financial assistance by the international community to the Afghan government,⁶⁸ Afghanistan still suffers from growing illicit drug economy and the insurgency. As David Mainsfield⁶⁹ argues, there is a need to reorient the international strategy to deal with the drug problem in Afghanistan. In particular, the counter-narcotic policy has to be accompanied by the provision of “alternative livelihoods” strategy. Efforts should be directed towards wider state building process with clear economic and social goals. The international community should not limit its counter-narcotic strategy to only a specific area where drug production is concentrated; rather, it should assist and promote overall sustainable development programs in different parts of the country. The aim at the outset should not be in measuring the reduction of hectares of illicit crops, but rather in the addressing of root causes of

⁶⁴ Mansfield and Pain, *Briefing Paper. Alternative Livelihoods: Substance or Slogan?*, 9.

⁶⁵ Rubin and Sherman, *Counter-Narcotics to Stabilize Afghanistan: The False Promise of Crop Eradication*, 20.

⁶⁶ Aubron, ‘L’éradiation précipitée du pavot peut avoir un coût humain catastrophique’, *Liberation*, 13 March 2005, 46.

⁶⁷ The International Narcotics Control Board (INCB) is the independent and quasi-judicial control organ monitoring the implementation of the United Nations drug control conventions. It was established in 1968 in accordance with the [Single Convention on Narcotic Drugs, 1961](#).

⁶⁸ At present there are about 47,000 troops under NATO command in Afghanistan, along with a 14,000-strong separate US force. Only the American assistance to Afghanistan for the fiscal years 2001-2006 is over US\$ 10.3 billion. During the Paris Conference in Support of Afghanistan (12 June 2008), a commitment of \$21.4 billion has been given for the development of Afghanistan.

⁶⁹ David Mainsfield is an alternative livelihoods specialist with several years of experience conducting research into the role of illicit crops in rural setting.

opium cultivation in the country. To this end, human development and livelihood needs must be prioritized.

Concluding Thoughts

According to the United Nations Development Program (UNDP), Afghanistan suffers from a very low Human Development Index (HDI). Afghanistan ranks 174th in the list of 178 countries, ahead of only Burkina Faso, Mali, Sierra Leone, and Niger.⁷⁰ The country is one of the poorest in the world as well, with a per capita income of USD\$ 335.⁷¹ Adult illiteracy (76.5 per cent of the total population), lack of access to clean water (68 per cent of the population), high rates of infant mortality (1000: 135), persistent gender discrimination,⁷² and political corruption are just some of the pressing problems this country faces.⁷³ In this environment of dire poverty and social and political chaos, opium production plays a key role in Afghanistan's economic survival. It guarantees the survival of thousands of poor households, granting them access to credit, land, and income. There is no basis to argue against the positive relationship between poverty and opium poppy cultivation.

Forced eradications plans without providing alternative livelihood opportunities to the people further worsen the precarious Afghan situation. The negative consequences of a repressive policy combined with crop eradications and opium ban affects the poorest part of the Afghan population. In particular, iniquities on eradication process fuel resentment and frustration among poor farmers and strengthen the position of those that can pay bribes and buy high protection. Crop destruction, moreover, does not conciliate with the traditional credit system, increasing the farmers' debt and also decreasing the possibility of their access to credit. The already dire economic condition of the majority of the Afghan people worsens further, hindering the achievement of one of the most important UN Millennium Development Goals: to eliminate extreme poverty and hunger.

Existing policy overwhelmingly linking illicit narcotic trade with terrorism, believes without much foundation that the elimination of the drug production will lead to the defeat of the Taliban insurgency. Under the pressure of the international community, the present foreign forces in Afghanistan aim to achieve immediate results in terms of reduction of opium production and trafficking. There are serious doubts about the prospects for this mission's success. As argued above, this strategy has focused too much on the Taliban, though they are only one of the many groups involved in this activity. In fact, since the Civil War period in the 1990s, all major warring factions have been involved in the illicit narcotics trade.⁷⁴

Moreover, Afghan tribal warlords and others are directly engaged in this illicit industry because it is a very lucrative business. The drug economy is so profitable partly because it is illegal, enjoying a constant demand and a vacuum of rule and regulation, opportunely filled by criminal organizations. Militant and terroristic groups have increasingly exploited narcotics trade to finance their operations, posing serious threats to regional and global security. To find a just and sustainable solution, the international community needs to find ways, perhaps a serious rethinking of worldwide prohibitionist policy altogether in order to drastically reduce the profit margins of the illicit drug trade.

⁷⁰ UNDP, *UNDP Afghanistan Human Development Report 2007*, 19.

⁷¹ UNDP, *UNDP Afghanistan Annual Report 2006*, 3.

⁷² Afghan women continue to face enormous obstacles to receive adequate instruction, to hold gainful employment and access to health care.

⁷³ UNDP, *UNDP Afghanistan Human Development Report 2007*, 19-20.

⁷⁴ Cornell, 'Narcotics and Armed Conflict: Interaction and Implications', 218.

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Political Violence and the International Community

Kirsti Samuels

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450 pages.

Reviewed by Dr. Craig Zelizer*

Throughout the history of international affairs and international law, one of the theoretical challenges has been to determine which comes first: the development of new ideas and a consensus that eventually translates into new international legal norms, or new international legal norms, which then create new norms and processes within the wider social context.

In her new book, Dr. Kirsti Samuels, an Oxford educated scholar and lawyer, who has over a decade of applied experience in the fields of peacebuilding and law, explores this theme – centering her discussion of the development of international policy and law on the question of how the international community responds to political violence in intra-state conflicts.

Over the past half a century, the field of international law has created clear legal norms regarding the legality of inter-state conflict, and developed a number of policies and mechanisms to manage, prevent, and deal with these challenges. Responses range from forceful military interventions to stop violence or support a cease-fire, to economic or arms sanctions on one or more countries, to UN Security Council relations, to diplomatic initiatives.

Surprisingly, the existing international policies and legal code regarding the legality of intra-state political conflict are fairly underdeveloped. The question then arises: when armed actors take violent action to force changes in the political system within a state, how are these actions viewed through the prism of international legal norms and policy?

As Samuels comments, “The traditional position remains that civil conflict is largely beyond the reach of international law and neither legal nor illegal” (p. 12). Therefore, it is not clear if conducting civil conflict involves a significant breach of international law or not.

This ambiguity leads to a set of further questions: Should groups that undertake political violence to force changes in government be seen as legitimate actors, as illegal criminals? Or does the legality of their actions depend on the underlying motivations for their actions? For example, if a group representing a community begins a campaign of political violence due to their lack of access to political and economic power, is this a legitimate action? Should groups resisting authoritarian regimes that undertake political violence in the name of greater democracy be seen as legitimate? Who has the authority and power to decide on such issues? In addition, what is the relationship between evolving social norms, policies, and laws?

Moreover, how has the response of the international community to civil conflict developed, both in terms of policy and legal doctrine, in recent years? Although, for decades there has been a view held among many legal scholars and academics that states should not intervene in domestic civil conflicts due to the importance of state sovereignty, Samuels rightly indicates that there is a significant gap between the stated norms and international practice, as “Intervention in civil conflicts is widespread and consistent” (p. 19). Throughout the Cold War, the superpowers and others consistently

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intervened in civil conflicts through proxy wars, providing military support and training, economic embargoes and more. The UN also intervened in a number of civil conflicts through various measures. However, there has been no widespread or consistent policy response from the larger international community questioning the legitimacy of the use of political violence in civil conflicts.

This trend of intervening in civil conflicts has continued to strengthen today as the international community, through its institutions, is increasingly taking a stand against extreme political violence and coup d'états, with a corresponding move away from respect for state sovereignty in certain circumstances. Increasingly, the interventions are based on the principle that the Security Council "rejects the use of force to achieve a political outcome" (p. 109). Despite this increased practice of the international community, to date there has not been much systematic analysis of how international norms and policy have changed regarding civil conflicts, particularly regarding the legitimacy of the use of force in internal civil conflicts.

While the author focuses her analysis primarily on the emerging international norms and practice, she asserts that changes in norms and policies set the context for new laws to emerge. Instead of law coming from an abstract sphere, she discusses how laws emerge to a significant degree from developing norms. As Samuels explains, "...this book considers international law to be a sub-system of international politics, whereby, since both are in a state of continued evolution, as new issues arise in international politics, so international policy is reformulated and international law is slowly crystallized, and each reinforces the other" (P.6). The author suggests that there is an emerging norm of how the international community recognizes and responds to civil conflict involving extreme violence and in the future this is likely to lead to the creation of new legal norms.

In contextualizing her argument, the author focuses the bulk of her analysis on the role, decisions and policies of the UN Security Council in responding to 32 civil conflicts and coup d'états. In addition, she devotes a chapter to exploring the interventions of the international community in Sierra Leone, Cote d'Ivoire, and Liberia, particularly through regional organizations including the African Union and the Economic Community of West African States. Samuels is careful not to overstate the role of the Security Council or assume that there is a single coherent norm emerging. She does explore UN Security Council Resolutions on a range of civil conflicts and finds that the Council is increasingly condemning and rejecting the use of force by parties in civil conflicts.

As she explains, her research reveals a strong trend that the Security Council "has consistently supported and applied a set of recognizable principles when dealing with political violence in the forms of civil conflicts or coups d'état" (p. 139). Moreover, the member states of the African Union have adopted the Lome Declaration, which states that unconstitutional changes will not be tolerated by the AU "(p.199). These emerging principles (while not consistent across all cases) include the following:

Rejecting Violence to Resolve Political Disputes

Rejecting Political Violence Against a Democratically Elected Government

An Obligation to Resolve Conflicts Peacefully

Rejecting Violence Against Civilians

Through her analysis, Samuels sees that these norms are increasingly being integrated into the responses of the international community and regional organizations and are an indication of an underlying change in policy and norms. When coups happen, or groups seek to undertake violence to achieve political goals, there are increasingly strong responses from the international community in terms of condemning and questioning the use of violence as a means for political change.

While these responses have yet to be codified in new international laws regarding extreme civil violence, they are indicating a trend that is likely to move in that direction. As Samuels explains, “The practice of rejecting recourse to force for political aims is of a recent nature, but it is accompanied by normative changes in the perception of civil conflict. This practice provides crucial information of the direction of the evolution of this field and that suggest that all recourse to force in civil conflicts (other than in self-defence against illegal overthrow or violent oppression) is increasingly being rejected by the international community as a matter of international policy and may, in time, become prohibited under international law” (p.216). Of course, as Samuels indicates, the international community is often strongly influenced by political dynamics in their policy response to the conflicts they choose to become involved with.

This book makes a valuable contribution to peacebuilding and rule of law, and the under-researched area of how international policy and law is developing in relation to civil conflicts. The text should be an excellent addition for scholars and practitioners working at the intersection of the two fields regarding civil conflicts. However, I have a number of critiques of the text and several areas for future developments.

First, this book is based on Dr. Samuel’s dissertation and was published by a press that largely specializes in international law issues. Thus, the writing style and analysis is best suited for an international law audience. I personally would have appreciated a bit of rewriting to make the work more accessible to an audience of peacebuilding scholars and practitioners.

Second, although this book was published in 2007, there is not much discussion of the emerging Responsibility to Protect Doctrine. While this is a slightly different area than the nature of regime change in political civil violence, the emerging norms and practices around Protection could have provided a useful comparison to compare trends and challenges.

Third, although the author provides significant theoretical background regarding the relationship between norms, policies and laws, and discusses some of the methodological challenges in differentiating between these, there is no significant discussion of the research methodology or methods of analysis used in the text. Having an overview of the means of research and analysis, even in brief, would have made a contribution to the text. This may be because the text was written primarily for an international law audience.

Fourth, I would have liked to see a further expansion of regional organizations and case studies beyond Africa. Samuels does not provide a clear explanation for the choice of the more in-depth case studies and their geographic location. Perhaps this is something that could be done in future research, to explore how the Organization for Security and Cooperation in Europe or the Organization of American States is also dealing with these emerging norms and policies.

Finally, given the depth of practice that Samuels has in these areas from her direct field experience in Somalia, and many other conflict regions, the text could have benefited in several sections from some of her direct, on the ground, personal experiences.

Despite these critiques, I believe that academics and professionals will find her book a valuable contribution to the field.

The Separatist Conflict in Sri Lanka: Terrorism, ethnicity, political economy

Asoka Bandarage

Routledge, London and New York, 2009.

223 pages.

Reviewed by Clyde Sanger*

Professor Bandarage sets out very clearly from the start of her excellent 223-page book her major thesis, and then skillfully guides the reader – or at least this reader – into acceptance of her view of the most likely solution to this vicious 25-year civil war. Her major thesis is that many, too many, analysts and writers have opted for the simplistic bipolar description of the conflict: at one pole the Sri Lanka government, dominated by Sinhala ministers and heavily influenced by Buddhist priests, and at the other the minority Tamil population (some 18 % of the total according the last national census held in 1981) who have suffered discrimination culturally and economically virtually since independence in 1948.

It really wasn't a difficult task to demolish this bipolar model. Hardly any conflict situation is that simple. In the case of Sri Lanka, she needed only to mention the third ethnic group, the Moors of Muslim faith, who overall may only amount to 6 % of total population but, even after all the fighting, make up about one-third of the peoples in Eastern province, a strategic part of the island's make-up since the LTTE (Liberation Tigers of Tamil Eelam, also known as the Tamil Tigers) has claimed it as integral part of the Tamil Homeland, giving the Tamils two-thirds of the island's coastline. Another one-third of the province's population is Sinhala, and these facts lead Professor Bandarage to refer continuously, when it embraces the Eastern province as well as the Northern province, to "the fictitious Tamil Homeland concept".

She includes an interesting early chapter about the period of British administration (1796-1948), in which she argues that the colonial power favoured the advancement of Tamils over the Sinhala population in education and professional training, and the much criticized legislation by the government – the 1954 Education Ordinance and the 1956 Official Language Act – was aimed to bring an end to the Tamil entrenchment in the civil service and in the ranks of doctors and engineers. Some of this legislation was later revoked, either under pressure or because its purpose was fulfilled of opening opportunities to the majority.

There are many other events – disasters, massacres, misunderstandings, deceptions in this sorry history of a once-blessed isle – that point up the complications and negate the bipolar model. Nevertheless, with tactical political skill, a mixture of charisma and ruthlessness, and plain luck, the LTTE leader Velupillai Prabhakaran has managed not only to survive decades of warfare but achieve the merger of the Northern and Eastern provinces, inflict heavy losses on both Sri Lankan forces and units of the Indian Peace Keeping Force (IPKF) and build up extraordinary influence and financial support among the Tamil diaspora in Europe and Canada.

To mention briefly some of these complications to the bipolar model that Mr. Prabhakaran has used to present the Tamils as victims of an aggressive Sinhala Buddhist government. Although precise figures are unavailable, it seems certain that more Sinhalese, military and civilian, died in the suppression of the JVP insurgency led by well-educated youth frustrated in poverty in the Southern Province than Sri Lanka forces inflicted on the Tamil rebels in the north; also that the Tigers, in their

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march to power over more moderate Tamils, have killed more of their own folk than they have dispatched of the government's forces.

Stir into this witches' brew the caste system among Tamils that has led the Tigers to recruit child soldiers from poorer families; the several cease-fires used for rearming or killings until abrogated by one side or the other; the clumsy intervention for three years of the 100,000-strong IPKF; the to-and-fro policies of successive Sri Lankan presidents (sometimes militant, sometime conciliatory), and the equally maladroit and mostly misguided efforts towards peace of outsiders – the Norwegian government, church groups and international NGOs – and one can only be amazed at how many elements have conspired to make the Sri Lanka civil war such an indictment of all parties. There are really no political heroes.

I will leave the distressing details to readers who want to get to all the buried or charred bones. There are plenty of those, for an estimated 40,000 people died in the JVP (Janatha Vimukthi Peramuna or People's Liberation Front) uprising in the south, on top of the 70,000 who have perished in the campaigns and massacres to capture or defend Jaffna and the north. More political leaders than probably in any other country have been assassinated on the island, where the Tigers invented the body-pack for young suicide bombers. Also best left to the specialist are the contradictory policies of the Indian government and of Tamil Nadu state (seen by Colombo as a latent threat to its sovereignty because of its 50 million people). Professor Bandarage argues that the Tamil Nadu state leaders have been encouraging a "surrogate campaign" for separatism, having been thwarted by Delhi's tightening the constitution to forbid secession in India. The conspiracies and the complications multiply.

What solution would the author offer today, writing from her perch at Georgetown University? Her book was finished before this latest campaign by Sri Lanka government forces under President Mahinda Rajapakse to eliminate the last stronghold of the Tigers, although it describes the frustrated attempts he made at negotiation after the failure of the Norwegian initiative. He has refused to accept a cease-fire offer and seems intent on finishing off the Tigers' military strength. Will the moderate Tamils pluck up courage, claim (probably correctly) to speak for the war-weary majority and accept a form of devolution that guarantees provincial councils a range of powers over education, language, religion and taxing powers? This is clearly the author's preference. One fact is certain: Sri Lanka faces an exceptional opportunity to end this appalling conflict, and the government should expend as much energy and communication skills on the Tamil diaspora, to persuade those in Toronto, London and elsewhere that it is sincerely intent on a peace fair to all. This book should help.