

**THE CASE FOR SOLIDARITY RIGHTS: APPLYING CHARLES BEITZ'S
POLITICAL APPROACH TO HUMAN RIGHTS**

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Philosophy

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ABSTRACT

Solidarity rights protect interests of individuals that can only be meaningfully experienced in the context of society as a whole (“common-good interests”). This thesis applies Charles Beitz’s approach, in which rights are modelled as political presumptions, to determine whether solidarity rights can be considered human rights.

Solidarity rights have been treated with scepticism by rights scholars, yet the states and regional bodies that promote them are increasingly influential in international politics. While this has brought discourses about solidarity rights to new prominence, we lack a corresponding theoretical assessment.

The first part of the thesis will explore the key tenets of Beitz’s model, with a focus criteria used to identify those interests which merit recognition as rights. It will argue that Beitz’s approach is preferable to orthodox accounts of human rights, for the purposes of this project, because it offers a model that more closely reflects how rights manifest in international law and politics.

Human rights traditionally protect interests held by the individual against the group. In the second part of the thesis it is argued that they can also protect common-good interests. The transnationally interconnected nature of post-industrial modernity means that individuals necessarily have interests, experienced in a collective context, on a global scale. These interests can be urgent in a manner equivalent to those protected by other classes of rights. They therefore merit protection with the rights mechanism. Solidarity rights protect these interests by imposing duties on states to work together to address corresponding transnational threats.

The strength of this case will be demonstrated with an *argumentum a priori* exercise, examining the case for solidarity rights from a hostile perspective. The

arguments will then be applied in practice, with case studies of the rights to self-determination, peace, and a clean and healthy environment.

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INTRODUCTION

Recognition as a human right elevates an interest to a high political status. The general accord about the standing of human rights is not, however, matched by consensus around which interests should, and should not, be included in that class. “Solidarity rights”¹ are especially controversial because they protect interests that are held by individuals yet meaningfully experienced in the context of society as a whole. Critics of solidarity rights maintain that human rights can and should only protect interests are experienced independently of our fellow humans.² Should solidarity rights, then, be considered human rights? In this thesis, I will attempt to answer that question.

The time is ripe for a re-evaluation of solidarity rights. The states and regional bodies that promote them are increasingly influential in the United Nations.³ This has brought discourses about solidarity rights to new prominence.⁴ Theory, however, has not kept pace with practice. We still lack a satisfactory theoretical assessment of the status of solidarity rights as human rights. In this thesis solidarity rights will be justified using the “political approach” of Charles Beitz⁵. This model offers a persuasive account of human rights. For Beitz, recognising an interest as a right is a political decision. If an interest can be justified as sufficiently important, from a sufficiently wide range of perspectives,

¹ This refers to a class in rights theory and thus should not be confused with the “Solidarity Rights” in Title IV of the Charter of Fundamental Rights of the European Union which, conversely, contains economic, social and cultural rights. (Official Journal of the European Union, 2012/C 326/02)

² See, for example, Jack Donnelly, “In Search of the Unicorn: The Jurisprudence and politics of the Right to Development”, [1985] 15 Cal. W. Int’l L. J. 473, pp. 473-509

³ Rosa Freedman, “Third Generation Rights: Is There Room for Hybrid Constructs Within International Human Rights Law?” 2 CJICL 4 (2013), pp. 935-959

⁴ Ibid, p. 936

⁵ Charles Beitz, *The Idea of Human Rights*, (Oxford; Oxford University Press, 2011). p. 2

then it can be recognised as a right. The task of the advocate for solidarity rights is, thus, a political one: to make an argument that can be understood from the widest possible range of perspectives.

For Beitz, human rights cannot be fully understood in purely legal terms. A comprehensive model of human rights must take into account their manifestation in law, politics, culture, and society. For this reason, Beitz adopts Allan Buchanan's metaphor of the "Practice" of human rights.⁶ Talking about "the Practice" allows us to consider the full scope of human rights and the broad range of inputs in the human rights discourse. "The Practice" encompasses the legal manifestation of human rights, the political processes which lead to their creation and impacts, their use in the international system, and the wider discourses about human rights which feed and inform these political processes. In this thesis, like Beitz, I will consider human rights in terms of the Practice rather than in purely legal terms.

The thesis is in two parts. In the first part, the key tenets of Beitz's model, and how it is distinguished from orthodox accounts of human rights, are examined. This part also includes a detailed examination of the distinguishing features of solidarity rights. In the second part of the thesis, Beitz's model is utilised to make a positive argument for solidarity rights. I will begin with the theoretical case and progress to three case studies, of solidarity rights at various stages of acceptance in the Practice. Finally, it is argued that that the application of Beitz's political approach answers the principal critiques of solidarity rights.

⁶ Allen Buchanan, *The Heart of Human Rights*, (New York: OUP, 2013), p. 2

Part One: Addressing the Theoretical Bases

In Chapter One the fundamental features of Beitz's political approach are set out, bearing in mind that his model was developed to justify civil and political rights and economic, social, and cultural rights (I call these the “accepted classes” of rights). Thus, when Beitz’s model is applied to solidarity rights in Part Two, it will demonstrate that solidarity rights can be justified on the same terms as other classes of rights.

Human rights are, according to Beitz, political presumptions, worked out at the international level. They make the individual a subject of global concern. Rights empower the individual in relation to the state. They protect interests accepted as important by the international community from threats that are reasonably predictable. They do this by imposing a "two-level" duty on states. The first-level duty is to protect the interest in question. The second-level duty is, as part of the international community, to intervene when another state fails to fulfil its first-level duty.

According to Beitz, an interest can be recognised as a right if it is sufficiently important or "urgent". There is no utility in protecting interests that are not under threat, so rights only protect interests that are faced by reasonably predictable, or “standard”, threats. Similarly, there is no utility in applying the rights mechanism unless doing so will have a tangible impact on the interest in question. Therefore, an interest will not be recognised as a right unless the rights mechanism can be reasonably effective in protecting it. Rights take effect generally, so an interest will only be recognised as a right if the (a) urgency, (b) standard threat, and (c) the reasonable effectiveness of the rights mechanism, can be recognised from *both* the perspective of the interest holder *and* from the perspective of a non-interest-holder.

In Chapter Two the reasons that Beitz's political approach differs from other, (as Beitz calls them) "orthodox",⁷ justificatory theories are examined. By contrast to Agreement, Naturalistic and Juridical theories, Beitz's political approach avoids unverified and unverifiable assertions about the foundations of rights, and accounts for the full range of rights recognised in the Practice, in an international context. It thereby provides a much more satisfactory model of human rights for analysing rights in the light of the Practice as it stands.

In Chapter Three, a working description of solidarity rights is set out. It is argued that solidarity rights are "human rights that protect the common-good interests of individuals, by imposing both outward-facing and inward-facing duties on states". Outward-facing duties compel states to act in cooperation with each other, to achieve common, long-term goods. They thus require states to show solidarity with each other, and with individuals outside their borders. Inward-facing duties are directed entirely at the domestic population of a state.

In this chapter the identity of the holders of solidarity rights is also examined given that this has been a topic of controversy in the relevant literature. Some scholars have attempted to identify a collective entity, a "people", as the holder of solidarity rights. It is argued that solidarity rights are better understood as rights belonging to individuals. The accepted classes of rights protect, what I call, "independent-good interests" and are thus experienced independently of the rest of society. Solidarity rights protect common-good interests, which are experienced, by the individual, in common with other individuals. Thus, solidarity rights are held by individuals but they can only be meaningfully experienced in a social context.

⁷ Beitz, n. 5, p. 2

Part Two: The Case for Solidarity Rights

In Chapters Four and Five Beitz's approach is applied to demonstrate that solidarity rights should be considered human rights. As noted in Chapter One, Beitz's approach requires that the urgency of an interest must be understandable from both sympathetic and non-sympathetic perspectives. In Chapter Four, the case is made from the sympathetic perspective. It is argued that the class of "common-good interests" can include interests that meet Beitz's criteria for recognition as a right: to be urgent, faced with a standard threat, and protected, to reasonable effect, by the rights mechanism. The transnationally interconnected nature of post-industrial modernity⁸ means that individuals experience important interests in a global context, similarly, threats to those interests manifest globally and transcend state borders. Solidarity rights are particularly suited to protect transnational interests from transnational threats.

According to Beitz, if an interest (or class of interests) is to be considered a right then its urgency, vulnerability to a standard threat, and the reasonable effectiveness of the rights mechanism in protecting it, must also be understandable from perspectives that are not sympathetic to the interest. Chapter Five demonstrates that the case for solidarity rights conforms to this standard by undertaking an *argumentum a fortiori* exercise, utilising the political theory of F. A. Hayek: a perspective that is as hostile as possible to the concept of solidarity rights. Hayekian theory rejects solidarity as a concept. It rejects

⁸ For an exploration of some of the elements of the transnational interconnection of post-industrial modernity see Saskia Sassen, *The Mobility of Labor and Capital: A Study in International Investment and Labor Flow*, (Cambridge; Cambridge University Press, 1988), pp. 126-170 and Anne-Marie Slaughter, "Judicial Globalisation", 40 Va. J. Int'l. L. 1103 1999-2000, pp. 1103-1126

the active state, embraces inequality, and sees appeals to common interests as a veil for the dictatorial agendas of socialist regimes⁹. Nevertheless, in Chapter Five it is demonstrated that, despite its hostility to solidarity *per se*, the case for solidarity *rights* can be understood from the Hayekian perspective. The purpose of this chapter is not to endorse the Hayekian perspective. It is rather to demonstrate that, even from a hostile perspective, the case for solidarity rights can be understood.

In Chapters Six, Seven, and Eight the political approach is applied to justify three different solidarity rights: the (established) right to self-determination, the (emerging) right to peace, and the (prospective) right to a clean and healthy environment.¹⁰ Each of these rights are analysed according to the Beitz criteria of (1) protecting interests that are urgent, (2) faced with a standard threat and (3) can be protected to reasonable effect by the rights mechanism. These three case studies demonstrate the efficacy of Beitz's model for analysing solidarity rights in practice.

In Chapter Nine it is demonstrated that the application of Beitz's political approach to solidarity rights also answers the principal critiques of solidarity rights. These concern (1) the compatibility of solidarity rights with other classes of rights, (2) their enforcement, (3) their necessity, and (4) the hybrid nature of solidarity rights.

In the concluding chapter, the application of Beitz's model to solidarity rights, beyond those already considered, is examined. Finally, it is concluded that, according to Beitz's political approach, solidarity rights must be considered human rights.

⁹ See F. A. Hayek, *The Road To Serfdom*, (London; Routledge, 2001, first published 1944), pp. 33-45

¹⁰ While recognised in a number of regional instruments, the right to a clean and healthy environment remains a prospective right at the international level. See pp. 217-219

PART ONE: ADDRESSING THE THEORETICAL BASES

CHAPTER ONE: THE POLITICAL APPROACH OF CHARLES BEITZ

Introduction

To argue that solidarity rights should be considered human rights, one must first decide what “human rights” are. For Charles Beitz, human rights are “reasons for action” and are best understood by studying their role in international relations. This chapter explores the key tenets of Beitz’s approach. According to Beitz’s, rights are *political presumptions, worked out at international level, that protect the urgent interests of individuals from standard threats*. A right differs from a mere interest. Rights protect interests that are (a) urgent, (b) faced with a standard threat and (c) for which the rights mechanism can provide reasonably effective protection. I will refer to these three criteria as the “Beitz criteria”. To explain Beitz’s model, I will first examine how Beitz conceptualises human rights. I will consider what, in Beitz’s model, human rights are, what they do, how they do it, how one distinguishes between a right and a mere interest, and why rights have authority. The elements of Beitz’s model, identified in this chapter, will be applied, in Part Two, to make the case for solidarity rights.

Beitz’s approach to human rights was originally developed with the civil and political rights and economic, social, and cultural rights in mind. These two classes of rights are widely accepted by practitioners. I will refer to them as the “accepted classes” of rights. In this chapter I will explore Beitz’s model purely in relation to the accepted classes of rights. This is important because, when I turn to solidarity rights in later

chapters, it must be clear that I am holding them to the same standards as the accepted classes of rights.

Beitz's Approach

Beitz develops a “practical” or “political” approach¹¹ to human rights. Human rights must be understood as “reasons for action”.¹² A useful theory of human rights must, for Beitz, reflect their role in the existing international system and, in particular, the manner in which they cause states to take some actions and refrain from others.

Beitz attributes scholarly scepticism about human rights to the unsatisfactory nature of existing theories.¹³ He criticises human rights theorists who move models of human rights too far away from their practical application in international law, politics and culture.¹⁴ Beitz seeks a new theory of human rights, focusing on how rights provide reasons for action.¹⁵ He adopts Richard Rorty's approach to understanding the basis of human rights. For Beitz and Rorty, human rights are already a “fact” of international politics¹⁶: rational people generally understand that humans should receive a basic standard of respect, guaranteed by rights. It is no longer necessary to convince people about the moral rightness of human rights as a concept. A useful theory of rights will,

¹¹ Beitz, n. 5, p. 102

¹² Ibid. p. 3-7

¹³ Ibid, pp. 3-7

¹⁴ Ibid, pp. 59-74 and 89-96

¹⁵ Ibid, pp. 7-14, for Beitz, theories that model rights based on values that are external to the Practice, such as natural law or cultural agreement, engender scepticism about rights. They make rights discourse about the external value, not about human rights themselves. The advantages of Beitz's model compared to orthodox theories is discussed in Chapter Two.

¹⁶ Rorty, “Human Rights, Rationality and Sentimentality” in Stephen Shute and Susan Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures*, (New York; Basic Books, 1993), p. 112

therefore, focus on their practical manifestation and impact rather than attempting to identify abstract foundations.¹⁷

The Practice

Beitz adopts the idea of the “Practice” of human rights¹⁸. He defines human rights in a broader sense than many other theorists¹⁹. His approach encompasses the impact that human rights have in a broad “political” sense,²⁰ including the political and social impact of rights, but also the processes by which new rights are recognised and existing rights refined. Beitz’s Practice includes international law (encompassing human rights treaties, declarations, customary international law, and “soft law”) but also the legal, quasi-legal and political institutions that deal with human rights at the international level, their equivalents at domestic level, and the “discourse” that surrounds human rights²¹. The “discourse” describes the role of human rights in relations between states, their application, and their development in international institutions. It also includes the use of human rights language and norms among the agents engaged in the human rights debate, including politicians, diplomats, academics, lawyers, judges and civil society²².

¹⁷ Ibid, pp. 112-134

¹⁸ Beitz, n. 5, pp. 14-49

¹⁹ See, for example, R. Dworkin, *Taking Rights Seriously*, (New York; Bloomsbury, 2013) (first published 1977), pp. 13-29

²⁰ Beitz owes a debt to Amartya Sen in this respect. See, Amartya Sen, “Elements of a Theory of Human Rights”, 32 *Philosophy and Public Affairs* 4, pp. 316-356

²¹ Ibid, pp. 27-31

²² Ibid, pp. 27-31

The Practice is “emergent” and “evolving”: it is relatively young and still developing.²³ The Practice dates back only to the aftermath of the Second World War. Other areas of international relations, such as trade, have existed for much longer.²⁴ The Practice has therefore had less time to develop than other international norms. Beitz does not, however, identify a point at which the Practice will have fully “emerged” and thus cease to evolve. Older classes of international relations norms, such as trade²⁵ or humanitarian²⁶ norms, evolve continuously. Nothing in Beitz’s model suggests that the Practice will not also evolve indefinitely. As long as international relations evolve there is no reason why the Practice will not evolve with them.

Beitz’s debt to Rawls

Beitz owes a debt²⁷ to John Rawls’ *The Law of Peoples*.²⁸ Rawls sets out a theory of international relations based the principle of non-interference between states. For Rawls, respect for human rights is a condition of non-interference. Human rights provide reasons for action because states respect them in order to avoid becoming vulnerable to interference from other states.

²³ Ibid, pp. 42-44

²⁴ Ibid, pp. 42-44

²⁵ See John H. Barton, Judith L. Goldstein, Timothy E. Josling and Richard H. Steinberg, *The Evolution of World Trade Law: The Politics and Economics of the GATT and WTO*, (Princeton University Press; New Jersey, 2006)

²⁶ Theodor Meron, “The Continuing Role of Custom in the Formation of International Humanitarian Law, 90 AJIL 2 (1996), pp. 238-249

²⁷ Beitz acknowledges this debt. See Beitz, n. 5, pp. 96-102

²⁸ John Rawls, *The Law of Peoples*, (Harvard University Press; Cambridge, Massachusetts, 1999)

Rawls calls his system the “society of peoples”. For Rawls, the term “peoples” generally corresponds to nation states.²⁹ The “society of peoples” is thus, broadly put, an idealised system of international relations. According to Rawls, if a rational individual was to design a system of norms to regulate relations between “peoples”, but did not know to which “people” she would belong nor what comparative advantages each “people” would enjoy,³⁰ she would choose a system of norms based on mutual respect and non-interference.³¹ For Rawls, however, only certain classes of people should enjoy these norms. Rawls identifies these as “liberal peoples” and “decent peoples”. “Liberal peoples” are constitutional democracies.³² “Decent peoples” are polities which broadly include all citizens in the decision-making process, but may not open every aspect of the polity to every individual. Rawls identifies three characteristics of “decent peoples”: They have (a) some form of consultative hierarchy, (b) permit (peaceful) dissent and (c) respect human rights.³³ For Rawls, no external attempt should be made to convert “decent peoples” into “liberal peoples”.³⁴ States that are neither “liberal” nor “decent” are “outlaw peoples”. They are defined by their failure to live up to the standard required of “liberal” or “decent” peoples³⁵ and, in particular, by their failure to respect human rights. “Outlaw peoples” are not entitled to the mutual respect and non-interference

²⁹ Rawls thus does not use the term “people” in the same sense in which it is used in relation to solidarity rights.

³⁰ This is based on Rawls’ thought experiment: “the original position”. One must make decisions about the design of society without knowing one’s prospective social position. Rawls uses this experiment to justify moral arguments. See J. Rawls, *A Theory of Justice*, (Harvard University Press; Cambridge, Massachusetts, 1971), pp. 15-19

³¹ Rawls, n. 28, pp. 59-88

³² Ibid, pp. 1-10

³³ Ibid, pp. 59-88

³⁴ Ibid, p. 86

³⁵ Ibid, pp. 59-88

enjoyed by “liberal peoples” and “decent peoples”. They are therefore vulnerable to interference from other polities up to and including violent incursions or invasion³⁶. Thus, for Rawls, respect for human rights is the price of safety from interference by other states.

Beitz points out that Rawls’ list of human rights is more limited than those recognised in the International Bill of Human Rights.³⁷ Rawls’ model thus does not account for the Practice as it stands. Nevertheless, it provides Beitz with a foundation on which to build his model. The value of Rawls’ theory is that it demonstrates that human rights can be modelled based purely on their practical role in international relations.³⁸ For Rawls, respect for human rights is a necessary criterion for membership of the “society of peoples” and the advantages that confers.

Beitz adopts this aspect of Rawls’ theory. He seeks a theory of rights based on their political role. Beitz, however, aims to reflect the nature of the international political system as it stands more accurately than Rawls’ *Law of Peoples*. In Beitz’s words:

"We attend to the practical inferences that would be drawn by competent participants in the Practice from what they regard as valid claims of human rights. An inventory of these inferences generates a view of the discursive functions of human rights and this informs an account of the meaning of the concept."³⁹

Like Rawls, Beitz sees rights as justifications for intervention. Rights provide reasons for action because, if a state fails to protect and provide for the rights of its citizens, other states are justified in intervening in its internal affairs. Thus, for both Beitz and Rawls,

³⁶ Ibid, pp. 59-88

³⁷ Beitz, n. 5, p. 100

³⁸ Ibid, p. 101

³⁹ Ibid, p. 102

the fear of intervention remains the consistent motivating factor behind the normative force of human rights.

What Are Human Rights?

In Beitz's approach, human rights are political presumptions, worked out at the international level, that make each individual a subject of global concern and, consequently, empower individuals in relation to states. The Practice has its basis in negotiations in the aftermath of the Second World War. The framers of the Practice aimed to create a system that would prevent the atrocities connected with that war, and the associated international instability, from happening again. Before the war, states were generally not accountable to the rest of the international community for the treatment of their citizens.⁴⁰ The framers believed that this facilitated the atrocities associated with the 1930s and 1940s and the global violence and instability that accompanied them⁴¹. In the hope of avoiding such atrocities in the future, the framers created a system in which certain individual interests would be protected by the international community. Thus, for Beitz, the aim of the Practice is (a) to avoid the subjugation of individual interests and (b) to avoid the international instability that occurs when a state is allowed to infringe on urgent individual interests to a significant extent.⁴²

The Practice creates accountability at an international level for the treatment of the individual. The failure, by a state, to adequately protect the rights of its citizens gives

⁴⁰ See Phillipe Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity*, (London, W&N, 2016), pp. 137-190

⁴¹ Ibid, pp. 102-109

⁴² Beitz, n. 5, p. 14-16

the international community a reason to intervene in that state. As Beitz puts it, rights represent the “articulation in the public morality of world politics that each person is the subject of global concern.”⁴³ For Beitz, the Practice thus reflects an explicit international agreement that individual humans all have interests that must be accorded a basic, and generally equal, level of respect, guaranteed by the international community.

What Do Human Rights Do?

What is involved when a political presumption makes individuals a matter of international concern? The Practice achieves its aim by protecting the particularly important, or “urgent”, interests of individuals from reasonably predictable, or “standard”, threats.⁴⁴ In doing so, it empowers the individual in relation to the state. Put another way: rights disperse political power. The state system concentrates power in the hands of governments,⁴⁵ human rights disperse power to individuals. The Practice gives individuals claims against their states and, in some cases, against other states, thus putting power in the hands of individuals. It is not an equal dispersal of power. The Practice is often inadequate, for example, in addressing the differing abilities of individuals to make their rights claims heard.⁴⁶ Yet it nevertheless represents a loss of power on the part of states, and a general sharing out of that power amongst individuals.

⁴³ Ibid, p. 1

⁴⁴ Ibid, p. 110

⁴⁵ Some theorists argue that globalisation represents a loss of power on the part of states (See, for example, David Kennedy, “The Forgotten Politics of International Governance”, 2 E.H.R.L.R. [2001], pp. 117-125). But globalisation theory suggests that power is concentrated elsewhere. For example, in the hands of multinational corporations (Ibid, p. 121),

⁴⁶ See generally, Rosa Freedman, *Failing to Protect: The UN and the Politicisation of Human Rights*, (London; Hurst, 2014)

Rights thus give individuals the power to compel action on the part of states to address their urgent interests.

How Do Human Rights Protect Urgent Interests?

How are urgent interests protected? In Beitz's theory rights impose a "two level" duty on states.⁴⁷ The first-level duty requires states to act, within their own borders, to give effect to human rights through domestic law and public policy. The second-level duty is imposed on the international community collectively. It requires the international community to intervene if a particular state fails in its first-level responsibility. This is a *pro tanto*, rather than absolute, responsibility.⁴⁸ As Beitz puts it:

"The conventional contrast [with *pro tanto* reasons] is with conclusory reasons. Conclusory reasons require us to act regardless of the other considerations in play. These reasons override other reasons, whatever their content. *Pro tanto* reasons are genuine reasons for action, but they do not necessarily override competing reasons that may also be in play. According to the model, when a state's institutions fail to respect human rights, appropriately placed outside agents have a *pro tanto* but not necessarily conclusory reasons to act."⁴⁹

The second-level responsibility is thus important without being compulsory. Intervention to protect human rights is a high priority, but it is not the only priority for states acting in international politics.⁵⁰

⁴⁷ Beitz, n. 5, p. 106

⁴⁸ Ibid, pp. 116-117

⁴⁹ Ibid, p. 117

⁵⁰ Ibid, pp. 106-117

Beitz's conception of intervention is broader than Rawls'. It can include developing international measures to ensure that states are accountable for their first-level responsibilities (such as reporting mechanisms in the Human Rights Council), providing incentives or assistance to fulfil those duties (such as development aid), engaging with domestic political parties or NGOs, and adapting international structures to facilitate compliance with first-level responsibilities. The armed intervention envisaged by Rawls is encompassed in Beitz's theory, but only as one possibility amongst several.⁵¹

Rights have both legal and, what I will call, "persuasive" impact. Recognising rights in international law is but one way in which states hold each other accountable for discharging their first-level duties. Rights also operate beyond the legal system. They can be used to encourage and, in some cases, coerce states into taking measures without the need to resort to legal action. This does not minimise the importance of the legal manifestation of rights. In the international political system, recognition in international law is a mark of the importance of a norm. Recognition in a treaty, or customary international law, or (to a lesser extent) recognition in a UN instrument, denotes a norm of high importance. Recognition in international law is, thus, important to the persuasive impact of human rights as well as the legal impact of human rights.

Beitz's model could be criticised as excessively statist.⁵² The political approach casts states as the only bearers of direct duties. Non-state actors may have responsibilities because of human rights, but these responsibilities are imposed upon them by states, rather than imposed directly by the rights themselves. When a human rights duty is imposed on a non-state actor it represents a state respecting its duty under

⁵¹ Ibid, pp. 33-42

⁵² Ibid, pp. 128

the right (albeit in part). Put another way, human rights do not have a truly horizontal impact.⁵³ For example, the right to privacy imposes a duty on states. In discharging that duty, a state may legislate to restrict newspapers from photographing children in private contexts, or it might enshrine a right to privacy in domestic law, or it might do both.⁵⁴ This imposes an obligation upon non-state actors (such as newspapers) because of a human right. But it is an indirect imposition, stemming from the primary responsibility of the state itself.⁵⁵ The right may be the animating norm but the domestic law or policy is the directly impacting law. Even when non-state actors play a role in human rights issues, duties accrue primarily to states. John Ruggie's guiding principles on multi-national corporations and human rights address the role of non-state actors. Ruggie considers "best practice" standards for non-state actors, but he only assigns explicit duties to states.⁵⁶ For Ruggie, it is for states to enforce human rights standards on multi-national corporations and other non-state actors.⁵⁷ This is reflected in the European Court of Human Rights doctrine of *Drittwirkung* or "third party applicability".⁵⁸ When a non-state actor violates a right, the state with authority over that actor can be held responsible

⁵³ Nicholas Bamforth, "The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies", 58 Cambridge L.J. 159 (1999), p. 160

⁵⁴ For example, in *Murray v Express Newspapers Ltd and Another* [2007] EWHC 1908

⁵⁵ Beitz, n. 5, pp. 122-125

⁵⁶ Ibid, pp. 122-125

⁵⁷ Whether the Practice should evolve, to impose duties directly on non-state actors, is an interesting question. An argument could be made, for example, that some non-state actors exercise power that is equivalent to or greater than that exercised by states (See, for example, Jessica T. Mathews, "Power shift." 1 Foreign Affairs 50 (1997), pp. 50-66). They should, therefore, be subject to the same basic norms as states, including human rights. Such a discussion is, however, beyond the parameters of this project.

⁵⁸ E. Alkema, "The Third Party Applicability or 'Drittwirkung' of the European Convention on Human Rights", in F Matscher and H. Petzold (eds.), *Protecting Human Rights: the European Dimension* (Cologne; C. Heymanns Verlag, 1988), p. 38. See, generally, A. Clapham, *Human Rights in the Private Sphere* (Oxford; OUP, 1993), chs. 4, 7

for the violation. As Judge Dimitros Evrigenis puts it, *Drittwirkung* imposes an “ecological liability”:⁵⁹ the state is not the author of the violation but can be held responsible because it had a duty to take preventative measures. The state is, therefore, “not merely answerable for violations committed by itself but also, in a more general sense, for all violations committed within its territory”.⁶⁰ Right have, thus, a generally vertical, rather than horizontal, effect. An individual will not, *prima facie*, succeed in a human rights claim against a non-state actor unless the state has taken measures to facilitate such claims in domestic law. The individual can, however, succeed in a claim, based on the same facts, against the state. The state has a duty to actively protect human rights, respecting this duty can involve taking domestic measures to prohibit non-state actors from violating the interests of individuals.

Beitz also considers whether his decision to assign only general duties means that his mechanism lacks force. If a specific, achievable duty cannot be identified, are rights anything more than aspirations?⁶¹ Beitz applies Joel Feinberg’s idea of “manifesto rights”⁶² to resolve this issue. Feinberg considers economic, social, and cultural rights. Conditions of conflict and scarcity may prevent the realization of such rights in the immediate term. For Feinberg, however, this doesn’t mean that they are no longer rights. Such rights impose a floating obligation, to be picked up as the capability to do so is achieved.⁶³ Thus, for Feinberg and Beitz, rights include a two-part duty at the first level: the first part obliges state to reach a point at which the measures necessary to address the right become a practical and political possibility. The second part obliges states to take

⁵⁹ 6 “Recent Case Law of the European Court of Human Rights on Articles 8 and 10 of the European Convention on Human Rights” (1982) 3 H.R.L.J. 121, p. 137, quoted in Bamforth, n. 53, p. 167

⁶⁰ Ibid, p. 167

⁶¹ Onora O’Neil, “The Dark Side of Human Rights”, 81 International Affairs (2005), pp. 427-439

⁶² Joel Feinberg, Social Philosophy, (Prentice Hall; Englewood Cliffs, NJ, 1973), pp. 41-67

⁶³ Beitz, n. 5, pp 117-121

those measures. This reflects the reality of the Practice. Article 2(2) of the International Covenant on Civil and Political Rights provides:

“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary *steps* [emphasis added], 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.”⁶⁴

Article 2(1) of the International Covenant on Economic Social and Cultural Rights provides:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”⁶⁵

The language of both provisions recognises that protecting the interests recognised by the covenants may require multiple steps. Respecting a right is a process, not a discrete action.⁶⁶ Rights are often recognised when they are mere aspirations in many states.⁶⁷

⁶⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art. 2(2)

⁶⁵ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Art. 2(1)

⁶⁶ It should be noted that scholars and practitioners widely agree that respecting civil and political rights can require active measures on the part of states. The “positive” duty to take measures to protect rights is not limited to economic, social and cultural rights. See, for example, Aoife Nolan, *Children's Socio-economic Rights, Democracy and the Courts*, (Oxford; Hart Publishing, 2011), pp. 21-28

⁶⁷ Ian Brownlie, “The Rights of Peoples in Modern International Law” in James Crawford (ed.), *The Rights of Peoples*, (Oxford; Clarendon Press, 1988), p. 8-14

The recognition of aspirational rights is still an effective way to protect urgent interests. It indicates that the protection of the interest is a priority in the eyes of the international community and should, therefore, be a priority. In states in which the interest is not yet protected, governments should prioritise those policies that will put the state in a position to protect and provide for the interest in the future. Part of the reason for recognising an interest as a right is to give political and legal support for the struggle to protect that interest. The Committee on Economic Social and Cultural Rights notes that the Covenant obligations do not require the immediate realization of every right contained therein. Rather, states parties must “take steps” or “action” to move towards a point at which the rights can be realised.⁶⁸ When rights against apartheid were recognised at the international level,⁶⁹ the system remained the official policy of the government of South Africa for a further decade. But the recognition of the right assisted in the struggle to overturn the policy. Indeed, rights have limited utility if they are only recognised once the duty element is easily performable.

What Makes an Interest a Right?

Which interests will the Practice protect? For the purposes of this thesis, the most important question to ask of Beitz’s model is how it differentiates between mere *claims* and *rights*. This will allow us to test whether claims of solidarity rights merit recognition as rights. All rights protect interests, but not every interest merits recognition as a right. For Beitz, an interest can be recognised as a right if it meets three criteria; The interest

⁶⁸ CESCR, General Comment No. 3, “The Nature of States Parties’ Obligations”, (14th December 1990), UN Doc. E/1991/23

⁶⁹ See, for example, the United Nations General Assembly The Elimination of All Forms of Racial Discrimination, (20th November 1963), A/Res/18/1904

must be (1) urgent, and its urgency must be understandable from both the perspective of those sympathetic to the interest-holder and from the perspective of non-sympathetic non-interest holders. This means that even those who do not hold the interest in question, and are likely to be non-sympathetic to the claims of interest-holders, must at least be able to understand why it would be a “bad thing”⁷⁰ for the interest holder if that interest were to be set back. The interest must be (2) threatened by a “standard threat” and, similarly, the nature of this threat must be understood from both sympathetic and non-sympathetic perspectives. Finally, recognising the interest as a right must have (3) a practical impact. If recognition will change nothing, then there is little value in the exercise. Therefore, the rights mechanism must be reasonably effective in protecting the interest.

Only by identifying these criteria does it become possible to determine whether solidarity rights should be considered genuine human rights, according to the political approach. The statement “x is a human right” is a normative statement within the Practice. It means “x is an interest which should be given the high level of protection and authority that the two-level model accords”.⁷¹ Only interests of high importance merit such recognition.

Beitz’s “schema”

Beitz recognises that there is no single quality that inherently distinguishes rights from mere interests. Rights are identified through debate, refinement, and political positioning, as part of the Practice. From this process Beitz identifies general criteria that

⁷⁰ Beitz, n. 5, p. 103

⁷¹ Ibid, p. 104

are consistently present in the interests recognised as rights. A successful argument to recognise a particular interest as a right will “make good on three contentions:

1. “That the interest should be protected by a right is sufficiently important when reasonably regarded from the perspective of those protected that it would be reasonable to consider its protection to be a political priority.
2. “That it would be advantageous to protect the underlying interest by means of legal or policy instruments available to the state.
3. “That, in the central range of cases in which the state might fail to provide the protection, the failure would be a suitable object of international concern.”⁷²

Not all parts of this schema carry equal weight. In practice, Beitz’s schema is better applied as a consideration of (1) urgency, (2) threat and (3) effectiveness.

(1) Urgency

The first of the schema contentions concerns the urgency of the interest. It is not sufficient that the holder of the interest merely has a preference in its favour. It is also necessary that an agent, who does not share the interest, would understand it to be of sufficient importance. Both the holder of the interest and a reasonable agent, who does not hold the interest, must be able to appreciate that it is a particularly “bad thing” for the holder if the interest is set back.⁷³

The urgency of the interest is, however, also relevant to the satisfaction of the second and third schema contentions. Under Beitz’s second criterion “it would be advantageous to protect the underlying interest by means of legal or policy instruments available to the

⁷² Ibid, p. 136

⁷³ Ibid, pp. 136-141

state”. Political institutions such as states must balance competing interests. The urgency of an interest, therefore, generally determines whether it is advantageous to protect the interest “by means of the legal and policy instruments available to the state”. There are certain interests to which the protection of the state would make only minimal difference or no difference at all. There are, however, other interests for which protection by the state is difficult considering the political conditions of the time. This second class is often treated in the same manner as the first. Governments claim that it is not possible to protect a certain interest, when measures to protect the interest would face significant political headwinds, but are not physically impossible or undesirable. In a political institution, prioritising one interest generally means compromising another. The question in these cases is not “is it advantageous to protect this interest?”, but “is this interest important enough to justify the compromises that protecting it will require?” This is a question of the relative urgency of the interest. For example, protecting indigenous rights requires compromising other interests. It generally requires making policy that impacts on the interests of richer and more powerful groups of citizens. There is little motivation for governments to do this because indigenous peoples, historically, have little role in national politics. Protecting the interests of indigenous peoples can demand reassessing long standing legal and political doctrines.

In Australia, it was, for much of the 20th century, considered politically impossible to protect indigenous land rights. One of the founding principles of white Australian law and national identity was the doctrine of *terra nullis*: the understanding that land in Australia had belonged to no one before white settlers arrived. It was, literally, not “land” in the legal sense. Based on this doctrine, the land claimed by indigenous Australians had been in the possession of white Australians for centuries. It had been traded, made the subject of mortgages, easements, entailments, and the full range of

proprietary interests. The white Australians who held rights in land in the 20th century believed themselves to have purchased it fairly. Those who did not own land believed that it should remain available, as part of a free market. Recognising indigenous land rights in Australia required setting certain pieces of land outside the market and the Australian law of real property, to be administered by representative bodies of the indigenous community. To many white Australians, this seemed like an unjust and arbitrary appropriation of their property by the government. White Australians were, and continue to be much better represented in Australian politics than indigenous Australians, and therefore exercise greater political power. The political conditions in 20th Century Australia were, therefore, particularly hostile to the measures required to protect indigenous land rights. Yet realising those interests of indigenous peoples, in living with dignity and respect for their culture (to which land rights were essential), was ultimately considered more important than avoiding the real political inconvenience that it would cause⁷⁴. The urgency of the indigenous peoples' interest in land rights outweighed the urgency of the rest of the population's interest in maintaining their law of real property and doctrine of *terra nullius*, thus protecting them became possible. The Practice requires that states find a way to make that which is difficult, possible. If an interest is sufficiently urgent, it should be possible to overcome most political impediments to its protection and will generally meet the second schema contention. The urgency of an interest is, therefore, determinative as to whether it meets the second schema contention

The third schema contention also turns on the urgency of the interest. It requires that (a) it is practically possible to correct a state's failure to fulfil its first-level duty with

⁷⁴ For a summary of the debate about *terra nullius* see Linda Burney, "An Aboriginal Way of Being Australian", 19 Australian Feminist Studies [1994], pp. 17-24

international action, (b) that such action would “satisfy the relevant standards of public morality”,⁷⁵ and (c) that those in a position to carry out the intervention have “sufficient reason to bear the burdens involved with intervention”.⁷⁶ This requires that the urgency of the interest outweigh the presumption of non-intervention in other states. Non-intervention is a basic principle of global political morality.⁷⁷ The Practice itself (as will be examined in Chapter Six) enshrines the principle of non-intervention as part of the right to.⁷⁸ An individual interest that is a “suitable object of international concern” is an individual interest of sufficient urgency to rebut the presumption against intervention.

The matter of whether states will have “sufficient reason to bear the burdens associated with intervention” can also be reduced to a question of the urgency of the interest. The question of burden bearing demands, *prima facie*, an assessment of the capabilities of states in relation to the costs of intervention. If a state has significant and appropriate capabilities, such as a booming economy generating a large public budget, an experienced, well-equipped and mobile military, or highly effective mechanisms for exerting soft power, then it will be able to bear the burden of a costly intervention with relative ease. Most of the time the burden of intervention will, therefore, appear relatively manageable. It will, thus, be easier to find a reason that justifies the burdens of intervention. By contrast, a state with limited capabilities will find the even a low-cost intervention imposes a significant burden, and it will consequently be more difficult to find a reason that justifies bearing that burden. This means that the question of whether

⁷⁵ Ibid, p. 137

⁷⁶ Ibid, p. 137

⁷⁷ Ian Brownlie, *Principles of Public International Law*, 7th Ed., (London; Oxford University Press, 2008), pp. 105-122

⁷⁸ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, (Cambridge; Cambridge University Press, 1995), p. 80

an interest offers sufficient reason to bear the burdens of intervention requires a different assessment in the case of every state and every intervention.

When we make the case for a right, however, we cannot accurately predict which states will be called upon to intervene, in service of that right, beyond (at most) the next few years. We cannot predict whether those states called upon to intervene will have extensive capabilities or limited capabilities. We cannot predict whether the costs of intervention will be significant or limited. We cannot, therefore, assess whether the burdens of intervention will be great or small and, consequently, what sort of reason will be “sufficient” to justify bearing them.

This is not to say that we cannot address the question of burden bearing. We can argue that an interest is so important that an assessment of the capabilities of particular states and costs of particular interventions become unnecessary to the question of burden bearing. We can argue that an interest is of such high importance that, within a central range of reasonably predictable cases, it will *always* provide sufficient reason to justify the burdens of intervention. In other words, even if the capabilities of a state are relatively limited and the costs of intervention relatively high, the interest is of sufficient importance that it will nevertheless justify the burdens of intervention. This is a question of urgency: it requires us to ascertain whether the interest in question can be understood as of high importance from a sufficiently broad range of perspectives. An assessment of the urgency of an interest is, therefore, relevant to all three of Beitz’s schema criteria and must be the first step in deciding whether an interest merits recognition as a right.

(2) Threat

Under Beitz's second criterion the interest must be at risk from a standard threat. In Beitz's words, a standard threat is "reasonably predictable under social circumstances in which the right is intended to operate. The human rights of international doctrine are not, for the most part, best understood as unrestricted blanket protections of urgent interests"⁷⁹. Even if an interest is urgent, there is no point in protecting it if it is not under threat. A standard threat must be reasonably immediate. There is no point in protecting an interest from a threat that has no impact in the present and is unlikely to have an impact in the foreseeable future.

The assessment of a standard threat is global in scope. The Practice is international so the absence of a standard threat on one state does justify discounting the threat *per se*. In Sweden, for example, there is no discernible threat to the freedom to criticise the government. In Zimbabwe, Russia, China, or North Korea (for example) such a threat exists. The right to criticise the government is, from a global perspective, therefore subject to a standard threat. The existence of a standard threat in a significant subsection of states is sufficient to justify the recognition of a right at the international level.

(3) Reasonable Effectiveness

Beitz's second and third schema contentions require that the available rights mechanism, in principle, be effective in protecting the interest. For the second contention, it must fall within the power of the state to protect the interest by means of

⁷⁹ Ibid, p. 110

law or public policy. For the third, it must fall within the ability of the international community to intervene in the event that a state fails in its first-level duty. In both cases the action taken must make a tangible difference. If, in principle, the legislative and public policy tools available to a state (notwithstanding the political balancing considered above) will have no impact in protecting the interest, then the Practice is simply the wrong mechanism with which to protect that interest. If intervention by the international community, if a state fails to respect its first-level duty, can have no impact, then the Practice is the wrong mechanism with which to protect that interest. Therefore, the final step, in deciding whether to recognise an interest as a right, is to determine whether the rights mechanism will be effective in protecting that interest. Rights contain a duty to protect an interest. They oblige states to take some form of action, but states have latitude as to the specific steps they take to protect the interest in practice. Indeed, the specific action required may differ in different states. In some cases, states may agree further practical steps at international level. As such, answering the question of reasonable effect does not require specific policy recommendations. It is sufficient that the rights mechanism can effectively prescribe identifiable general duties on states in relation to the interest protected by the right.

Why Do Human Rights Have Authority?

So far Beitz's work identifies *how* the Practice provides reasons for action. But it is not yet clear *why* it does so. Why do states accept the duty that the two-level model places on them? For Beitz, this is the wrong question. There is no single source of authority for rights. Different states will observe their duties for different reasons. The

Practice functions in the same manner regardless of the reasons that states have for applying its norms. As long as its norms are applied, it is effective.

Rawls makes a normative argument: "the great evils of human history - unjust war and oppression, religious persecution and denial of liberty of conscience, starvation and poverty, not to mention genocide and mass murder - follow from political injustice"⁸⁰. In other words: bad things happen when human rights are not respected. In Rawls' society of peoples, human rights provide reasons for action from a self-interested perspective. Respect for human rights is a necessary precondition for a state to retain its territorial integrity free from the fear of incursion. For Rawls, rights ultimately provide reasons for action because states wish to avoid the consequences of neglecting their duties.

For Beitz, to search for the moral basis of the Practice *as a whole* is a pointless endeavour. States accept the authority of the norms of the Practice because they have agreed to do so. Interests must be justified before they are recognised as rights in the Practice, but they need not be justified based on the same moral criteria⁸¹. Rights are "mid-level norms".⁸² They lie between the reason for protecting an interest and the range of actions required to do so. Rights do not contain the reason that they should be respected, nor do they necessarily specify the range of actions required to protect them. The content of the right is thus distinct from the reasons for respecting it. Rights have normative force because they reflect reasons beyond themselves. Different states will have different reasons for respecting the same rights. But this doesn't detract from the

⁸⁰ Rawls, n. 28, p. 7

⁸¹ Beitz, n. 5, p. 97

⁸² Ibid, p. 140

authority of the Practice because its norms are, for whatever reason, generally respected.⁸³

Beitz's account of the normative force of rights can be understood with the metaphor of a game of tennis. One competitor obeys the rules out of respect for the spirit of the game. The other obeys the rules because he believes that doing so gives him the best chance of winning. The Practice operates in a similar manner. States may observe the rules of the Practice as a matter of political or ethical principle. They may believe that the general application of the rules gives them a competitive economic advantage and, thus, obey the rules out of pure self-interest. They may wish to avoid or atone for the deeds of colonialism. They may be coerced into respecting the norms of the Practice by the threat of intervention. The effect of all of these different motivations is the same: the norms of the Practice have force as reasons for action.⁸⁴

This understanding of normative force also applies to the second-level duty. Not all states will intervene every time a state fails to fulfil its first-level duty. A state's motivation for supporting a particular right will inform the way it respects its duty to intervene. For example, when states are unable to fulfil the duties that are encompassed by the right to development, other states intervene by providing development aid. But development aid is not provided on a uniform basis. European states often provide development aid based on links with their former colonies. The UK, therefore, provides more aid to India than France does, but France provides larger sums to Algeria and Morocco.⁸⁵ Although states respect rights for different reasons, the Practice has coherence because states generally respect the same set of rights.

⁸³ Ibid, pp. 31-42

⁸⁴ Ibid, pp. 31-42

⁸⁵ A. Alseina and D. Dollar, "Who Gives Foreign Aid to Whom and Why?", 5 *Journal of Economic Growth* 33 (2005), pp. 1-45

This division, between reasons for respecting the norms of the Practice and reasons for entering the Practice *ab initio*, allows Beitz to distinguish between disagreement *within* the Practice and disagreement *about* the nature of the Practice itself. For Beitz, disagreements about certain rights or mechanisms are integral to the Practice. When different actors participate in the Practice for different reasons, disagreement about which interests should be recognised as rights, and the best way to protect them, is inevitable. Indeed, it is to be encouraged. Disagreement and debate ensures that ideas are thoroughly tested and forces a proposer to consider a wider range of perspectives when advancing a particular position. Disagreement is thus part of the discourse of human rights, rather than an indication of the failure or incompleteness of Beitz's model.⁸⁶

Conclusion

For Beitz, human rights are political presumptions, worked out at international level, that make individuals a matter of global concern. They protect the urgent interests of individuals from standard threats and, in doing so, empower individuals in relation to states. They do this by imposing a two-level duty on states, first to address the interests protected by rights and, second, to intervene when another state fails to fulfil its first-level duty. An interest merits protection by the rights mechanism if it is (1) particularly important (urgent), (2) faced with a standard threat, and (3) if the rights mechanism will be reasonably effective in protecting it. In subsequent chapters, solidarity rights will be tested against these three criteria to determine whether they have a legitimate place in the Practice. If solidarity rights protect interests that are urgent and faced with standard

⁸⁶ Op. cit., pp. 102-109

threats, from which the rights mechanism will be reasonably effective in protecting them, then they should be considered human rights.

CHAPTER TWO: HOW IS BEITZ'S APPROACH DISTINCT FROM ORTHODOX THEORIES?

Introduction

Before I test solidarity rights against Beitz's model, it is necessary to explain how his theory is distinct from more "orthodox" (as Beitz calls them) accounts of human rights. Beitz's model is, in my view, distinct in two principle ways. It is, first, practical and agnostic and thus facilitates analysis of rights without the necessity of taking an ontological position. It is, second, able to account for the full range of rights represented in the Practice, where most persuasive orthodox theories can only satisfactorily account for a subsection of those rights. This is useful for the purpose of this project, which is to analyse solidarity rights in relation to the Practice as it stands. In this chapter I will analyse orthodox models of human rights in relation to the accepted classes of rights (civil and political rights and economic, social, and cultural rights). I will not, at this point, consider solidarity rights because, if solidarity rights are to be seen as human rights, they must be justified on the same terms as the accepted classes of rights.

In this chapter I will consider three classes of orthodox theory. I will first consider Agreement theories, in which human rights are modelled based on assertions of underlying agreement between cultures. Second, I will consider Naturalistic theories, in which human rights are based on objective truths. Third, I will consider juridical theories, in which human rights are analysed based on their role in legal systems. Finally, I will argue that, in addition to its specific distinctions in comparison with each class of orthodox theory, Beitz's approach differs generally because it admits divergent accounts of human rights.

Agreement Theories

Agreement theories, such as those of Jack Donnelley⁸⁷ and Amartya Sen,⁸⁸ model human rights based on assertions of agreement within and between cultures about certain norms. This is the prevailing approach at the United Nations. Agreement theories fail to provide a satisfactory account of rights because they (a) rely on empirical assertions that they leave unverified and (b) they cannot account for the range of rights currently recognised in international law. Agreement⁸⁹ theories have a nominally empirical basis. For Agreement theorists, such as Donnelley, for example, all cultures value human dignity. There is an underlying agreement amongst all, or the majority of, cultures that humans are entitled to a certain standard of treatment purely by virtue of being human. Not all cultures and societies use the language of rights. Yet all cultures and societies take some measures to protect certain basic aspects of the human condition. Agreement theorists do not claim to identify conscious agreement. They argue that, apparently coincidental, underlying similarities justify enshrining the aspects of protection, on which all cultures implicitly agree, in international law as rights.

Agreement theorists differ as to the nature of the implicit agreement. For some, such as Donnelley,⁹⁰ there is implicit agreement about the *specific interests* that must be protected. For others, such as Sen,⁹¹ the specific interests recognised may differ, but there is implicit agreement as to the *proper process* for recognising the interests that

⁸⁷ Cf. Donnelley, "Cultural Relativism and Universal Human Rights", 6 H.R.Q., 4, (1984), pp. 400 – 410

⁸⁸ Sen, n. 20, pp. 316-356

⁸⁹ Beitz, n. 5, pp. 74 - 90

⁹⁰ Donnelley, n. 87, p. 400

⁹¹ Sen, n. 20, pp. 316-356

merit protection. The common ground for Agreement theorists is that they locate the grounds for human rights in some form of underlying, cultural agreement. In my view, agreement theories are unsatisfactory for two reasons. First, they make nominally empirical claims about the nature of human society which are not supported by the necessary anthropological research. Second, they cannot account for the full range of rights recognised by the Practice. In this section I will explore two different types of agreement theory, (i) interest based agreement and (ii) agreement about public reason. I will then examine how Beitz's model differs from Agreement theories and why it is to be preferred.

Interest based agreement

For proponents of rights based versions of Agreement theories, there is an underlying agreement between cultures to protect certain human interests. Not every culture will use the language of "rights". Yet all cultures protect important interests in some way, through law or other social or political structures.⁹²

Jack Donnelley attempts to reconcile the Agreement approach with a system of internationally recognised human rights.⁹³ He separates the substance of human rights from the form. For Donnelley, all cultures manifest certain basic ways of protecting

⁹² cf. Jack Donnelley, "Natural Law and Natural Rights in Aquinas' Political Thought", 33 *Wes. Pol. Q.* 1980, "Human Rights and Human Dignity", 79 *Am. Pol. Sc. R.* 1982 and and Abdullahi Ahmed An-Na'im, "Universality of Human Rights: Mediating Paradox to Enhance Practice," in Miodrag Jovanovic & Ivana Krstic (eds.), *Human Rights Today – 60 Years of the Universal Declaration*, (Utrecht: Eleven International, 2010), pp. 29-50

⁹³ Donnelley, n. 87, pp. 400 – 410

human dignity.⁹⁴ In some cultures, this is achieved with explicitly recognised human rights, in others it is achieved with social conventions, or with legal duties that are imposed on all members of society.⁹⁵ Regardless of the specific nature of the measures employed, on this view, all cultures seek to achieve the common aim of protecting human dignity. This agreement justifies protecting human dignity internationally, but it does not necessarily justify using the mechanism of "rights". The imperative to protect human dignity is universally agreed then, but it is not universally agreed political rights are the best way to satisfy that imperative.

Nevertheless, Donnelley argues, international human rights are useful as an organising concept. Human rights provide a common language by which the international community can recognise the substance of underlying cultural agreements about protecting human dignity. The measures taken to protect the interests recognised by rights must, however, be left to the discretion of individual societies.⁹⁶ Donnelley's model accounts for both the underlying agreement as to the imperative of protecting certain interests and the absence of consensus as to the best measures by which to do so.

Donnelley illustrates his model with the example of the right to a fair trial. All societies implicitly agree that the innocent should not be punished for crimes they did not commit. Methods for ensuring this differ. The right to a fair trial recognises the underlying agreement regarding this imperative at international level. The imperative is given effect at domestic level in a number of different ways. Some societies use adversarial trials, while others use investigatory trials. Others do not use trials at all, preferring alternative forms of community arbitration or mediation. For Donnelley, the

⁹⁴ Ibid, pp. 407 - 408

⁹⁵ Ibid, p. 11

⁹⁶ Ibid, pp. 415 - 417

form of the “trial” doesn’t matter so long as it is “fair”.⁹⁷ The language of international human rights thus makes the implicit explicit. The underlying agreement in principle is represented at international level with rights language. The principle is applied in different forms in practice depending on the state applying it.⁹⁸

Public reason

An alternative version of Agreement theory locates the underlying cultural agreement in a common conception of public reason. Proponents of this model identify cultural agreement in the *process* by which important interests are recognised as meriting protection with the rights mechanism. In Amartya Sen’s account,⁹⁹ rights allow individuals to realise their “capabilities”.¹⁰⁰ This model recognises the diversity between individuals as well as between cultures.¹⁰¹ All humans have capabilities, but the specific nature of capabilities differs between individuals. For Sen, human dignity is most completely recognised when every individual is able to realise their capabilities.¹⁰²

⁹⁷ Ibid, pp. 415 - 416

⁹⁸ Donnelley’s model doesn’t match the reality of the Practice exactly. International and regional courts have given states less leeway in the application of certain rights than is indicated by Donnelley’s model. (For example, the European Court of Human Rights has set strict guidelines for the conduct of trials. See Paul Roberts, “Does Art. 6 of the European Convention on Human Rights Require Reasoned Verdicts in Jury Trials?”, 11 H.R. L. Rev 2 (2011), pp. 213-235). But it nonetheless serves as a useful ideal theory, balancing cultural difference with agreement on underlying principles.

⁹⁹ Sen, n. 20, pp. 316-356

¹⁰⁰ Ibid, p. 317

¹⁰¹ Ibid, p. 316 - 318

¹⁰² Martha Nussbaum shares Sen's "capabilities" approach but she locates cultural agreement at the level of rights themselves in a similar manner to Donnelley. cf. Martha Nussbaum, "Human Capabilities: Female Human Beings", in Nussbaum and Jonathan Glover (eds.), *Women, Culture and Development: A Study of Capabilities*, (Clarendon Press; London, 1995), pp. 1 - 57

Rights are a mechanism for ensuring that all individuals are able to realise their capabilities. Rights are identified through public discourse. Not all cultures share the language of rights. All liberal cultures, however, exhibit some form of public discourse. Those that do not are, for Sen, dictatorships.¹⁰³ For Sen, this amounts to an underlying agreement between all cultures as to the value of public debate. This represents common agreement as to the proper process by which rights are recognised.¹⁰⁴

Sen shares elements of the "naturalistic" approach (discussed below). Parts of his model rely on qualities, like having capabilities, that are inherent in human nature. Beitz thus identifies Sen as a proponent of the Naturalistic approach rather than an Agreement theorist¹⁰⁵. Sen's model of human rights however, ultimately relies on an anthropological assertion of cultural agreement. Having *capabilities* is part of human nature. In Sen's model, however, humans have *rights* because there is an underlying agreement within and amongst cultures about the value of public discourse through which human capabilities can be recognised. The discourse, not capabilities, is the foundation of rights. *Through* public discourse, societies decide to recognise certain interests in a normative system, to best help individuals realise capabilities. For Sen, the authority of human rights comes from a universal underlying agreement about the value of public discourse, not from the existence of capabilities.

The problems with Agreement theories

¹⁰³ Sen, n. 20, pp. 355 - 356

¹⁰⁴ Sen, n. 20, pp. 355 - 356

¹⁰⁵ Beitz, n. 5, pp. 48 - 72

In my view, Agreement theories of all types cannot offer a satisfactory account of the accepted classes of rights because they (a) rely on unverified assertions about culture and society and (b) they cannot account for the full range of rights recognised in the accepted classes. This section will discuss each of these issues in turn. Agreement theories rely on apparently empirical statements such as "all cultures recognise human dignity" or "all cultures value public debate". These are anthropological statements and therefore should be grounded in anthropological research. A theory based on empirical assertions, like Donnelley's or Sen's, can be supported or discredited through anthropological study. Yet Donnelley and Sen fail to do this. Their justifications for human rights are based on unverified assertions rather than empirically verified facts. Sen acknowledges the limitations of his model. Not all societies value public debate in the way he claims. For Sen, however, societies that do not fit his rubric as "dictatorships".¹⁰⁶ This doesn't solve the problem. Even if Sen's assertion is "all non-dictatorships value public debate" rather than "all societies value public debate", it is still an assertion of fact that is not supported by empirical research. Put another way, Donnelley's and Sen's approaches may be based on accurate assertions or they may be based on inaccurate assertions. The problem they face is that we have no way of knowing whether their underlying assertions are accurate because they have not supported their assertions with the necessary anthropological study.

Even if Sen and Donnelley had conducted the required research, their theories would still be unsatisfactory if one's purpose is to analyse the full range of rights recognised in the Practice. As Beitz points out, the class of "qualities that could be considered rights based on agreement between societies" is incredibly narrow. Agreement theories can only account for a small sub-section of the rights recognised in

¹⁰⁶ Sen, n. 20, p. 356

the Practice. It is not possible to find universal or even widespread cultural agreement about the full range of interests recognised in the Practice. Beitz notes that freedom of religious practice and freedom from discrimination on grounds of sex cannot be said to be matters of agreement within and amongst cultures.¹⁰⁷ Donnelley and Sen both identify a range of rights that is narrower than that recognised in international law. This thesis aims to argue for solidarity rights as part of the Practice as it stands.¹⁰⁸

Why Beitz's approach is distinct from Agreement theories

Beitz's political approach is preferable to Agreement theories. It doesn't depend on an unverified empirical assertion and it accounts for the full range of rights recognised in the Practice. In a certain sense, Beitz himself could be described as an agreement theorist. His model implies an agreement (to abide by the norms of the Practice) among all states that participate in the Practice. Agreement theories, however, seek to locate the authority of rights in an *underlying* agreement between cultures. Beitz identifies agreement at a different level. For Beitz, states agree to observe the norms of the Practice, but they do so for different reasons. There is no underlying agreement, only an *nominal* agreement. Beitz relies on a single empirical assertion: all states in the Practice generally recognise by the norms of the Practice¹⁰⁹ most of the time. Beitz's assertion is therefore preferable to the assertions of agreement theorists because it is

¹⁰⁷ Beitz, n. 5, p. 88

¹⁰⁸ Beitz, n. 5, pp. 74 - 90

¹⁰⁹ Through ratification of treaties, membership of the United Nations, *opinio juris* and state practice. See p. 178 for a fuller discussion of how states recognised human rights norms.

generally agreed to be the case. In Rorty's words, human rights are a "fact" of public morality.¹¹⁰

Beitz also accounts for the full range of rights recognised in the Practice. Orthodox theories work from the foundations upwards. Agreement theories, for example, assert that an underlying agreement exists then ask what rights it justifies. Beitz works in the opposite direction. He looks at the rights recognised in the Practice and asks why they provide reasons for action. Beitz's model thus accounts for the content of the Practice as it stands, rather than in an idealised form. Applying Beitz's approach to solidarity rights allows us to analyse them on the same terms as the rights already recognised in the Practice, by subjecting them to a fair test and achieving a more satisfactory determination of whether solidarity rights are human rights.

"Naturalistic Theories"

In Naturalistic theories,¹¹¹ rights are based on objective truths that have value in and of themselves. This approach is represented particularly in scholarly theories such as those of John Finnis¹¹² and James Griffin.¹¹³ The authority in rights comes from the extent to which they reflect these objective truths. Naturalistic theories do not, however, provide an account of rights that is useful when seeking to analyse the Practice as it stands because they (a) rely on unverifiable assertions and (b) cannot account for the full range of rights currently recognised in international law.

¹¹⁰ Beitz, n. 5, p. 121

¹¹¹ Beitz, n. 5, p. 48

¹¹² John Finnis, *Natural Law and Natural Rights*, (2nd Ed.) (Oxford; OUP, 2011), pp. 24-48

¹¹³ James Griffin, *On Human Rights*, (OUP; New York, 2008)

The objective truths on which Naturalistic theories are based differ depending on the theory. They are generally universal, transcend social and political institutions, and pre-exist rights. Philosophers can identify these truths, but they have always existed and will always exist. Naturalistic theories fall into three groups. The first group of theories rely on assertions about natural law. The second group rely on assertions about human nature. In the third group, truths are identified through deductive reasoning. In my view, this reliance on unsupportable assumptions about the nature of humanity and, in some cases, truth, makes naturalistic approaches unsatisfactory if one's aim is to analyse the Practice as it stands. It also means that naturalistic theories generally can't account for the full range of rights recognised in the Practice. Beitz's approach is to be preferred because he models human rights without relying on assertions about abstract concepts. This section will (i) explore each different versions of naturalistic theories before (ii) identifying why their reliance on abstract concepts makes them unsatisfactory and (iii) why Beitz's approach is to be preferred.

Natural law

John Finnis develops a natural law approach to human rights.¹¹⁴ For Finnis, rights are a mechanism for achieving "forms of human good".¹¹⁵ Finnis postulates that a certain set of concepts are objectively and irreducibly good. They are "Knowledge", "Life", "Play", "Aesthetic Experience", "Sociability (friendship)", "Practical reasonableness" and "Religion" (or belief/faitth generally).¹¹⁶ It is not necessary to explain *why* these

¹¹⁴ Finnis, n. 112, pp. 24-48

¹¹⁵ Ibid, p. 24

¹¹⁶ Ibid, pp. 85 - 90

concepts are good. They are simply good as a matter of truth. For Finnis, moral values are good to the extent that they reflect one or more of the “forms of human good”. In Finnis’ model, values are either “objective” or not objective. A value that is not objective, can be justified according to the extent that it reflects or facilitates other values. Certain values, however, are “objective” and can’t be dissected. They are good in and of themselves, rather than because of their relationship with other values. These are “forms of human good”, their goodness is “self-evident”.¹¹⁷

Finnis contrasts moral reasoning with geometry. The rules of geometry are mutually justifying. The use of degrees to measure an angle only has relevance within the discipline of geometry. If the discipline did not exist, then a protractor would be nothing but a series of meaningless lines on a piece of plastic. By contrast, "forms of human good" are self-justifying. They are good because they are good. If philosophy textbooks did not exist to explain them, knowledge, practical reasoning and play (for example) would not cease to be good.¹¹⁸

For Finnis, morality is like physics. Physicists understand that the universe is made up of elements: substances that are made up of only one type of atom. While water may be a combination of two parts hydrogen to one-part oxygen, hydrogen itself is only made up of hydrogen and oxygen is only made up of oxygen. Finnis’ “forms of human good” are to moral reasoning as elements are to physical science. Just as an atom of oxygen can only be described as “oxygen”, a “form of human good”, such as “knowledge” can only be described as “knowledge”. Both are, for Finnis, irreducible and therefore self-justifying.

¹¹⁷ Ibid, pp. 24-48

¹¹⁸ Ibid, pp. 100 - 125

Finnis acknowledges that individuals and societies have limited resources. It is not possible to pursue every "form of human good" all the time. One must choose where to devote one's resources. The best distribution of moral resources is identified by applying practical reason (which is, itself, a "form of human good"). Practical reason is the process of making decisions objectively while balancing the needs of both the individual and society. One result of the application of practical reason is human rights. For Finnis, rights are a method of balancing individual good with public good in order to best realise the "forms of human good".¹¹⁹ In Finnis' conception, rights are not good in and of themselves. They are a means of realising that, which is self-evidently good. If we are to analyse rights based on Finnis' model, we must, therefore, ask what relation they have to the concepts that Finnis has identified as "forms of human good".

Human nature

An alternative Naturalistic approach bases human rights on truths about human nature. In these theories, certain qualities are inherent in all individuals by virtue of their humanity. Such qualities must be protected by human rights. For James Griffin,¹²⁰ all human beings inherently have the ability to reason about what makes a "good life". Based on this reasoning humans calculate our impact upon the world.¹²¹ This quality distinguishes human from other animals. It is thus worth protecting. Griffin calls this quality "personhood".¹²² For Griffin, agency is fundamental to personhood. Humans already have the ability to reason. Therefore, they should have the agency to put that

¹¹⁹ Ibid, pp. 100 - 125

¹²⁰ Griffin, n. 113

¹²¹ Ibid, pp. 29 - 51

¹²² Ibid, p. 32

reason into practice. Griffin identifies two essential aspects of agency. First, an agent must have "autonomy": She must not be compelled or constrained by another. But an agent must also have the means to exercise her autonomy: her "choice must be real". For example, she must have the resources and education¹²³ necessary to exercise agency. Human rights protect agency.

Griffin equates the necessities of "personhood" with biological necessities. For Griffin, respect for agency is necessary for an individual to function as a sentient human being, just as food, water and shelter are necessary for an individual to function biologically. The denial of personhood has a detrimental effect on the individual's sense of themselves in the same way that a denial of food has an effect on their body¹²⁴. For Griffin, rights thus protect personhood. He illustrates this assertion with an examination of the right against torture. Torture causes pain, but this is not sufficient to justify a right against torture. Rights do not and cannot, for Griffin, protect against everything that causes pain, even extreme pain. Rights protect humans from torture because torture robs the individual of her autonomy thus compromising her personhood¹²⁵. If we are to analyse rights based on Griffin's account, we must, therefore, ask whether they are relevant to the qualities that Griffin identifies as necessary to "personhood".

The problems with Naturalistic theories

Richard Rorty identifies the problem with relying on abstract concepts to support a model of human rights. Rorty's focus is on the usefulness of human rights models in

¹²³ Ibid, pp. 29 - 51

¹²⁴ Ibid, pp. 111 - 124

¹²⁵ Ibid, pp. 29 - 51

relation to the Practice. He does not seek to fundamentally undermine naturalistic theories, rather to identify the reasons they are not useful for a set of practical, global, political norms.

Naturalistic theories all claim to be premised on something that is objectively "true". In an imperfect world, however, it is not possible to identify "truth" in any meaningful sense. For Rorty it is impossible to develop a mechanism that will enable us to identify objective truths¹²⁶. Rorty begins with the process that is used to ascertain "truths". Philosophers like Griffin and Finnis both appeal to "reason" or "rationality" as, in Rorty's words, an "innate truth oriented faculty".¹²⁷ For Griffin and Finnis, individuals can apply reason to identify the truths on which to base their model of rights. Yet, as Rorty points out, this relies on a circular argument. Any definition of reason must include a set of criteria which, when broken down themselves, can only be described as "reason".¹²⁸ The statement "reason is reason" is meaningless.

Finnis relies on concepts that explicitly cannot be justified by reference to anything other than themselves. For Finnis, this indicates the strength of his account. If a value cannot be justified by reference to anything other than itself, it must be objective.¹²⁹ "Forms of human good" are good in and of themselves. The question "but what is good?" it could only be answered, within Finnis' theory, with a reference to the "forms of human good": good is good because it is good. For Finnis' theory to have practical value we must trust that one can correctly identify the forms of human good.

¹²⁶ cf. Beitz, n. 5, pp. 3 - 20

¹²⁷ Rorty, "Universality and Truth", in Robert B. Brandon (ed.), *Rorty and His Critics*, (Blackwell; Massachusetts, 2000), p. 1

¹²⁸ Ibid, pp. 1 - 3

¹²⁹ Finnis, n. 112, pp. 85 - 87

For Rorty, Naturalistic theorists attempt to treat morality in the same way that we might treat physical science.¹³⁰ Yet statements about physical science are tested extensively. In Naturalistic theories, statements about moral truths are inherently untestable. When testing a scientific hypothesis, all factors that might distort the result are removed from the experiment. If a scientist wishes to test the hypothesis that two hydrogen atoms combined with one oxygen atom would create a molecule of water, she must go to considerable lengths to ensure that there are, for example, no sulphur atoms in the experiment. Moral philosophers do not enjoy that luxury. It is not possible to test moral statements in laboratory conditions. Philosophers are the product of their own culture, society, history and personal background.¹³¹ Philosophers might attempt to transcend their socio-cultural context. Yet their very understanding of "transcending cultural context" will have been developed within that same context.¹³² Thus, even our understanding of objectivity is subjective. For Rorty, the closest one can come to objectivity is, ironically, to acknowledge one's ultimate lack of objectivity. Arguments are stronger when they acknowledge the context in which they are made.¹³³

Rorty does not deny the existence of objective truth. Any theorist might stumble across truth. As no theorist can view the world from an objective standpoint, however, they cannot be sure to know truth when they see it. Theories of human rights are more coherent when they acknowledge this limitation and seek to build models of human rights that do not rely on assertions of objectivity. Searching for the objective truth in human rights is, for Rorty, a waste of time. It is not necessary to convince people that

¹³⁰ Rorty, n. 127, p. 5

¹³¹ Rorty, n. 127, pp. 7 - 20

¹³² E. H. Carr, *What Is History?*, (Penguin; London, 2008), (First published in 1966), pp. 40 - 62

¹³³ Rorty, n. 127, p. 25

human rights norms should generally be respected. Human rights have become “a fact of the world”.¹³⁴ Only someone who is entirely unable to comprehend basic social norms, would require convincing that human rights norms are a “good thing”. Critical analysis is, for Rorty, more usefully applied to questions of the application of human rights and the development of the Practice.¹³⁵ Ontological arguments based on claims to objectivity are of little use when analysing human rights in practice. They require entering into debates about a principle upon which there is already general agreement (that human rights merit general respect), which distracts from more pertinent questions, such as how human rights are to be more fully realised in practice.

Moral theory does not, for Rorty, require claims of objectivity. A moral proposition cannot be accurately described as objectively true. It can, however, achieve a status that is practically equivalent. If a proposition is justified repeatedly, to a diverse range of different audiences, and incorporates critiques from those audiences in order to become stronger, then it gains widespread acceptance. For the purpose of developing normative systems, this is practically equivalent to the proposition being objectively true. If a proposition is broadly accepted by a wide enough range of agents, then it has the same effect as if it were inherently true. Human rights norms do not, therefore, need to be based on truths. It is enough that they are broadly accepted.¹³⁶

Tasioulas

¹³⁴ Beitz, n. 5, p. 134

¹³⁵ Ibid, p. 134

¹³⁶ Ibid, p. 149

John Tasioulas recalibrates the Naturalistic account of human rights to address Rorty's criticism. For Tasioulas, rights can be identified by applying "natural reason".¹³⁷ In the light of Rorty's critique, Tasioulas accepts that it is no longer viable to base rights on claims to objective foundations. Instead, Tasioulas develops a theory of human rights retaining "foundations" but eschewing "foundationalism".¹³⁸ For Tasioulas, rights must be based on something but that something need not be an appeal to objective truth. Tasioulas develops his model over several articles and book chapters.¹³⁹ He rejects accounts that base human rights on "defective accounts of what objectivity is".¹⁴⁰ He also rejects models (like Griffin's) that base all human rights on a single quality. Tasioulas strives to develop a theory that is non-parochial, demonstrates a degree of fidelity to the practice as it stands, and that captures the "distinctive importance" human rights."¹⁴¹ At the same time, for Tasioulas, rights must be more than political assertions. They must have foundations in something more fundamental than politics.¹⁴²

For Tasioulas, human rights are "natural rights", but are also linked to their social context. Human rights are "natural" because they are derivable through "natural moral reasoning".¹⁴³ But they are context dependent because natural moral reasoning can produce different conclusions in different contexts. Natural reason can be applied in two ways: derivative reasoning or independent reasoning.¹⁴⁴ Derivative reasoning requires

¹³⁷ John Tasioulas, "Human Rights, Legitimacy and International Law", 58 *American Journal of Jurisprudence* 1 (2013), pp. 1-25,

¹³⁸ John Tasioulas, "On The Nature of Human Rights", in G. Ernst and J. Hellinger (eds.), *The Philosophy of Human Rights*, (Berlin; De Gruyter, 2012), pp. 17-61

¹³⁹ Ibid, pp. 45; Tasioulas, n.137, pp. 97-116;

¹⁴⁰ Tasioulas, n. 137, p. 45

¹⁴¹ Tasioulas, n. 138, p. 17

¹⁴² Tasioulas, n. 137, pp. 54-55

¹⁴³ Tasioulas, n. 138, p. 26

¹⁴⁴ Tasioulas, n. 137, pp. 51-66

examining existing rights and identifying common themes. The foundations of rights can be derived from these themes.¹⁴⁵ Independent reasoning involves determining the foundations of rights without relying on analysis of existing rights. For Tasioulas, rights are grounded in human dignity. But dignity provides only the “moral background”¹⁴⁶ to rights, not the content of rights themselves. Dignity is the reason that humans have rights in general, the content of specific rights is derived from human interests. For Tasioulas, a human interest is “objective [in the sense that it applies to all humans whether particular individuals wish to make use of it], standardised, open-ended and pluralistic.”¹⁴⁷ An interest becomes a right if it is of sufficient importance to generate corresponding duties. The duty forms the content of the right.¹⁴⁸

The importance of an interest can be determined by analysis of how it interacts with other interests. Tasioulas recognises that there are always competing interests. The analysis of an interest must recognise the extent to which it impacts on or facilitates others.¹⁴⁹ Interests that, when fulfilled, facilitate the fulfilment of other interests are more likely to justify duties than interests that, when fulfilled, have a negative impact on other interests. An interest is relevant only to the holder. Only the most important interests generate corresponding duties and can thus be recognised as a right. A right, therefore, necessarily imposes duties on others. Natural reason allows us to identify which interests are important enough to generate duties and should therefore be recognised as rights.

Tasioulas avoids some of the pitfalls of other Naturalistic approaches. He is not, however, successful in avoiding Rorty’s critique entirely. Tasioulas’ model is pluralistic.

¹⁴⁵ Tasioulas, n. 137, pp. 45-46

¹⁴⁶ Ibid, p. 51

¹⁴⁷ Ibid, p. 52

¹⁴⁸ Ibid, p. 48

¹⁴⁹ Ibid, pp. 51-56

Rights are not tied to a particular set of objective values and so Tasioulas' model can accommodate multiple perspectives. Yet his model of human rights still rests on the assertion that humans have a moral status independent of society. Tasioulas' "natural reason" mechanism ultimately aspires to moral objectivity in the same way as other orthodox theorists. The natural reason model must reject some interests from consideration as rights and accept others. Otherwise it will have no critical impact. Furthermore, Tasioulas cannot justify the authority of rights in general without relying on the assertion that humans all possess an undefined quality called "dignity" purely by virtue of our humanity. But Tasioulas does not explain how he can achieve a standpoint of sufficient objectivity to (a) identify that all humans possess "dignity" and (b) distinguish between those interests that prescribe duties and those that do not. Furthermore, Tasioulas does not explain why "natural reason" is a legitimate process by which to distinguish between interests and rights. For Tasioulas natural reason delivers the correct answers because it is "natural", it is inherent in humanity. Tasioulas applies "natural reason" in the same way that Finnis applies "reason" as, in Rorty's words, an "innate truth oriented faculty"¹⁵⁰. As Rorty points out, it is not possible to identify a truth oriented faculty because it is not possible to identify objective moral truths.

Neither Tasioulas nor other orthodox theorists make room in their models for the full range of rights recognised in the Practice. As Beitz points out, it is not clear that a model based on personhood, for example, would account for a right to an adequate standard of living. In a personhood model the right would entitle the individual to only "the material conditions necessary for effective agency". The Practice, however, provides for a right based on the "dignity" of the individual. As Beitz puts it: "Dignity has a social dimension: it involves one's standing with others and its achievement may

¹⁵⁰ Beitz, n. 5, p. 128

require a higher level of material well-being than the considerations of agency alone would justify”.¹⁵¹

Why Beitz's model is preferable to Naturalistic theories

Beitz's model is distinct from Naturalistic models because it doesn't rely on an appeal to objective truth or a "truth oriented faculty". Beitz is agnostic about any supposed objective foundations for rights. For him, human rights are political presumptions. Humans have rights because humans have made a *political decision* to have rights. This was not a decision made by all of humanity acting together, but by political leaders acting through international political fora in the aftermath of the Second World War.¹⁵² The reasons political leaders have for taking (and continuing to broadly support) that decisions are not, for Beitz, important. The Practice has broadly the same practical impacts regardless of the reasons participating parties support it. The Practice evolves through continuing action in political fora and the range of fora through which the Practice can be influenced (and consequently the range of individuals who can influence the Practice) has broadened. The Practice can now be influenced by for a that are accessible to civil society, not merely political leaders. Rights need not be based on interests with inherent value or serve an objective truth. A right is distinguished from an interest by its recognition in the Practice. Beitz identifies the process for the recognition by analysing those rights that are already recognised in the Practice. For Beitz, rights are institutional. They relate to the relationship between the individual, the state, and the international community. If the institutions through which they take effect did not exist,

¹⁵¹ Ibid, p. 67

¹⁵² Ibid, pp. 14-26

then human rights would not exist either. This model is more appropriate for this thesis. My aim is to argue for solidarity rights as part of the Practice. It is not necessary that I rely on an objective truth to do so because the Practice is not based on objective truth. This is clear because no Naturalistic theory can account for the full range of rights recognised in the Practice.¹⁵³ It is a political exercise.

In Naturalistic theories, a right reflects a truth. If a right recognised in the model is called into question, then one must also question whether the model has correctly identified the truth or has applied it incorrectly. This calls into question the validity of all the other rights recognised by the model. If the model has misidentified the truth on which rights are based, then every right it recognises is based on a mistake. If it has misapplied the truth on which rights are based, then it may also have misapplied it in regard to any of the other rights it recognises. For Beitz, controversy is part of the Practice. If rights are political presumptions, then it is to be expected that they will be the subject of disagreement. Controversy about a right doesn't undermine Beitz's model because Beitz's does not claim his model is based on objective truth. Beitz's model therefore provides a more satisfying account of human rights than Naturalistic theories.

Juridical Theories

The third class of orthodox theories, juridical accounts of human rights, primarily focus on the work rights do rather than the basis for rights. leading proponent of the juridical approach, Ronald Dworkin,¹⁵⁴ develops a model based on a distinction between

¹⁵³ Beitz, n. 5, p. 50

¹⁵⁴ Dworkin also considers natural law theories of rights (Dworkin, n. 19, pp. 13-29). Like Rorty he is critical of theories which confuse the (empirically observable) laws of nature with (unobservable) natural

“institutional” and “background” rights.¹⁵⁵ Institutional rights are held by individuals, in relation to a specific institution such as the state or the courts. Background rights are moral rights and apply universally, regardless of institutions. One can, however only receive remedies in relation to institutional rights. They compel the institution in question to behave in a certain manner.¹⁵⁶ From Dworkin’s perspective, human rights in the Practice are best understood as institutional rights. They take effect in relation to a series of institutions including the UN, international courts, regional and state level institutions. Rights act as “trumps”.¹⁵⁷ They prevent the will of the majority from overwhelming the interests of the individual with regard to a limited class of interests.

Dworkin’s juridical model is, however, of limited utility for analysing international human rights. Dworkin’s model generally presupposes an established judiciary that is able to act independently and may have confidence that its decisions will be enforced on their own authority. In other words, Dworkin’s model presupposes a judiciary akin to the domestic judiciary in a Western democracy. Some of his most influential work involves applying his account of rights to legal and public policy debates in the USA. But international politics lacks a unified court system and a

law. But he is more forgiving than Rorty. Dworkin accepts that there are certain observable moral interests that are common to all humans. But morality is a poor basis for rights. For Dworkin, morality is a “blunt instrument” (Dworkin, n. 19, p. 107). Its inclusion in reasoning about rights (or any aspect of law) makes it more difficult to resolve the “hard cases” (Dworkin, n. 19, p. 107) which require precise reasoning. Moral reasoning can only provide broad assertions.

But Dworkin does not embrace relativism. Indeed, he dismisses moral relativist critiques of orthodox theories. For Dworkin, to hold a certain position yet simultaneously accept that it is one of several equally valid positions, is not to hold a position at all (Ibid, pp. 319-335). A statement that comes with the qualifier that it is merely the result of subjective judgement, is not a meaningful contribution to discourse. It makes the original statement critically meaningless.

¹⁵⁵ Dworkin, n. 19, pp. 13-29

¹⁵⁶ Ibid, pp. 13-29

¹⁵⁷ Ibid, p. 14

comprehensive or cohesive means of enforcing judicial decisions. Therefore, an argument for solidarity rights based purely on Dworkin's account is unlikely to be convincing in context of international human rights.

Beitz's model applies to the international human rights system, in which rights are not consistently enforced by courts with universal jurisdiction, but are better described as political presumptions. Beitz theory has room for rights to take effect in court, both in an international and domestic context. But, for Beitz, giving rights legal effect is only a part of fulfilling the two levels of duties that the Practice imposes. To give rights effect in the domestic legal system (as, for example, the UK Human Rights Act 1998 or other justiciable bills of rights do) is one way in which states can fulfil their first-level duty. To give rights effect in international law is but one way of fulfilling the second-level duty. Beitz's political approach therefore offers a more satisfying account of the rights under scrutiny in this thesis than juridical accounts like Dworkin's.

Conclusion

In this chapter, I have demonstrated that Beitz's political approach is distinct from orthodox approaches. I have argued that agreement theories rely on empirical claims that, although verifiable, have not been verified. Agreement theories therefore tend to rely on assertions. Even if agreement theories were tested, it is unlikely that they would support more than a small core of rights, and they are thus unable to account for the Practice as it stands. Naturalistic theories generally rely on claims to objectivity that make them of limited utility for analysis of the Practice and only account for a limited subset of rights. Naturalistic and Agreement theories are, thus, of limited utility for analysing human rights in the Practice. Juridical theories are better suited to modelling

rights in domestic systems and do not have space to account for the broader range of variables at work in the international human rights system.

Beitz's political approach is the most useful model of human rights for the purpose of analysing rights in relation to the Practice as it stands. First, it does not rely on unverifiable claims of objectivity or unverified assertions because it avoids ontological arguments about the nature of rights altogether. In modelling rights as mid-level norms, Beitz makes it unnecessary to engage in such debates. Second, it accounts for the full range of rights recognised in the Practice. Third, it embraces competing theories of rights.

Beitz's model of rights is pluralistic. It has room for all types of orthodox theory. For Beitz, rights are mid-level norms. One right may be respected for many different reasons. It doesn't matter whether people respect a right because they believe it is based on an objective truth or because they are respecting a perceived cultural agreement. For a right to function as a political presumption, all that matters is that it is respected and given effect in the majority of cases. The reasons for doing so are irrelevant and so all reasons are compatible with Beitz's model. Beitz's model does not, therefore, aim to supplant orthodox theories. It has room for individuals or states to respect rights for any reason they choose. If a state respected human rights based on a national belief in personhood, this would be equally acceptable for Beitz's theory as if a state respected rights purely in order to avoid intervention by other states.

Having established the key tenets of Beitz's political approach, and the reasons it is to be preferred to orthodox approaches, I will now turn to solidarity rights. The next chapter will identify a working description of solidarity rights. This will enable solidarity rights to be evaluated against the key tenets of Beitz's model in the second part of this thesis.

CHAPTER THREE: IDENTIFYING SOLIDARITY RIGHTS

Introduction

In order to justify solidarity rights according to Beitz's criteria, we must understand, in detail, what characterises solidarity rights and marks them out from other classes of human rights. This chapter will sketch a detailed picture of solidarity rights. In my view, solidarity rights have three key features. They are *rights that (1) protect interests in common-goods by (2) imposing an outward-facing duty on states and (3) are held by individuals.*

In Beitz's model, as identified in Chapter One, rights impose a two-level duty on states. The first level requires states to protect and provide for the interest recognised in the right. In contrast with the accepted classes of human rights, in which the first-level duty relates purely to the domestic realm, the duty in solidarity rights generally looks beyond the borders of the state: it is thus *outward-facing* as well as inward-facing. The accepted classes of rights generally impose a duty on states to provide for and protect urgent interests within their own borders. Solidarity rights impose a duty on states to protect and provide for urgent interests by taking action both within and outside their borders. This generally requires that states cooperate with each other or take into account the global impacts of their domestic and foreign policies. Solidarity rights, like all human rights, are held by individuals. Unlike other classes of rights, however, they have meaning only in a collective context.

In this chapter I will, first, argue for a departure from established definitions of solidarity rights. I will then consider the three key features in my description: I will identify the class of interests protected by solidarity rights (common-good interests),

analyse the nature of the duty to cooperate (the outward-facing duty), and, finally, examine the nature of the holders of solidarity rights (individuals).

Attempts to Define Solidarity Rights

Previous attempts to identify the key features of solidarity rights have proved unsatisfactory. They do not accurately capture the way solidarity rights manifest in international law and politics. UNESCO director, Karal Vasak, set out the first conception of solidarity rights, what he called "Third Generation" rights, in 1977.¹⁵⁸ Vasak was working with limited experience of, what should now be called, solidarity rights. At that time the only established one was the right to.¹⁵⁹ Examination of the state practice and case law that has developed since Vasak proposed his definition exposes its limitations. It similarly demonstrates that many subsequent definitions, that are broadly based on Vasak's, are equally unsatisfactory.

Vasak used the metaphor of "generations" to classify rights into three groups, corresponding to the French revolutionary slogan: "Liberté, Egalité, Fraternité".¹⁶⁰ For Vasak, the "First Generation" of rights are the rights of "liberté". These correspond to civil and political rights. They ensure individual freedoms from oppression, such as

¹⁵⁸ Karal Vasak, "A 30 Year Struggle", UNESCO Courier (November 1977), pp. 28 - 32

¹⁵⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art. 1

¹⁶⁰ Ibid, pp. 28 - 32

freedom of expression,¹⁶¹ freedom from arbitrary arrest,¹⁶² and protection from cruel or inhuman punishment¹⁶³ at the hands of the state. The state's role in these rights is, for Vasak, one of restraint.¹⁶⁴ As the jurisprudence of rights has developed, this description has been challenged.¹⁶⁵ Vasak's "Second Generation" are the rights of "égalité". They correspond with economic, social, and cultural rights. They include the right to education¹⁶⁶, the right to health¹⁶⁷ and labour rights.¹⁶⁸ For Vasak, these rights are identified by the requirement that governments take positive action towards their realisation.¹⁶⁹ "Third Generation" rights are the rights of "fraternité". For Vasak, these are "solidarity rights".¹⁷⁰ "Third generation" rights "reflect a certain conception of

¹⁶¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Art 19; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art. 19(2); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

¹⁶² UDHR, Art 9; ICCPR Art. 9; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art. 5

¹⁶³ UDHR, Art 5; ICCPR, Art. 7; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art. 3

¹⁶⁴ Vasak, n. 158, pp. self-determination 28 - 32

¹⁶⁵cf Sandra Fredman, "Human Rights Transformed: Positive Duties and Positive Rights", Oxford Legal Research Paper Series, Paper No 38/2006, August 2006

¹⁶⁶ UDHR, Art 26; International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR) Art. 13

¹⁶⁷ UDHR, Art 25; ICESCR, Art. 12

¹⁶⁸cf. UDHR Art 23; ICESCR, Art. 6; and, for example, International Labour Organisation (ILO), Convention concerning Freedom of Association and Protection of the Right to Organise (Entry into force: 04 Jul 1950), Adoption: San Francisco, 31st ILC session (09 Jul 1948); ILO C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

¹⁶⁹ Vasak, n. 158, pp. self-determination 28 – 32, of course, this distinction is no longer broadly accepted. For example, Aoife Nolan's work demonstrates that, so called, "First Generation" rights also impose positive obligations. See Nolan, n. 66, pp. 21-28

¹⁷⁰ Vasak, n. 158, p. 29

community life”.¹⁷¹ They can only be implemented by collective effort of all individuals and states.¹⁷² In Vasak’s view, they are not held by individuals, but by the "nation" or the "people". They include the (at the time, nascent) rights to development, a healthy and ecologically balanced environment, peace, and ownership of the common heritage of mankind.¹⁷³

Vasak’s system of classification poses several problems. In Beitz’s account, all rights include both positive and negative duties. The first-level duty may be to refrain from imposing on an interest (a negative duty) but the second-level duty is always to intervene. The second-level duty is, therefore, always a positive duty. This is the same for both civil and political rights and economic, social, and cultural rights. This, taken alone, need not necessarily undermine Vasak’s system of classification. He may have been referring to first-level duties only. If that is the case, Vasak’s distinction between First and Second Generation rights is better expressed as: “First Generation rights impose negative duties at the first-level. Second Generation rights impose both positive and negative duties at the first-level.” This, however, is ultimately no more satisfactory. “First Generation” rights can also involve positive first-level duties.¹⁷⁴ Civil and political rights require that a state (a) refrain from taking action that would impose on the interest in question and (b) take positive action to ensure that its citizens do not impose on each other’s interests. For example, courts have found that the right to life requires governments take measures to ensure the safety of citizens¹⁷⁵ and institute adequate investigations should a citizen be killed.¹⁷⁶

¹⁷¹ Ibid, pp. 30 - 31

¹⁷² Ibid, pp. 28 - 32

¹⁷³ Ibid, pp. 28 - 32

¹⁷⁴ See, for example, *Öcalan v Turkey* [2005] 41 EHRR 45

¹⁷⁵ Ibid, at 49

¹⁷⁶ *Makaratzis v Greece* [2005] 41 EHRR 49

Although Vasak's definition relies on flawed models of the accepted classes of rights, it usefully explains that solidarity rights entail "common-goods". It lacks specificity, however, about how they do so. This has opened the door to a range of alternative definitions.

The "generations" metaphor

Vasak rightly suggests that solidarity rights should be treated as a distinct class. His "generations" metaphor is, however, criticized for misrepresenting international human rights law¹⁷⁷. The generations metaphor implies an order of succession or precedence¹⁷⁸. This undermines the indivisibility of the human rights canon¹⁷⁹ and ignores the evolutionary potential of "First" and "Second Generation" rights.¹⁸⁰

Vasak's choice of the generations metaphor is misleading. As Vasak himself argued, international human rights law is evolutionary.¹⁸¹ But that evolution manifests through in the developing application of existing rights or existing categories of rights as well as through entirely new categories.¹⁸² The language used to classify rights should reflect the true nature of the way the Practice evolves. The term "solidarity rights" is preferable. It identifies rights based on their application and relevance in the system of

¹⁷⁷ cf. Philip Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law", 29 Neth. Intl. L. Rev. 307; Carl Wellman, "Solidarity, the Individual and Human Rights", 22 Hum. Rts. Q. 639 2000; B. Algan, "Rethinking Third Generation Human Rights, Ankara Law Review, 1: 1 (2004)

¹⁷⁸ cf. Nsongura J. Udombana, "Articulating the Right to Democratic Governance in Africa", 24 Mich. J. Int'l. L. 1209 2002-2003; Alston, n. 177, p. 307

¹⁷⁹ Wellman, n. 177, p. 639; see also UN General Assembly, *Vienna Declaration and Programme of Action*, 12th July 1993, A/CONF/157/23, Art. 5

¹⁸⁰ cf. Udombana, n. 178, p. 1209 and Alston, n. 177, p. 310

¹⁸¹ Vasak, n. 158, pp. 28 - 32

¹⁸² Algan, n. 177, p. 433

international human rights law, rather than by a (questionable¹⁸³) reference to their historical precedence.

Alternatives to Vasak's definition

Alternative definitions to Vasak's are often equally unsatisfactory. Stephen Marks calls solidarity rights the "rights of peoples". He distinguishes them from other classes of rights by two characteristics. For Marks, the "rights of peoples" are rights that (a) belong to "neither the individualistic nor socialist tradition" and are (b) "at an early phase of the [international] legislative process¹⁸⁴ and show promise of being accepted as international rights".¹⁸⁵

This description is rather dated and too limited to serve as a working description for the purpose of this thesis. The primary forces in the clash between "individualistic and socialistic traditions" were, respectively, the USA and USSR. The politics of international human rights is no longer defined by tension between these two powers. In the 21st century the politics of international human rights are multi-dimensional. China and the EU have emerged as independent and significant voices.¹⁸⁶ The politics of the UN Human Rights Council subject to multipolar tensions, with groupings originating in

¹⁸³ Alston, n. 177, p. 310

¹⁸⁴ At the time Marks was writing, in 1980, Stephen P. Marks, "Emerging Human Rights: A New Generation for the 1980s?", 33 Rutgers L. Rev. 435 1980-1981

¹⁸⁵ Ibid, p. 437

¹⁸⁶ Abdullah Ahmed An-Na'im and Abd Allah Ahmad Naim, *Human Rights in Cross Cultural Perspectives*, (Philadelphia; University of Pennsylvania Press, 1995), p.71

the Global South, such as the Organisation of Islamic Co-Operation, exercising increasing influence.¹⁸⁷ Non-state entities also increasingly play an important role in UN institutions and other aspects of human rights discourse.¹⁸⁸

Many solidarity rights are no longer "at an early stage" of development. Some solidarity rights, such as the right to a clean and healthy environment or the right to tourism,¹⁸⁹ are undoubtedly in their infancy. Others, however, such as self-determination are well established as part of international law. It is now misleading to suggest that solidarity rights, as a class, are "at an early stage" of development in comparison with other rights. Furthermore, the Practice is "emergent": rights jurisprudence, no matter how well established, is constantly evolving. To identify a certain class of rights as being early in the evolutionary process tells us relatively little when all classes of rights are evolving continuously.

An alternative definition can be found in the work of Jason Morgan-Foster.¹⁹⁰ For Foster, solidarity rights are only experienced as a group and impose duties on both the state and the individual.¹⁹¹ This distinguishes solidarity rights from other classes of human rights, which only impose duties on the state. For Morgan-Foster, solidarity rights require that individuals, as well as states, act to protect and preserve the interest they protect. It is, however, misleading to suggest that solidarity rights impose duties on the individual. The African Charter of Human and People's Rights (the Banjul Charter) is

¹⁸⁷ See Eric Heinze, "Even Handedness and the Politics of Human Rights" 21 Harv. Hum. Rts. J. 7 (2008) and Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment*, (London; Routledge, 2013), pp. 119-147

¹⁸⁸ See John H. Knox, "Linking Human Rights and Climate Change at the United Nations", 33 Harv. Envr. L. Rev. 2009, pp. 477-498

¹⁸⁹ See Ch. 8

¹⁹⁰ Jason Morgan - Foster, "Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement", 8 Yale Hum. Rts. & Dev. L. J. 67 2005, pp. 67 - 116

¹⁹¹ Ibid, pp. 67 - 116

the only international human rights instrument to recognise a range of solidarity rights on a significant scale. The Banjul Charter also includes duties that the individual owes to the state. But these duties are *in addition* to the rights for which it provides. They not related to the rights themselves. The Banjul Charter is not a contract. Individuals' entitlements to Banjul Charter rights are not contingent on performance of the Banjul Charter duties. Indeed, they are contained in entirely separate chapters. The Charter provides for obligations that individuals owe to the state (such as the obligation to pay taxes). But these are separate from the provisions that address solidarity rights (or any other rights).¹⁹² The Banjul Charter simply provides for rights and provides for duties. These are entirely separate, non-contingent provisions.

Solidarity rights impose primary obligations on individuals, as of necessity, to the same extent as the accepted classes of rights. In the course of respecting the first-level duty (imposed by a right of any class), a state may impose duties on individuals. States have imposed duties on individuals in the course of respecting duties imposed by civil and political rights and economic, social, and cultural rights. Such duties are not, however, necessarily imposed by the right itself. Rather, they are imposed through domestic legislation or public policy. It may be necessary for a state to impose obligations on individuals to ensure that rights are respected. For example, the right to education (a member of the accepted classes of rights) imposes a duty on states to provide their citizens with a reasonable standard of education in a non-discriminatory manner.¹⁹³ The UK respects this duty by providing fully funded school places to children

¹⁹² For a more thorough examination of language of duties in the Banjul Charter see Makau W. Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evolution of the Language of Duties", 35 Va. J. Int'l. L. 339, (1995)

¹⁹³ See UNESCO, *Convention Against discrimination in Education*, 14th December 1960, available at <http://www.refworld.org/docid/3ae6b3880.html> [accessed 1 September 2016]

until the age of 18 and, through domestic law, imposing a duty on parents to ensure that their child attends school until the age of 16.¹⁹⁴ This obligation is arguably necessary for the respect of the UK's first-level duty. Parents have legal control over their children. It is possible, therefore, for parents to deny their children access to education despite the public provision of free school places. Parents might, for example, compel or encourage their children to work from an early age¹⁹⁵ rather than attend school. Imposing a duty on parents, to ensure their children attend school, the UK ensures that children cannot be denied access to education by the actions of their parents. The right to education, however, does not specify a duty to impose obligations on parents. The duty is imposed by the state as an, arguably necessary, step in respecting its duty under the right. The right is the animating force but the direct impact obligation on the individual is created by domestic law.

The same analysis applies to solidarity rights. Human rights associated with the common heritage of mankind¹⁹⁶ impose duties on states to protect mankind's heritage.

¹⁹⁴ Education Act 1996, s. 7 (UK)

¹⁹⁵ The employment of children is also regulated by English law. See, for example, The Children and Young Persons Act 1933 Part II and section 107, amended by the Children (Protection at Work) Regulations 1998 (S.I. 1998/276), the Children (Protection at Work) Regulations 2000 (S.I. 2000/1333) and the Children (Protection at Work) (No 2) Regulations 2000 (S.I.2000/2548).

¹⁹⁶ See UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html> [accessed 1 September 2016]; UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, available at: <http://www.refworld.org/docid/4042287a4.html> [accessed 1 September 2016]; UNESCO, *Universal Declaration on the Human Genome and Human Rights*, 11 November 1997, available at: <http://www.refworld.org/docid/404226144.html> [accessed 1 September 2016]; UNESCO. Declaration on the Responsibilities of the Present Generations Towards Future Generations. 12 Nov. 1997. http://portal.unesco.org/en/ev.php-URL_ID=13178&URL_DO=DO_TOPIC&URL_SECTION=201.html [accessed 1 September 2016]; Jennifer Frakes, "The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?". 21 Wisconsin International Law Journal (2003), p. 409

These duties are outward-facing so they require states to cooperate with each other¹⁹⁷ States have partially fulfilled their duty to cooperate to protect the common heritage of mankind by creating Art. 8, part 2 of the Rome Statute. This prohibits: “Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, [...] provided they are not military objectives” and “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”¹⁹⁸ On 22nd August 2016 the International Criminal Court conducted the first prosecution under Art. 8(2). The man charged, Ahmad al-Mahdi, pleaded guilty to the offence.

The Art. 8(2) offence and the human rights associated with the common heritage of mankind must be distinguished. The right to common heritage of mankind is the animating force for states. It requires that states take some sufficient action to protect the common heritage of mankind. One of the actions that states have taken to respect this duty is the Rome Statute. This treaty imposes further duties on individuals, such as the duty not to destroy cultural heritage. Mr al-Mahdi pleaded guilty to committing the Art. 8 offence. In doing so he admitted to failing the duty, imposed by states upon individuals, not to destroy cultural heritage. Mr al-Mahdi has not, however, violated the right to the common heritage of mankind. He has violated a duty that states have collectively imposed upon individuals in respecting their own duty under the right. In other words, the duty imposed on individuals is a different duty, one removed, from that imposed by the right.

¹⁹⁷ The outward-facing duty, and the questions of jurisdiction it raises, is discussed in more detail on page pp. 76-82

¹⁹⁸ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 1 September 2016]

It is arguable that, had states not cooperated to impose the Art. 8(2) duty then they would have failed to respect the right to the common heritage of mankind, according to the doctrine of third party applicability.¹⁹⁹ States have a duty to prevent individuals destroying cultural heritage. If an individual destroys cultural heritage, and states have taken no measure to prevent him doing so, then states have failed in their duty. In order to respect their duty, states, therefore, created the Art. 8(2) offence, thus imposing an obligation on individuals. There are thus two orders of duty at play. The first is the duty imposed *on* states by the right. The second is the duty imposed *by* states, on individuals in order to respect the first order duty.

The rights impose a general duty on states to protect the common heritage of mankind.²⁰⁰ The signatories to the Rome Treaty (partially) fulfills that duty by imposing specific obligations on individuals through Art. 8(2). But states can also fulfil their duties in other ways. Art. 8(2) is an effective mechanism for protecting the common heritage of mankind, but is not necessarily the only possible mechanism. To return to the comparison with the right to education: that right imposes a duty on states to provide a reasonable standard of education. In order to respect that duty some states impose an obligation on individuals to attend school until a certain age. This latter duty is one of many ways in which a state can respect the duty in the right. Similarly, the right to enjoy the common heritage of mankind imposes a duty on states to cooperate in order to protect the common heritage of mankind. In discharging that duty, states cooperated to create the Rome Statute which imposes duties on individuals. The right to enjoy the common heritage of mankind obliged states to take some action to ensure mankind's

¹⁹⁹ See the discussion of *Drittwirkung* at pp. 23-24

²⁰⁰ Ian Hodder, "Cultural Heritage Rights: From Ownership and Descent to Justice and Well-being" 83 *Anthropological Quarterly* 4 (2010), pp. 861-882

common heritage is protected, the Rome Statute requires individuals not to destroy common heritage. These are two separate duties, imposed by two separate classes of norm. Solidarity rights, like the accepted classes of human rights, impose duties only on states.

The First Key Feature: Common-Good Interests

Like other classes of rights, solidarity rights protect a certain sub-set of interests. Solidarity rights protect common-good interests. These are interests, held by individuals, in shared goods and thus generally experienced in a collective context. Shared goods are goods that can only have meaning when experienced in common with the rest of society. These contrast with independent-good interests, which are protected by the accepted classes of rights. An individual may experience an independent-good interest in common with the rest of society or she may experience it independently of society. Freedom of association, for example, can be experienced with just one other person. The individual can thus experience freedom of association regardless of whether it is also experienced by rest of society at the same time. By contrast, a common-good interest is, in the central range of cases, *only* meaningfully experienced in common with the rest of society. Judge Lionel Murphy, in the High Court of Australia, gave an illustrative description of common-good interests when considering the common heritage of mankind:

"The preservation of the world's heritage must not be looked at in isolation but as part of the co-operation between nations which is calculated to achieve intellectual and moral solidarity of mankind and so reinforce the bonds between people which promote peace and displace those of narrow nationalism and alienation which promote war...[the encouragement of people to think

internationally, to regard the culture of their own country as part of world culture, to conceive a physical, spiritual and intellectual world heritage, is important in the endeavour to avoid the destruction of humanity."²⁰¹

Put another way, a threat to an interest in the accepted classes may be systemic, but it is not necessarily so. By contrast, a threat to a common-good interest is necessarily systemic. For example, the extra-judicial murder of a civilian may put the rest of society in reasonable fear of extra-judicial murder, but it will not necessarily do so. In a state like North Korea extra-judicial murder is believed to be systemic: the murder of one indicates the threat to all. In a state like Sweden, for example, extra-judicial murder is not believed to be systemic: the extra-judicial murder of one will not, alone, be sufficient to overturn a political culture, laws, constitutional checks and balances, and social norms that protect society in general from the threat of judicial murder. The murder of one does not, therefore, reasonably constitute a threat to all. For a common-good interest, by contrast, a threat to one is necessarily a threat to all. Pollution, for example, is systemic damage to the environment resulting from the introduction of foreign substances. Pollution will always be a threat to all, or at least a significant subsection, regardless of the context. A nuclear accident, toxic waste spill, or the release of excessive amounts of carbon into the atmosphere is always systemic, whether it occurs in Sweden or North Korea. Similarly, if a site of great architectural, historical, or cultural value is destroyed then all individuals lose the chance to benefit from, *inter alia*, the increase in the collective knowledge of humanity that will result from the study of that site. This is the case even for those who live on the other side of the world from the heritage site.

²⁰¹ *Commonwealth v Tasmania* (1983) 46 ALR 625 at 733 and 734

The Second Key Feature: Outward-Facing Duties

To address common-good interests, solidarity rights generally impose a duty that can only be respected if states take into account those beyond their borders. The first-level duty in the accepted classes of rights is primarily domestically focussed: It is inward-facing. In the case of solidarity rights the duty is generally both inward-facing and *outward-facing*.²⁰² Solidarity rights can only be effectively protected if states take positive action in concert, both within their own borders and in other states.²⁰³ This outward-facing duty was first identified by Vasak. For his "Third Generation" rights to be realised, states pursue the general good rather than their own specific interests.²⁰⁴ For example, to realise the right to self-determination states must cooperate by refraining from unreasonably violating the integrity of other states and taking action to ensure that territories that otherwise fulfil the criteria for statehood, have a recognised path to become states. This cooperation replaced the colonialism, in which states violated the integrity of other territories and states to advance their own, competing, ends.²⁰⁵ As Rosa Freedman puts it:

“Third Generation Rights extend the scope of rights owing to their extension of the substance and subjects of rights. The right to international solidarity, for example, seeks to place responsibility on states for ensuring sufficient redistribution of wealth to enable other states to have sufficient resources for human rights to be realised in their territories. That scope goes beyond traditional

²⁰² For Vasak, the nature of the duty they impose is a key distinguishing feature of solidarity rights. See Vasak, n. 158, pp. 28 - 32

²⁰³ Ibid, p. 32

²⁰⁴ Ibid, p. 32

²⁰⁵ Cassese, n. 78, pp. 37-65

territorial and extraterritorial application of human rights obligations. Instead, human rights become a collective responsibility for all states insofar as there is a global responsibility to ensure that all states are able to implement human rights.”²⁰⁶

Legal realists are skeptical about basing rights on solidarity.²⁰⁷ In the modern international system, they argue, it is unrealistic to expect states to act against their individual interests.²⁰⁸ For Alston, it is unrealistic to base international legal structures on the idea of solidarity because states make foreign policy decisions based primarily on their own interests.²⁰⁹ Richard Bilder takes a similar view. Despite the international approach of the post-war period, the goals of universal human rights have not, he argues, been achieved.²¹⁰ There is not enough commonality of interest between states at a global level.²¹¹

It would, however, be a mistake to conflate the rejection of specific instances of solidarity with the rejection of solidarity *in totum*. It would also be a mistake to draw a permanent distinction between a state “acting in solidarity” and “acting in its best interests”. It is often in the best interest of states to act in solidarity. When calculating their interests, states look beyond the immediate term. Sometimes it is in the interests of states to cooperate because they lose nothing by doing so. In securing short term interests states cooperate, for example, in developing common standards for air traffic control. Negotiations for any common standards must involve each party conceding on certain

²⁰⁶ Freedman, n. 3, p. 954

²⁰⁷ Alston, n. 177, p. 313

²⁰⁸ Ibid, pp. 308 - 319

²⁰⁹ Ibid, p. 307

²¹⁰ Richard B. Bilder, “Rethinking International Human Rights: Some Basic Questions”, 1969 Wis. L. Rev. 171 1969, pp. 171 - 217

²¹¹ Ibid, p. 184

points but remaining committed to the negotiations and their outcome because they believe their interests are better served by co-operation and compromise than by attempting to act alone. The commercial gains of common air-traffic control measures vastly outweigh any small sacrifices made in developing a consensus.

States often concede on issues of short term interest to make gains in the medium term. For example, multilateral trade agreements often require states to alter domestic regulation in the short term to maximise commercial gain in the medium term. The liberalisation of trade following the ratification of the North American Free Trade Agreement (NAFTA) led to large numbers of job losses in the USA.²¹² This was not an unexpected result. The USA justified the decision to ratify NAFTA based on its medium-term interests.²¹³ NAFTA required the USA to sacrifice certain economic interests because the liberalisation of tariffs and regulations meant that jobs would flow to those states able to provide cheaper labour. American standards for workplace safety, paid holidays and the minimum wage meant that labour in the USA is more expensive than in Mexico. The USA was willing to compromise this short-term interest in maintaining manufacturing jobs because it secured standards in, for example, intellectual property and dispute settlement that would benefit it in the medium term, and would lead to the creation of new, higher paying jobs, replacing those that were lost.²¹⁴

States are similarly willing to sacrifice their immediate or medium-term interests to secure long term interests. The development of international or regional institutions like the UN, EU, World Trade Organisation (WTO), International Monetary Fund (IMF)

²¹² Katherine A. Hagen, "Fundamentals of Labor Issues and NAFTA", 27 U.C. Davis L. Rev. 917 (1993-1994), p. 920

²¹³ Kerry A. Chase, "Economic Interests and Regional Trading Agreements: The Case of NAFTA", 57 International Organisation 1 (2003), pp. 137-174

²¹⁴ Ibid, pp. 137-174

or International Criminal Court (ICC) represents a surrender of sovereignty on the part of member states²¹⁵. It is undoubtedly against the apparent interests of a state to surrender any portion of its sovereignty, but the long-term interests of states in a more peaceful world, the application of the rule of law to an increased extent, and common commercial standards, justifies the compromise of sovereignty. Indeed, states are willing to go further. Between 2000 and 2010 The African Union alone engaged in missions in Mali, Mauritania, Togo, Somalia, Sudan and Anjouan. These missions involve a significant expenditure on the part of member states including commitments of personnel, resources and capital²¹⁶. It is difficult to argue that spending large sums and committing troops in a foreign state without expectation of financial or territorial gain is in a state's the short-term interests.

In all the examples above states acted in their own self-interest, compromising on short-term interests to secure long-term interests. Solidarity rights also require sacrificing short-term interests in the name of long-term interests. Solidarity rights do not require selflessness, but enlightened self-interest. They require that states cooperate and, where necessary, sacrifice their shorter-term interests for a shared long term interest. This is different from requiring states to act against their interests. It is requiring them to act on certain of their interests at the expense of others. Therefore, the challenge for advocates of solidarity rights is not to justify "solidarity" as a reason for action. It is to argue for the interests that will be protected by displaying solidarity to be given precedence ahead of other, competing, interests. In other words, to argue for the urgency of common-good

²¹⁵ For a more detailed exposition of this argument see Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalisation*, (New York; Columbia University Press, 1996)

²¹⁶ Tim Murithi, "The African Union's evolving role in peace operations: the African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia", 17 African Security Review 1 2008 pp. 69 - 82

interests. Solidarity is not the basis of solidarity rights. It is part of the action required for their realisation. The basis for solidarity rights, like the other classes of human rights, is the urgency of the interest protected.

For Jack Donnelley, it doesn't matter whether solidarity is a realistic basis for rights. It remains an insufficient identifying quality.²¹⁷ In Donnelley's analysis, all international human rights require solidarity. States voluntarily cede a degree of sovereignty to the international community, and a degree of power to their own citizens, when they recognise human rights. From a realist perspective neither concession is in the interest of the state, as an institution, because conceding power weakens the institution. Both concessions are nevertheless made because they advance longer term interests, held by all states. For Beitz, states respect and participate in the Practice because it is in their interests to do so.²¹⁸ This fits the model of solidarity developed above. But, if this is the case then, as Donnelley argues, are not *all* human rights "solidarity rights"?

Donnelley, however, conflates solidarity in the second-level duty with solidarity in the first-level duty. In Beitz's two level model²¹⁹ the first-level duty requires states to protect and provide for the interest identified by the right. The second-level duty requires states to intervene when another state fails in its first-level duty. Civil and political rights and economic, social, and cultural rights impose a second-level duty of solidarity. States must cooperate as the international community to intervene when other states fail to perform their first-level duty.²²⁰

Solidarity rights require co-operation to properly respect the first-level duty. Solidarity rights require that states cooperate with other states and take the interests of

²¹⁷ Donnelley, n. 2

²¹⁸ Beitz, n. 5, pp. 102-106

²¹⁹ Ibid, p. 106

²²⁰ Ibid, pp. 106-117

individuals beyond their borders into account. The right to development, for example, includes both inward-facing duties and outward-facing duties at the first level.

Development is intrinsically linked to both global economic structures and the actions of other states. Under the Seoul Declaration states must take account of how the external effects of their economic policies impact the development of other states. States must cooperate to make changes to the global economic arrangements to facilitate the development of poorer states.²²¹ These first-level obligations concern the basic measures necessary to secure the protection and realisation of the right. The second-level obligation is to ensure, as part of the international community, that states fulfil those obligations. In the case of the right to development, the Millennium Development goals, for example, provide criteria against which states' performance of their first-level obligations are evaluated.²²² The international community has created common requirements. Similarly, the Seoul Declaration creates a mechanism of accountability. It sets down specific standards to which states should be held.²²³ These are both forms of intervention.

Similarly, the right to peace becomes largely meaningless unless construed in the context of relations with other states. This right involves an inward-facing duty, but, taken alone, this could be subsumed into existing civil and political rights or economic,

²²¹ Principle 3, Declaration on the progressive development of international law relating to a new international economic order (Seoul Declaration, adopted at the 62nd ILA conference, 1986)

²²² For example, see, F. O. C. Nwonwu, *Millennium Development Goals: Achievements and Prospects of Meeting the Targets in Africa*, (Oxford, African Books Collective, 2008)

²²³ It is important to distinguish between the declaration itself, which creates standards (in fulfilment of the second-level obligation) and the content of those standards (which detail the nature of the first-level obligation).

social, and cultural rights.²²⁴ The right to peace also includes an outward-facing duty at the first-level. It requires that states refrain from promoting violence within or violence against other states.²²⁵ This concerns both physical and structural violence.²²⁶ States must cooperate to reduce physical violence and to eliminate or reform global, regional, and local structures that create relationships of violence between individuals, states and groups. The second-level obligation is respected by the creation and participation in international institutions intended to promote and regulate peaceful relations between states²²⁷. Through these organisations the international community collectively intervenes when a state fails in its first-level duty to promote peace.

The Third Key Feature: Held by Individuals

For many theorists, a solidarity right is held by a “people” or a “nation”:²²⁸ a collective entity without a broadly agreed definition. A better understanding is that solidarity rights are held by individuals. Vasak originally identified the holders of Third Generation rights as “peoples”. Discussion of the holders of solidarity rights has focused on identifying a definition of a “people” as a result of this initial definition. This, however, is the wrong question to ask. Solidarity rights are held by individuals. The term “people” is better understood as referring to the collective condition in which individuals meaningfully experience solidarity rights.

²²⁴ Patrick Hayden, “Constraining War: Human Security and the Human Right to Peace”, 6 Hum. Rts. L. Rev. 1, pp. 35-55

²²⁵ Ibid. p. 40

²²⁶ See pp. 195-199 for a detailed discussion of the relationship between physical and structural violence.

²²⁷ Ibid, p. 47

²²⁸ Vasak, n. 158, p. 15

Without a specific holder to seek its enforcement, a right is unlikely to have an impact in practice. The precise definition of a “people” has, thus, preoccupied analyses of solidarity rights. For Alston, the failure of supporters of solidarity rights to identify a particular agent, who can seek enforcement of a right, is integral to the failure of their project as a whole.²²⁹ For Wellman, a right held by a people is simply a right held by several individuals. Each holds a “fraction” of that right. A people’s right would thus be more accurately described as a collection of individual rights.²³⁰ If it is supposed to mean something else then, Wellman concludes, it is too conceptually vague to supply a justiciable concept, and is better used as a “legal fiction”. If Wellman is correct, however, then his concept of a people is not helpful at all, even as a legal fiction. If a “people” is essentially the collective noun for a group of individuals, each holding a fraction of a right, then it is not clear whether each fraction of the right is effective independently or whether they only have effect when combined. In the latter case, it is not clear how many fractions make a whole and if this means that a “people” must be a particular number of individuals. If Wellman actually means that a “people” is several individuals, each holding a complete right, who exercise their rights together, then there is no conceptual need for a “people” at all. Wellman’s conception thus adds to neither the justiciability of the concept, nor its use in a purely theoretical context.

Furthermore, Wellman's conception does not reflect the application of the concept in the Practice. In *Kitok v Sweden* the UN Human Rights Committee was asked to decide on a case brought by several individuals belonging to the Sami people. The case concerned their right to herd reindeer. The claimants invoked their right to self-

²²⁹ Philip Alston, "Peoples' Rights: Their Rise and Fall", in Alston (ed.), *Peoples' Rights*, Oxford; OUP, 2001), pp. 259-293

²³⁰ Wellman, n. 177, p. 639

determination. They argued that herding reindeer in particular parts of Sweden was a part of the culture of the Sami people. They did not each claim to hold "part" of the right. The claimants argued that they *all* had the right to herd reindeer on *all* the land in question because they were members of the Sami nation. Their contention was never that they each had a claim to a part of the land in question or to a particular reindeer. The right to self-determination, on which they relied, was held by each of the claimants as individuals, but it took effect for them as members of the Sami people as a whole.²³¹

Hector Gros-Espiell offers an alternative to Wellman's approach.²³² Gros-Espiell analyses solidarity rights as two-part rights,²³³ held by both the individual and the wider community.²³⁴ For example, the right to benefit from the common heritage of mankind²³⁵ is (a) the right for "mankind" to own the heritage collectively and (b) "the individual" to benefit from that heritage.²³⁶ On that view, the right is held in common by some collective entity. Gros-Espiell, however, fails to explain why it is necessary to differentiate the "individual" from the "people" for this purpose. If the people, "mankind", owns the heritage and individuals have the right to benefit from it,²³⁷ both parts of the right are meaningless. Owning heritage means having the right to benefit from it to the exclusion of others. "Mankind" describes the sum of all individuals. "Mankind" cannot, therefore, own property in its own right without changing the meaning of ownership. A better understanding is that individuals have a right to the

²³¹ *Kitok v Sweden*, UN Human Rights Committee, CCPR/C33/D/197/185, (1988)

²³² Hector Gros-Espiell quoted in Marks, n. 184, p. 440

²³³ *Ibid*, p. 440

²³⁴ *Ibid*, p. 440

²³⁵ cf UNESCO, Convention Concerning the Protection of World Cultural and Natural Heritage (Adopted 16th November 1972)

²³⁶ Gros-Espiell in Marks, n. 184, p. 441

²³⁷ *Ibid*, p. 440

common heritage of mankind, but only meaningfully experience it in common with others. An individual cannot experience the common heritage of mankind alone.

Heritage that individuals experience alone is not the *common* heritage of mankind.

Common heritage is a common-good. It is valuable to one because it is valuable to all.²³⁸

The instruments of international human rights law are of little help in defining a “people”. The term appears in several human rights instruments, including the Universal Declaration on Human Rights,²³⁹ UN Charter and Banjul Charter. Yet it is not defined in any of those instruments. The UN Sub Commission on the Prevention of Discrimination and Protection of Minorities approved a definition in 1986, defining “peoples” as groups which have “some form of historical continuity”, consider themselves “distinct from other sectors of the societies now prevailing in those territories, or parts of them” and are “determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems”.²⁴⁰

That definition is insufficiently precise. In practice, a wide range of agents rely on solidarity rights in court. In some cases, the claimant could best be described as a “nation”. For example, the Namibia case concerned a population of a defined

²³⁸ For further discussion of this subject see, generally, Mary Robinson, “Connecting Human Rights, Human Development and Human Security”, in Richard Wilson (ed.), *Human Rights in the War on Terror*, (Cambridge; Cambridge University Press, 2005), pp. 308-316

²³⁹ UDHR, Preamble, Art. 21(3); United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Preamble, Arts. 1(2), 55, 73(a) and (b), 76(b) and (c), 80; Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Preamble, Arts. 19, 20(1), (2) and (3), 21(1) and (5), 22(1), 23(1), (24)

²⁴⁰ Jose R. Martinez Cobo, Study of the Problem of Discrimination Against Indigenous Populations, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc.

E/CN.4/Sub.2/1986/7/Add.4 (1986). At:

http://www.minorityrights.org/2813/themes/selfdetermination.html#_edn4 last checked 17/6/2016

geographical area that shared a political and cultural tradition.²⁴¹ By contrast, in *Pennsylvania v National Gettysburg Battlefield Tower* the claimant was the State of Pennsylvania, litigating on behalf of the citizens of Pennsylvania, relying on the right to a clean and healthy environment in the Pennsylvania Constitution.²⁴² While it is arguable that a political entity, like a state, can litigate on behalf of its citizens, it is not clear that the state of Pennsylvania (rather than, for example, the federal US government) is the appropriate representative for the “people” that would have been affected by real estate development on the Gettysburg battlefield. In *Kitok* the claimants were acknowledged representatives of a homogenous group. In *Comunidad de Chanaral v Codelco Division el Salvador* the claimant was a child who, although unable to bring a case on his own behalf, was recognized as representative of future generations.²⁴³

For Cassese, it is better to understand a people as self-defining.²⁴⁴ It is not possible to develop a satisfactory definition of a “people” because cultural, historical, political and even geographic factors are entirely dependent on the self-perception of the people in question. This, however, leaves those attempting to identify the agent who can enforce a solidarity right in an even worse position than Alston describes. If it is impossible to identify an agent who can seek enforcement, then solidarity rights lose any practical meaning.

²⁴¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Namibia)*, (1970) JCI Reports (1971), The Quebec case concerned a similar group but, as a reference to the Supreme Court of Canada, the agent that brought the case was the “Governor in Council”, acting on behalf of the people of Quebec. See *Reference Re. Secession of Quebec* (Supreme Court of Canada), [1998] 2 SCR 217

²⁴² *Pennsylvania v National Gettysburg Battlefield Tower* (USA), Supreme Court of Pennsylvania, 454 Pa. 193 A.2d 588 (1973)

²⁴³ *Comunidad de Chanaral v Codelco Division el Salvador* 9 (Chile)(1988) S/Recurso de Proteccion Corta Suprema

²⁴⁴ Cassese, n. 78, p. 143

In practice, attempting to define a “people” is unnecessary. Solidarity rights can be coherently modelled as individual rights. Solidarity rights concern common-goods, so individuals necessarily experience the interest in a collective context. This can be demonstrated by contrasting the right to self-determination (a solidarity right) with the right to freedom of expression²⁴⁵ (a civil and political right).²⁴⁶ The individual may experience freedom of expression²⁴⁷ whether or not every other individual in society does so. If Citizen A were prevented from voicing certain opinions in public but Citizen B were not, Citizen B would not necessarily have cause to argue that her right to freedom of expression had been violated. Further, Citizen B would have no standing to sue for the violation of Citizen A’s right. By contrast,²⁴⁸ is meaningless for the individual unless experienced collectively.²⁴⁹ The individual is only experiencing self-determination when

²⁴⁵Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Art 19; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art. 19(2); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art. 10

²⁴⁶ Art. 1, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Art 1, International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976)

²⁴⁷ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Art 19; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art. 19(2); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art. 10

²⁴⁸ Art. 1, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Art 1, International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976)

²⁴⁹ It should be noted that individuals can generally “opt out” of the collective experience. For example, the decision in *Kitok*, while protecting the practice of reindeer herding, did not compel every member of the Sami people to become a reindeer herder, nor did it compel every individual born into the Sami people to continue to identify as Sami. See *Kitok v Sweden*, UN Human Rights Committee, CCPR/C33/D/197/185, (1988)

in a collective context. The right to self-determination is a right of all individuals to have a voice in the political status of the polity with which they identify. Self-determination cannot, by nature, logically be experienced in anything but a collective context.²⁵⁰ Self-determination protects the individual's interest in determining the direction of her polity, so it logically presupposes the existence of the polity.²⁵¹

When elites use the rhetoric of self-determination to justify their preeminent position, as (for example) white South African governments did to justify the continuation of apartheid, no member of the group is experiencing.²⁵² Self-determination requires that individuals have a voice in the political structure of their society.²⁵³ Under the apartheid regime, white South Africans could vote for the government but they could not vote or campaign to end apartheid.²⁵⁴ Those who attempted to do so were often persecuted. White South Africans thus could only exercise political agency within a pre-determined structure. They could not truly influence the political structure of their society. South Africans, therefore, were not enjoying self-determination, an elite was merely using the term to legitimise its control over the state.

In *Kitok*,²⁵⁵ the claimants were granted their reindeer herding privileges. This meant that *any* member of the Sami people would also have those privileges. A further

²⁵⁰ Art. 1, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Art 1, International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976)

²⁵¹ For further discussion of this see pp. 166-185

²⁵² Legal consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding security council resolution 276 (1970) International Court of Justice Advisory Opinion of 21 June 1971

²⁵³ See pp 146-187 for a more detailed discussion of the right to self-determination

²⁵⁴ See Donald L. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society*, (Davis; University of California Press, 1991), pp. 163-203

²⁵⁵ *Kitok v. Sweden*, U.N. Human Rights Committee, CCPR/C33/D/197/185.

issue in the case therefore turned on whether another claimant was a member of the Sami people, and thus entitled to reindeer herding privileges. It was not enough that an individual had a claim to experience the reindeer herding privileges themselves. They had to be able to do so in a collective context.

When “people” is taken to refer to the necessary condition rather than the enforcing agent, the various claimants in the Namibia, Quebec, Gettysburg and *Comunidad de Chanaral* cases can be reconciled. The claimants in those cases were not the sole possible claimants. The rights concerned were held by all individuals. The claimants were victims of specific failures, by states, to fulfill their first-level duties. In some cases, they represented groups of victims. In others, only themselves. In the Namibia case this was the political representatives of the Namibian nation. In *Comunidad do Chanaral* it was a token representative exemplifying the interest of future generations.

Beitz defines rights as “urgent interests of individuals”.²⁵⁶ When “people” is understood to refer to the conditions required for the meaningful experience of the right, rather than the petitioning agent, this definition poses no problem for solidarity rights.

Conclusion

In my view, solidarity rights are rights that (a) protect common-good interests by imposing (b) both inward-facing and outward-facing duties and (c) are held solely by individuals. A successful definition requires the identification of the class of interests protected, the duties required and the holders of the rights. Solidarity rights protect common-good interests, which are only meaningfully experienced collectively. They

²⁵⁶ Beitz, n. 5, p. 136

entail duties for states to cooperate to act in their long term common interests rather than their short term competing interests. Thus, the duty element in solidarity rights is outward-facing as well as inward-facing at the first-level. Like all human rights, solidarity rights are held by individuals and, like all human rights, they can be enforced by individuals, representatives, groups, NGOs, states or any agent with a sufficient interest. They are sometimes described as the “rights of peoples”, but that phrase should be understood as describing the condition in which individuals meaningfully experience the common-good interests, not a construct that replaces the individual as the rights holder.

PART TWO: THE CASE FOR SOLIDARITY RIGHTS

CHAPTER FOUR: THE SYMPATHETIC PERSPECTIVE

Introduction

Under Beitz's approach, a successful case for a right must be understandable from both the perspective of those sympathetic to the interest protected and from the perspective of those who are non-sympathetic. This chapter addresses the former perspective. Common-good interests cohere with Beitz's three criteria for recognition as rights: they can be urgent, faced with standard threats, and protected, to reasonable effect, by the rights mechanism. A theoretical argument for a class of rights must account for both the rights currently recognised in the class and interests that may, in the future be recognised as rights. In other words, the argument must account for a class that evolves.

The class of common-good interests contains interests, and has the potential to contain further interests, that are urgent in a manner equivalent to the interests protected by the accepted classes of rights because, in the 21st Century, individuals are part of a global community and thus share interests globally. Common-good interests require protection with the rights mechanism because they are subject to standard threats. The interconnected nature of post-industrial modernity means that standard threats can transcend states. This means that they cannot be addressed by unilateral action. Furthermore, transnational interconnection can disempower individuals, limiting their agency to demand or effect responses to standard threats. It is appropriate to protect transnational common-good interests using the human rights mechanism because

interests that transcend states can only be effectively protected if states cooperate.

Solidarity rights compel states to cooperate to address threats that cannot be addressed unilaterally. They address the transnational nature of common-good interests, and the corresponding threats, by providing for outward-facing duties. These require that states act beyond their own borders, generally by cooperating or otherwise acting in solidarity with other states. Common-good interests can thus be protected by rights to reasonable effect. This chapter will analyse solidarity rights according to each of Beitz's three criteria in turn.

Urgency

For Beitz, an interest is urgent if it is of high importance to the holder. It is not sufficient that the holder has a mere preference in its favour. It must be broadly understandable that it would be a particularly "bad thing" if the interest was to be set back.²⁵⁷ Common-good interests can be sufficiently urgent to be recognised as rights. It is relatively uncontroversial to say that humans are social animals and individuals can, therefore, share important interests that are meaningful in a social setting. This does not, however, mean that urgent common-good interests are necessarily akin to urgent independent-good interests. The accepted classes of rights protect interests that individuals hold by virtue of being human. For sceptics of solidarity rights, these protect interests that individuals hold by virtue of identifying as part of a particular community. Such interests might be important but they are not important in the same way that independent-good interests are important.

²⁵⁷ Beitz n. 5, p. 137

In the 21st Century, however, globalisation means that human society is interconnected transnationally. All individuals are therefore part of a global community, with interconnected interests, regardless of whether we identify as such. Common-good interests are held in the context of the global community. They can, therefore, be urgent in a manner that justifies protection with the rights mechanism regardless of how individuals identify in relation to particular communities.

I. Individual dignity and common-good interests

If solidarity rights are to be considered human rights, then interests that are meaningful in the collective context must be urgent in an equivalent manner to interests that are meaningful in an independent context. It is well established that humans are social animals. Living in a community is generally considered a part of being human.²⁵⁸ Interests held as part of a community can, therefore, be, *prima facie*, of great importance. Are they, however, important in the same way as independent-good interests? The interests protected by the accepted classes of rights are associated with a status as an individual human being that is independent of the rest of society. The precise nature of the rights and interests associated with this status is open to dispute. Yet it is difficult to

²⁵⁸ For a discussion of how acting independently of society and as part of society are co-essential aspects of human nature, see self-determination J. A. Wagner and M.K. Moch, "Individualism-collectivism: Concept and measure", 11 Group and Organizational Studies [1986], pp. 280-304; Anthony Giddens, *Capitalism and Modern Social Theory: An Analysis of the writings of Marx, Durkheim and Max Weber*, (Cambridge; Cambridge University Press, 2000), pp. 65-105; Emile Durkheim, *The Division of Labour in Society*, (London; Free Press, 1964), p. 9; P. Christopher Earley and Cristina B. Gibson, "Taking Stock in Our Progress On Individualism-Collectivism: 100 Years of Solidarity and Community", 24 Journal of Management 3 (1998), pp. 265-304; For an examination of how essential aspects of human interaction, such as normativity, are fundamentally collective endeavours, see Guyora Binder, "The Case for Self Determination", 29 Stan. J. Int'l. L. 223 (1992-1993), pp. 223-270

deny that, at some basic level, humans are individual creatures, able to reason and perceive the world independently from the rest of society, if only to a limited extent. By contrast, community, in the sense in which it relates to solidarity rights, is something that the individual can choose to be a part of, or to leave. The right to self-determination, for example, can protect traditional practices that are integral to the identity of the community, but it cannot be used to compel individuals to participate in such practices or, indeed, to identify as a member of the community.

For Donnelley, this distinction means that solidarity rights should not be considered human rights:

“If human rights derive from the inherent dignity of the human person, collective human rights are logically possible only if we see social membership as an inherent part of human personality, and if we argue that as a part of a nation or people, persons hold human rights substantively different from, and in no way irreducible to, individual human rights.”²⁵⁹

Solidarity rights, in Donnelley’s view, can be described as protecting the relationships between individuals. They thus contrast with individual rights, which protect interests relating to the dignity of the individual. Relationships are a conscious choice. If an individual is to be part of a relationship, and to value that relationship so highly that they consider it an urgent interest, then they must consciously perceive themselves as party to that relationship. According to Donnelley, conscious relationships are not necessary to the human condition in the same way that the status as an individual is necessary. It is “logically and phenomenologically possible”²⁶⁰ to be a human being, and thus possessed of human rights, “without perceiving oneself to be or being considered by others to be a

²⁵⁹ Ibid, pp. 492-492

²⁶⁰ Ibid, p. 493

member of the international community and thus a beneficiary of the rights of solidarity.”²⁶¹ Therefore:

“The very concept of human rights, as it has heretofore been understood, rests on the view of the individual person as separate from, and endowed with inalienable rights in relation to, society, and especially the state. Furthermore, within the area defined by these rights, the individual is superior to society in the sense that ordinarily, in cases of conflict between individual human rights and social goals or interests, individual rights must prevail. The idea of collective human rights represents a major, and at best confusing, conceptual deviation.”²⁶²

As such, while it is possible, or even likely, that an individual will perceive themselves to be part of a community. It is not necessary that they do so. Furthermore, individuals are unlikely to perceive themselves as members of the same community and, thus, unlikely to hold the same common-good interests. Even in the event, therefore, that a common-good interest is of high importance to its holders, it will never be sufficiently widely understood to achieve recognition as a right.²⁶³ For solidarity rights to be recognised as human rights the collective context, in which common-good interests are meaningful and the individual context, in which independent-good interests are meaningful, must be reconciled.

²⁶¹ Ibid, p. 493

²⁶² Ibid, pp. 493

²⁶³ Furthermore, Donnelley’s “individual versus group” construction of rights is inadequate to capture the nature of the Practice. Human rights are not general trumps applied against any group. They are specific, political presumptions, which limit the power of states by making the interests of individuals “a matter of international concern”. Solidarity rights do not protect the “relationship between individuals”. They protect the interests of individuals in common-goods against threats from powerful agents.

II. Transnational interconnection and the scale of common-good interests

In the late 20th Century and early 21st Century (a period roughly corresponding to that referred to as “post-industrial modernity” and to which I will refer as “the transnational age”), individuals hold interests as part of a global community, regardless of whether they identify as part of that community. In the transnational age the lives of individuals are interconnected on a global scale. This transnational interconnection is independent of the manner in which individuals identify as part of a community. We are part of a global community regardless of whether we make a conscious choice to be so. A fervent nationalist is subject to transnational interconnection in the same way as someone with more cosmopolitan beliefs. An individual who identifies solely with their local community or tribe is subject to transnational interconnection even if they reject associations with those outside the tribe. The status of the individual as a global citizen is, in the transnational age, as inevitable as the status of an individual as an independent agent.

Transnational interconnection permeates throughout society.²⁶⁴ In the transnational age, economics,²⁶⁵ trade,²⁶⁶ labour,²⁶⁷ culture, memory,²⁶⁸ politics,²⁶⁹ food, drink, music,²⁷⁰ social media,²⁷¹ and various other “layers”²⁷² of human interaction are all subject to global dynamics. Society is, as a result, increasingly “horizontally integrated”. Before the transnational age, any international interaction between individuals was facilitated by the state. This was “vertical integration”.²⁷³ In the transnational age the role of the state in facilitating cross-border interactions between citizens is increasingly supplanted by multiple levels of transnational interconnection which transcend the state.

²⁶⁴ For a detailed discussion of transnational interconnection see Akira Iriye, "The Making of A Transnational World", in Iriye (ed), *Global Interdependence: The World After 1945*, (London; Belknap Press of Harvard University Press, 2014), pp. 679-847 and Marie-Laurie Djelic and Sigrid Quack, "Transnational communities and their impact on the governance of business and economic activity", in Djelic and Quack (eds), *Transnational Communities: Shaping Global Economic Governance*, (CUP; 2010), pp. 377-413

²⁶⁵ Robert O. Keohane and Joseph S. Nye, "Globalisation: What's New? What's Not? (And So What?)", 118 *Foreign Policy* (2000), pp. 104-119

²⁶⁶ See Kennedy, n. 45, pp. 117-125 and Kyla Tienhaara, "What you don't know can hurt you: Investor state disputes and the protection of the environment in developing countries", 6 *Global Environmental Politics* 4 (2006), pp. 73-100

²⁶⁷ Bill Jordan, "Global justice: The Terrors of Interdependence", 1 *Social Policy and Society* pp. 119-129

²⁶⁸ Martin Conway and Kiran Patel, *Europeanization in the Twentieth Century - idea of a "community of shared memory"*, (Basingstoke; Palgrave Macmillan, 2010), pp. 50-58

²⁶⁹ Iriye, n. 264, p. 700

²⁷⁰ Sassen, n. 8, pp. 40-41

²⁷¹ Ibid, pp. 727-770

²⁷² Iriye, n. 264, pp. 679-847

²⁷³ Slaughter, n. 8, pp. 1103-1126

The interconnected nature of the transnational age means that self-perception necessarily has a global dimension. For Anthony Giddens,²⁷⁴ the transnationally interconnected nature of early 21st century, a period to which he refers as "modernity"²⁷⁵, has fundamentally altered the human experience.²⁷⁶ In Giddens' analysis, the individual is both influenced by and influencing society.²⁷⁷ Individuals understand the world through the prism of our social development. Every experience is understood by reference to every other experience. Humans therefore develop self-conception through a "reflexive" process: reacting to the stimulus provided by our social environment in order to understand who we are.²⁷⁸ At the same time, humans also contribute to our social environment. When individuals interact with the social environment, we also shape it. Giddens demonstrates this using the example of language. Durkheim identified language as proof that engaging with the social is fundamental to being human: each individual "speaks a language he did not create".²⁷⁹ Giddens goes further. For him, in using language, humans are influencers as well as influenced. When we use language, we contribute to the way in which language is understood. Language is not a static structure but an ever-evolving tool. The meaning of a word is not objective; it is simply what it is socially understood to be. In using language humans thus contribute

²⁷⁴ Giddens builds on Emile Durkheim's theory of "solidarity". Durkheim describes the state of being in which an individual subconsciously makes decisions based on social norms and concerns as "solidarity". See Durkheim, n. 258, p. 9

²⁷⁵ Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Modern Age*, (Cambridge; Polity, 1991), pp. 1-9

²⁷⁶ In developing this theory Giddens builds on Durkheim's theory of "solidarity" in which the individual unconsciously relates to the rest of society at all times. See Durkheim, n. 258, pp. 88-105

²⁷⁷ Ibid, pp. 10-34

²⁷⁸ Ibid, pp. 35-68

²⁷⁹ Emile Durkheim, "Review of Albet Schaffle", in *Bau und Leben des Socialen Korpers*, (2nd Ed.) 1885 p. 87, referenced in Giddens, n. 258, p.85

to the social understanding of language.²⁸⁰ Giddens refers to this process of reflexive development as "practical consciousness".²⁸¹ This now manifests, in the central range of cases, on a global scale. The English language is spoken across the globe and thus shaped by individuals globally. Practical consciousness is now global in scope.

For Giddens, the interconnections of the transnational age have created a "separation of time and space".²⁸² In the past, time was related to space because the impact of events at one location took time to impact on another. News took days or weeks to communicate. Armies, food, culture, and even disease required a long period of time to travel long distances. In the transnational age, however, that news can be relayed immediately.²⁸³ Similarly, contracts can be agreed, opinions shared, trades completed, and culture experienced, from the other side of the world with no interval of time. Modern humans can relate to the entire globe, in an immediate sense. In Giddens' words, modern social organisation "presumes the precise coordination of the actions of human beings physically absent from one another; the 'when' of those actions is directly connected to the 'where', but not, as in pre-modern times, via the mediation of place".²⁸⁴

This result of this is the "dis-embedding of social institutions".²⁸⁵ Social relations are "lifted out" from their local contexts and "rearticulated across indefinite tracts of time-space." Humans now understand social relations in multiple dimensions. For example, with 78% of all internet users using social media,²⁸⁶ social relations can take

²⁸⁰ Giddens, n. 275, pp. 23-27

²⁸¹ Ibid, pp. 35-68

²⁸² Ibid, pp. 14-20

²⁸³ Ibid, pp. 14-20

²⁸⁴ Ibid, pp. 14-20

²⁸⁵ Ibid, pp. 14-20

²⁸⁶ Pew Research Centre, "Social Networking Factsheet", last accessed 4th December 2015, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/>

place in an equally "real" way between groups on different sides of the world as they can between groups in the same room. This means that practical consciousness now has a global dimension. Humans continue to interpret the world through the prism of social experience, but this social experience now encompasses inputs from potentially anywhere in the world. Similarly, when humans reflexively influence our society, that influence has a global impact.²⁸⁷ All self-perception is, therefore, in some way global.

This applies even to individuals whose self-perception is, *prima facie*, parochial. If, in the transnational age, self-perception is generally worked out with reference to global dynamics, then understandings of parochialism are also developed in this context. A self-identification as parochial is, therefore, based on an understanding of what it means to be parochial that is developed in a transnational context.

If individuals are interconnected on a global scale, then common-good interests can manifest on the same scale. For example, normativity is now a global issue. For Sullivan and Kymlicka, globalised communication and movement facilitate the spreading and interaction of norms.²⁸⁸ Normative debate takes place at both an international and transnational level. Binder argues that normativity is a "collective project".²⁸⁹ The process of building social coalitions of those who share our normative preferences. Now those coalitions are built on a global scale. Normative choices are informed by ideas, events and debate in every part of the globe. State borders are increasingly irrelevant to the development of normativity. Where the state was once a primary source of moral authority, those sources are now almost infinite. An individual

²⁸⁷ Giddens, n. 275, pp. 14-20

²⁸⁸ William M. Sullivan and Will Kymlicka, *The Globalisation of Ethics: Religious and Secular Perspectives*, pp. 1-16

²⁸⁹ Binder, n. 258, pp. 223-270

may be informed by, *inter alia*, other individuals, organisations, peoples, or any other state.²⁹⁰ Common-good interests are, thus, necessary to the individual in the same manner as independent-good interests. In Donnelley's analysis, human rights protect independent-good interests because "being an individual" is an inherent aspect of human personality. Put another way, the status by which an individual experiences independent-good interests cannot be avoided: it is a necessary status. In the transnational age being part of the global community is similarly a necessary status. Urgent interests that are meaningfully experienced in the global collective context are thus important in an equivalent manner to urgent independent-good interests.

Considering the right to peace demonstrates how common-good interests can be (a) transnational and (b) manifest regardless of how individuals define themselves in relation to the global community. Peace is essential for individuals to flourish²⁹¹ and the interest in peace is global. Violence, the absence of peace, dehumanises and degrades both those who commit it and those who are victims or bystanders.²⁹² It may occur only within the borders of a state or it may occur between states. Yet violence is not confined, nor are its impacts confined, to either of these situations. The impacts of violence, whether in the shape of war, terrorism, intra-community violence, rioting, or almost any other form, transcends state borders. When there is violence in one state, it impacts on individuals in others.²⁹³

²⁹⁰ Sullivan and Kymlicka, n. 288, pp. 13-15

²⁹¹ Federico Mayer, "The Human Right to Peace", 50 UNESCO Courier 7/8 (1997), pp. 2-4. This will be discussed in more detail in Chapter Six.

²⁹² For an authoritative discussion of these arguments see Bertrand Russell, *Why Men Fight*, (New York; Routledge, 2009), (First published 1916), pp. 4-12

²⁹³ See pp. 199-209 for a more detailed exploration of this point.

The impacts of violence occur on multiple levels of transnational interconnection including the economic, political and cultural. To illustrate this, consider the transnational impacts of conflict in the Middle East. Conflict in the Middle East, for example, impacts on trade and investment. It alters the price of commodities like oil.²⁹⁴ This, in turn impacts on the price of energy. When the price of energy rises, it impacts on industry, making production more expensive, so the prices of industrial goods rise.²⁹⁵ If the change in price is significant it can have a chilling effect on consumer spending (because consumers are spending more on domestic energy bills so have less to spend on luxury items) which can slow down consumer driven economies, like those of Europe and the USA.²⁹⁶ Conflict in the Middle East can thus impact on the economies of states that are, geographically, far removed from the conflict. The same conflict can also impact on the domestic politics of states that are geographically removed. In Europe and the USA leaders are judged by the electorate on their response to various issues in the conflict.²⁹⁷ Support for various factions can determine whether a political leader receives certain donations, air time or appeals to certain constituencies.²⁹⁸ At the grass roots, support for Israel or Palestine is a core distinguishing issue for membership of certain political factions²⁹⁹. Support for one side or another in the Israel/Palestine conflict is used to indicate membership within certain, Western, political communities.³⁰⁰ Conflict

²⁹⁴ Robert B. Barsky, and Lutz Kilian, "Oil and Macroeconomy Since the 1970s", 18 *Journal of Economic Perspectives* 4 (2004), pp. 115-134

²⁹⁵ *Ibid*, pp. 115-134

²⁹⁶ *Ibid*, pp. 115-134

²⁹⁷ John J. Mearsheimer and Stephen M. Walt, "The Israel Lobby and US Foreign Policy", 13 *Middle East Policy* 3 (2006), pp. 29-87

²⁹⁸ *Ibid*, pp. 29-87

²⁹⁹ Stephen Mamura, "A net advantage? The internet, grassroots activism and American Middle-Eastern Policy, 10 *New Media and Society* 2 (2008), pp. 247-271

³⁰⁰ *Ibid*, p. 247-271

in the Middle East also impacts on culture. For example, in 2016 the play “Queens of Syria”, in which Syrian refugees performed a version of Euripides’ “Trojan Women”, toured major theatres in the UK. It was the centrepiece of the summer season at the Young Vic,³⁰¹ one of the UK’s leading theatres.³⁰² The conflict in Syria thus made a significant impact on artistic culture in the UK. These examples demonstrate that violence in one part of the world impacts, in a direct manner, on individuals in parts of the world geographically removed from the violence itself. These impacts exist regardless of whether an individual consciously as a member of the global community. Therefore, all individuals have an interest in peace *everywhere*, not merely peace in close proximity to ourselves.

Not every common-good interest is sufficiently urgent to merit protection with the rights mechanism. The right to resist foreign occupation, enshrined in the Arab Charter of Fundamental Rights,³⁰³ is unlikely to meet the threshold. Resistance to occupation might be justified with arguments based on the value of autonomy, but this is already protected (as discussed in Chapter Six) by the right to self-determination. The interest in resistance itself is difficult to justify as urgent because the international system offers a range of alternative mechanisms for responding to occupation (such as international organisations, structures, norms and laws). While the use of these mechanisms may be considered a form of resistance, access to them already provided by other rights.

³⁰¹ The Young Vic, “What’s On? 5th to the 9th July”, available at <http://www.youngvic.org/whats-on/queens-of-syria> (last accessed 27th October 2016)

³⁰² See The Society of London Theatre, “Laurence Oliver Awards: Full list of winners 1976-2008”, available at http://www.officiallondontheatre.co.uk/servlet/file/LOA_fulllist.pdf?ITEM_ENT_ID=101095&ITEM_VE_RSION=1&COLLSPEC_ENT_ID=8 (last accessed 27th of October 2016)

³⁰³ League of Arab States, *Arab Charter on Human Rights*, 15 September 2004, Art. 2(c)

Transnational Threats

Just as common-good interests are transnational, standard threats to common-good interests are transnational as well. As discussed in Chapter One, standard threats are reasonably predictable, generally relevant, and have a reasonable degree of immediacy. The interconnected nature of the transnational age means that standard threats to common-good interests transcend state borders. The existence and nature of these standard threats makes it necessary to protect sufficiently urgent common-good interests with the rights mechanism.

Transnational standard threats are inevitable in an interconnected world. As the impact of our actions increasingly transcends states, so does our ability (deliberately or indirectly) to compromise each other's interests. Giddens terms these "high consequence risks"³⁰⁴ because they manifest and impact on a global scale. The Skoll Global Threats Fund identifies five examples of global threats: Climate change, water security, pandemics, nuclear proliferation and the Middle East conflict.³⁰⁵ It describes "global threats" as:

"Global threats have the potential to kill or debilitate very large numbers of people or cause significant economic or social dislocation or paralysis throughout the world. Global threats cannot be solved by any one country; they require some sort of a collective response. Global threats are often non-linear, and are likely to

³⁰⁴ Giddens, n. 275, p. 4

³⁰⁵ Skoll Global Threats Fund, "Global Threats", available online at <http://www.skollglobalthreats.org/>

become exponentially more difficult to manage if we don't begin making serious strides in the right direction in the next 5-10 years.”³⁰⁶

The existence of transnational threats is recognised by both states and international organisations. The former Secretary General of the United Nations, Kofi Annan (in reference to “terror and AIDS”) argued that, in terms of such threats “a threat to one is a threat to all”.³⁰⁷ The US National Security Strategy now includes threats which originate outside the US sovereign jurisdiction but nevertheless have the potential to harm US citizens.³⁰⁸

Skoll's research may not have identified an exhaustive list of transnational standard threats. It does, however, provide an indicative sample. The threats identified by Skoll cannot be confined within national borders and cannot be addressed with action by a single state. Both the causes and impacts of these threats transcend national borders. Akira Iriye illustrates the transnational nature of Middle East conflict. In 2005, Paris suffered prolonged and destructive riots. The principle perpetrators were young men of Arab descent, who lived in the *banlieues*, the housing projects on the outskirts of the city. Iriye attributes these riots, in part, to conflict in the Middle East.³⁰⁹ For Iriye, global migration, partially caused by conflict in the Middle East, created the circumstances for

³⁰⁶ Skoll Global Threats Fund, “Mission and Strategy”, available online at <http://www.skollglobalthreats.org/about-us/mission-and-approach/>

³⁰⁷ Kofi Annan, Speech to the Council on Foreign Relations, New York, December 16, 2004. C.f. United Nations High Level Panel on Threats, Challenges and Change, “A More Secure World: Our Shared Responsibility” (New York; United Nations, 2004), p. 9 available online at http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf

³⁰⁸ Gregory F. Treverton, “Enhancing Security Through Development: Probing the Connections”, (Annual Bank Conference on Development Economics, Amsterdam, May 23-24, 2005) available online at <http://siteresources.worldbank.org/INTAMSTERDAM/Resources/GregTaverton.pdf> (last checked 9th September 2016)

³⁰⁹ Iriye, n. 264, pp. 815-847

the riots³¹⁰. Conflict in the Middle East caused migration to Europe on a sustained and significant scale. In France, many migrants fleeing the conflict congregated (or were compelled to congregate) in the *banlieues*. The poor conditions in the *banlieues* and the marginalisation suffered by migrants, as a result of government policy and cultural racism, increased social tension prior to the riots. Conflicts in the Middle East thus contributed to riots in Paris.³¹¹

For Iriye, colonialism was an early root of transnational interconnection. The nature of the French withdrawal from its north African colonies led to both mass migration and festering resentment between the native French and new migrants. This, in turn, led to a series of repressive policies and actions aimed at France's Arab immigrant population. This too contributed to the context in which the 2005 riots took place.³¹²

Transnational standard threats impact across the various areas of society. The interconnected nature of the energy market, finance and trade mean that economic, environmental or violent incidents in one part of the world can have an immediate and direct impact on individuals on a global scale. In 2000, the US produced 1425m tons of energy but consumed 2052m:³¹³ the very process of keeping the lights on in the USA is dependent on importing energy from a variety of markets across the globe. Similarly, the failure of a US financial institution in 2007 led to a global financial meltdown because securities, that included sub-prime US assets, are traded globally.³¹⁴ The day to day existence of individuals in one part of the world can no longer be detached from that of

³¹⁰ Ibid, pp. 815-847

³¹¹ Ibid, pp. 815-847

³¹² For an interesting extrapolation of tensions relating to the Arabic community in France see Jeremy Jennings, "Citizenship, Republicanism and Multiculturalism in Twentieth Century France", 30 British Journal of Political Science 4 (2000), pp. 575-598

³¹³ Iriye, n. 264, pp. 815-847

³¹⁴ Ibid, pp. 815-847

individuals in another. Transnational standard threats can't be addressed by unilateral action because they transcend state borders. France may suffer the impacts of conflict in the Middle East, but it has no control over that conflict. Transnational standard threats can only be addressed by co-operation between states.

Not all common-good interests are subject to standard threats. The right to own or possess communication technologies, for example, is both transnational and arguably sufficiently urgent. It is not clear, however, that it is subject to any sort of general or immediate threat. The proposed right would guarantee individuals the opportunity to possess devices required to access the internet, as well as make phone calls, text message and access other communication applications. The right to possess communication technologies differs from the right to free expression (a member of the accepted classes of rights). The latter concerns the suppression of forms of expression while the former concerns access to specific communications technologies. Even if we accept, however, that an argument could be made that accessing communications technologies is (a) a common-good interest and (b) urgent, any standard threat to the interest only exists on the level of free expression. States that prevent access to the internet or ownership of mobile telephones or other devices, are violating the right to freedom of expression. Indeed, it is not clear that any action could violate the communication right without also violating the right to freedom of expression. By contrast, the right to peace, as described above, is subject to a standard threat. Although that threat comes in different forms, all of those forms can be classified as "violence". As argued above, they transcend state boundaries so cannot be addressed by the unilateral action of any single state.

The balance of power

Transnational interconnection can concentrate power in the hands of unaccountable agents. This creates a second layer of transnational threat. It limits the power of states to protect the interests of their citizens through unilateral action and consequently disempowers individuals. Anthony Carty takes a contrary view. For him, globalisation has empowered states and individuals because it has increased the range of options available to a state and its citizens.³¹⁵ There is little doubt that increased transnational commerce increased consumer choice. This does not mean, however, that it has empowered individuals.³¹⁶ Transnational interconnection is better described as transferring power from accountable to unaccountable agents. In terms of consumer choice: while the menu available may be larger, the power to set that menu is now less accountable to individuals.

The transnational mobility of capital and labour disempowers states and individuals in favour of transnational agents. All individuals affect and are affected by society on a transnational scale, but not all agents impact, and are impacted on, to the same extent. Some individuals and organisations are better equipped to exert transnational influence than others. Such agents are generally less vulnerable to the transnational influence of others.³¹⁷ They include, inter alia, multi-national corporations and individuals who are wealthy enough to establish assets in multiple jurisdictions and move between them.³¹⁸ These are “transnational agents”. States must attract investment

³¹⁵ Anthony Carty, "The Third World claim to economic : the economic rights of peoples: theoretical aspects", in Chowdhury and de Waart, *The Right to Development in International Law*, (The Hague; Martinus Nijhoff Publishers, 2005), pp. 43-60

³¹⁶ David Harvey, *A Brief History of Neoliberalism*, (London; Oxford University Press, 2007), pp. 76-78

³¹⁷ Ibid, pp. 76-78

³¹⁸ Ibid, pp. 76-78

from the private sector to keep their economies healthy.³¹⁹ Private sector investors are increasingly mobile. This gives them bargaining power in relation to states. As a transnational agent, an investor can choose to locate her business anywhere in the world. If conditions become unfavourable in a particular state, she can simply leave and locate her investment in a different state.³²⁰ A state needs the investor more than the investor needs the state. States must compete to attract investment so have little choice but to accede to the demands of an investor.³²¹ The bargaining process may be explicit, such as when banks threaten to leave a state if a certain policy becomes law. Or it may be implicit, with policymakers crafting laws intended to appease investors without an overt threat becoming necessary.³²² International economic law facilitates the mobility of capital and gives international investors special rights against sovereign states. Investment treaties give transnational investors the advantage of private courts, which are outside national legal systems and are not accessible to citizens, for the settlement of investment disputes.³²³ In a democracy, an individual primarily exercises agency in the making of public policy through representative government. When representative governments are disempowered in relation to transnational agents, individuals are also disempowered in relation to transnational agents. Thus, although individuals have common-good interests on a global scale, they are often disempowered when it comes to protecting these interests.

³¹⁹ Ibid, pp. 39 - 63

³²⁰ Kyla Tienhaara, "Once BITen, twice shy? The Uncertain future of 'shared sovereignty' in investment arbitration", 30 Policy and Society (2011), pp. 185-196

³²¹ Harvey, n. 316, pp. 39-63

³²² Gus Van Harten, "Comments on the European Commission's Approach to Investor-State Arbitration in TTIP and CETA, Osgoode Legal Studies Research Paper No. 59/2004, p. 14, available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2466688 (last checked 9th September 2016)

³²³ Tienhaara, n. 266, pp. 73-100

This can have a direct impact on communities and individuals. In the Niger delta, Royal Dutch Shell, an Anglo-Dutch oil company, holds a monopoly on extraction of hydrocarbons. The Nigerian government is reliant on the income that Shell provides in oil rents, so has been reluctant to impose regulation.³²⁴ Shell's extraction activities have caused pollution, destruction and, in some cases, led to forced relocation of local populations.³²⁵ The Nigerian government needs the income from Shell's activities more than it needs to ensure it wins the votes of local communities.³²⁶ As such, the communities affected have little agency in protecting their environment. Shell's activities contribute to climate change, which impacts on individuals globally. Yet those most affected by climate change have no agency in relation to the Nigerian government, and so they are unable to protect their common-good interest in a safe and healthy environment. The individuals affected by the threat to the environment are thus disempowered when it comes to protecting that interest.

Transnational agents can avoid or subvert the coercive powers of states. They can leave the jurisdiction, compel the state to act in a certain manner, or make use of dispute settlement mechanisms to which only they have access. This disempowers individuals, who can't avoid or compel the coercive powers state in an equivalent manner. Threats to common-good interests thus manifest on both a global scale and in a context that leaves individuals least capable of protecting their interests.

Reasonable Effect

³²⁴ Cyril I. Obi, "Global, state and local intersections: power, authority and conflict in the Niger Delta oil communities", in Thomas Callaghy, Ronald Kassimir and Robert Latham (eds), *Intervention and Transnationalism in Africa: Global-Local Networks of Power*, (CUP, 2001), pp. 173-194

³²⁵ Ibid, pp. 172-194

³²⁶ Ibid, pp. 172-194

Beitz model requires that, in order to be recognised as a right, an interest must be capable of being protected by the right mechanism to reasonable effect. In order to protect common-good interests from transnational standard threats, two issues must be addressed: (1) individuals are disempowered when it comes to protecting of common-good interests, and (2) it is impossible for individuals or states to address transnational general threats by unilateral action. The rights mechanism is reasonably effective at protecting urgent common-good interests from standard threats because it responds to both issues.

The disempowerment issue

Solidarity rights empower individuals in relation to common-good interests by giving them a globally recognisable claim against states. In the case of the Niger delta, the Ogoni people, some of the principal victims of Shell's activities, relied on a solidarity right (the right to a clean and healthy environment) before the African Commission³²⁷. Their case was successful and the Nigerian government was compelled to take measures to redress the damage caused by Shell.³²⁸ One of the primary purposes of a state is to protect the interests of its citizens.³²⁹ It is appropriate, therefore, that it falls to states to protect common-good interests. Solidarity rights give individuals a claim on states that is recognised by the international community. This allows individuals to effectively

³²⁷ *Social and Economic Rights Action Centre v Nigeria*, African Commission on Human and Peoples' rights Case No. ACHPR/Comm/A044/1, Decision Regarding Comm. No. 155/96 (2001)

³²⁸ *Ibid*

³²⁹ Francis Fukuyama, "Nuclear Shadowboxing: Soviet Intervention Threats in the Middle East", 25 *Orbis: A Journal of World Affairs* 3 (1981), pp. 571-605

demand that states act to address situations in which transnational agents compromise common-good interests.

The unilateralism issue

Solidarity rights address the impotence of unilateral action by imposing outward-facing duties. The outward-facing duty obliges states to act beyond their own borders. This may be through *ad hoc* cooperation, the creation of international institutions, or some other form of international solidarity. The right to peace, for example, imposes a general duty on states to cooperate in order to preserve or achieve peace.³³⁰ This duty may be partially respected merely by refraining from directly or indirectly causing violence in other states. It may be partially respected by intervening to promote peacekeeping efforts. It may be respected by creating global or international institutions to resolve conflicts without the need for violence.³³¹ All of these actions involve showing international solidarity. It is only by acting in solidarity that states can address threats that transcend them individually.

The right to participate in the common heritage of mankind provides an alternative illustration. Heritage transcends national borders.³³² Sometimes heritage is shared by all. For example, Antarctica is considered the heritage of all mankind³³³. Sometimes particular examples of heritage are more relevant to certain peoples. Australians consider the Gallipoli beaches to be an important part of their national

³³⁰ Mayer, n. 291, pp. 2-4

³³¹ Ibid. 2-4

³³² Hodder, n. 200, pp. 861-882

³³³ Ibid, pp. 861-882

heritage, but those beaches fall within the territory of Turkey.³³⁴ The right provides for an outward-facing duty to preserve and facilitate the enjoyment of the common heritage of mankind. This goes beyond refraining from destroying cultural heritage sites. It may be respected by respecting the heritage of those in other states, such as in the case of the Gallipoli beaches.³³⁵ It may be respected by cooperating to protect heritage, such as in the agreements for the exploration of Antarctica, or by creating and participating in international institutions to do so, such as UNESCO.³³⁶

What about democracy?

Sometimes individuals can compel the state to protect and provide for their common-good interests by engaging in the democratic process. Recognition of a right sets an interest outside this process. Why should solidarity interests be set outside the democratic process when that process, which is based on the will of the majority, is suited to the protection and provision for collective interests? I submit three reasons.

First, common-good interests, and associated standard threats, transcend electorates as they transcend state boundaries. Electorates are organised on a state by state basis. No organisation operating at a global or transnational level is accountable through the democratic process in a manner equivalent to democratic states. The provision for and protection of common-good interests requires states to act in cooperation. While an electorate may have the ability to compel its own state to cooperate, it cannot compel other states to do the same thing. The transnational nature of

³³⁴ Ibid, pp. 861-882

³³⁵ Ibid, pp. 861-882

³³⁶ Ibid, pp. 861-882

common-good interests requires a distinctly global method of governance. Majoritarian democracy is insufficient to ensure protection and provision for common-good interests.

Second, some (although not all) common-good interests are logically prior to majoritarian democracy. For example, self-determination is (in part) a right of individuals to participate in the organisation of their polity, generally along democratic lines.³³⁷ The process cannot provide for itself. Thus, the right to self-determination is logically prior to democracy.

The third reason is that certain solidarity interests are of sufficient urgency that it is rational to set them outside the process of majoritarian decision making. Human rights protect interests of such urgency that it is not rational to subject them to arbitration by the majoritarian process. If urgent common-good interests are equally important to human dignity as urgent independent-good interests and, with the development of transnational interconnection, equally vulnerable to standard threats, then it is rational to conclude that common-good interests should be set outside the majoritarian decision making process in the same way that urgent independent-good interests are set outside it. How this can take effect in relation to specific interests will be explored in the final two chapters of this thesis.

Standing

Common-good interests can be difficult to enforce against governments because, while all members of a society share that interest, none has a specific claim. Citizen A's interest in a clean and healthy environment is no more acute than Citizen B's or Citizen C's. As such, no agent has particular standing to enforce the protection of a collective

³³⁷ Cassese, n. 78, pp. 67-99 and 101-133

good. As argued in Chapter Three, it is not necessary for an entire people to act as a claimant in order for a solidarity right to be enforced. Individuals or groups, who are particularly affected by a government's failure to respect its duty, can enforce solidarity rights in court. Sometimes this is on behalf of a "people" as a whole. But this need not be the case. In *Comunidad de Chanaral*³³⁸ the interest in question was held by future generations. As those generations did not, at the time, exist, it was impossible for them to enforce their interest either through the courts or the democratic mandate. Yet this didn't make the interest in question any less urgent. The actions that were the subject matter of the case were taking place in the present but, by the time those directly affected would have been in a position to enforce their interests, the harm would already have occurred. In permitting certain individuals to act as representatives of that future generation, the solidarity right to the environment was effective in protecting the interest.

Conclusion

In this chapter I set out to make the argument that solidarity rights should be considered human rights according to Beitz's model. In Beitz's approach, an interest can be recognised as a right if it is urgent, faced with a standard threat, and can be protected to reasonable effect by the rights mechanism. I have argued that the class of common-good interests can contain interests that meet this test. Common-good interests can be urgent because they can be equally fundamental to individual dignity as independent-good interests and, in the 21st century, they manifest on a global scale. They can be faced with standard threats because threats to common-good interests transcend state borders in the same way as the interests themselves. Common-good interests can be protected to

³³⁸ *Comunidad de Chanaral v Codelco Division el Salvador* (1988) S/Recurso de Proteccion Corta Suprema

reasonable effect by the rights mechanism because the outward-facing duty in solidarity rights empowers individuals to demand that states cooperate to protect the interests that cannot be protected by unilateral action.

Beitz's model requires that the case for solidarity rights can be understandable from both a sympathetic and a non-sympathetic perspective. This chapter has addressed the sympathetic perspective. In the next chapter I will address the non-sympathetic perspective. I will make the argument that the class of solidarity rights has the potential to contain interests that meet the Beitz criteria, from the perspective of Hayekian political theory.

CHAPTER FIVE: THE NON-SYMPATHETIC PERSPECTIVE

Introduction

Solidarity rights encompass interests that should be considered human rights according to Beitz's criteria of urgency, standard threat, and the reasonable effectiveness of the rights mechanism. In Beitz's model, it is not sufficient to make this case from only a sympathetic perspective. The case must also be understandable from non-sympathetic perspectives. In this chapter I will address non-sympathetic perspectives by arguing for solidarity rights from the perspective of Friedrich Hayek. He proposes a society organised with the aim of limiting the coercion of the individual. Hayek's theory is, *prima facie*, hostile to the idea of solidarity rights. For Hayekians, solidarity leads to coercion and retards the progress of society. This chapter is an *argumentum a fortiori* exercise. Hayek's political theory is not endorsed as the ideal lens through which to analyse human rights, nor is this chapter intended as a substantive defence of Hayek's work. Rather, it is applied because it is a particularly hostile perspective. This will demonstrate that, even from an exceptionally non-sympathetic perspective, the importance of common-good interests, and the effectiveness of the rights mechanism in protecting them, can be understood. This, in turn, indicates that the case for solidarity rights can be understood from non-sympathetic perspectives more generally.

Even from Hayek's (hostile) perspective, common-good interests can be understood to meet the Beitz threshold. They can be urgent, faced with a standard threat, and protected to reasonable effect by the rights mechanism. Hayekian theory aims to limit coercion. The protection of common-good interests limits coercion. They can therefore be understood as urgent from a Hayekian perspective. Standard threats to

common-good interests are a form of coercion. In an ideal Hayekian society, the market protects the interests of individuals from the threat of coercion, but the market cannot protect common-good interests effectively. The rights mechanism is the least coercive alternative mechanism that can effectively protect common-good interests and should therefore be embraced by Hayekians as reasonably effective in protecting common-good interests.

Why Hayek?

Identifying the non-sympathetic perspective for a class of rights presents a challenge. It is not clear that the non-sympathetic perspective will be the same for every solidarity right. A perspective that is non-sympathetic to the right to peace will not necessarily also be non-sympathetic to the right to self-determination or the right to a clean and healthy environment. One approach would be to identify the non-sympathetic perspective for each common-good interest in turn. This would, however, be unsatisfactory. In the first instance, there could be more than one non-sympathetic perspective for each common-good interest. In the second, this would merely serve to provide an argument for each of the existing members of the class, not the class itself. The non-sympathetic perspectives identified for the existing members of the class will not necessarily be non-sympathetic towards future members of the class. A better method is to undertake an *argumentum a fortiori* exercise, addressing common-good interests on a conceptual level. This requires identifying a perspective that is unsympathetic to common-good interests *as a concept*. The strongest version of this argument will adopt a perspective that is actively hostile to the concept of common-good interests. If the importance of common-good interests can be understood from a particularly hostile

perspective, it will indicate that their importance can be understood from a broad range of non-sympathetic perspectives.

An alternative approach would be to argue for solidarity rights from several different abstract non-sympathetic positions. This would, however, make for a weaker case overall. To adopt a variety of positions, even in the abstract, would only serve to show that solidarity rights could be justified from those specific positions. The Practice is emergent. Therefore, any class of rights must have the potential to evolve beyond the interests it recognises at any one time. The strongest non-sympathetic argument will indicate that the importance of common-good interests and the propriety of the rights mechanism in protecting them, can potentially be recognised from an open-ended range of non-sympathetic perspectives. If the case can be made from a particularly hostile perspective, then it is reasonable to assume that it can also be justified from a range of less hostile perspectives.

Why Hayek is hostile to solidarity rights?

The Hayekian perspective is particularly hostile to solidarity rights on three principle grounds. First, solidarity rights require that the state interfere in society and the market and, for Hayek, unreasonable interference in the market by the state is coercive towards individuals.³³⁹ The aim of Hayek's theory is to minimise coercion³⁴⁰, so the interference required by solidarity rights is anathema to Hayek's ideal model of society. Second, solidarity rights are often used to combat inequality and, in Hayekian theory,

³³⁹ F. A. Hayek, *The Constitution of Liberty*, (London; Routledge and Kegan Paul, 1960), pp. 117-130

³⁴⁰ Ibid, pp. 9-20

inequality is necessary in a functioning society³⁴¹. Third, “solidarity” can be used as a rhetorical device to justify the coercion of individuals by the state³⁴². This sub-section will consider each of these points of hostility in turn.

i. Solidarity rights require state interference.

Protecting common-good interests generally requires states to take positive action. This means that states act to protect group interests, sometimes ahead of individual interests. For Hayek, individual interests should be prioritised over collective interests. The state should allow individuals to compete. It should not intervene to “pick a winner”. To do so is coercive. Solidarity rights often require the state to interfere in fair competition. For example, states often respect their outward-facing duty under the right to development, by providing aid to certain industries or areas of agriculture in developing states.³⁴³ This means that the recipients of the aid are at an artificial advantage. For a Hayekian, intervening in the market in this way is coercive and unjust.³⁴⁴

Hayekian theory admits some solidarity because it requires a degree of social cohesion.³⁴⁵ This, however, must occur organically, rather than through coercion. It must

³⁴¹ Ibid, pp. 266-281

³⁴² P. Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights*, (Oxford; OUP, 1985), p. 55

³⁴³ Pieter VerLoren van Theermat and Nico Schriver, "Principles and instruments for implementing the right to development within the European Community and the Lome IV States", in, Chowdhury and de Waart, *The Right to Development in International Law*, (The Hague; Martinus Nijhoff Publishers, 2005), pp. 89 -111

³⁴⁴ Hayek, n. 339, pp. 22-38

³⁴⁵ Ibid, pp. 36-48

emerge from the voluntary actions of individuals.³⁴⁶ There is both an ideological and a practical justification for this. The ideological explanation is that, if an individual is forced to cohere with the rest of society then she is being coerced.³⁴⁷ The practical explanation is advanced most persuasively by Milton Friedman, who substantially developed Hayek's political theory.³⁴⁸ For Friedman, if social cohesion is not voluntary then it is not effective. Friedman uses the metaphor of a game, such as football or basketball, that generally requires a referee or umpire to ensure that all players follow the rules and penalise those who do not. It also requires that the players generally accept the rules without the umpire having to become involved. Players must, thus, accept the rules without being coerced into doing so by the umpire. If the umpire must use her powers of penalty to coerce every player into accepting every rule, then she will be constantly intervening and the game could not proceed. If all players generally accept the rules the umpire is only required to intervene occasionally, so the game flows more effectively.³⁴⁹ The same is true of society. If no individual accepted social norms there would be anarchy: Hobbes' "war of all against all".³⁵⁰ All members of society must, therefore, have a basic acceptance of social norms, it is not sufficient that they observe norms because they are coerced into doing so by the state.

ii. Solidarity rights require the state to artificially suppress inequality

³⁴⁶ Ibid, pp. 36-48

³⁴⁷ Milton Friedman, *Capitalism and Freedom*, (Chicago; University of Chicago Press, 1963), pp. 7 - 22

³⁴⁸ Nicholas Whapshott, *Keynes Hayek: The Clash that Defined Modern Economics*, (London; Norton, 2012), pp. 208-221

³⁴⁹ Ibid, pp. 7 - 22

³⁵⁰ Thomas Hobbes, *Leviathan*, (London; Penguin Classics, 1982, first published 1651), p. 1

In Hayekian theory, inequality is a necessary evil. It facilitates the progress of society as a whole. Progress naturally leads to inequality and inequality is vital to progress.³⁵¹ It is necessary for the social progress that some people are “ahead” and some “behind”. It is only through this division that new ideas can be tested. Those “behind”, benefit from the resources of those “ahead” because they enjoy the results of their experiments without the need to invest themselves.³⁵² Inequality thus motivates individuals to innovate in order to get ahead.

For Hayek and Friedman, the alternative to inequality is injustice. A planned society (in which the state interferes to “correct” inequality) would still require inequality because it would still require elites to drive society forward. The nature of the elite would change. The capitalist class would be replaced as the elite by whoever happened to control the state. The social structure, with an elite leading the rest of society, would remain the same. However, in a planned society, inequality would be mandated by the whim of the powerful rather than result from “impersonal” forces like the market or accident of birth.³⁵³ The latter choice is preferable because, in minimising coercion by the state, it more effectively facilitates social progress.³⁵⁴ Solidarity rights can require governments to intervene to remove inequality. For example, cultural rights can impose an obligation on governments to address inequalities between indigenous peoples and the rest of society.³⁵⁵ For Hayek, this merely prolongs inefficient cultural practices. Indigenous peoples should be left to compete in the marketplace. If their way of life puts them at a disadvantage they should abandon that way of life.

³⁵¹ Hayek, n. 339, pp. 39-53

³⁵² Ibid, pp. 39-53

³⁵³ Hayek, n. 339, pp. 39-53

³⁵⁴ Ibid, pp. 39-53

³⁵⁵ Brownlie, n. 67, p. 10

- iii. “Solidarity” can be used to justify coercion of individuals by the state.

Solidarity is often used by states as an excuse to justify coercion. Hayek was highly critical of socialist and social democratic governments.³⁵⁶ They interfere in the market and other areas of society in the name of the collective good.³⁵⁷ This leads to the subjugation of individual rights. Coercion happens when the state interferes with individual liberty in favour of the “greater good” of society. Shared interests offer a proxy for the state to subjugate individual interests in favour of its own. Civil and political rights are acceptable because they limit the state’s capacity for coercion. Recognising solidarity rights requires recognising that collective interests can have an equivalent status to individual interests. Privileging common-good interests over individual interests can legitimise coercion on a broad scale. It is, in reality, more likely that the government has identified its own interest and claimed that it is a shared interest³⁵⁸. Hayekian theory, therefore, begins as hostile to solidarity rights as a concept. In the rest of this chapter I will argue that, despite this conceptual hostility, the case for solidarity rights can be understood from the Hayekian perspective.

The Case from the Hayekian Perspective: Urgency

The overarching objective of Hayek’s political theory is to limit coercion of the individual. Coercion involves imposing one agent’s plan on another. It thus reduces the

³⁵⁶ Hayek, *The Fatal Conceit: The Errors of Socialism*, (London; Routledge, 1988), p. 80

³⁵⁷ Ibid, p. 80

³⁵⁸ Hayek, n. 339, p. 39

potential for social experimentation and so reduces the cumulative knowledge of society. This retards the development of society. The international system in the twenty-first century, however, presents a different set of challenges to the mid-twentieth century domestic systems in which Hayek developed his theories. When Hayek wrote his most influential works, political power was generally concentrated in the state. In the transnational age, political power is multipolar. To achieve Hayek's overarching goal, of minimising coercion, it is therefore necessary to depart from some of his tactical recommendations, when these recommendations relate solely to the political context of the mid-20th Century. Embracing solidarity rights represents a departure from some of Hayek's tactics, to better achieve his overarching goal, reducing coercion, in the multipolar context of the transnational age. Coercion should, for Hayek, be limited because we have limited knowledge. Any attempt to plan is thus more likely to have adverse results than positive results. To impose the plan of one agent on others (coercion) is therefore harmful. Respecting common-good interests limits the imposition of one agents plan on others.

Hayek's overarching goal: limiting coercion

To understand Hayek's overarching objective of limiting coercion, it is necessary to first understand his theory of comprehension. For Hayek, it is only possible for an agent to comprehend a tiny proportion of all the information in existence. Hayek and Friedman identify two limitations on comprehension. The first is substantive: it is impossible for any agent to access the sum-total, or even a significant proportion of the information in existence.³⁵⁹ It is therefore impossible for any agent to be fully informed

³⁵⁹ Hayek, n. 356, pp. 66-88

or even close to fully informed. The second limitation is cognitive. Even if it were possible for an agent to access sufficient information in existence, it would be more information than she could possibly process. Furthermore, that information is constantly subject to change, and reliant on additional bodies of contextual information in order to have meaning. It cannot possibly be processed by a single mind or even a cohesive group of minds.³⁶⁰

The inevitable limits on any agent's comprehension mean that it is impossible for one agent to plan for the whole of society.³⁶¹ In modern society, a single agent cannot predict the outcomes of their actions. Attempts to plan a society will, therefore, retard social progress. Hayek sets out this argument with five propositions:

1. It is impossible to observe the effects of our morality in the long term.
2. In an extended order, most ends of action are not conscious or deliberate.
3. Extended orders are too complex to attempt to hold all possibilities in one mind.
4. What is unknown cannot be rationally ordered.
5. What cannot be known cannot be planned.³⁶²

For Hayek, the “curious task of economics is to demonstrate to men how little they really know about what they imagine they can design.”³⁶³ The desire to plan a society, in the view of Hayek and Friedman, comes from the fear of a lack of control. Ultimately, however, attempts to plan afford the planner no greater control than they enjoyed before:

“The understandable aversion to such morally blind results, results inseparable from any process of trial and error, leads men to want to achieve a contradiction

³⁶⁰ Ibid, pp. 66-88

³⁶¹ Ibid, pp. 11-29

³⁶² Ibid, pp. 66-88

³⁶³ Ibid, p. 76

in terms: namely, to wrest control of evolution – i.e., of the procedure of trial and error – and to shape it to their present wishes. But the invented moralities resulting from this reaction give rise to irreconcilable claims that no system can satisfy and which thus remain the source of unceasing conflict. The fruitless attempt to render a situation just whose outcome, by its nature, cannot be determined by what anyone does or can know, only damages the functioning of the process itself.”³⁶⁴

Friedman calls this “the law of unintended consequences”.³⁶⁵ Our comprehension is inevitably limited so the planner can never take into account every factor necessary to ensure that her plan is a success. Actions will almost always have consequences that were not predicted. As a result, any plan is a gamble that is more likely to fail than it is to succeed³⁶⁶. When the planner imposes her plan on others it causes a double harm. In the first instance, it makes them subject to the outcome of her gamble, whether they wanted to be or not. In the second, it eliminates the chance for them to develop their own ideas and measures in that area. If individuals are subject to the plans of another then they must apply the measures that the other’s plan prescribes. This means they do not develop their own measures to achieve the same outcome. As such, fewer alternative measures are developed and there is thus chance of developing a measure that will be genuinely

³⁶⁴ Hayek, n. 356, p. 74

³⁶⁵ Friedman, n. 347, pp. 22-36

³⁶⁶ For Amartya Sen, Hayek and Friedman overplay their hand. If knowledge is necessarily limited, then it is impossible to predict, with certainty, that the “unintended consequences” of planning will be negative (See Amartya Sen, “The Profit Motive”, 147 *Lloyds Bank Review* [1983], pp. 1-20). But, for Hayek and Friedman, the danger lies in not knowing either way. If a plan produces only positive in fifty percent of instances, then it is still a gamble. What Hayek and Friedman propose is effectively a policy of hedging. Just as it is prudent to spread investments across a wide portfolio in case some fail, it is best to develop a diverse range of social practices.

effective.

Organising society in a non-coercive manner

Although imposing one agent's plan on others is counterproductive, For Hayek and Friedman, humans must nevertheless live in society and society must progress. Anarchy benefits only the strong³⁶⁷ and societies that do not progress tend to disintegrate.³⁶⁸ Central planning will retard social progress, so societies must find a way to organise themselves without it.³⁶⁹ A rational society organises itself and progresses by harnessing the cumulative knowledge of its members. This knowledge is beyond that which any individual can process. In a properly organised society, however, it is not necessary for the individual to process the entire body of knowledge. For Hayek and Friedman, a properly organised society allows the individual to benefit from knowledge that she does not have. In such a society, the individual can still benefit from the cumulative knowledge of all other members of society.³⁷⁰

To build the cumulative knowledge of society, individuals must be free to experiment. Liberty is thus the rational response to the limits on agents' comprehension.³⁷¹ Different measures and ideas, developed by individuals, will

³⁶⁷ Hayek, n. 339, pp. 201-205

³⁶⁸ Ibid, p. 202

³⁶⁹ For example, see Friedman, n. 347, pp. 7-22

³⁷⁰ Hayek, n. 356, p. 80

³⁷¹ Attempting to capture the essence Hayek's nascent political theory in 1955, Carl Freidrich argued that it was dominated by the idea of "freedom". For Freidrich, "freedom" was achieved by limiting the ability of the state to coerce the individual (see Carl J. Friedrich, "The Political Thought of Neo-Liberalism", 49 American Political Science Review 2 (1955), pp. 509-525). But Friedrich mistook mechanism for foundation. The rational reaction to the limits on comprehension is to organise a society so that individual liberty is maximised. (See Hayek, n. 339, pp. 3-14)

inevitably compete. The most effective will be adopted by more individuals and the less effective will be abandoned. The most effective measures do not, therefore, need to be identified by the state. They are adopted naturally by free individuals. When individuals are at liberty, modern societies “plan” themselves. Individuals must be free to learn from each other through trial and error.³⁷² Hayek aspires to a society that facilitates “human development in its richest diversity”.³⁷³

For Hayek and Friedman, central planning retards the progress of society. If one measure or idea is imposed on others, then those others are no longer able to experiment. This means that society loses the benefit of their competing ideas. The ultimate cumulative knowledge of that society is thus less than it otherwise would have been. This means that coercion harms society as a whole. If the planner is only attempting to plan for herself then she can gamble: when individuals attempt new things, it leads to innovation. If the individual’s gamble is successful it may be repeated by others. If it fails, then the loss only impacts on the individual.³⁷⁴ When applied to society as a whole, however, planning inhibits innovation. If society as a whole must follow the plans of an individual or small group of agents, then this eliminates the potential for competing ideas: if gamble does not pay off then it cannot be corrected. Furthermore, in making the gamble, the planner has eliminated the opportunity to develop measures that would have been more effective and more widely embraced. In a planned society, alternative visions must be sacrificed for that of the planner. Coercion is harmful because it forces individuals to accept the planning of others and thus stifles their potential for innovation

³⁷² Hayek, n. 356, pp. 38-47

³⁷³ Ibid, p. 80 (quoting John Stuart Mill).

³⁷⁴ Hayek, n. 339, pp. 22-38

and the potential social benefits of competition between different measures.³⁷⁵ A rational society is therefore one that is organised to minimise coercion.

The nature of coercion

Coercion can come from both the state and individuals. If an individual imposes her plan on another individual, then society loses the benefit of the alternative measures that individual might have developed. The core harm remains the same whether coercion is the work of the state or individuals: the potential for the development of, and competition between, multiple measures has been eliminated. The role of the state is to set general rules to prevent individuals from coercing each other. If all members of society follow the same rules, then none is coercing the others. Hayek adopts Locke's mantra: "We owe our freedom to restraints on freedom. For, Locke wrote, 'who could be free when every other man's humour might domineer over him.'"³⁷⁶ Hayek thus supports

³⁷⁵ Keynes described Hayek's theory of social evolution as social Darwinism: "The parallelism between economic *laissez-faire* and Darwinism ... is very close indeed. Just as Darwin invoked sexual love, acting through sexual selection, as an adjunct to natural selection by competition, to direct evolution along lines which should be desirable as well as effective, so the individualist invokes love of money, acting through the pursuit of profit, as an adjunct to natural selection, to bring about the production on the greatest possible scale of what is most strongly desired as measured by exchange value" (See John Maynard Keynes, "The End of Laissez Faire", (1926), reprinted in *Essays in Persuasion*, (London; Macmillan, 1931), p. 284). However, Hayek draws a distinction between himself and Darwin. The latter traced single lines of evolution. Genetic material is handed from parent to child. But social evolution is the product of many parents (See Hayek, n. 463, p. 9). Any member of society may benefit from its collective wisdom. Even though that individual cannot comprehend the sum of the combinations of information required to achieve that wisdom. The political thought of Hayek and Friedman may be described as Darwinian in that social development is determined by the "survival of the fittest" practices. But the purpose of competition is the benefit of society as a whole. In eventually adopting the practices that replaced their own, even the losers ultimately gain from the competition.

³⁷⁶ Ibid, p. 163 quoting John Locke, *2nd Treatise on Government*, sect. 57

the imposition of general rules applicable to all.³⁷⁷ Hayek's ideal society establishes general rules that limit the government and the exercise of power.³⁷⁸ Hayekian theory thus permits a trade-off between different forms of coercion.³⁷⁹ Some coercion is

³⁷⁷ Ibid, pp. 20-40

³⁷⁸ Ibid, p. 33

³⁷⁹ Human rights impose duties on the state to take positive action. For Samuel Moyn, Hayekian theory is completely incompatible with human rights in general (Samuel Moyn, "A Powerless Companion: Human Rights in the Age of Neo-Liberalism", 77 *Law and Contemporary Problems* 4 (2014), pp. 147-170). Hayek was certainly critical of the Carter administration's policy on human rights. He expressed surprise that:

"Suddenly it's the main object and leads to a degree of interference with the policy of other countries which, even if I sympathized with the general aim, I don't think it's in the least justified. . . ." (Interview by Robert Chitester with Friedrich A. Hayek, at UCLA (1978), *available at* http://www.hayek.ufm.edu/index.php?title=Bob_Chitester_part_I&p=video1&b=930&e=1037.)

However, this analysis is a critique of the Carter administration's foreign policy. Not human rights as a concept. Hayek was criticising the way in which the Carter administration used human rights as a pretext for intervention in other states.

Nevertheless, the human rights tradition comes from the enlightenment ideas of rational social design that Hayek rejected. The roots of the practice lie in the most prominent modern examples of attempts to design a society based on the "reason" of elites: the American constitution of 1788 (See Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815*, (New York; Oxford University Press, 2009), pp. 53-94) and the constitution of the French First Republic from 1792 to 1804 (See Jennings, n. 312, pp. 29-65). In both instances the enlightenment theories that dominated amongst the republican elites were applied to the task of reconstituting a state. Both states enshrined bills of rights in their constitutions, guaranteeing citizens specific rights against the state. Hayek and Friedman reject attempts to depart from the cumulative wisdom of past civilisations, Hayek arguing that it is hubristic to believe that humans should become endowed with such a quantum leap forward in their powers of comprehension that they might conceive the knowledge required to re-design a society as a whole.

But the origin of the human rights tradition is less important than the actual impact of the Practice. Human rights ultimately reduce coercion overall. Coercion involves the imposition of a plan. If an urgent interest is compromised, then the plan of the compromiser replaces the plan of the holder of the interest. Human rights thus limit the power of the state to coerce and impose a duty to prevent individuals coercing each other. Hayek and Friedman explicitly endorse a number of the norms of the Practice, particularly civil and political rights. For Hayek, both freedom of speech and freedom of action are important. Individuals must be free to discuss and try ideas especially those outside the orthodoxy. For Hayek, human rights are the lesser of two evils. Coercion with regard to protecting a small number of interests is acceptable because it minimises coercion in general.

permissible, as long as it is minor, specific, regular and generally applied, in order to avoid more widespread and arbitrarily applied coercion.³⁸⁰

Coercion and common-good interests

Compromising common-good interests is also coercive. It involves subjugating the plans of individuals to the plans of more powerful agents. As argued in the previous chapter, from a sociological perspective, common-good interests can be essential to individuals in the same manner that independent-good interests can be essential. Hayekian theory focuses primarily on the coercion of individuals by their own state. Yet Hayek was writing for a pre-transnational society. In the transnational age, achieving Hayek's overarching goal of limiting coercion requires addressing different challenges. In a globalised system, states and individuals coerce those beyond their borders.³⁸¹ This may be in a direct manner such as through war, illegitimate intervention or colonialism.³⁸² These all involve the imposition of one state or agent's preferred measures on another, thus extinguishing potential alternative practices. The transnationally interconnected nature of the twenty-first century means that the actions of states have an impact on individuals beyond their borders. This impact is coercive because those who it affects have no control over whether they are affected and are not compensated for their resulting losses. The common-good interest of the individual is subject to the plan of the more powerful agent. The potential for the individual to

³⁸⁰ There are parallels between Hayek's statement of the permissible forms of coercion and J.S. Mill's harm principle (See J.S. Mill, *On Liberty*, first published 1859, (London; CreateSpace Independent Publishing Platform, 2015), Ch. I para. 12, Ch. III para. 1, Ch. IV paras. 3, 10, 12, Ch. V para. 5).

³⁸¹ See Iriye, n. 264, pp. 681-848

³⁸² This argument is made in Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (London; Cambridge University Press, 2004)

experiment or innovate based on that interest is extinguished.

When the common-good interest in peace is violated, those who are affected by the violence are subject to the agenda of the perpetrators of the violence: they thus suffer coercion. Experiencing violence inhibits the ability of individuals to develop trade, culture or social innovation. In an interconnected world, the scale of those affected by violence can be global.³⁸³ Violence has economic, cultural, and political impacts that extend far beyond those who are subject to the immediate instance of violence. The potential for millions of small experiments or innovations can be lost because of the violence committed by a few individuals. The perpetrators of violence thus coerce on a global scale.³⁸⁴

When, for example, the right to common heritage of mankind is violated, every individual, who has a link to that heritage, suffers coercion. They are denied the opportunity to, *inter alia*, learn, develop their self-perception or profit from the piece of heritage. If the Antarctic is destroyed or damaged, all mankind will lose the benefit of what can be learned from the region. In the case of Ahmad al-Mahdi,³⁸⁵ the defendant pleaded guilty to destroying ancient tombs in Timbuktu because his version of Islam prescribes that tombs may not be built more than one foot off the ground.³⁸⁶ In doing so, he imposed his version of morality on the citizens of Mali and individuals throughout the world who might have learned from the tombs or had an emotive, cultural, traditional or

³⁸³ Skoll Global Threats Fund, "Mission and Strategy", available online at <http://www.skollglobalthreats.org/about-us/mission-and-approach/>

³⁸⁴ For example, Raoul Bianchi describes how a terrorist attack in Mombasa in 2002, in which 20 people were killed, impacted on millions of individuals the world over. (Raoul Bianchi, "Tourism and the globalisation of fear: Analysing the politics of risk and (in)security in global travel", 7 *Tourism and Hospitality Research* 64 (2006), pp. 64-76)

³⁸⁵ *The Prosecutor v Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, as discussed at p. 72

³⁸⁶ *Ibid* as discussed at p. 72

theological connection to the tombs. By imposing his moral plan, Mr al-Mahdi ended all the potential opportunities associated with the tombs. He thus eliminated untold possibilities for innovation or the development of culture or learning. Even from a Hayekian perspective, the interest in the common heritage of mankind can thus be understood as important.

On a global level, rights, like the right to peace, protect the space required for diverse practices to develop. Violence is coercion of weaker peoples or states by stronger peoples or states and leads to the elimination of competing practices by a force rather than fair competition³⁸⁷. Diversity requires the space for competing practices to develop and be refined, the right to peace helps create this space. Creating a non-coercive public space at both a global and domestic level is essential for the development of markets and trade. The right to peace, which gives states a duty to find ways to settle their differences beyond violence and this minimises violent disruption to commerce.

Creating the space for trade and markets, however, requires the minimisation of coercion beyond that of direct violence. The right to development includes a duty to limit or remove restrictive trade practices. The EU has sought to facilitate member states in fulfilling their duties under the right using the common market.³⁸⁸ In liberalising trade and movement and establishing general basic standards required for labour and commerce, the EU has given peoples in its poorer states the opportunity to compete with those in richer states.³⁸⁹ The EU has also limited the incentive to attempt to gain

³⁸⁷ Mayer, n. 291, p. 8

³⁸⁸ VerLoren van Theermat and Schriver, n. 343, pp. 89 -111, it should be noted that the EU measures were, in this case, limited to member states. The measures are not intended to assist poor states that are not members of the Union.

³⁸⁹ Ibid, pp. 89-111

commercial advantage through coercive practices, such as forcing individuals to work for lower wages or in worse conditions than the market demands.

Coercing individuals into abandoning their culture is similarly problematic for Hayekian theory. For Hayekians, diversity is a social asset. A diverse society means that a broad range of different measures can compete. This increases the effectiveness of the competition in identifying the best measures. Cultural diversity is part of this. The limited nature of knowledge makes it impossible to identify a complete conception of an “ideal” culture so it is rational to promote cultural diversity.³⁹⁰

In summary, Hayekian theory seeks to discourage coercion. Coercion means the imposition of one agent’s plan on others. It should be minimised because it retards the progress of society. In the 21st century, respect for common-good interests can prevent

³⁹⁰ Coercing individuals into abandoning their culture is problematic for Hayekian theory. For Hayek, diversity means that a broad range of measures can compete. The effectiveness of the competition, in identifying the best measures, is thus increased. Cultural diversity plays an important role in this. The limited nature of knowledge makes it impossible to identify a complete conception of an “ideal” culture so it is rational to promote cultural diversity.

Common-good interests in respect for different cultures are interests in preventing imposition of a dominant culture on minority cultures. This manifests in both global and domestic spheres. In practice, the coercive nature of interference to protect a culture must be balanced against the coercive nature of interference to change or obliterate it. In order for society to progress certain cultural measures must be replaced with new, more effective cultural measures. Cultural rights that artificially maintain static cultures are detrimental to social progress. However, the interest in respect for culture encompasses cultural development. Those who would lock in outdated cultural measures are not respecting the culture. They are coercing others by using the language of cultural rights to protect their own status (See the discussion of the *Shah Bano* case in Chapter Nine, pp. 263-264). Effective cultural rights keep multiple roads open, but they do not protect attempts to block the road. Cultural rights are asserted to protect cultural practices from being extinguished as a result of coercion, not through impersonal processes of social evolution³⁹⁰. Indigenous peoples in Australia and Canada have asserted cultural rights in response to a history of violence by the (now) dominant cultures in those states (Hodder, n. 200, pp. 861-882). New and competing measures cannot develop if non-dominant cultures are coercively extinguished.

the imposition of one agent's plan on others. Common-good interests can, therefore, be considered urgent even from the Hayekian perspective.

The Case from The Hayekian Perspective: The Threat

The market is Hayek's preferred method of organising society in a manner that minimises coercion. But the market cannot address threats to common-good interests. Hayek and Friedman favour a society in which diverse sources create new measures. The most effective measures emerge through competition. A mechanism is required to facilitate this process. State planning is coercive. Yet the complete absence of structures is also coercive. Hayek and Friedman reject the Jeffersonian³⁹¹ reliance on human nature as the source of social organisation. For them, the strongest will coerce the weaker if there are no structures to prevent it. This will retard social progress, because the measures that survive any process of competition will be those favoured by the strongest rather than those most suited to the task at which they are directed.³⁹² As Friedman argues: "However attractive anarchy may be as a philosophy, it is not feasible in a world of imperfect men."³⁹³

The advantages of the market

³⁹¹ Wood, n. 379, pp. 140-173

³⁹² Friedman, n. 347, p. 22

³⁹³ Ibid, p. 25

The market coordinates the efforts of a society, and facilitates experimentation, with minimum coercion. In a free market, agents take decisions based on their own self-interest. If it is in their interest to perform an action, then the agent will perform that action³⁹⁴. Rational agents³⁹⁵ can weigh the costs and benefits of an action. If the benefits outweigh the costs the agent will perform the action. Given the limits on possible comprehension, the free market is the most objective mechanism that can possibly be achieved for identifying the most useful practices and discarding the least useful³⁹⁶.

The market functions according to the price mechanism: The utility of a measure is indicated by the price people are willing to pay for it. Measures are evaluated by the whole of the combined wisdom of the agents in the market: "...an order arising from the separate decisions of many individuals on the basis of different information cannot be contained by a common scale of the relative importance of different ends."³⁹⁷ The "merit" of a measure is indicated by the price the market awards. This price will change when alternative, more effective practices, emerge.³⁹⁸ In this way merit is determined in an "impersonal" manner. The most diverse spread of measures can compete with a minimum of coercion.³⁹⁹ In Friedman's words, it provides "unanimity without

³⁹⁴ Ibid, pp. 2-20

³⁹⁵ In the "Austrian School" of economists, with which Hayek identified, a "rational agent" is an economic agent with clear preferences who models uncertainty based on expected values of variables or functions of variables and always elects to perform the action with the optimal expected outcome for herself based on the information available to her. See Richard N. Langlois, "Knowledge and Rationality in the Austrian School: An Analytical Survey", 9 *Eastern Economic Journal* 4 (1985), pp. 309-330

³⁹⁶ Hayek, n. 339, pp. 89-105

³⁹⁷ Ibid, p. 79

³⁹⁸ Hayek, n. 339, pp. 85-102

³⁹⁹ Ibid, pp. 85-102

conformity”.⁴⁰⁰

The limitations of the market

The market is an effective mechanism for social organisation. There are, however, limits to its utility which make it unable to adequately protect common-good interests. Friedman identifies three key limitations:

1. The market cannot coordinate public goods.
2. The market cannot coordinate necessary action on “paternalistic grounds”.
3. The market cannot establish or regulate itself.⁴⁰¹

Common-good interests fall within the first limitation. When the protection of public goods is left to markets, the result is a “demand failure”.⁴⁰² The increased cost of protecting the interest in the case of a single person is the same as the increased cost of protecting a million (or more). Any measure that effectively protects a single individual’s common-good interest will inevitably protect the common-good interests of a broad range of individuals. Costs can never be effectively recouped because no one has a greater incentive to pay than anyone else. If costs cannot be recouped there is no market

⁴⁰⁰ Friedman, n. 347, p. 23. Hayek and Friedman depart from classical theories of the market. Classical theories assume that a free market will ultimately reach an equilibrium at which the demand and prices are settled. The most the optimal distribution of resources across society is, thus, achieved (this is called “Pareto efficiency”, see Dieter Helm, "The Assessment: The Economic Borders of the State", 2 Oxford Review of Economic Policy 2 (1986), pp. 1-24) Hayekian theory, however, embraces a market in which equilibrium is never achieved. In the Hayekian market, the absence of equilibrium means that there is always the potential for profit to be made. This drives the creation of new products and measures which, in turn, drive society forward. (See, Helm, pp. 1-24)

⁴⁰¹ Friedman, n. 347, pp. 22-36

⁴⁰² Ibid, n. 343

incentive to supply the necessary protection⁴⁰³. The common-good interest in question, thus, goes unprotected. In Friedman's words, when it comes to public goods, "voluntary exchange is either expensive or impossible."⁴⁰⁴

The market is also ill equipped to address a conflict of freedoms. Hayek and Friedman accept that freedoms may sometimes conflict. As Friedman puts it:

"Men's freedoms can conflict, and when they do, one man's freedom must be limited to preserve another's - as a Supreme Court Justice once put it, "My freedom to move my fist must be limited by the proximity of your chin."⁴⁰⁵

In a subset of cases, the market can be an appropriate mechanism for the resolution of conflicts. When a freedom may be sacrificed for appropriate compensation from the other party without damaging the structures that protect personal freedom as a whole, the market can facilitate this exchange. When, however, the sacrifice of a freedom in an individual case equates to (a) the sacrifice of the freedom of others and (b) their consent may not be gained and appropriate compensation is not realistically possible, then any market exchange is coercive. If society is to be organised in a manner that generally minimises coercion, a non-market mechanism must protect common-good interests.

The Rights Mechanism

According to Beitz's model, the rights mechanism must be reasonably effective at protecting the interests in question if those interests are to be recognised as rights.

From the Hayekian perspective, the human rights mechanism turns out to be reasonably

⁴⁰³ Helm, n. 400, pp. 1-24

⁴⁰⁴ Friedman, n. 347, p. 27

⁴⁰⁵ Ibid, p. 26

effective at protecting common-good interests because it both protects those interests and, at the same time, minimises coercion generally. The rights mechanism disperses power and maintains the rule of law. This simultaneously minimises the potential for coercion and protects the interests in question.

The limitations of the democratic mechanism

If the market is unable to effectively protect common-good interests, then some might argue that a democratic government should step in. It is surely the role of a democratic government to protect public goods. Hayek and Friedman are, however, sceptical of the effectiveness of the democratic mechanism when it comes to protecting generally important interests. For Friedman, governments tend to perform the same tasks less efficiently than private enterprises.⁴⁰⁶ This is because the democratic mechanism gives vested interests disproportionate power. The democratic process rewards those best placed to lobby the government. Friedman cites the example of the New York taxi monopoly.⁴⁰⁷ New York city placed a cap on the number of taxi permits that could be issued. This meant that existing permits became a scarce commodity, and thus could be traded for significant sums. It also meant that taxi drivers could drive up fares without fear of competition. The permit cap set supply at a fixed level while demand increased exponentially, due to the city's rapidly increasing population. A proposal to raise or

⁴⁰⁶ Milton Friedman, "The Role of Government in a Free Society", in Paul Peretz, *The Politics of American Economic Policy Making*, (Chicago; M. E. Sharpe, 1996), pp. 7-13

⁴⁰⁷ Ibid, p. 7

abolish the permit cap faced vociferous and organised opposition from taxi drivers who all had a direct vested interest in maintaining the cap. There was no comparative organised lobbying for scrapping the cap. The general public all had an interest in its removal, but no individual had a specific interest comparable to that of a taxi driver, so no one was prepared to abandon their other commitments in order to lobby. A practice that drove up prices and drove down quality, thus, continued to enjoy a government mandate.⁴⁰⁸

Furthermore, politicians often have an interest in perpetuating failure. A politician's interest is primarily in the perceived success of a project, not necessarily in its actual success.⁴⁰⁹ As long as voters believe that a project backed by a particular politician is successful, they are likely to vote for that politician. It doesn't actually matter whether that belief is accurate. Public projects that fail are thus often renewed because their political backers wish to create the appearance of success. By contrast, when a private project fails, those with an interest in it stand to lose money, so they cancel the project as quickly as possible or reform it to such an extent that it becomes profitable.⁴¹⁰

For Hayek, democratic government is inherently coercive. The act of governing requires one agent to choose the path for society as a whole. In some cases, there is no alternative, but these occasions are limited. The democratic mechanism encourages government in favour of vested interests and neglect of the general interest.⁴¹¹ To win elections politicians must build coalitions. Once in office they must maintain that

⁴⁰⁸ Ibid, pp. 7-8

⁴⁰⁹ Ibid, pp. 9-10

⁴¹⁰ Friedman, n. 406, pp. 9-10

⁴¹¹ Hayek, n. 339, pp. 103-118

coalition. It is in politicians' interest to reward each member of their coalition, to secure election in the future, rather than legislating for the general good.⁴¹² Furthermore, politicians have no inherent interest in being at the forefront of progress. The interest of a politician lies in winning election. This is most often achieved by embracing that which is already accepted, not that which (regardless of whether it is more effective) is more progressive.⁴¹³ Hayek argues that the majority has no wisdom in determining great art or progressive intellectual endeavour.⁴¹⁴ Democratic politics is therefore structurally unsuited to reward or encourage innovative thinking or entrepreneurialism. Yet innovative thinking and entrepreneurialism are necessary for social progress. Majoritarian democracy, therefore, incentivises social stagnation rather than social progress.⁴¹⁵

Hayekian theory, therefore, prescribes a limited role for government. A democratically elected government is useful when it acts as a regulator for the market and acts on paternalistic grounds where the market is unable to do so. The government cannot, however, be trusted to consistently protect interests of high importance.⁴¹⁶ Individuals must have confidence that their important interests will be protected. Furthermore, common-good interests are global, while governments are state based.

⁴¹² Ibid, pp. 103-118

⁴¹³ Ibid, pp. 118-133

⁴¹⁴ Ibid, pp. 118-133

⁴¹⁵ Ibid, p. 120. Hayek might be criticised for appearing to believe that the same agents display entirely different characteristics when acting in the market and acting as electors. But his argument is structural, not a critique of the agents themselves. The market facilitates the reward of innovation and risk taking without the necessity for most participants to take risks themselves. However, the government makes rules that apply to all. So electors must themselves take a risk when they cast their vote. This means that the market is structurally designed to drive progress, while democratic governments are structurally predisposed to conservatism. Politicians must protect the interests of those who elect them. This creates an incentive to make laws designed to benefit certain sectors of society rather than society as a whole.

⁴¹⁶ Ibid, pp. 103-118

Common-good interests and threats thus transcend governments. Even if Hayek and Friedman had more confidence in the democratic mechanism, it would still be impractical to address common-good interests.

The rule of law

Rights apply generally and consistently according to the rule of law. The rule of law is central to Hayekian political theory. It maintains the appropriate balance of coercion in extended orders. Hayekian theory requires that the state take measures to prevent individuals from coercing each other. When states observe the rule of law, they minimise coercion between individuals without themselves becoming excessively coercive. If society is governed by a series of abstract rules, applied consistently and predictably, then individuals can regulate their behaviour accordingly.⁴¹⁷ Consistent rules enable the greatest degree of liberty consistent with all members of society sharing an equal degree of formal liberty. In Hayek's words: "To operate beneficially, competition requires that those involved observe rules rather than resort to physical force."⁴¹⁸ Abstract rules must apply to the government as well. A government must only exercise specifically defined powers and refrain from infringing on specifically protected liberties. When it does make new rules, those rules must apply generally and equally.⁴¹⁹

⁴¹⁷ Ibid, pp. 148-161

⁴¹⁸ Hayek, n. 339, p. 20

⁴¹⁹ Ibid, pp. 205-219

The most important set of rules that a government can create and enforce are those governing the ownership and transfer of property. This is necessary because it forms the fundamental rules for the market.⁴²⁰ Hayek argues:

“The prerequisite for the existence of such property, freedom and order, from the time of the Greeks to the present, is the same: law in the sense of abstract rules enabling any individual to ascertain at any time who is entitled to dispose over any particular thing.”⁴²¹

Hayek contrasts a rule governed society with a planned society. In the latter, the entire energy of society is directed towards a predetermined end through the application of predetermined methods. In the former society is free to experiment and develop its own ends and own methods through processes of competition and refinement.⁴²²

Hayekian theory therefore requires that, even in a democracy, certain interests must be carved out from the authority of the majority. Certain interests are of sufficient importance that they must be treated as abstract rules and, as such, must compel the state to act or refrain from acting. Hayekian theory prescribes some of these interests (such as freedom of expression) but makes no pretence at the identification of a complete list. No agent can objectively identify a complete list of such interests because they can never access sufficient knowledge to do so. It is possible, however, to identify certain interests in a piecemeal manner. Hayek and Friedman do not proscribe public interests from belonging to this class. A democratic government is equally unsuited to protect public interests as the market, beholden as it is, to sectional interests. This leaves space for an alternative mechanism.

⁴²⁰ Ibid, pp. 220-233

⁴²¹ Ibid, p. 30

⁴²² Ibid, pp. 48-66

The rights mechanism

The mechanism that protects common-good interests must have three properties in order to be consistent with Hayekian theory: the interests must be protected by (1) consistent, (2) accessible rules that (3) apply generally. Rights are accessible to all individuals and arbitrariness. In identifying a set of presumptions that apply generally, they minimise coercion.

Solidarity rights disperse the power to provide for and protect common-good interests. This means that the individuals to whom those interests belong have the power to demand their protection or provision. If one's aim is to minimise coercion then it is rational to, embrace structures that disperse power. The democratic process may disperse power occasionally, but it can only do so to a limited extent. In Hayekian theory, the democratic process is only capable of passing power to a different set of elites. The market also disperses power, but does not do so effectively in relation to public goods. Solidarity rights disperse power and, by doing so, protect common-good interests. This is the most effective means to ensure that they are protected and provided for with the minimum of coercion.

Solidarity rights reduce coercion by holding states accountable for the external impacts of their actions. This is the outward-facing duty. It is not possible for the market to impose appropriate costs for the violation of common-good interests.⁴²³ It is important, however, that some form of "cost" is imposed.⁴²⁴ If states are not held accountable for the external impact of their actions, then there is nothing to prevent

⁴²³ Friedman, n. 406, pp. 6-7

⁴²⁴ Hayek, n. 339, pp. 71-84

effectively unlimited coercion of peoples external to the state save the power of their own state. Solidarity rights empower individuals to hold states accountable for the protection and provision for their common-good interests. This can include imposing costs on those who abuse common-goods.⁴²⁵

The right to development, for example, seeks to impose costs for the external impacts of state's economic policies.⁴²⁶ Policies aimed at benefitting a domestic economy, such as tariffs, tax breaks, state aid and even state procurement policies can all have coercive impacts on peoples beyond the borders of a state.⁴²⁷ Furthermore, historical practices, such as extractive colonialism, have long lasting coercive impacts. The Seoul Declaration creates a duty for states to address those external effects.⁴²⁸ In fulfilment of that duty, states may provide aid, but also assistance with education, technological development and access to international trade.

Solidarity rights also address domestic coercion. The right to development gives peoples the power to determine the course of their own development.⁴²⁹ This can include, *inter alia*, demands for democratic accountability, free markets, or the breaking up of monopolies. Indeed, the specific mechanisms are less important than the fact that, by the provision of a right to development, the power to determine the nature of development is dispersed where it might otherwise be concentrated.

Conclusion

⁴²⁵ See the discussion of the right to a clean and healthy environment in Chapter Seven.

⁴²⁶ Tatjana Ansbach, "Peoples and individuals as subjects of the right to development", pp. 155 - 165, pp. 155-165

⁴²⁷ Ibid, pp. 155-165

⁴²⁸ Declaration on the progressive development of international law relating to a new international economic order (Seoul Declaration, adopted at the 62nd ILA conference, 1986), Principle 5

⁴²⁹ Ansbach, n. 426, pp. 155-165

The objective of this chapter was to argue that, even from a hostile perspective, common-good interests can be understood as important, and appropriately protected by the rights mechanism. This was an argumentum a fortiori exercise, adopting an actively hostile perspective to indicate can be understood from non-sympathetic perspectives more generally. Hayekian theory is an appropriate choice of perspective because it rejects state intervention, embraces inequality and is suspicious of appeals to solidarity. It is thus conceptually hostile to solidarity rights. Hayekian theory seeks to organise society in a manner that minimises the coercion of the individual. In order to minimise coercion generally, certain interests must be protected. This class can include common-good interests. To deny a common-good interest is as coercive as it is to deny an individual good interest. Both involve the imposition of one agent's plan upon another. This limits their capacity to innovate and potentially retards the development of society.

For Hayek, the market is the preferable method of social organisation. It facilitates innovation and identifies the most effective measures, thus benefitting society as a whole, while keeping the coercion of individuals to a minimum. But the market is ineffective at addressing common-good interests. The rights mechanism is the least coercive alternative. It protects common-good interests by establishing consistent and generally applicable norms. In doing so it disperses power. This limits the potential for coercion. Solidarity rights can therefore be understood as important and appropriate from the perspective of Hayekian theory.

CHAPTER SIX: THE RIGHT TO SELF DETERMINATION

Introduction

This chapter aims to explain an anomaly in the treatment of self-determination by rights scholars. Few dispute that the right to self-determination is well established in international law. Indeed, rights scholars who are sceptical about solidarity rights often accept the legitimacy of the right to self-determination.⁴³⁰ Yet it does not obviously fit into either of the accepted classes of rights. A space exists, therefore, for analysis of self-determination as a solidarity right. The right to self-determination protects the urgent common-good interest in political autonomy. Political autonomy means that individuals have a voice in determining the political status and direction of the polities with which they identify. The right to self-determination responds to the threat of domination by other groups or institutions. It provides for an outward-facing duty to refrain from domination of groups outside a state's territory, and an inward-facing duty to refrain from domination of groups within a state's territory. Political autonomy is integral for the functioning of both individuals and society, its importance can be appreciated from both perspectives that are sympathetic to solidarity rights and perspectives that are not sympathetic to solidarity rights. The latter will be demonstrated by analysing self-determination from the perspective of Hayekian political theory.

⁴³⁰ See, for example, Alston, n. 177, p. 313

Why Self-Determination?

Self-determination is an established right in international law.⁴³¹ The international community's attempts to protect political autonomy predate the Practice. Why is it necessary to analyse an established right in this thesis? There are two reasons: first, since the breakup of the USSR, political leaders have attempted to portray self-determination as a remedy rather than a right. Second, the theoretical justifications for self-determination generally fail to offer a satisfactory argument for self-determination as a *right* rather than as a merely instrumental good.

Right or remedy?

The right to self-determination was recognised in international law after the Second World War. It was initially applied in relation to colonial disputes. The inhabitants of territories, colonised by European powers during the 18th and 19th centuries, relied on the right to self-determination to argue for independence from the metropolitan power. Self-determination was thus, in practice, initially applied as a right to freedom from colonial rule.⁴³² It was applied in a similar manner during the breakup of the USSR. Eastern European states relied on self-determination discourses to seek independence from Russia's sphere of influence and secure recognition as independent states from the international community.⁴³³

⁴³¹ Cassese, n. 78, p. 37

⁴³² Ibid, pp. 71-88

⁴³³ Ibid, pp. 257-273

These newly formed, post-colonial states were rarely homogenous. They faced problems when groups within their territory relied on the same self-determination discourses to secure greater independence from the post-colonial state as the leaders of the state had used to secure independence from the former colonial power. Post-colonial governments responded that self-determination was not a continuing right: once used to secure independence from colonial domination, the right to self-determination is expired.⁴³⁴ I will refer to this construction as the “colonial interpretation”.

The colonial interpretation, however, makes self-determination a remedy rather than a right. A right involves a continuing entitlement for the holder and a continuing duty for the state. When one expresses a controversial opinion in public, one does not extinguish one’s right to freedom of expression. The right continues: one may express controversial opinions in public again in the future. A legal measure that is extinguished after responding to a specific harm is not a right, but a remedy. For example, the remedy of damages cannot be claimed more than once for the same harm. Once damages have been collected, the claimant’s entitlement, and the defendant’s obligation, is extinguished. The colonial interpretation construes self-determination purely as a remedy. Colonialism is the harm: self-determination remedies colonialism by compelling the colonial power to withdraw and recognise the former colony as a state. The entitlement to self-determination is then extinguished in the same way that the entitlement to damages is extinguished once damages have been paid.

The colonial interpretation is, *prima facie*, consistent with the principle of *uti possidetis*. This provides that, in the case of post-colonial states, the new state will inherit

⁴³⁴ Ibid, p. 206

the borders of the former colonial territory.⁴³⁵ If the new state must retain the borders of the colonial territory then attempts, by groups occupying portions of that territory, to secede from the new state are impermissible because they would inevitably require changes to the established borders.

Uti possidetis stands, for Antonio Cassese, in contradiction with the principle of self-determination. It means that only those individuals alive at the time of independence from colonial rule can exercise self-determination, confining the right to self-determination to a single generation. *Uti Possidetis* is, nevertheless, a peremptory norm of international law.⁴³⁶ It governed the establishment of the independent states that emerged from the breakup of European colonial empires in Africa and has been affirmed by the Organisation of African Unity.⁴³⁷ Genuine self-determination is, for Cassese, thus “trumped” by *uti possidetis*. If the colonial interpretation is correct, self-determination either (a) does not belong in the class of “human rights” but, rather, the class of remedies or (b) serves to demonstrate the fragility of rights norms in the face of incompatible norms of international law.

⁴³⁵ See Steven R. Ratner, “Drawing a Better Line: *Uti Possidetis* and the Borders of New States”, 90 AJIL 4 (1996), pp. 590-624

⁴³⁶ Case Concerning the Frontier Dispute, ICJ Reports 1986, 565, para. 20

⁴³⁷ Resolution adopted by the Assembly of the Heads of State and Government of the Member States of the Organisation of African Unity, Cairo, 1964. For a full text see Ian Brownlie, *African Boundaries – A Legal and Diplomatic Encyclopaedia*, (London; Hurst, 1979), pp. 10-11

The unsatisfactory nature of existing theoretical justifications

The colonial interpretation is reflected in theoretical models, such as those of Allan Buchanan⁴³⁸ and Lea Brilmayer,⁴³⁹ that construe self-determination as a purely instrumental good. For Brilmayer, self-determination is important only as a remedial device: a means to end the particularly egregious oppression of a group. For Buchanan, self-determination facilitates groups in demanding respect for their other human rights. If those rights continue to be denied, then self-determination allows the group in question to secede from the territory of the oppressive state. For Brilmayer and Buchanan, self-determination thus has value because it helps to secure the realisation of other human rights.⁴⁴⁰ In both constructions self-determination performs the role of remedy, correcting the harm caused by the violation of rights, rather than the role of right in itself.

For Ted Gurr, self-determination is valuable as a tool for peace-making.⁴⁴¹ Modern conflict is more often between cultural or ethnic groupings than states.⁴⁴² In most such conflicts, the failure to respect a group's right to self-determination is "an issue - sometimes *the* issue."⁴⁴³ Respect for the right to self-determination ensures that

⁴³⁸ Alan Buchanan, *Secession: The Morality of Political Divorce from Fort Sumpter to Lithuania and Quebec*, (Boulder; Westview, 1991)

⁴³⁹ Lea Brilmayer, "Secession and : A Territorial Interpretation", 16 Yale. J. Int'l. L. 177 (1991), pp. 177-202

⁴⁴⁰ Ibid, pp. 331-400 This is not how the right takes effect in the Practice (See Cassese, n. 78, pp. 10-22) self-determination is a right. Secession is one of several actions that can be justified by the right. self-determination does not have to mean secession (Ibid, pp. 331-400)

⁴⁴¹ Ted Gurr, *Minorities At Risk: A Global View of Ethnopolitical Conflict*, (Washington DC; United States Institute of Peace Press, 1993), p. 248

⁴⁴² Ibid, p. 332

⁴⁴³ Ibid, p. 332

groups can coexist in a state of mutual respect. They thus do not have to resort to violence to defend their political or cultural identity. This argument is attractive but, once again, offers only an instrumental account of self-determination. The threat addressed by self-determination is, for Gurr, war and violence. This threat is, however, more precisely addressed by the right to peace.⁴⁴⁴ If self-determination is simply a means to more fully realise the right to peace, then it is better understood as part of the duty for which *that* right provides and not as an independent norm of the Practice in its own right.

In my view, self-determination should be construed as a right rather than a remedy or an instrumental good. self-determination protects an interest, political autonomy, that is urgent *in itself*. Further, I will argue that self-determination takes effect in international law as a continuing right. The reasonable effectiveness of this “continuing interpretation” demonstrates that the colonial interpretation is not reflected in international law and Buchannan’s and Brilmayer’s models of self-determination do not reflect its manifestation in the Practice.

Urgency

The right to self-determination protects an urgent interest, in political autonomy, that is integral to the functioning of individuals in society. In my view, “political autonomy” refers to the balance of power between an individual and society. It should be understood in a broader sense than “personal autonomy” (the absence of excessive

⁴⁴⁴ General Assembly, “Declaration on the Right of Peoples to Peace”, 12th November 1984, GA res. 39/11 (1984)

coercion by the state)⁴⁴⁵ and “moral autonomy” (“being able to make one’s own moral decisions”).⁴⁴⁶ Political autonomy means that an individual can consciously influence her social environment at a structural level. An individual, exercising political autonomy, can engage in, *inter alia*, party politics or activism, culture, and social norms individually⁴⁴⁷ and will have a voice in determining the structure of society in which these activities occur.⁴⁴⁸ Personal and moral autonomy are, thus, necessary for political autonomy, but they are not sufficient. Political autonomy means living in a society that is responsive to its members in both its structure and its day to day functioning. Political autonomy is essential to both individuals and society as a whole.⁴⁴⁹

The urgency of political autonomy

Without political autonomy individuals would be entirely subject to the decisions of others. Political autonomy requires both the absence of immediate restraints and the absence of structural constraints:⁴⁵⁰ the freedom to affect one's cultural and political context. Amy Gutman's extensive study of political structures explains how our

⁴⁴⁵ Gerald Dworkin, "Autonomy", in Robert E. Goodwin and Philip Pettit (eds), *Companion to Contemporary Political Philosophy*, (New York; Blackwell, 1996), pp. 442-452

⁴⁴⁶ Ibid, p. 447

⁴⁴⁷ For an exploration of some of the hard cases for political autonomy, see Ciaran O'Faircheallaigh, "Aboriginal-mining company contractual agreements in Australia and Canada: implications for political autonomy and community development." 30 *Canadian Journal of Development Studies* 1 (2010), pp. 69-86.

⁴⁴⁸ The relationship between self-determination and democracy is discussed at pp. 176-185

⁴⁴⁹ A similar version of this construction is advanced by Marglit and Raz. For them, the value of self-determination is that it ensures decisions are made by those whom they concern. See Avishai Margalit and Joseph Raz, "National Self Determination", 87 *Journal of Philosophy* 9 (1990), pp. 439-463.

⁴⁵⁰ See Charles Taylor, "What's Wrong with Negative Liberty," in *Philosophical Papers Vol. II: Philosophy and the Human Sciences*, (Cambridge: Cambridge University Press, 1985), pp. 227-50

decisions, even those taken without immediate duress, are shaped, and in many cases defined, by our social, cultural, and political context.⁴⁵¹ For Gutman, "many of the most important, along with the most trivial of our life choices are influenced and constrained by social context, over which political authority has the greatest human control."⁴⁵² Making almost any choice in society akin to choosing from a menu at a restaurant. If the individual was empowered to make a truly free choice, she could call through to the kitchen and instruct the chef to cook whatever took her fancy. This, however, is impossible. She must instead select from the pre-identified choices. Such is the position of the individual in society. When acting in society, the individual does not have a free choice. She must choose between the options available in her society. For example, the individual may be able to choose which party she votes for. She must, however, vote according to a pre-determined electoral system and generally choose between established political parties. The winner will govern according to pre-determined constitutional norms, in a state with a pre-determined political status. To vote for a government is only to exercise autonomy in relation to a fraction of the polity. Furthermore, the individual's choice between parties is, in part, the product of her cultural and political education, the social norms she has internalised and her own, reflexively developed, self-perception.

The most complete way to maximise autonomy for a particular individual is either for (a) that individual to take dictatorial control of the society in which she lives, or (b) abjure society altogether. The latter option is not realistic. Living in a society is part of being human. Humans are social animals⁴⁵³ and society provides almost all of the things necessary to existence as a human as we understand it. So much for the autonomy

⁴⁵¹ Amy Gutmann, "The Disharmony of Democracy," in John W. Chapman and Ian Shapiro (eds.), *Democratic Community*, (New York: New York University Press, 1993), pp. 126-163

⁴⁵² Ibid, p. 142

⁴⁵³ P. Philpott, "In Defence of ", 105 *Ethics* 2 (1995), p. 369

of the hermit. What of the dictator? Complete control of society would enhance autonomy, but only the autonomy of the dictator. We can't all be the dictator. What is left is to have a *share* in shaping society. Political autonomy requires that each individual have a share in the determination of the political status and governance of their society. We may not be able to instruct the kitchen with a free hand, but we can have a role in deciding what is on the menu. The political autonomy of all members of society is thus advanced to the greatest extent possible.

Will Kymlicka offers an alternative version of this argument⁴⁵⁴. For Kymlicka, culture defines the decision of individuals. Culture is "the media through which we come to an awareness of the options available to us".⁴⁵⁵ We only develop an awareness of ourselves through the prism of our socio-cultural context. We understand ourselves as individuals in the context of our society. Without political autonomy, the individual would be entirely at the mercy of others. Her sense of self would be entirely determined by the ancestors who established the political status of the territory and developed the prevailing social, cultural, and moral norms, and contemporaries who control the government and dictate developments in social, cultural, and moral norms.⁴⁵⁶ Political autonomy gives individuals a share in the control of the context in which we understand ourselves. As such, political autonomy ensures that individuals have the power to exercise a degree of control in their own self-realisation.

This can be illustrated in practice. In Canada, the government of Pierre Trudeau announced in 1961 that it intended to develop "Indian blind" laws.⁴⁵⁷ Indigenous

⁴⁵⁴ Will Kymlicka, *Liberalism, Community and Culture*, (Oxford; Clarendon, 1991), pp. 166-169

⁴⁵⁵ Ibid, pp. 166 - 169

⁴⁵⁶ Ibid, pp. 166 - 169

⁴⁵⁷ Ibid, pp. 166 - 169

Canadians would be treated in exactly the same manner as all other Canadians. Their tribal lands would be freely alienable and they would vote for national, regional and local government in the same way as every other Canadian citizen.⁴⁵⁸ Indigenous Canadians protested fervently and successfully. In doing so, they appealed to their right to self-determination.⁴⁵⁹ Trudeau's policy was not *prima facie* discriminatory, but it would have undermined the political and social structures that preserved the indigenous way of life. Indigenous Canadians would, in the future, lose the opportunity to develop a sense of self as "indigenous Canadians" (or members of a particular indigenous nation) rather than simply "Canadians". The Trudeau reforms would have undermined the political institutions that facilitated indigenous culture (such as tribal control of land and decision making) and replaced them with those used by the majority of Canadians, such as the free market. Although Trudeau offered them rights as individuals, indigenous Canadians demanded to exercise political autonomy in determining the context in which they could use those rights. Trudeau's government largely backed down and tribal land rights and structures of governance remain.⁴⁶⁰

Political autonomy is essential to a functioning society. Without autonomy, it is difficult to maintain legitimate normative structures. Individuals cannot reasonably be held responsible for their actions if their actions are largely the result of social structures over which they have no control.⁴⁶¹ If autonomy is the standard assumption, then individuals can be held responsible for their actions.⁴⁶² This allows us to have a meaningful discussion about the norms that regulate society and to enforce them in a

⁴⁵⁸ Ibid, pp. 166-169

⁴⁵⁹ Ibid, pp. 166-169

⁴⁶⁰ Ibid, pp. 166 - 169

⁴⁶¹ Philpott, n. 453, p. 355

⁴⁶² Ibid, p. 355

way that is transparent, understandable and capable of achieving popular acceptance and legitimacy. As such autonomy and society are mutually dependent. Without autonomy, the individual would be entirely defined by her social context. If its members did not enjoy autonomy, then society could not function according to generally applied norms. It can, therefore, be broadly understood that political autonomy is an urgent interest.

Challenges

This argument has two *prima facie* problems. The first concerns balancing the autonomy of different groups. The second concerns whether an individual is truly consenting to their political context. The exercise of self-determination by a group may reduce the autonomy of the rest of the population of the territory in question. This impact would be most extreme in the case of secession. Yet it can also be relevant to more limited exercises of self-determination. The demand for self-determination on the part of indigenous Canadians in response to the Trudeau reforms, for example, represented a denial of a market to other Canadians. The land controlled by the tribal councils would not become freely alienable even for a fair price.⁴⁶³

Respecting the right to self-determination requires balancing the interests of different groups.⁴⁶⁴ Indeed, balancing the interests of the different groups, to which individuals identify as members, is an aspect of respecting the political autonomy of individual. Almost every significant action represents the denial of an opportunity to someone else, even if only indirectly. If I eat a piece of toast then the opportunity to eat that toast has been denied to my companions at breakfast (and, indeed, to the rest of the

⁴⁶³ Kymlicka, n. 454, pp. 166 - 169

⁴⁶⁴ See Philpott's discussion of this point, n. 453, p. 363

world). The application of rights generally involves striking a balance between competing interests. In *Reference Re secession of Quebec*⁴⁶⁵ the court balanced the right of the Quebecois to self-determination with the right of the Canadian people, as whole, to territorial integrity, along with a range of economic, social and cultural rights. In that case, the latter bundle of rights outweighed the former. In the Namibia case, representatives of the Namibian people argued that Namibia should be permitted to secede from South African control. In doing so, they relied on the right to self-determination. The South African government, responding, also relied on the right to self-determination. The South African government argued that the status of Namibia was an internal issue, invoking the presumption of non-intervention contained in the right. The International Court of Justice held that both parties could rely on the right to self-determination. Yet the balance of their competing interests fell in favour of Namibia.⁴⁶⁶

The second problem is one of consent. Most individuals have no say in the political status of their territory. Once established, even democratic states rarely check to ensure that their citizens still support the existing political status of the territory in question. Self-determination is only referred to when someone challenges the *status quo*.

Locke argued that we accept our social and political context simply by engaging with society as we find it.⁴⁶⁷ This seems to set a high bar that must be cleared to signal one's rejection. Can an individual only express dissent from the political status of her territory by completely refusing to engage with society? Construing the issue this way, however misunderstands the nature of self-determination. If individuals wish to collectively express dissent from the *status quo* then they can rely on their right to self-

⁴⁶⁵ [1998] 2 SCR 217

⁴⁶⁶ *Namibia*, ICJ Reports (1971), separate (concurring) opinion of Vice President Ammoun, p. 51

⁴⁶⁷ John Locke, *Second Treatise on Civil Government*, first published 1689, (Buffalo, NY; Prometheus, 1986), para. 119

determination. This happens even in established democracies. In the UK, the overwhelming support for limited self-government in Scotland by the Scottish people was respected when Parliament passed the Scotland Act 1999 establishing a devolved government⁴⁶⁸. The UN Human Rights Committee has looked with scepticism on individuals who attempt to base their claims in self-determination. Yet it is much more generous when the applicant represents a number of individuals acting collectively.⁴⁶⁹

The Hayekian Case

The importance of political autonomy can be further demonstrated by returning to the *argumentum a fortiori* exercise undertaken in the last chapter. Justifying a class of interests from an actively hostile perspective provides the strongest demonstration that the case can be understood from non-sympathetic perspectives. In the previous chapter I made the case for solidarity rights from the (hostile) perspective of Hayekian political theory. That case can be applied to the right to self-determination. Political autonomy can be understood as important from the Hayekian perspective. Autonomy is necessary to set general rules that maximise freedom and minimise coercion.

Hayek and Friedman aim to minimise coercion of individuals and groups.⁴⁷⁰ Coercion can be both direct, involving physical force, or indirect, privileging certain

⁴⁶⁸ Mike Raco, "Governmentality, subject-building, and the discourses and practices of devolution in the UK", 28 Transactions of the Institute of British Geographers 1. (March 2003), pp. 75-95

⁴⁶⁹ Compare, for example, the responses of the Human Rights Committee in *Bernard Ominayak and the Lubicon Lake Band v Canada*, Communication No. 167/1984, UN Doc. CCPR/C/38/D/167/1984, 10 May 1990, para. 2.1 and *Kitok v Sweden* UN Human Rights Committee, CCPR/C/33/D/197/185

⁴⁷⁰ For example, Hayek, n. 339; Friedman, n. 347, pp. 7-22

groups ahead of others by means other than the free market.⁴⁷¹ Yet a Hayekian society still requires restrictions on action. Friedman notes that a society with no coercive rules is likely to facilitate the coercion of the weak by the strong⁴⁷² Societies must, therefore, impose certain restrictions on the liberty of individuals to preserve greater liberty overall.⁴⁷³ In an ideal world, the free market would play this role. It is the least coercive mechanism of social organisation because it "permits unanimity without conformity".⁴⁷⁴ The free market, however, is not a universally applicable solution. It is important that the market has certain rules on which all participants agree.⁴⁷⁵ These rules don't pre-exist the market: someone must create them and that person or institution must have sufficient legitimacy that her creation, the market and its rules, is respected. It is unlikely that unanimity will be achieved on every rule so there must be a force that can enforce the rules.⁴⁷⁶

Political autonomy ensures that, when a society creates general rules, it does so in the least coercive manner possible. If every member of society has a voice in the political structure, as required by political autonomy then coercion is minimised because the power of the state is regulated by the will of the electorate. Further, political autonomy requires that the state is accountable in all its dealings, not merely during elections. When states take measures to enforce the rules of the market, therefore, those measures

⁴⁷¹ F. A. Hayek, *Law, Legislation and Liberty, Vol. III: "The Political Order of a Free People"*, (London; Routledge, 1979), p. 11

⁴⁷² Friedman, n. 347, pp. 22-37

⁴⁷³ Hayek, n. 471, p. 163

⁴⁷⁴ Ibid, p. 23

⁴⁷⁵ Ibid, pp. 25-34

⁴⁷⁶ Ibid, p. 27

are likely to be the least coercive overall because the state remains accountable to its citizens.⁴⁷⁷

Special treatment of any group is coercive towards all others. Some would argue, however, that self-determination requires special treatment for certain groups. When it abandoned the Trudeau reforms, the Canadian government gave indigenous citizens special treatment by allowing them to apply property rights⁴⁷⁸ and systems of governance⁴⁷⁹ that the majority of Canadians were not permitted.⁴⁸⁰ This disadvantaged the majority of Canadians. It denied them, for example, the commercial opportunities that would have resulted from the alienability of indigenous land.⁴⁸¹

Hayek is also critical of democracies in which the government wins a majority by making promises to specific groups to win their loyalty, rather than by proposing policies with general popular benefit.⁴⁸² It makes governments beholden to interest groups, and

⁴⁷⁷ Hayekian theory prefers capitalist political orders. It would not, however support imposing a capitalist order by coercion. For Hayek, non-capitalist regimes will inevitably fail. In eliminating free competition, the regime puts itself at a disadvantage because it can never be certain that it is applying the most effective measures. In the long term, such a regime will fall behind regimes that facilitate competition. Thus, non-capitalist regimes are doomed to be replaced by capitalist regimes. To impose a market regime on a society that has selected a non-capitalist regime is, therefore, unnecessary. Friedman has been accused of backing the violent imposition of market reforms in Chile. However, I submit that this represents a departure from his political theory rather than the application of it. In Chile large sections of the population were coerced into behaving in a certain manner or excluded from the market altogether. Violence was used to enforce the sale of certain assets which were, therefore, sold for a price below that which the market would have assigned. (See Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism*, (London; Penguin, 2008), pp. 55-78)

⁴⁷⁸ *Gerhardy v. Brown*, 57 A.L.R. 472 (Austl., 1985)

⁴⁷⁹ Michael K. Addo, "Political Self Determination Within the Context of the African Charter on Human and Peoples' Rights" in Robert McCorquodale (ed.), *Self Determination in International Law*, (Aldershot; Ashgate, 2000), p. 275

⁴⁸⁰ Such as in the case of the rejected Trudeau reforms, Binder, n. 258, p. 251

⁴⁸¹ International Commission of Jurists, "The Events in East Pakistan" (Geneva, 1972), p. 47

⁴⁸² Hayek, n. 471, p. 11

thus compromises their incentive to represent rather the whole electorate. Laws become arbitrary and narrow rather than general, predictable and suitable for equal application to all. When a government ceases to make general and predictable rules, it becomes coercive the populace cannot engage with each other on equal terms.⁴⁸³ Special provision for indigenous Canadians, justified by self-determination, seems like special treatment along these lines.

In order to apply general rules, however, an executive may have to take different action in different contexts.⁴⁸⁴ This is the case for political autonomy. The general rule requires context-appropriate action in order for it to be realised. In the case of the Trudeau reforms, the government took specific action to protect some particular customs which meant preserving different institutions for indigenous and non-indigenous Canadians.⁴⁸⁵ In *Kitok v Sweden* it was the protection of hunting rights,⁴⁸⁶ in *Gerhardy v Brown* it was the exclusive use of a piece of land.⁴⁸⁷ These differing actions were all intended to achieve the same general goal: preserving the political autonomy of all individuals to the greatest extent possible.

Respect for political autonomy, including the autonomy to identify with and live according to structures associated with diverse cultures, facilitates greater innovation overall. Friedman does not consider self-determination in international relations. It is, however, a necessary prior assumption for his ideas to be meaningful. Both Friedman

⁴⁸³ Ibid, pp. 20-40

⁴⁸⁴ Ibid, pp. 20-40

⁴⁸⁵ UN Security Council, *Security Council resolution 1244 (1999) [on the situation in Kosovo]*, 10 June 1999, S/RES/1244 (1999)

⁴⁸⁶ *Kitok v Sweden*, UN Human Rights Committee, CCPR/C33/D/197/185

⁴⁸⁷ *Gerhardy v. Brown*, 57 A.L.R. 472 (Austl., 1985)

and Hayek prescribe a certain form of society. They thus assume that the right of a people to determine the political status of a territory exists.

Hayek values cultural diversity. He argues that history, language and culture are the basis for the development of morality and reason itself:⁴⁸⁸

"Culture is neither natural nor artificial, neither generically transmitted nor rationally designed. It is a tradition of learned rules of conduct which have never been 'invented' and whose functions the acting individuals usually do not understand. There is surely as much justification to speak of the wisdom of culture as of the wisdom of nature - except perhaps that because of the powers of government, errors of the former are less easily corrected."⁴⁸⁹

Hayek goes further, asserting that culture teaches us to reason and reason itself is the product of a collectiveness consciousness, the sum of our social and cultural experience. For Hayek: "Man did not adopt new rules because he was intelligent. He became intelligent by submitting to new rules of conduct..."⁴⁹⁰ furthermore, "...mind can exist only as part of another independently existing distinct structure or order, though that order persists and can develop only because millions of minds constantly absorb and modify part of it."⁴⁹¹

If, for Hayek, culture is essential for the development of reason then it must be protected. It seems rational to extend this line of reason to say that multiple cultures are necessary for the Hayekian world. Hayek and Friedman support the competition of differing viewpoints and perspectives, with as few restrictions as possible on speech and

⁴⁸⁸ Hayek, n. 471, pp. 153-177

⁴⁸⁹ Ibid, p. 155

⁴⁹⁰ Hayek, n. 471, p. 163

⁴⁹¹ Ibid, p. 157

expression.⁴⁹² Ideas, like products in the marketplace, must compete. The best way to determine between them is to see which succeeds in the "market" of public debate. If reason is the product of society then a world with a wide array of different societies is a world with a richer market of ideas and, thus, a higher quality of reason.

Political autonomy means that societies and cultures are protected. This is different from enshrining outdated practices (something of which Hayekians would not approve) in law. Autonomy comes from the recognition that culture is an evolution, not a description of community practice at a fixed point in time. In the *Mashpee* case in Maine, the applicants sought to protect a culture that was a hybrid of multiple inputs, developed over time, and with the potential to develop further.⁴⁹³ In *Quebec*, the Canadian Supreme Court recognised that the Canadian state had taken extensive measures to facilitate the expression of a set of cultural practices but of Quebecois culture as an organic, evolving reality.⁴⁹⁴ For both Hayek and Friedman, autonomy facilitates the ideal society. It therefore seems reasonable to conclude that politically autonomy is sufficiently important to merit protection in the Practice.

The Threat

Beitz's model requires that an urgent interest be faced by a standard threat. Self-determination responds to the threat of the domination of a group by another group or institution. The idea of self-determination predates the Practice. In the second half of the

⁴⁹² Friedman, n. 347, pp. 17-18

⁴⁹³ Binder, n. 258, pp. 254

⁴⁹⁴ *Reference Re secession of Quebec* [1998] 2 SCR 217 (Supreme Court of Canada)

18th century, revolutionaries in France⁴⁹⁵ and the (then) British colonies in America⁴⁹⁶ based their arguments on the right of a self-identifying people to govern its own territory. In France, the advocates of self-determination responded to domination by an absolutist monarchy.⁴⁹⁷ In the USA, the Founding Fathers advanced the idea of self-determination to respond to British domination.⁴⁹⁸ In practice, the “self-determination” asserted by revolutionary France often meant that regions of metropolitan France were merely given a choice between becoming a French domain “voluntarily” or being invaded.⁴⁹⁹ The American experience, however, was the first time in modern history that individuals collectively asserted their right to political autonomy and were subsequently accepted into the international community.⁵⁰⁰

It was an American president, Woodrow Wilson, who first introduced the idea of self-determination as a *de jure*, or treaty based, aspect of international law.⁵⁰¹ Wilson advocated for the inclusion of a right to self-determination in the Treaty of Versailles. Wilson’s construction of self-determination focused on minor European territories, such as Schleswig, under the domination of European “Great Powers”.⁵⁰² Wilson only partially succeeded in inserting the principle into the text. He was, however, more successful in establishing a new standard for state practice.⁵⁰³ Between 1919 and 1939 the behaviour of states in international relations increasingly recognised the importance

⁴⁹⁵ Cassese, n. 78, p. 11

⁴⁹⁶ Brilmayer, n. 439, p. 177

⁴⁹⁷ Cassese, n. 78, p. 11

⁴⁹⁸ Wood, n. 379, p. 190

⁴⁹⁹ Cassese, n. 78, p. 11

⁵⁰⁰ Wood, n. 379, pp. 40-55

⁵⁰¹ Stephen Wheatley, *Democracy, Minorities and International Law*, (Cambridge, Cambridge University Press, 2005), pp. 287-290

⁵⁰² Cassese, n. 78, pp. 19-23

⁵⁰³ *Ibid*, pp. 19-23

of political autonomy and acted to minimise domination within Europe.⁵⁰⁴ In the aftermath of the First World War it fell to the newly formed League of Nations to adjudicate international disputes. Many disputes concerned the territories which had formerly been part of the European empires that had belonged to the powers on the losing side in the First World War. After the war, the citizens living in these territories demanded greater political autonomy. The response of the international community was different from that of the pre-war years. Before the First World War, the political status of citizens within a territory was largely subject to the interests of the most powerful nations. Individuals in contested territories would almost inevitably suffer domination by one power or another. States did not abide by coherent abstract norms in international relations, they pursued their short-term national interest.⁵⁰⁵ In the inter-war years, the League of Nations began to develop a set of norms (albeit not applied consistently) which gave the citizens of a particular territory a voice in determining its political status, thus limiting domination by the great powers.

The political status of Schleswig, for example, had previously been determined by a series of wars between Prussia and Denmark. The territory and its citizens had thus been alternatively dominated by two larger powers for almost a century.⁵⁰⁶ In 1920 it was determined by a plebiscite. For the first time in history, the citizens of the territory were

⁵⁰⁴ One aspect of this was that all states recognised in the Treaty of Versailles were required to sign and ratify Minority Rights treaties in which they committed to respect the rights of minorities and acknowledged that members of minorities living in their territory could apply to the League of Nations for remedy in the event of they failure to fulfil this treaty commitment. See Yoram Dinstein, "Collective Human Rights of Peoples and Minorities", 25 *International and Comparative Law Quarterly* 1, pp. 102-120

⁵⁰⁵ For a useful description of the mechanics of late 19th Century "great power" politics see Douglas Hurd and Edward Young, *Choose Your Weapons: The British Foreign Secretary*, (London; Weidenfield and Nicolson, 2010), pp. 151-240

⁵⁰⁶ See Edward Dicey, *The Schleswig-Holstein War*, (London; Biblio Bazaar, 2015)

consulted as to which state they would prefer to belong.⁵⁰⁷ Similar measures were taken in the case of the Aarland Islands in 1920⁵⁰⁸ and Upper Silesia in 1921.⁵⁰⁹ This was by no means self-determination as it is understood by the modern Practice. The citizens involved were only able to determine their political status insofar as they could choose which state they would join. There was no suggestion that they might exist as an independent state in themselves.⁵¹⁰ Furthermore, this limited principle of self-determination was selectively applied. Citizens in Europe were often granted plebiscites. The inhabitants of the vast African and Asian empires commanded by European states were, however, never consulted as to their preferred political status.⁵¹¹ When the indigenous inhabitants of the UK's Indian empire demanded political autonomy, their requests were stalled, repressed or ignored.⁵¹² This period is nevertheless significant in establishing a state practice in which the external political status of (certain) territories was determined (to an extent) by the inhabitants of the territory themselves. For the first time, international relations began to recognise the standard threat of domination of one people by another. The right to self-determination continues to protect the political autonomy of individuals from domination by other states, groups or institutions.

Reasonable Effect

⁵⁰⁷ Wheatley, n. 501, pp. 287-290

⁵⁰⁸ Cassese, n. 78, pp. 27-32

⁵⁰⁹ T. Hunt Tooley, *National Identity and Weimar Germany: Upper Silesia and the Eastern Border 1918-1922*, (Lincoln Nebraska; University of Nebraska Press, 1997), pp. 218-253

⁵¹⁰ Wheatley, n. 501, pp. 287-290

⁵¹¹ Marie Coleman, *The Irish Revolution: 1916-1923*, (London; Routledge, 2014), p. 51

⁵¹² Bipan Chandra, Mridula Mukherjee, Aditya Mukherjee, Sucheta Mahajan, and K.N. Panikkar, *India's Struggle for Independence*, (New York; Penguin Global, 1989), pp. 30-112

Under the third Beitz criterion the rights mechanism must be reasonably effective at protecting the interest. The right to self-determination is reasonably effective in protecting political autonomy against the threat of domination. As a solidarity right, it provides for both outward-facing and inward-facing duties, thus protecting individuals from domination by another group or state and domination by their own group or state. The outward-facing duty is often described as the “external limb” or “external self-determination”.⁵¹³ It obliges states to respect the territorial integrity of other states and to facilitate the development of new states in accordance with international law. The inward-facing duty is often called the “internal limb” or “internal self-determination”.⁵¹⁴ It obliges states to refrain from excluding groups within their own borders from participation in the polity, refrain from measures that will eliminate cultural structures and practices that deviate from those of the majority, and take measures to ensure that non-state actors do not exclude or eliminate non-majority groups. The external limb protects individuals from domination by another group or state. The internal limb protects individuals from domination by their own group or state.

Most states contain more than one self-identifying political group, and it is rarely possible to give each group its own state. Sometimes individuals identify as belonging to more than one group. The inward-facing duty thus can also involve measures to balance the self-determination claims of different groups within the same territory. It provides for a duty to ensure that all individuals are broadly consulted in the governance of the state and that the exercise of external self-determination is conducted with the consent of the individuals involved. These duties can be enforced through both legal and political mechanisms.

⁵¹³ Cassese, n. 78, p. 102

⁵¹⁴ Ibid, p. 104

External self-determination

External self-determination imposes a duty on states to refrain from dominating groups or polities outside their borders. This protects the political autonomy of individuals from domination by another group or state. The right to self-determination has, at its foundation, the principle of territorial integrity.⁵¹⁵ Self-determination is meaningless without the guarantee that the borders of the territory in question will be respected once its political status has been determined. The importance of territorial integrity was affirmed in the Declaration on Granting Independence to Colonial Peoples⁵¹⁶ and Art. 2(4) of the UN Charter. This means that the right to self-determination does not provide for an automatic right to secession. Secession is a possible remedy. It is only available, however, in the most cases of gross and systematic abuse.⁵¹⁷ It is possible, in most cases, to respect the political autonomy of individuals without permitting their group to set up its own state. In the Quebec case the Supreme Court of Canada held that there is no *prima facie* right to secession in international law.⁵¹⁸

Self-determination can be realised within the borders of the existing state. The Quebec case represents an instance of a duty of non-discrimination being effectively

⁵¹⁵ Rhona K. Smith, *Textbook on International Human Rights*, (London; Oxford University Press, 2003), pp. 285-301

⁵¹⁶ A/RES/1514(XV), S. 2

⁵¹⁷ See *KPC v Zaire*, African Commission on Human and Peoples Rights, Comm. No. 79/92 (1995)

⁵¹⁸ [1998] 2 SCR 217 at (3), although if a people had expressed a clear desire to secede, such as through a popular referendum, the metropolitan government had a moral responsibility to enter into negotiations in order to find a mutually acceptable solution, although the solution in question need not be outright secession.

respected. The Canadian Supreme Court found that legal protections for Quebequois culture and institutions, along with free and equal access to the government of Canada, were sufficient to realise Quebec's right to self-determination.⁵¹⁹ The Canadian Supreme Court's decision can be compared with the African Commission's in *KPC v Zaire*.⁵²⁰ In that case, the African Commission on Human and Peoples Rights held that secession is a legitimate remedy if the right to self-determination has been egregiously violated (such as by state oppression of the people in question). The Canadian court found that that the Canadian government had not violated the Quebecois right to self-determination. Rather, it had actively taken measures to ensure it was realised.⁵²¹ In *KPC* the African Commission came to a similar decision. Although the members of the Katangese People had a right to self-determination, it was not necessary for them to secede from Zaire in order for it to be realised. In both cases, secession was a possible remedy but was found to be unnecessary because the claimant's political autonomy could be protected without violating the territorial integrity of the polities involved.⁵²²

The African Commission has indicated that states should take specific measures to protect the political autonomy of individuals who identify as members of particular groups. It relied on the right to self-determination in, for example, protecting the political autonomy of members of the Yoruba people in Nigeria by, *inter alia*, implying a duty to protect the institution of chieftaincy in local government.⁵²³ In this way, the members of the Yoruba people were given a voice in choosing the political structure by which they were to be governed. Their political autonomy was, in this matter, preserved.

⁵¹⁹ [1998] 2 SCR 217 at (3)

⁵²⁰ Communication No 75/92 (Application No) IHRL 174 (ACHPR 1995)

⁵²¹ [1998] 2 SCR 217 at (3)

⁵²² Communication No 75/92 (Application No) IHRL 174 (ACHPR 1995)

⁵²³ Addo, n. 479

The Quebec case also demonstrates how self-determination can apply to non-homogenous states. Self-determination does not require that each group has its own state. A state may fulfil its duty to prevent domination if it takes reasonable measures to facilitate and respect all political identities within its borders in preserving and developing their customs and identity as peoples. The Canadian government took steps to do this in Quebec. The court therefore held that the Quebecois' right to self-determination was adequately respected within a non-homogenous state.

Self-determination is not an absolute right. Preserving political autonomy requires balancing the interests of all members of society. In states with multiple groups, the self-determination of one group must be balanced the rights of members of other groups. In the Quebec case, the court balanced the right of the Quebecois, to determine the political status of their territory by establishing an independent state, against the right, of Canadians as a whole, to continue to determine the status of their polity by maintaining its territorial integrity. The balance fell in favour of the latter. Membership of a federal Canadian state was not considered an infringement of sufficient severity to justify the, more significant, harm of violating the Canadian people's territorial integrity.

External self-determination is justiciable in international law. Individuals, self-identifying groups, or institutions⁵²⁴ can thus use the international legal system to petition for protections for their members' political autonomy and compel states to reduce or address domination. The right was first recognised as a universal human right in the UN Charter. In that document self-determination is described as the basis for relations between states.⁵²⁵ It further became part of treaty law with its inclusion as joint Art. 1 of the International Covenant on Civil and Political Rights and International

⁵²⁴ Including, in some cases, states see pp. 257-260

⁵²⁵ Art. 1(2), 1 UNTS XVI

Covenant on Economic, Social and Cultural Rights.⁵²⁶ The first section of Art. 1 provides for the protection of the interest of a people in the determination of its own political status and pursuit of “economic, social and cultural development”. It implies a first-level duty upon member states to refrain from taking action that unreasonably compromises these interests. The second section qualifies the right by making it subject to existing international obligations and international law. Concessions of sovereignty, freely made as part of a treaty, do not constitute a violation of self-determination. This is an important qualification because, without it, any international effort to protect human rights through international treaties or intervention could be construed as violating the right to self-determination. The third section provides for the second-level duty to promote respect for the right, “in conformity with the provisions of the Charter of the United Nations”. In effect, this provides for the international community to intervene, through the United Nations, should a state fail to perform its first-level duties

In addition to being enshrined in treaty law, external self-determination is a peremptory norm of international law (*jus cogens*). The Declaration on Friendly Relations Between Peoples⁵²⁷ and the Declaration on the Granting of Independence to Colonial Peoples⁵²⁸ both describe the right to self-determination as a “fundamental” aspect of international law. The inclusion of self-determination in General Assembly resolutions does not, in itself, establish self-determination as anything more than a principle of which the UN approves. The declarations, however, purport to describe existing state practice. Neither declaration asserts self-determination as a new addition to

⁵²⁶ UNTS, vol. 999, p. 171, UNTS, vol. 993, p. 3

⁵²⁷ UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV), available at: <http://www.refworld.org/docid/3dda1f104.html> [accessed 17 October 2015]

⁵²⁸ A/RES/1514(XV), Para 2

international law, but as an existing fundamental pillar. The Declaration on Friendly Relations is explicitly presented as a statement of existing international law. Both declarations refer to self-determination as an existing principle, on which they build further arguments. The majority of states thereby accept self-determination as a norm of international law.

The UK and USA initially advocated a more limited right.⁵²⁹ Although this doesn't affect the nature of self-determination as a matter of treaty law, it is more difficult to describe it as state practice or *jus cogens* without the assent of two states with significant influence in international politics. Both states have, however, since asserted that they consider self-determination, in both external and internal aspects, to be *jus cogens*⁵³⁰. The *jus cogens* status of self-determination was affirmed by members of the International Court of Justice in its ruling in the *Namibia* case.⁵³¹ In that case the International Court of Justice held that, although self-determination was enshrined in the International Convention on Civil and Political Rights and the International Convention on Economic Social and Cultural Rights, it had authority independent of these treaties, as a peremptory norm of international law.⁵³²

After its recognition in the UN Charter, the right to self-determination was primarily referred to in the context of de-colonisation relating, in particular, to the “salt water decolonisation”. Citizens of European colonies relied on self-determination to

⁵²⁹ Cassese, n. 78, pp. 71-88

⁵³⁰ (1983) 54 B.Y.I.L. 371-372.

⁵³¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Namibia)*, (1970) ICJ Reports (1971), separate (concurring) opinion of Vice President Ammoun, p. 51

⁵³² Manfred Lachs, "The Law in and of the United Nations" (1961) 1 Indiana J.I.L. 429 pp. 430-431 p. 432, Smith, n. 515, p. 290

assert their independence from their former colonial masters.⁵³³ Initial decolonisation claims were restricted to overseas territories. As a result, Warsaw Pact states and former colonies, facing demands for self-determination from minorities within their own borders, argued that self-determination only applied to the overseas colonies of the European states that had built colonial empires in the 19th Century. Once the right had been exercised and the former colonial power had withdrawn then it was exhausted⁵³⁴. The salt water construction is similar to the colonial interpretation.⁵³⁵ It would thus only effectively protect political autonomy in a small subset of circumstances.

The colonial interpretation does not, however, reflect the manner that self-determination takes effect in the Practice. External self-determination is a universal and continuing right.⁵³⁶ It is held by all individuals *at all times* and is not restricted to “salt water” cases, in which the territory claiming self-determination is geographically separate from the metropolitan power. It is thus more than a remedy for a specific grievance. Western states including, *inter alia*, the UK,⁵³⁷ USA,⁵³⁸ the Netherlands⁵³⁹ and Austria⁵⁴⁰ have adopted the latter construction. A wider acceptance of the “continuing” construction is implied by the description of the right in the Algiers

⁵³³ Cassese, n. 78, pp. 71-88

⁵³⁴ Ibid, pp. 101

⁵³⁵ Allen Buchanan, *Justice, Legitimacy, and Self Determination: Moral Foundations for International Law*, (Oxford; Oxford University Press, 2004), pp. 331-400 While a case could be made that almost every state “persecutes” a certain section of its population, it seems Buchanan sets a high bar to describe an action as “persecution”. Otherwise his thesis would mean very little as it would, in practice, allow self-determination to be construed as equivalent to a continuing right.

⁵³⁶ Cassese, n. 78, p. 206

⁵³⁷ See remarks by the UK Delegate to the UN General Assembly Third Committee, BYIL, (1984), p. 432

⁵³⁸ See remarks of the US Delegate to the UN General Assembly Third Committee in 1972, US Digest, (1974), p. 48

⁵³⁹ See NYIL, 1977, p. 160

⁵⁴⁰ Report of the Human Rights Committee to the G. A., 1988, UN Doc. A/43/40, para. 14

Declaration on the Rights of Peoples.⁵⁴¹ This is not a treaty. It was not made between states, but between statesmen and women, intellectuals, and the leaders of NGOs, all acting in a personal capacity. It is nevertheless a persuasive description of the existing law of self-determination because the framers, although acting in a personal capacity, represented a cross section of the international legal and political elite.⁵⁴² The UN Third Committee expressed a similar construction of self-determination, arguing that it was not a "one off exercise" but must be "continually established".⁵⁴³

The "continuing" construction is reflected in the application of self-determination by international tribunals. On the break-up of Yugoslavia, its constituent states asserted their right to self-determination. The Yugoslavia Arbitration Commission recognised the legality of the claim.⁵⁴⁴ Shortly after, Kosovo asserted its independence from Serbia. If self-determination were an extinguishable right, then it would have been extinguished when Serbia won independence from Yugoslavia. Yet the international community recognised Kosovo's exercise of the right.⁵⁴⁵ This indicates that the right to self-determination remains in existence for all individuals at all times. Individuals may, in certain circumstances, establish a new political entity if the one of which it was previously a part fails to provide for their political autonomy. The citizens of Serbia had the right to self-determination when they were citizens of Yugoslavia. When that state failed to provide for their political autonomy they were able to rely on the right to self-determination to make their remedy, forming a new state, legitimate in the eyes of the international community. The international community was obliged, by its duty under the

⁵⁴¹ Cassese, n. 78, pp. 301-302

⁵⁴² Ibid, p. 303

⁵⁴³ Ibid, p. 303

⁵⁴⁴ Ibid, pp. 268-273

⁵⁴⁵ See Resolution on the Situation in Kosovo, SC/RES/1244 (10 June 1999)

right, to recognise the new state. This did not, however, extinguish the right to self-determination. The Serbian state failed to provide for the Kosovar peoples' political autonomy. Those who identified as Kosovans therefore relied on the right to self-determination to legitimately secede from Serbia. The people of Kosovo were able to refer to an existing right in order to justify their secession. Their right to self-determination had not been exhausted when they seceded from Yugoslavia as part of Serbia.

The continuing interpretation can also be reconciled with the principle of *uti possidetis*. It seems, *prima facie*, that the principle is more coherent with the colonial interpretation: when a territory exercises self-determination to become an independent state, it inherits its former colonial borders. Post-colonial or secessionist states may, however, decide to alter their borders by mutual agreement. Such agreements can be made at the behest of groups seeking to alter the political status of their territory. This was confirmed by the Yugoslavia Arbitration Commission.⁵⁴⁶ The Commission reconciled the continuing interpretation of self-determination with the principle of *uti possidetis*,⁵⁴⁷ holding that the borders of a new state could be altered with the agreement of the parties concerned. A group may, therefore, secede from a state that has, itself, thrown off colonial domination and establish a new state within the principle of *uti possidetis*.⁵⁴⁸

Some African states have been reluctant to embrace the "continuing" interpretation of self-determination.⁵⁴⁹ In general, however, state practice within that

⁵⁴⁶ The Arbitration Commission of the Conference on Yugoslavia (Badinter Arbitration Committee), Opinion No. 2, 92 ILR, p.168

⁵⁴⁷ Ibid p.168

⁵⁴⁸ See the discussion of this in Cassese, n. 78, pp. 191-193

⁵⁴⁹ Cassese, n. 78, p. 309

region demonstrates an implicit acceptance. Sudan had exerted its right to independence from its colonial occupier (the UK) in 1956. However, in 2011, South Sudan was able to secede from the rest of Sudan and established itself as an independent state, recognised by the international community⁵⁵⁰. The “continuing” interpretation was affirmed by the African Commission in *KPC*. In that case, the Commission based its authority on the existing right to self-determination in the African Charter and the Conventions. But the African Commission went further than merely affirming the right in a general manner. It held that, if the Art. 1 right was infringed in a particularly egregious manner,⁵⁵¹ this meant the right could be directly exercised to justify secession.⁵⁵² The Commission did not limit to remedy of secession to a “once only” use. To do so would run contrary to the principle behind its decision. If the remedy of secession becomes available, under the right to self-determination, in response to egregious abuse of human rights, then it must always become it must always become available in cases that meet these criteria. If it is only available after the first egregious abuse, then the successor state would not be held accountable to the same degree as the original state. To avoid such an absurd conclusion, it is better to construe secession, under the right to self-determination, as available in response to egregious violations of rights regardless of whether the state committing those violations has, itself, seceded from another state in the past.

Internal self-determination

⁵⁵⁰ UN S.C. Res, 1999, (2011), recommending the admission of South Sudan was passed unanimously.

⁵⁵¹ In that case by the oppression of a specific people by the government of the state in which they were resident.

⁵⁵² African Commission on Human and Peoples Rights, Comm. No. 79/92 (1995)

Internal self-determination protects the political autonomy of individuals from domination by their own group or state. External self-determination can be legitimately exercised only if to do so is in line with the freely expressed will of the individuals in the territory concerned.⁵⁵³ This preserves the political autonomy of the individuals by giving all members of a polity a voice in determining its political status. Individuals thus have a voice in determining the political nature of their polity. Internal self-determination also requires that members of the polity be involved in its government on a day-to-day basis. The combination of the internal and external limbs of self-determination ensures that the political autonomy of individuals is protected from domination from other states *and* from domination by their own group or state.

Internal self-determination requires that the members of the polity must be (a) consulted, usually in a referendum or election, and (b) clearly express a desire to determine the political status of their territory in a manner different from the *status quo*⁵⁵⁴. The new political entity will not be recognised in international law unless it is governed by institutions that ensure that all citizens, and if necessary every people, within that territory, can play an equal part in the government.⁵⁵⁵

Not every state that is accepted as part of the international community is governed democratically. Many states deny certain groups access to the institutions of government. The internal limb of self-determination is nonetheless recognised by judges

⁵⁵³ A/RES/2625(XXV), para. I (2)

⁵⁵⁴ *Western Sahara*, Advisory Opinion, ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975), 16th October 1975, International Court of Justice, paras. 58 and 59

⁵⁵⁵ ⁵⁵⁵ A/RES/2625(XXV), para. 14

in both international⁵⁵⁶ and domestic courts,⁵⁵⁷ political officials,⁵⁵⁸ and scholars⁵⁵⁹. The challenge becomes distinguishing between genuine custom (albeit custom that is often violated) and mere aspiration or assertion. Self-determination is a norm that states apply when they are explicitly acting in accordance with international law. When it is apparently breached (such as in the case of China which consistently ignores Tibet's demands for self-determination⁵⁶⁰) the breach is often explicitly excused in rights language, and states that do respect human rights, or that claim to interpret human rights differently, offer an explanation for their engagement with the offender (generally public policy, economics or the need to encourage the state in question to "mend its ways" through "engagement"⁵⁶¹). Even in breach, the norm is thus recognised. States recognise the norm when they offer an explanation for their failure to respect the duties for which it provides.⁵⁶² Put another way, the norm is recognised in *opinio juris*.⁵⁶³ States recognise that they are acting in accordance with international law when the act in accordance with the norm. When states act in contravention of the norm they must justify their actions

⁵⁵⁶ *Namibia*, JCI Reports (1971), separate (concurring) opinion of Vice President Ammoun, p. 51

⁵⁵⁷ For example, in the UK, *R. (on the application of Misick) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1039 (Admin)

⁵⁵⁸ 1979 Memo from legal advisor to Acting Secretary of State Warren Christopher stated that Soviet invasion of Afghanistan was contrary to SD which was regarded as a peremptory norm of international law. In Cassese, n. 78, p. 136

⁵⁵⁹ For example, *Ibid*, p. 1

⁵⁶⁰ See Melvyn C. Goldstein, *The Snow Lion and the Dragon: China, Tibet and the Dalai Lama*, (Oakland, California; University of California Press, 1997)

⁵⁶¹ See James Mann, *About Face: A History of America's Curious Relationship with China, from Nixon to Clinton*, (New York; Taylor and Francis, 1998), pp. 4-10

⁵⁶² See discussion of the *Opinio Juris* principle in Theodor Meron, *Human Rights and Humanitarian Norms as Customary International Law*, (Oxford; Clarendon, 1989), pp. 41-61

⁵⁶³ See Frederic L. Kirgis Jr., "The Degrees of self-determination in International Law", 88 AJIL 2 (1994), pp. 304-310

using rights language because they understand that they are otherwise acting outside international law.

It is clear that internal self-determination is recognised as a check on external self-determination in both treaty-based and customary international law. In *Western Sahara*, the ICJ held that self-determination required paying regard to the “freely expressed will of peoples”.⁵⁶⁴ The importance of internal self-determination to the legitimacy of an act of external self-determination is clearly demonstrated by state practice. When the League of Nations supervised the exercise of self-determination in Silesia, Schleswig and the Aaland Islands, it did so by means of a referendum.⁵⁶⁵ The citizens were consulted. As the right evolved it has become necessary, not merely for the people to be consulted democratically, but for them to be involved in government after the secession has been achieved. The Baltic States seceding from the Soviet Union and Balkan States seceding from Yugoslavia based their claims for legitimacy on referenda or popular acclaim and their intention to govern themselves democratically.⁵⁶⁶ The people of South Sudan voted overwhelmingly to secede and subsequently established their own, democratic, government.⁵⁶⁷ In Bangladesh, although no referendum was held, its secession was triggered by the election of a government on a platform of demanding greater self-determination.⁵⁶⁸

⁵⁶⁴ See *Western Sahara*, Advisory Opinion, ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975), 16th October 1975, International Court of Justice, paras. 58 and 59

⁵⁶⁵ Cassese, n. 78, pp. 23-32

⁵⁶⁶ Ibid, pp. 257-273

⁵⁶⁷ UN S.C. Res, 1999, (2011), recommending the admission of South Sudan was passed unanimously.

⁵⁶⁸ Wheatley, n. 501, p. 99 The exercise of internal self-determination does not always result in a “success story”. The Eritrean Liberation Front and Eritrean People’s Liberation Front fought a bloody war to overturn the 1962 decision of the Eritrean Assembly to become part of Ethiopia. Although Ethiopia argued that the incorporation was an act of internal , the ELF and EPLF argued that the decision had been imposed on Eritrea by Ethiopia after the UN gave Ethiopia federal control over Eritrea after the Second World War,

The necessity of a democratic approach to external self-determination was recognised by the International Commission of Jurists in their report on East Pakistan.⁵⁶⁹ The Commission found that citizens could only exercise their right to self-determination, and subsequently be recognised as a state, if each people in the new entity was able to work together “to form a new association endowed with democratic associations of their choice.”⁵⁷⁰

Internal self-determination can create an incentive for dominating powers to populate areas with members of the dominant majority to avoid calls for secession or greater autonomy from homogeneous territories.⁵⁷¹ This practice, in fact, indicates a recognition of self-determination as a norm of international law. In taking action, albeit action that is morally (and possibly legally) reprehensible, to avoid a claim based on self-determination, the dominant state is recognising the legitimacy of the norm and seeking to subvert it. If the dominant power did not recognise the legitimacy of internal self-determination it would simply reject claims based on the right to self-determination outright.

without consulting the Eritrean people in a plebiscite. This represents a failure of the international community in its second-level duty. When the international community intervened to facilitate Eritrea exercising external , after it had been subject to the colonial domination of Italy and then the mandate of the UK, it should have done so in a manner that properly ascertained and respected the will of the Eritrean people. Instead the commission, to which the UN General assembly delegated the responsibility, held a series of hearings with little in the way of safeguards to ensure that the results would be representative. Thus, while the international community undoubtedly intervened, that intervention failed to promote the norms of . This represents an exception to normal state practice and demonstrates the injustice that can occur when internal self-determination norms are not adequately respected. (See Cassese, n. 78, pp. 218-222)

⁵⁶⁹ International Commission of Jurists, n. 481, p. 3

⁵⁷⁰ Ibid, p. 3

⁵⁷¹ For example, Tibet and the Baltic States, see (respectively) Cassese, n. 78, pp. 95-6, 258-264

In summary, internal self-determination requires that a people be governed by a representative government from which no subset of the population of the territory is unreasonably excluded. There are three qualifications to this: (i.) All citizens must be involved in government across a broad range of issues, it is not enough that only “some” government is representative. (ii.) Citizens who identify as members of different groups in composite territories must be given a measure of autonomy sufficient for them to continue to exist according to the culture with which they identify (although without the need for secession). (iii.) Internal self-determination must not be used to disenfranchise the individuals in question in relation to the national government.⁵⁷²

The UN Committee on the Elimination of Racial Discrimination addressed the extent of the requirements of internal self-determination. It found that it included the “rights of all peoples to pursue their economic, social and cultural development without outside interference”.⁵⁷³ When combined with the requirements described in the Declaration on Friendly Relations⁵⁷⁴ and Helsinki Final Act,⁵⁷⁵ this indicates that representative government must spread across a broad range of public policy areas. This interpretation was applied in the South Tyrol/Alto Adige⁵⁷⁶ dispute. The UN resolution addressing the dispute provided that citizens, who identify as sub-groups within larger composite territories, cannot necessarily access the remedy of secession. Yet they may

⁵⁷² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Namibia)*, (1970) JCI Reports (1971)

⁵⁷³ Committee on the Elimination of Racial Discrimination, "General Recommendation XXI on the right to " 15 March 1996, Reprinted in "Compilation of Comments and General recommendations" p. 212, para. 4

⁵⁷⁴ UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV), p. 8 available at: <http://www.refworld.org/docid/3dda1f104.html> [accessed 17 October 2015]

⁵⁷⁵ Cassese, n. 78, p. 111

⁵⁷⁶ G.A. Res 1497(XV) and 1661(XVI) 1960 and 61

be granted “complete autonomy” in matters concerning their cultural development.⁵⁷⁷

Group autonomy and participation in the government of the wider territory should not be considered mutually exclusive. In its resolution on Southern Rhodesia and South Africa, the UN made it clear that government by a minority cannot be justified by arguments about the preservation of cultural traditions.⁵⁷⁸ The South African government argued that segregation and minority rule was necessary to preserve the different cultures of the black majority and white minority.⁵⁷⁹ This argument was rejected by the UN.

The internal limb of self-determination was first explicitly recognised in international law in the UN Charter. Art. 1 of the Charter provides that self-determination is the basis for friendly relations amongst nations. It states that “equal rights... of peoples” is a basis for friendly relations of equal importance to self-determination,⁵⁸⁰ the manner in which such rights must take effect is ambivalent. It does not, however, state explicitly that states must be governed democratically. The UN Charter is clearer about the importance of democracy in the sections that deal with the trusteeship system. Those sections provide that a trustee is responsible for overseeing the development of a Non-Self-Governing Territory. The Charter refers to territories which have not “yet” achieved a full measure of self-governance, implying that self-determination is the ultimate goal for all territories.⁵⁸¹ The Charter mandates that trustees “develop self-government, to take due account of the political aspirations of the peoples

⁵⁷⁷ G.A. Res 1497(XV) and 1661(XVI) 1960 and 61

⁵⁷⁸ E.g. GA Res. 31/154 A 20 Dec 1976 (UN Ybk, 1976, 158-9) and SC Res 417, 31 Oct 1977 (UN Ybk, 1977, 161-2)

⁵⁷⁹ Herman Giliomee, “The Making of the Apartheid Plan, 1929-1948”, 29 *Journal of South African Studies* 2 (2003), pp. 373-392

⁵⁸⁰ UN Charter, Art. 1(2),

⁵⁸¹ UN Charter, Art. 73(b),

and to assist them in the progressive development of their political institutions.”⁵⁸² This implies that progress towards *self*-government and progress towards *democratic* self-government are inseparable.

The *de jure* force of internal self-determination was restated in the Declaration on Friendly Relations which provides that states “conducting themselves in compliance with the principle of equal rights and self-determination of peoples” will be “possessed of a government representing the whole people of a territory without distinction as to race creed or colour.”⁵⁸³ There are two important aspects to this provision. The first is that it mandates that a state that respects self-determination must have a representative government. The second this that it must represent the whole people “without regard to race, creed or colour”. It could be argued that final clause limits those preceding it. Under this interpretation, internal self-determination only prohibits exclusion from representative government on grounds of race, creed, or colour. Exclusion on other grounds, even unreasonable grounds, does not fall within the prohibition. Such an interpretation, however, is not accurate. In the first instance, it would be almost impossible for a government to “represent the *whole* people” if it made distinction based on *any* unreasonable characteristic. A state that excludes any class of citizen⁵⁸⁴ is, by definition, not representative of the *whole* people.⁵⁸⁵ The internal limb of self-

⁵⁸²UN Charter, Art. 78

⁵⁸³ UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV), available at: <http://www.refworld.org/docid/3dda1f104.html> [accessed 17 October 2015]; p. 8

⁵⁸⁴ With the exception of states that exclude certain classes of citizens from the government with a reasonable justification, such as the necessity of achieving the age of majority before voting.

⁵⁸⁵ For Cassese, the additional clause was added because these were the most common distinctions made at the time and thus the framers considered it necessary to give them special emphasis. (Cassese, n. 78, p. 114)

determination expounded in the Declaration on Friendly Relations was subsequently affirmed in the Helsinki Final Act⁵⁸⁶ and the Vienna Declaration.⁵⁸⁷ The Helsinki Final Act explicitly emphasises the two limbs of self-determination, providing that:

“By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.”⁵⁸⁸

The recognition of internal self-determination has moved beyond declarations and is now, like external self-determination, considered *jus cogens*. This is clear from both state practice and jurisprudence. The majority of regional organisations, including the EU, AU, OAS and OSCE formally require democratic government as a condition of membership⁵⁸⁹. In practice, this requirement is often breached. Yet its formal inclusion indicates that states view democratic government as the standard that international law requires. When these organisations admit states that are not fully democratic the treaties which require the norm are not changed. This indicates that admitting non-democratic states represents a failure to conform to the norms of international law, not an abandonment of those norms. The General Assembly Resolution on Southern Rhodesia

⁵⁸⁶ Organization for Security and Co-operation in Europe (OSCE), *Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki*, Art. VIII, 1 August 1975, available at: <http://www.refworld.org/docid/3dde4f9b4.html> [accessed 23 October 2015]

⁵⁸⁷ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, available at: <http://www.refworld.org/docid/3ae6b39ec.html> [accessed 24 October 2015]

⁵⁸⁸ Helsinki Final Act, Art. VIII (2)

⁵⁸⁹ Wheatley, n. 501, p. 128

and South Africa affirmed internal self-determination as norm of international law.⁵⁹⁰

This is significant because the resolution was supported by a number of states which, at the time, were friendly towards South Africa and Rhodesia. This indicates that internal self-determination enjoys acceptance almost universally. This was recognised by the International Court of Justice in *Western Sahara*⁵⁹¹ and the Yugoslavia Arbitration Commission, which held that internal self-determination is a peremptory norm of international law.⁵⁹²

In summary, both the external and internal limbs of self-determination are peremptory norms of international law. In the Practice, the right to self-determination responds effectively to the standard threat of the domination.⁵⁹³ The external limb of self-determination protects individuals from domination by another group or state. The internal limb protects individuals from domination by their own group or state. The right

⁵⁹⁰ GA Res on Southern Rhodesia and South Africa e.g. GA Res. 31/154 A 20 Dec 1976 (UN Ybk, 1976, 158-9) and SC Res 417, 31 Oct 1977 (UN Ybk, 1977, 161-2)

⁵⁹¹ ICJ Rep 12, ICGJ 214 (ICJ 1975), 16th October 1975, paras. 58 and 59

⁵⁹² 31 ILM (1992) 1488, Opinion No. 1,

⁵⁹³ It has been suggested that self-determination should not be described as a "right" because it is not justiciable at international level⁵⁹³. In the Lubicon Lake Band case the UN Human Rights Committee held that it would not rule on group rights because it was too difficult to identify a claimant (see *Bernard Ominayak and the Lubicon Lake Band v Canada*, Communication No. 167/1984, UN Doc. CCPR/C/38/D/167/1984, 10 May 1990, para. 2.1). However, the HRC is willing to rule on group rights when construed in conjunction with individual rights. In the case of the Lubicon Band the committee was effectively ruled on a group right by construing it in conjunction with Art. 17 and ruling on the facts. In the *Norway* case it relied on self-determination alone to protect the hunting rights of the Sami people (see UN Human Rights Committee Concluding Observations on Norway, UN Doc. CCPR/C/79/Ass. 112, 1 November 1999, para. 10). In addition, other courts clearly consider the right justiciable. The ICJ has applied the right in *Namibia* and in *Western Sahara*, and the African Commission regularly applies the right. Indeed in *Mpaka-Nsusu v Republic of Congo (Zaire)* (see African Commission on Human and Peoples' Rights, Comm. 157/1983, 26th March 1983) it explicitly asserted that it considered "group rights" like self-determination justiciable.

to self-determination thus protects the urgent, common-good interest in political autonomy to reasonable effect.⁵⁹⁴

Conclusion

Beitz's model requires that, for an interest to be recognised as a right, it must be urgent, faced with a standard threat and able to be protected to reasonable effect by the rights mechanism. Furthermore, this case must be understandable from both sympathetic and non-sympathetic perspectives. In this chapter I have argued that the right to self-determination meets that test. The right to self-determination protects the individual interest in political autonomy. It responds to the standard threat of dominance by one group or state over another. It protects the interest in political autonomy to reasonable effect through both treaty law and as a peremptory norm of international law.

⁵⁹⁴ Jan Klabbers has argued that self-determination has been “watered down” to the level of a “procedural guarantee” by the courts (see Jan Klabbers, “The Right to Be Taken Seriously: Self Determination and International Law”, 28 H.R.Q. 1 (2006) pp. 186-20). For him, self-determination is simply too “big” an issue for the courts to handle. It should instead be considered a political principle⁵⁹⁴. There are two problems with this position. The first is that international courts and tribunals have not treated self-determination in the manner described by Klabbers, as can be seen from the above discussion. The second is that all human rights are, in their most basic form, political principles. They differ from other political principles because they are particularly urgent, and so given greater authority by recognition them as “human rights” in international law. Rights have both legal impact and persuasive impact. In the latter context they take effect as a means of asserting political pressure on recalcitrant states and as a guideline for other states. It is undeniable that self-determination has a persuasive impact. A number of recent instances of the right being exercised did not involve any specific legal claim for self-determination (Such as South Sudan, the Baltic states and devolution to Scottish, Welsh and Northern Irish assemblies in the UK). But this does not mean it should not be considered a right. Klabbers claims the *Western Sahara* case is an example of self-determination being applied as a principle rather than a right (Ibid, p. 200). The court, in that case, used the term “principle”. But it clearly applied self-determination as a “right”. The court considered the relative claims of the parties, grounded their decision in existing human rights law and reached a conclusion based on the presumption that political autonomy will be respected.

The interest in political autonomy is urgent because it is integral to the effective functioning of individuals in society. This can be understood even from the Hayekian perspective, non-sympathetic to the very concept of political presumptions based on common-good interests, because it limits coercion. The right responds to the standard threat of domination by one political group of another. The rights mechanism is reasonably effective in protecting self-determination in imposing the outward and inward-facing duty to refrain from and regulate the domination of one people by another (external self-determination), which protects individuals from domination by a foreign state or group, and to involve all citizens in the governance of the state (internal self-determination), which protects individuals from domination by their own state or group. The right to self-determination, therefore, meets the Beitz criteria and should be recognised in the Practice as a solidarity right.

CHAPTER SEVEN: THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT

Introduction

In this chapter, Beitz's political approach will be applied to make the case for the right to a clean and healthy environment. This will demonstrate that the political approach can support emerging solidarity rights as well as established solidarity rights. The right to a clean and healthy environment is not yet justiciable in international law, but the common-good interest in a clean and healthy environment is nevertheless urgent, faced with a standard threat and can be addressed in a reasonably effective manner by the rights mechanism. Although the right to a clean and healthy environment remains an emerging right, there is thus a strong case for it to be recognised as a right in the Practice.

Environmental rights are often classed as either the right to a "clean and healthy environment" or human rights approaches to climate change. The former responds to localised pollution of water, air and land. The latter responds to the cumulative effects of the emission of greenhouse gasses on a global scale. This, however, is a false distinction. Localised pollution and climate change are two impacts of the same threat: damage to the environment. Climate change is, in part, the downstream impact of all localised pollution. Damage to the environment impacts on the same interests, whether it is caused by localised pollution or climate change. The jurisprudence addressing localised pollution is, however, far more developed than that addressing climate change. The discussion of the reasonable effectiveness of the right will therefore focus primarily on how the right addresses localised pollution. Based on this discussion, the final section

will offer some thoughts on how the right might evolve to address climate change in future.

This chapter will (1) consider the current state of the right to a clean and healthy environment at international level and the sceptical position of a number of NGOs and scholars. It will argue that (2) the interest in a clean and healthy environment is urgent and its urgency lies in intergenerational responsibility, (3) the threat to the environment is caused by humans and takes effect in the form of both localised pollution and climate change, (4) the urgency of the interest protected by the right to a clean and healthy environment can also be identified from the Hayekian perspective, demonstrating the breadth of the interest and (5) the rights mechanism is a reasonably effective at protecting the environment in cases of localised pollution. This will be demonstrated by analysing its application at regional and national levels. Finally, I will discuss (6) how the right could evolve to address climate change.

The Current Status of the Right to a Clean and Healthy Environment

International law does not currently recognise a right to a clean and healthy environment. A number of inter-state bodies, multilateral agreements, courts, and tribunals have suggested that damage to the environment should be a human rights issue. Tuvalu has threatened a case against the United States in the International Court of Justice⁵⁹⁵ based on the right to a clean and healthy environment. Tuvalu argues that the USA, as the most significant contributor to climate change, has violated the rights of

⁵⁹⁵ Rebecca Elizabeth Jacobs, "Treading Deep Waters: Substantive Law Issues In Tuvalu's Threat to Sue the US in the ICJ", 14 Pac. Rim L. & Pol'y 103 (2005), p. 105

Tuvaluan citizens who live in areas that are threatened by rising sea levels. The threat, thus far, not resulted in litigation.

A number of international instruments recognise damage to the environment as a human rights issue. Under the Stockholm Declarations, "both aspects of man's environment, the natural and the man-made, are essential to his wellbeing and the enjoyment of basic human rights and the right to life itself."⁵⁹⁶ The United Nations Human Rights Council has recognised that climate change "poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights".⁵⁹⁷ A second Human Rights Council resolution states that human rights obligations and commitments "have the potential to inform and strengthen international and national policy-making in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes".⁵⁹⁸ Human Rights Council resolutions, however, are of, at most, persuasive authority in international law. Given concerns about anti-western bias in the Council, even the persuasive authority of its pronouncements is open to question.⁵⁹⁹

Neither the Stockholm Declaration nor the Human Rights Council resolutions represent "hard law". They are therefore unenforceable between states. The multilateral Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters is, by contrast, directly enforceable between states. The Aarhus Convention identifies a specific right to a clean and healthy environment. It lays down a number of entitlements, such as public access to information

⁵⁹⁶ Principle 1, Stockholm Declaration, 16th June 1972

⁵⁹⁷ United Nations Human Rights Council Resolution 7/231

⁵⁹⁸ U.N. Human Rights Council Res. 10/4, in U.N. Human Rights Council, Draft Report of the Human Rights Council on its Tenth Session 13, 15, U.N. Doc. A/HRC/10/L.11 (Mar. 31, 2009)

⁵⁹⁹ Heinze, n. 187, and Freedman, n. 187, pp. 119-147

about polluters and the causes of climate change, which indicate specific steps by which states can respect the duty to protect the environment.⁶⁰⁰

The signatories to the Aarhus Convention right are limited to European and Asian states. It would, therefore, be excessive to claim that the Convention establishes a justiciable right with general effect in international law. It is nevertheless a significant recognition that threats to the environment should be considered relevant to the Practice at an international level. This indicates that space exists for the international recognition of an effective right in the future.

Scepticism about the right to environment

Some scholars and NGOs are sceptical about applying the human rights mechanism to address damage to the environment.⁶⁰¹ For sceptics, environmental problems are better dealt with through other public policy mechanisms. Recognising a right to a clean and healthy environment would unduly politicise the Practice. Edward

⁶⁰⁰ Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice on Environmental Matters, 25th June 1998, UNTS Vol. 2161, p. 447, Art. 1. Currently ratified by 47 parties (including the EU member states and the EU in its own capacity), Art. 20(1) of the Convention provides for its entry into force on the ninetieth day after the deposit of the sixteenth instrument of ratification. The Convention entered into force on the 30th October 2001. The UK, on ratification, made a declaration stating that the right to a clean and healthy environment, contained in the declaration, was an aspirational rather than a justiciable right. It is not, however, clear that the UK still holds this position. No other contracting party joined the UK in its declaration. See discussion in Svitlana Kravchenko and John E. Bonine, *Human Rights and the Environment: Cases, Law and Policy*, (Durham, NC; Carolina Academic Press, 2008), p. 23

⁶⁰¹ The International Council on Human Rights Policy concludes that "In the absence of strong institutions, either at national or international level, it is not immediately obvious what human rights can add to a policy discussion that is already notably welfare-conscious, even if focused on the general good rather than on individual complaints" (ICHRP, "Human Rights and Climate Change", (New York, 2008), p. 4)

Cameron describes (although does not endorse) this position; "many climate change professionals fear that human rights can easily become politicised and controversial, injecting added complexity and cleavages into an already polarised global challenge".⁶⁰²

If, however, an interest otherwise satisfies the Beitz criteria, then perceived political controversy should not prevent it being recognised as a right. If the Practice only recognised interests that were politically uncontroversial, then it would not recognise any rights at all. Both human rights and climate change discourses are inevitably highly politicised. The recognition of an interest as a right represents a redistribution of power. Any redistribution of power will attract opposition because it means that someone's interests are being compromised. Powerful agents have interests in both human rights and climate change discourses⁶⁰³. Addressing climate change requires acting contrary to the interests of some of the most powerful multinational companies and political factions in the world.⁶⁰⁴ By analogy, there is significant global opposition to the right to freedom of expression,⁶⁰⁵ yet that is never described as "too politicised". We must accept that there will always be opposition to human rights and ask, instead, whether the arguments in favour of the right outweigh the arguments against it. Opposition to an interest may indicate that it is not sufficiently urgent to be a right. We must evaluate the opposition arguments to determine whether they outweigh the arguments in favour of recognising the interest as a right. The mere fact that an interest is controversial should have no bearing on discussions about whether it should be protected with the rights mechanism.

⁶⁰² Edward Cameron, "Development, climate change and human rights: From the margins to the mainstream?" 123 World Bank Social Development Working Papers [2011], p. 5

⁶⁰³ Naomi Klein, *This Changes Everything*, (Bloomsbury; London, 2012). ch. 1

⁶⁰⁴ For an account of the highly politicised nature of the environment discourse see *ibid.* ch. 1

⁶⁰⁵ Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad*, (New York; Norton, 2007), p. 85

The rights mechanism protects interests in a way that other public policy mechanisms cannot. Laws and regulations that protect the environment, whether from localised pollution or climate change, are created and enforced by governments or between governments through legislation, regulation or bi-lateral or multi-lateral treaties. The response to the threat to the environment often pits one set of powerful people (legislators and diplomats) against another (polluters). Those who suffer from the threat to the environment tend to be those with less power.⁶⁰⁶ The response to the threat to the environment is, therefore, left to those least motivated to respond. Similarly, majoritarian or democratic controls are insufficient to address the environmental threat because they cannot easily take the intergenerational aspect (discussed below) of the threat into account.

Human rights give those with less power (individuals) a claim against those with greater power (states). A human right to a clean and healthy environment diffuses the power to mandate a response to threats to the environment. Environmental law is largely made by governments (a concentration of power). A human right to a clean and healthy environment, however, entitles individuals to demand action by their governments.

Human rights have been used to empower individuals in relation to environmental issues in both developed and developing states. In *Lopez Ostra v Spain*, the European Court of Human Rights found that the municipality (and by extension the State) had a duty to take effective measures to protect the applicant (and others) from pollution.⁶⁰⁷ An individual was, therefore, able to exercise the power, transferred to her by the human rights mechanism, to demand that her government take action. In

⁶⁰⁶ Nicholas Stern, *The Economics of Climate Change (The Stern Review)*, (London; Cambridge University Press, 2006), p. 11

⁶⁰⁷ *Lopez Ostra v Spain* ECHR, App No. 16798/90, Series A no. 303-C, (1995) 20 E.H.R.R. 277

developing states this transfer of power has had even wider impacts. Individuals have relied on various human rights to achieve environmental goals including to enforce national policy programmes and legislation.⁶⁰⁸

Furthermore, human rights have a greater persuasive impact than ordinary legislation. As Cameron argues, “human rights are as much about ethical demands, calls for social justice, public awareness, advocacy and political action as they are concerned with legal norms and rules.”⁶⁰⁹ To borrow John Ruggie's analysis, human rights give the less powerful a claim in the "court of public opinion" even if they are unable to or unsuccessful in asserting their claim in a court of law.⁶¹⁰ A right to a clean and healthy environment at international level would empower individuals in relation to environmental issues on a broad scale.

For Günther Handl, "(1) a simple right to environment may not address the complex and technical issues present in the environmental threat; (2) a right to environment merely addresses the social symptoms and does not solve the structural causes of environmental degradation, such as the relationships of political economy...".⁶¹¹ Yet, contrary to Handl's assertion, the right to a clean and healthy environment addresses underlying social issues by dispersing power. Concentration of

⁶⁰⁸ For example, *Dhungel v Godawari Marble Industries*, Supreme Court of Nepal (Full Bench), WP 35/1992 (31 October 1995) In which the Indian Supreme Court relied on both international and domestic environmental obligations when it ordered the Indian government to create new legislation to protect “air, water, and the environment”.

⁶⁰⁹ Cameron, n. 602, p. 16

⁶¹⁰ John Ruggie, "Protect, Respect and remedy: a Framework for Business and Human Rights", Report of the Special Representative of the Secretary General in the issue of human rights and transnational corporations and other business enterprises. A/HRC/8/5, Geneva: United Nations Human Rights Council

⁶¹¹ Gunther Handl, "Human Rights and Protection of the Environment" in A. Eide, C. Krause & A. Rosas, (eds.), *Economic, Social and Cultural Rights: A Textbook*, (2nd Ed.), (New York; Martinus Nijhoff Publishers, 2001), p. 117

power is a structural, and thus underlying, social issue. Human rights offer one way of addressing the dangers of concentrated power. It is not necessary for a right to environment to address, in the right itself, the detail of the technical issues relevant to the threat to the environment. Human rights are not public policy programmes: they are an entitlement to demand that such programmes be put in place. The human rights jurisprudence on environmental issues demonstrates this balance. In *Lopez Ostra*, the European Court of Human Rights did not seek to develop the finer details of environmental policy. It held that public policy, as it stood, did not sufficiently fulfil the government's obligations mandated by the right to private and family life (Art. 8 of the European Convention on Human Rights) and sent it back to the government to do better. Exactly how the government was to "do better" was left to the government. In cases that demand a high level of technical expertise to settle, courts have means of drawing on such expertise. A court may assess threshold questions of climate science in the same way that a court can adjudicate the extent to which a doctor has been negligent in performing a highly complex and specialised medical procedure: by drawing on a range of expert witnesses and surveys of the profession as a whole.

In summary, the right to a clean and healthy environment is not yet recognised as an enforceable right at international level and it is subject to a degree of scepticism. The objections raised do not, however, present an insurmountable barrier to recognition as long as the interest in a clean and healthy environment meets the Beitz criteria.

Urgency

The first of the Beitz criteria is urgency. The environment is a resource that is shared with future generations. For an interest to be protected as a right, in Beitz's

model, it must first be established that it is “sufficiently important when reasonably regarded from the perspective of those protected that it would be reasonable to consider its protection a political priority.”⁶¹² Cases relying on an environmental right have cited a number of issues that indicate the importance of a clean and healthy environment. Prominent amongst them are the destruction of ancestral homelands⁶¹³, health problems,⁶¹⁴ the impact on sites of cultural significance,⁶¹⁵ threat to traditional practices,⁶¹⁶ and economic loss. Yet it is difficult to ground the right to environment in any of these alone. Each could be addressed by a different right, such as the right to culture, the right to self-determination, or the right to health. A better argument must identify the interest that underpins all these cases.⁶¹⁷

⁶¹² Beitz, n. 5, p. 105

⁶¹³ Resolution 12/85 [Yanomami case] Inter-American Commission on Human Rights IACHR Case 7615 (Brazil) (March 5, 1985), printed in Inter-Am, C.H.R., 1984-1985 Annual Report 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (Oct. 1, 1985)

⁶¹⁴ *Guerra v Italy*, ECHR, App No. 14967/89, Reports of Judgements and Decisions 1998-I, (1998) 26 E.H.R.R. 357

⁶¹⁵ *Pennsylvania v National Gettysburg Battlefield Tower* (USA), Supreme Court of Pennsylvania, 454 Pa. 193 A.2d 588 (1973)

⁶¹⁶ Sheila Watt-Cloutier with the Support of the Inuit Circumpolar Conference, "Petition to the Inter-American Commission on Human Rights, (7th December 2005)

⁶¹⁷ An alternative case can be made for the urgency of the interest in a clean and healthy environment based on global justice. Those who experience the worst effects of climate change are those who live in areas that are vulnerable to droughts, sea level rises and extreme weather conditions. These tend to be developing states. Such states are often located in geographically vulnerable areas (deserts or islands), and have fewer resources to devote to creating the sort of infrastructure that can resist the impacts of climate change. But these states have contributed the least to climate change. Western states have been emitting greenhouse gasses for over 400 years. Developing states only began to emit greenhouse gasses in significant amounts in the second half of the 20th century. It is unjust that those individuals who have contributed the least to creating the general threat, should suffer its worst effects.

This argument is, however, less persuasive than that based on intergenerational justice because it misrepresents the nature of the threat. Climate change will impact on developing states most significantly in the short term, but it will ultimately impact globally. The threat to the environment is a threat to all, not

The best argument for the urgency of the interest in the environment is based on intergenerational justice. The environment is a finite resource.⁶¹⁸ When it is harmed unnecessarily, as by anthropogenic action rather than natural geological or environmental process, that harm affects future generations. The interests of future generations in the environment are particularly vulnerable. The market is 21st century society's primary tool for determining the use and value of assets. The environment is an asset. We must, therefore, assess whether the market adequately takes future generations into account. Economists generally discount the value of future assets. Through technological advances, assets tend to be produced more cheaply in future. Assets also tend to lose value as they accumulate because we derive less marginal benefit from each additional unit of an asset that we consume.⁶¹⁹

The environment will not, however, be less valuable in the future since it is a finite resource.⁶²⁰ Once the environment is damaged it takes centuries to repair itself. In many cases the damage cannot be repaired at all. Future damage to the environment will harm future generations. Clean air and water will become increasingly scarce. If environmental resources are scarce then there will be greater competition for them. That competition will, in turn, risk greater political instability.⁶²¹

just citizens of developing states. Furthermore, this argument only takes climate change into account. The right to a clean and healthy environment addresses both climate change and localised pollution. An argument for the right must address both limbs of the threat to which it responds.

⁶¹⁸ Stern, n. 606, p. 6

⁶¹⁹ John Broome, "Discounting the Future", 23 *Philosophy and Public Affairs* 2, (1994), pp. 128-156

⁶²⁰ Emilio Padilla, "Intergenerational equity and sustainability", 41 *Ecological Economics* [2002], pp. 69-83

⁶²¹ Rosemary Rayfuse and Emily Crawford, "Climate Change, Sovereignty and Statehood", University of Sydney Legal Studies Research Paper 11/59 (2011)

The situation might be different if future generations could exercise market agency. For Broome, this would mean that the value assigned to finite assets like the environment would be higher.⁶²² Yet future generations cannot exercise market agency. Some have proposed that the interests of future generations should be represented by a tax.⁶²³ On Broome's view, however, that measure would require that we judge the present monetary value that future generations will place on the environment. Such a judgement would be arbitrary. Of course, compensation in law is often arbitrary. In this case, however, we have no indication of the preferences of future generations beyond the assumption that they would hope to survive. In practice, it would be almost impossible to coordinate such a tax among states. Individual states would have to administer the tax and it would be easy for states to negate its impact through tax cuts in other areas. Even if governments were to interfere in the market in favour of future generations in this way, their actions are therefore unlikely to be effective.⁶²⁴ Some other mechanism must be found.

What is important about protecting the interests of future generations?⁶²⁵ The earth is a finite resource. Future generations will have no option but to use the same earth

⁶²² Broome, n. 619, pp. 128-156

⁶²³ Ibid, pp. 128-156

⁶²⁴ Ibid, pp. 128-156

⁶²⁵ For Rawls, justice demands that we make provision for future generations (Rawls, n. 30, p. 291). In *A Theory of Justice*, Rawls justified this assertion from his "original position": If a rational individual did not know into what generation she would be born, but understood the concept of generations, she would make policy that took future generations into account. For Rawls, she would naturally be motivated to protect our descendants (Ibid, p. 301). Rawls later altered his argument. In *Political Liberalism* he maintained his claim that, in the original position, a rational person would choose a structure of society that protected future generations. But, instead of a natural motivation, he claims that one would reach that decision on a quasi-contractual calculation: past generations have cared for the present generation, therefore the present generation is obliged to care for future generations (John Rawls, *Political Liberalism*, (New York; Columbia University Press, 1993), p. 274). Brian Barry takes a similar position. For him, we owe a moral

that present generations use. In effect, we hold the earth on trust for future generations. Unlike a trust that takes effect in law, there is an imbalance of power. Future generations can't act to protect their interest. We must, therefore, remedy the imbalance of power with some other mechanism.

The Practice assumes that all humans have value. This means that all humans in the future will also have value. If future humans have value, then they are entitled to just treatment. The environment is fundamental to a wide range of human interests including, *inter alia*, food, shelter, communication, life and heritage. Yet future generations' enjoyment of the environment lies in the hands of the present generation. We have, therefore, an intergenerational responsibility to protect the environment. This makes the interest in protecting the environment urgent.

For Marglin, intergenerational justice should not be a factor in public policy debates.⁶²⁶ Marglin believes it is undemocratic to impose structures for the sole purpose of protecting the interests of future generations. It requires sacrificing the interests of those who are currently entitled to vote in favour of the interests of those who cannot yet do so.⁶²⁷ The case in favour of a human right is, however, inevitably a case for rejecting the will of the majority in certain situations. Rights are political presumptions intended to take effect, if necessary, against the will of the majority. The inclusion of arguments about intergenerational justice hasn't changed this, it has always been part of the Practice. The question is not "is this proposal compatible with respect for the will of the voting majority", but "is this interest of such importance that it justifies overriding the

duty to past generations, who have built the world from which we currently benefit (Quoted in Axel Gosseries, "Theories of intergenerational justice: a synopsis", 1 S.A.P.I.E.N.S. 1 (2008) online at <https://sapiens.revues.org/165>).

⁶²⁶ Stephen Marglin, "The Social Rate of Discount and the Optimal Rate of Investment", 77 Journal of Quarterly Economics (1963), p. 97

⁶²⁷ Ibid, p. 98

will of the majority?" Future generations must be able to experience a reasonably undamaged environment. Existing social structures do not sufficiently protect the interests of future generations. The interest in the environment should thus be considered both urgent and insufficiently protected by non-rights structures and mechanisms.

The importance of intergenerational justice has been recognised in judicial consideration of the right to a clean and healthy environment. In *Comunidad de Chanaral v Codelco Division El Salvador*⁶²⁸ the Chilean Supreme Court held that the constitutional right to a clean and healthy environment was owed to both current and future generations. The Supreme Court of the Philippines reached a similar conclusion in *Oposa v Factoran*.⁶²⁹ In that case, the applicant was allowed to bring a suit on behalf of several children, representing "future generations". The suit was successful and the Court ordered a moratorium on all logging in the Philippines. In *Carlos Roberto Meja Chacon contra el Ministerio de Salud y la Municipalidad de Santa Ana*⁶³⁰ the Costa Rican Constitutional Court ordered a municipal waste site to be closed based on a suit brought by a child himself. According to Costa Rican law, the applicant was too young to bring a suit in his own right. The court allowed it because it was based on the right to a clean and healthy environment and that right has an intergenerational dimension. In *Gray v Minister for Planning*, The New South Wales considered arguments regarding intergenerational equity when invalidating the approval process for an open cast mine.⁶³¹

⁶²⁸ *Comunidad de Chanaral v Codelco Division el Salvador* (1988) S/Recurso de Proteccion Corta Suprema

⁶²⁹ *Oposa v Factoran* (Philippines) Supreme Court of the Philippines G.R. No. 101083, 224 SCRA 792 (July 30, 1993), 33 I.L.M. 173 (1994)

⁶³⁰ *Carlos Roberto Meja Chacon contra el Ministerio de Salud y la Municipalidad de Santa Ana*, Sentencia No. 3705-93, July 30, 1993 (Sal Constitucional de la Corte Suprema de Justicia, Costa Rica)

⁶³¹ *Gray v Minister for Planning*, New South Wales Land and Environment Court [2006] NSWLEC 720

The Threat

The threat to the environment is caused by the actions of humans and transcends national borders. Ongoing and systematic damage to the environment, in any location, contributes to impacts transnationally. The threat cannot be addressed by the unilateral action of any individual state. Threats to the environment fall into two categories. The first, localised pollution, includes harm to the environment that has its primary impact on a definable geographical area. The causes of localized pollution are generally proximate to its impacts. The second, climate change, which includes impacts that cannot be specifically linked to corresponding local causes. Climate change is caused by the cumulative actions of multiple generations. It has a variety of harmful impacts. Yet it is not possible to link a specific cause to a specific impact. Emissions in one state don't specifically cause impacts in another. All states are partially responsible for all impacts of climate change, but no state is specifically responsible for any particular impact.

Causes

Local pollution is caused by a variety sources. Its primary causes are power plants, industrial plants and factories, and road traffic.⁶³² Coal-burning factories and power plants are the most significant cause.⁶³³ The discharge of chemicals, burning-off

⁶³² David Coady, Ian Parry, Louis Sears, Baoping Shang, "How Large Are Global energy Subsidies?" IMF Working Paper WP/15/105, (IMF, 2015), p. 11

⁶³³ Ibid, p. 11.

natural gas,⁶³⁴ and unanticipated emissions (such as oil spills) all cause damage to the local environment. Burning-off natural gas as a byproduct of oil extraction, for example, is the largest single source of air pollution in Nigeria.⁶³⁵ Localised pollution tends to have its primary impact on a definable geographic area. This does not mean, however, that it is confined within state borders. The area impacted may be within the borders of a single state but there is no necessary correlation between the geographical extent of the impact of an instance of localised pollution and political borders.

Although climate change is often the highest profile impact of damage to the environment, damage resulting from local pollution represents a significantly higher proportion of total damage to the environment.⁶³⁶ Local air pollution remains concentrated in the atmosphere for a relatively short time before it disperses. This means that the pollution remains in the atmosphere but is spread out over a wider area. Concentrations in any particular area are thus lower, but the polluting particles have not disappeared. Pollution caused by other emissions, such as chemicals, can remain in one place for hundreds of years.⁶³⁷

Climate change is caused by the concentration of greenhouse gasses in the atmosphere. The most common greenhouse gasses are Carbon Dioxide and Methane. These particles reflect heat. Heat from the sun is normally reflected from the earth's surface, back into space. When greenhouse gas particles collect in the earth's atmosphere in sufficient concentrations, they reflect the heat from the earth's surface back towards

⁶³⁴ Kravchenko and Bonine, n. 600, p. 581

⁶³⁵ Ibid, p. 581

⁶³⁶ Coady et al, n. 632, pp. 18-23

⁶³⁷ Graham Merrington, Linton Winder, R. Parkinson, Mark Redman, *Agricultural Pollution: Environmental Problems and Practical Solutions*, (London; CRC Press, 2003), p. 149

the earth. This prevents it from dispersing into outer space. This raises the temperature of the Earth and its atmosphere.⁶³⁸

The increase in greenhouse gasses in the Earth's atmosphere is man-made. It primarily results from industrial processes, such as the burning of fossil fuels.⁶³⁹ The United Nation's Intergovernmental Panel on Climate Change reports on the consensus amongst credible scientific research on climate change. The Panel's 2014 report was compiled by 235 writers, 38 review editors and 38 governments. The multi-stage review process involved 38315 comments and the final report includes nearly 10 000 references.⁶⁴⁰ The report concluded that there is a 95% probability that the burning of fossil fuels, as a result of human industrial activity, is responsible for abnormally high concentrations of greenhouse gasses in the Earth's atmosphere⁶⁴¹ as opposed to non-human factors.

Climate change and localised pollution may be analysed as separate aspects of the threat to the environment, but they are not separate threats. The emissions that cause localised pollution are the same as those that cause climate change. When localised emissions disperse, they remain in the atmosphere in lower concentrations. As more pollution disperses, these concentrations increase. The result of increased concentrations of greenhouse gasses emissions in the Earth's atmosphere is climate change. Climate

⁶³⁸ International Bar Association, Climate Change Justice and Human Rights Taskforce Report, *Achieving Justice and Human Rights in an Era of Climate Disruption*, (London; IBA, 2014), p. 40

⁶³⁹ 5 IPCC, *Climate Change 2013: The Physical Science Basis, Summary for Policymakers* (Cambridge; Cambridge University Press 2013), p. 15

⁶⁴⁰ 2 IPCC, *Climate Change 2014: Mitigation of Climate Change, Fact Sheet* (13 April 2014), at <http://mitigation2014.org/background>

⁶⁴¹ 5 IPCC, *Climate Change 2013: The Physical Science Basis, Summary for Policymakers* (Cambridge University Press 2013) 15

change is therefore best understood as the cumulative effect of localized emissions in the long term, on a global scale.

Impacts

The impacts⁶⁴² of damage to the environment have a tangible effect on individuals. They take effect regardless of location. Threats to the environment impact everywhere in the world, but these effects are indiscriminate with regards to political borders.⁶⁴³ Other types of local pollution have similar effects. Radiation from nuclear power generation causes serious health problems even in generations as yet unborn.⁶⁴⁴ Nuclear accidents have health impacts that can last hundreds of years.⁶⁴⁵ Waste disposal

⁶⁴² The impacts of threats to the environment are not without controversy. It is not my intention to engage with the “climate skepticism” debate to any significant extent. However, in order to avoid unnecessary controversy, I have selected sources that use the aggregate of a range of different studies (including those which are skeptical of the impact of environmental threats) in their analyses. Where this has not been possible I have only relied on the aspects of the sources cited that have not been subject to significant criticism.

⁶⁴³ For example, Local air pollution is estimated to be responsible for between 10% and 20% of all cases of cancer worldwide. The World Health Organisation estimates that air pollution accounts for or contributes to two million premature deaths every year, with half a million in India alone. Air pollution also causes chronic illnesses such as silicosis, WHO Factsheet, *Ambient (outdoor) air quality and health*, (WHO, 2014), available at <http://www.who.int/mediacentre/factsheets/fs313/en/>. Radiation from nuclear power generation causes serious health problems even in generations as yet unborn (C.f. *Faddeyeva v Russia*, ECHR, App No. 55723/00, ECHR 2005-IV (2007) 45 E.H.R.R. 10)

⁶⁴⁴ C.f. *Faddeyeva v Russia*, ECHR, App No. 55723/00, ECHR 2005-IV (2007) 45 E.H.R.R. 10

⁶⁴⁵ John P. Christodouleas, Robert D. Forrest, Christopher G. Ainsley, Zelig Tochner, Stephen M. Hahn and Eli Glatstein, M.D "Short Term and Long Term Health Risks of Nuclear Power Plant Accidents", N. Engl. J. Med. [2011], available at <http://www.nejm.org/doi/ref/10.1056/NEJMra1103676#t=references>

plants have been found to cause chronic health problems even when partially shut down.⁶⁴⁶ In one case, an improperly secured rubbish tip caused a buildup of methane gas, resulting in a fatal explosion.⁶⁴⁷ Local pollution also affects agriculture, for example, through soil pollution which impairs crop growth.⁶⁴⁸ It affects rivers through chemical runoff.⁶⁴⁹ It can even destroy or irreversibly alter entire native homelands, such as through oil spills or mines.⁶⁵⁰

The impacts of climate change are likely to increase exponentially. If greenhouse gas concentrations remain at their current levels (430 parts per million), there is a 20% chance that the Earth's surface temperature will rise by up to five degrees centigrade above pre-industrial levels by 2100.⁶⁵¹ If greenhouse gas emissions continue to rise then it is almost certain⁶⁵² that the Earth's surface temperature will rise by at least 3.7°C above 20th century levels by 2100.⁶⁵³ The rise in temperatures will not be evenly distributed. With a global average warming of 4°C, the polar regions will experience warming of around 8°C, tropical regions will experience warming of around 3°C, and middle latitudes will experience warming of around 5°C.⁶⁵⁴

⁶⁴⁶ C.f. *Lopez Ostra v Spain* ECHR, App No. 16798/90, Series A no. 303-C, (1995) 20 E.H.R.R. 277

⁶⁴⁷ C.f. *Oneryildiz v Turkey* ECHR (Grand Chamber) App No. 48939/99, ECHR 2004-XII, (2005) 41 E.H.R.R. 20

⁶⁴⁸ *Merrington et al*, n. 637, pp. 149-151

⁶⁴⁹ *Ibid*, pp. 149-151

⁶⁵⁰ C.f. *Social and Economic Rights Action Centre v Nigeria*, African Commission on Human and Peoples' rights Case No. ACHPR/Comm/A044/1, Decision Regarding Comm. No. 155/96 (2001)

⁶⁵¹ *Stern*, n. 606, p. 11

⁶⁵² Defined as "a 95%-100% probability", 7 IPCC, *Climate Change 2014: Mitigation of Climate Change, Summary for Policymakers* (13 April 2014) 8: <http://mitigation2014.org>, p. 17

⁶⁵³ 7 IPCC, *Climate Change 2014: Mitigation of Climate Change, Summary for Policymakers* (13 April 2014) 8: <http://mitigation2014.org>, p. 17

⁶⁵⁴ *Stern*, n. 606, p. 16

It is difficult to quantify the impacts of this rise because models cannot accurately account for all anthropogenic action. Yet it is possible to predict a range of impacts if no action is taken to mitigate greenhouse gas emissions. The sea has hitherto absorbed 84% of the additional heat trapped by greenhouse gasses,⁶⁵⁵ but this is not sustainable. Increased or sustained warming will lead to a predicted sea level rise of 9-88cm by 2100.⁶⁵⁶ As warming only penetrates the oceans slowly, sea levels will rise by significantly more over a longer period of time. Particularly dramatic rises will result from the melting or collapse of the Greenland and West Antarctic ice sheets.⁶⁵⁷ The rise in sea levels will threaten coastal cities and states. A rise of 1 meter, for example, will leave more than 20% of Bangladesh under water,⁶⁵⁸ Shanghai, New York, Tokyo and Amsterdam, among others, will also experience significant effects.⁶⁵⁹ The distribution of sea level rises will not be even. As sea levels rise in some locations, others will experience increased water scarcity. The area of land experiencing drought at any one time is likely to increase from 20% to 50% of the Earth's surface and the area experiencing extreme drought is likely to increase from 3% to 30% by 2090.⁶⁶⁰

Climate change increases extreme weather events. The frequency of hurricanes and typhoons assessed as category 4 or 5 (the top of the scale) has doubled since the 1970s, because of rising sea surface temperatures.⁶⁶¹ The UN High Commissioner for

⁶⁵⁵ Ibid, p. 15

⁶⁵⁶ Ibid, p. 18

⁶⁵⁷ Ibid, p. 18

⁶⁵⁸ Ibid, pp. I-xxvii

⁶⁵⁹ R. J. Nicholls, et al., working paper "Ranking Port Cities with High Exposure and Vulnerability to Climate Extremes: Exposure Estimates", *OECD Environment Working Papers*, No. 1, (Paris; OECD Publishing, 2008), pp. 23-26

DOI: <http://dx.doi.org/10.1787/011766488208>

⁶⁶⁰ Stern, n. 606, p. 18

⁶⁶¹ Ibid, p. 18

Human Rights and Climate Change predicts that other impacts of rising temperatures are likely to include heat waves, food shortages and increased morbidity from malnutrition, cardio-respiratory and infectious diseases, and injuries from extreme weather events.⁶⁶²

The report of the UN High Commissioner on the Relationship Between Human Rights and Climate Change found that climate change alone would compromise several existing rights. These include the rights to life, food, water and health.⁶⁶³ A relatively modest rise in sea levels could result in island nations such as Tuvalu entirely ceasing to exist. This would likely create a global refugee and political crisis as millions of displaced people seek a new place to live and the international political system struggles to address states that no longer have territory.⁶⁶⁴

A rise in the Earth's temperature will trigger phenomena that contribute to a further release of greenhouse gasses and thus a further rise in temperatures. These "feedback" effects may add an additional 1°C to 2°C degrees of warming by 2100.⁶⁶⁵ The most significant feedback effect would be the release of greenhouse gasses from "carbon sinks" such as permafrost and peat bogs. These are natural phenomenon that "store" carbon. Plants and trees remove carbon from the atmosphere through photosynthesis. When these organisms die, the carbon is released, generally through decomposition or burning. Carbon sinks, like permafrost and peat bogs, prevent the release of carbon through decomposition. Models that take into account the release of carbon sinks predict the release of an additional 20-200ppm of GHGs by 2100.⁶⁶⁶ Thawing permafrost has

⁶⁶² Annual Report of the UN High Commissioner for Human Rights on the Relationship Between Human Rights and Climate Change (Pillay Report), (15 January 2009), A/HRC/10/61

⁶⁶³ Pillay Report, n. 662, p. 14

⁶⁶⁴ Rayfuse and Crawford, n. 621, p. 14

⁶⁶⁵ Stern, n. 606, p. 11

⁶⁶⁶ Ibid, p. 12

already increased emissions in Siberia by 60% since the 1970s.⁶⁶⁷ Feedback effects also increase local pollution, as the release of gasses from carbon sinks swiftly increases the concentration of carbon in the surrounding air or water.⁶⁶⁸

In summary, threats to the environment have tangible impacts on individuals but these impact without regard to political borders. Furthermore, the causes can rarely be identified in any specific sense. However, there is almost no doubt that certain actions cause damage to the environment and certain impacts are the result of that damage. It is just not always possible to identify which specific actions directly cause which specific impacts. Yet this does not mean that the impacts are any less severe.

The Hayekian Perspective

The Hayekian perspective, hostile to the concept of solidarity rights, usefully illustrates the breadth of the interest in a clean and healthy environment. As in previous chapters, the Hayekian perspective is not endorsed in this chapter, but rather applied as an *argumentum a fortiori* exercise. Although Hayekian theory begins as actively hostile to the concept of solidarity rights, the case for the right to a clean and healthy

⁶⁶⁷ K.M. Walter, S.A. Zimov, J.p. Chanton, "Methane bubbling from Siberian thaw lakes as a positive feedback to climate warming", *Nature* 443 (2006), pp. 71-75

⁶⁶⁸ While scepticism about climate change and its impacts exists, this represents only 3% of climate scientists (see John Cook, Dana Nuccitelli, Sarah A Green, Mark Richardson, Bärbel Winkler, Rob Painting, Robert Way, Peter Jacobs and Andrew Skuce, "Quantifying the consensus on anthropogenic climate change in the scientific literature", 8 *Environ. Res. Lett.* 2, pp. 1-7), and their principal arguments have largely been debunked (see Stern, n. 606, p. 7). Indeed, even sceptics like Bjorn Lomborg, who argues that climate change is a real phenomenon but the costs of change make any attempt to address it untenable (see Bjorn Lomborg, *The Sceptical Environmentalist*, (Cambridge; Cambridge University Press, 2001)), represent only isolated voices. In view of the overwhelming consensus amongst climate scientists about the existence and impacts of climate change, I will not consider scepticism here.

environment can nevertheless be understood from that perspective. Threats to the environment are coercive. They impose costs on individuals without their consent or possibility of reparation. They directly harm individuals and damage economic growth. They therefore compromise the overriding objective of Hayekian political theory: limiting coercion. The market cannot regulate exchange between those who harm the environment and those who suffer that harm. Moreover, threats to the environment are actively facilitated by government intervention when governments provide subsidies to polluters.

Damage to the environment causes economic damage on a global scale. A rise in global temperatures of between 5°centigrade and 6° centigrade by 2100 is predicted to cause a 5% to 10% per cent loss to the global economy.⁶⁶⁹ In the UK floods in the year 2014-1015 caused a 0.1% drag on the UK economy. A rise in the global average temperature of between 3°C and 4°C by 2100 will increase the economic impact of flooding in the UK to a drag of around 0.4% of GDP per year.⁶⁷⁰ In 2003 Europe experienced heat waves that killed 35 000 people. It is predicted that, on current rates of warming, such heat waves will occur regularly by 2050.⁶⁷¹ Social scientists predict that the increased migration caused by climate change is likely to cause tensions that escalate into violent conflict. This will cause further economic and humanitarian damage on a global scale.⁶⁷²

The market is structurally ill suited to the task of minimising coercion from environmental threats. According to Friedman:

⁶⁶⁹ Stern, n. 606, pp. I-xxvii

⁶⁷⁰ Ibid, pp. I-xxvii

⁶⁷¹ Ibid, pp. i-xxvii

⁶⁷² Jon Barnett and W. Neil Adger, "Climate change, human security and violent conflict", 26 Political Geography [2007], pp. 639-655

"The man who pollutes the stream is in effect forcing others to exchange good water for bad. These others might be willing to make the exchange at a price. But it is not feasible for them, acting individually, to avoid the exchange or enforce appropriate compensation."

Environmental damage represents, in the words of Nicholas Stern, "a market failure on the greatest scale the world has ever seen".⁶⁷³ The market should facilitate the most efficient allocation of resources while minimising coercion.⁶⁷⁴ The market calculates the relative cost of an asset. A market actor calculates the benefits of taking a certain action against the costs of taking that action. If the former outweighs the latter, she will proceed.⁶⁷⁵ The price of an asset or action is the average of every market actor's decision about the relative costs and benefits. The market, however, cannot effectively assign the costs of environmental damage to the perpetrators. They are, instead, imposed on individuals who have had no benefit from the damage to the environment.⁶⁷⁶ This means that it is not necessary to weigh up the costs and benefits of damaging the environment.⁶⁷⁷ A market actor can damage the environment without having to bear the cost. The market thus fails to allocate the costs of damage to the environment with long-term fairness or efficiency.

The market, therefore, no longer allocates resources with minimal coercion. A market minimises coercion by ensuring that all market actors bear the cost or benefit of their actions. Every market choice is, thus, a free choice, individuals take action if the benefits outweigh the costs. Yet polluters impose costs on other market actors without

⁶⁷³ Stern, n. 606, p. 28

⁶⁷⁴ See, for example, Hayek, n. 339, pp. 22 - 53 and Friedman, n. 347, pp. 7 - 22

⁶⁷⁵ Hayek, n. 339, pp. 7/22

⁶⁷⁶ Francesco Bosello, Roberto Boson, Richard S. J. Tol, "Economy-wide estimates of the implications of climate change: Human Health", 58 *Ecological Economics* (2006), pp. 579-591

⁶⁷⁷ Stern, n. 606, p. 27

their consent and without having to pay them reparations. In relation to the environment, the market fails to provide “co-ordination without coercion”. Building a mine, for example, has numerous environmental impacts. It can cause subsidence in land around the mine or pollute local water sources. Burning coal extracted from the mine creates air pollution, which causes respiratory illnesses. The polluting particles remain in the atmosphere and contribute to climate change. Despite these multiple environmental impacts, only one market transaction has occurred. The land on which the mine is built is subject to the free market: the owner of the mine pays a market price for the land. When the mine owner’s actions (on his own land) impact beyond that land, the market cannot assign a price for those impacts, because the individuals who are subject to the impacts can’t avoid the exchange. Local landowners can’t refuse to have their lands subside. Local communities can’t avoid having their water polluted. Individuals can’t avoid breathing in the toxic particles in the air. The world can’t reject the impacts of climate change. The impacts of the mine can’t be avoided so it is impossible to extract a price for them. The mine owner can impose costs on others, and enjoy the consequent benefits to himself, without any incurring any cost. He has no incentive to voluntarily assume costs. The market alone cannot, therefore, regulate exchange in relation to environmental harm.

Furthermore, states actively intervene in the market to prevent it from properly assigning the costs of damage to the environment. The price mechanism is fundamental to the Hayekian market.⁶⁷⁸ The price of an asset contains information about the utility of the asset set against the cost of production.⁶⁷⁹ In the case of (environmentally harmful)

⁶⁷⁸ Friedman, n. 347, p. 50

⁶⁷⁹ Ibid, p. 52

fossil fuels, however, governments artificially alter the price of energy generated by paying subsidies to polluters.⁶⁸⁰

The efficient price of energy is indicated by (a) the basic costs of production and delivery added to (b) a Pigouvian tax (which represents the cost of the damage it causes to the environment) and (c) a consumption tax (representing the need for taxation on all assets to raise revenue).⁶⁸¹ This is not, however, the price paid by the consumer. Instead polluters benefit from subsidies that reduce both the basic cost of production and delivery (pre-tax subsidies) and the cost of damaging the environment (the post-tax subsidy). Total subsidies amount to over \$5 trillion per year,⁶⁸² representing more than 6% of global GDP.⁶⁸³ The largest subsidies are awarded to energy companies that extract and burn coal, but significant subsidies are also given to energy producers that extract and burn gas and oil.⁶⁸⁴

Even without the cost of environmental impacts, fossil fuel industries are not efficient enough to succeed in the modern economy. Pre-tax subsidies represent 11.1% of total global subsidies to polluters.⁶⁸⁵ This prevents the market operating effectively. Markets rely on a process of "creative destruction" to facilitate progress.⁶⁸⁶ Measures will succeed because sufficient demand exists that they can be profitably sold in a free market. When new technologies or methods of manufacture find a way of recreating the same benefits more cheaply (or consumers simply lose interest and begin to demand a

⁶⁸⁰ Coady, et al, n. 720, p. 40

⁶⁸¹ Ibid, p. 20

⁶⁸² Ibid, p. 6

⁶⁸³ Ibid, p. 6

⁶⁸⁴ Ibid, p. 6

⁶⁸⁵ Ibid, p. 21

⁶⁸⁶ Hayek, n. 339, p. 88

different measure) it will no longer be possible to make a profit using the old (less efficient/in demand) measure. When this happens, the measure dies out is replaced by the new, more efficient model.⁶⁸⁷ If fossil fuel based industries require a pre-tax subsidy, there is not sufficient demand for them to sell their products on the open market at a high enough profit to survive. For the price of their products to remain competitive, it must be artificially depressed by government intervention. In a functioning market, fossil fuel industries would be allowed to decline and be replaced with a more efficient alternative. The global pre-tax subsidy is preventing the process of creative destruction from facilitating technological and social progress.

Governments' failures to properly tax polluters mean that the cost of damage to the environment is imposed on those who didn't cause the pollution.⁶⁸⁸ Post-tax subsidies represent the increased cost that governments must assume due to the damage that polluters cause to the environment. The state or individuals must pay higher costs for healthcare, the impact on natural resources and numerous other externalities. This has wider knock on effects because it squeezes other areas of the economy.⁶⁸⁹ Government intervention is artificially shifting this cost away from polluters (who create the cost) onto innocent parties, who receive no compensation. This means that the price we pay for energy is not an accurate description of the actual cost of that energy: the price mechanism is not functioning, so the market cannot function.

⁶⁸⁷ Ibid, p. 89 Hayek uses the example of a beloved institution that has become a bar to progress. Although many individuals have a vested interest in that institution (either emotional or financial), if someone works out a way to perform the function of the institution more effectively, its demise must be accepted for the good of society as a whole. (See Hayek, n. 339, pp. 39 – 53)

⁶⁸⁸ Bosello and Boson, n. 676, pp. 579-591

⁶⁸⁹ Ibid, pp. 579-591

The majority of subsidies (75%) relate to domestic and localised pollution, the remainder relate to climate change.⁶⁹⁰ This means that there is an overwhelming Hayekian case for the right to a clean and healthy environment, even if it doesn't address climate change. Statistically speaking, developing states account for the majority of subsidies.⁶⁹¹ This, however, obscures the real source of the subsidies. The majority of production that uses energy from fossil fuels occurs in developing states, but the majority of consumption occurs in developed states.⁶⁹² This means that, while energy use is allocated to developing states on the balance sheet, that energy is actually being used for the benefit of developed states.⁶⁹³

Government subsidies are not limited to polluting industries. Subsidies to fossil fuel industries can, however, be distinguished from most other subsidies for two reasons. The first is that they facilitate actions that harm most individuals. Hayek and Friedman both accept that it may be necessary for governments to interfere in the free market in situations where interference will create a social benefit that the market cannot provide.⁶⁹⁴ In the case of environmental threats, governments intervene support industries that cause harm to the majority of individuals. The second reason is the scale of the intervention. Governments subsidise polluting industries on a global scale. It is not limited to any particular state or region, but takes effect in every part of the world. No other standard threat is so actively and directly facilitated by governments on an equivalent scale.

⁶⁹⁰ Coady et al, n. 632, p. 22

⁶⁹¹ Ibid, p. 23

⁶⁹² "European Union CO2 Emissions: Different Accounting Perspectives", European Environmental Agency Technical Report No. 20/2013, (2013), pp. 7-8

⁶⁹³ Cf. Ibid, pp. 7-8

⁶⁹⁴ See generally, Friedman, n. 406

This market failure makes environmental damage an important issue from a Hayekian perspective. Damage to the environment represents, in the first instance, a failure of the market to accurately assign costs and, in the second, an artificial intervention by governments to prevent the market functioning as it should. This is not merely a market failure, it is an active undermining of the free market, facilitating coercion on a global scale. Hayekian theories of social organisation are based on the premise that a free market will facilitate the efficient distribution of resources with the minimum amount of coercion. A market that is (a) incapable of properly assigning the cost of actions and (b) manipulated to artificially support an inefficient industry, is neither free nor functional. Hayekian political theory can therefore support a non-market mechanism for responding to threats to a clean and healthy environment.

Reasonable Effect

For an interest to be recognised as a right in the political approach, the rights mechanism must be reasonably effective in protecting that interest. In the case of the right to a clean and healthy environment, the effectiveness of the rights mechanism is demonstrated by its successful application at regional and national level. At regional level, the application of an explicit right to a clean and healthy environment is limited. Some tribunals have, however, applied a human rights approach to address the threat to the environment. At the domestic level, several states have recognised a justiciable constitutional right to a clean and healthy environment and this has been enforced by the courts. The application of environmental rights has been primarily focused on addressing localised pollution. The model offered by existing jurisprudence, however, offers an indication of how the right could also be applied to address climate change.

Regional

The right to a clean and healthy environment remains vague at the international level. Regional instruments and tribunals have been more proactive in recognising the right. Art. 28 of the African Charter recognises the right of all humans and peoples to "an environment favourable to their development".⁶⁹⁵ This right was applied in *Social and Economic Rights Action Centre v Nigeria*. In that case, the African Commission on Human and People's Rights relied *inter alia* on the Art. 28 right when awarding members of the Ogoni people substantial damages, after oil extraction in the Niger Delta exposed their homeland to air, water and soil pollution.⁶⁹⁶ The San Salvador Protocol to the Inter-American Declaration on Human Rights recognises a right to a clean and healthy environment.⁶⁹⁷ In the Yanomami Case,⁶⁹⁸ Brazil was found to have violated the right to a clean and healthy environment when it authorised the building of a road through the Yanomami people's traditional homeland.⁶⁹⁹

⁶⁹⁵ Banjul Charter, Art, 24

⁶⁹⁶ *Social and Economic Rights Action Centre v Nigeria*, African Commission on Human and Peoples' rights Case No. ACHPR/Comm/A044/1, Decision Regarding Comm. No. 155/96 (2001)

⁶⁹⁷ Art. 11, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 17th November, 1988, O.A.S. Treaty Series No. 69, Inter-Am. C.H.R., OAE/Ser.L.V/II.82 doc. 6 rev. 1 (1992) (San Salvador Protocol)

⁶⁹⁸ Resolution 12/85 [Yanomami case] Inter-American Commission on Human Rights IACHR Case 7615 (Brazil) (March 5, 1985), printed in Inter-Am, C.H.R., 1984-1985 Annual Report 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (Oct. 1, 1985)

⁶⁹⁹ Ibid

The European Convention on Human Rights does not contain a specific right to a clean and healthy environment. The Convention was drafted in 1950, before scientists understood the threat to the environment.⁷⁰⁰ Yet the European Court of Human Rights has noted the importance of the environment and sought to protect interests in a clean and healthy environment in the application of existing rights. The court has applied Art. 2 (the right to life) and Art. 8 (the right to private and family life) of the Convention to address environmental issues,⁷⁰¹ In *Lopez Ostra v Spain* the court found that the Art. 8 right had been violated when emissions from a sewage treatment plant caused health problems for the applicant and her children. The court found that the municipality had "general supervisory powers" which implied the responsibility regulate and limit pollution from the plant. The municipality had failed to respect this duty because it had not adequately followed its own environmental protection procedures.⁷⁰² In *Giacomelli v Italy* the local authority's failure to conduct an environmental impact assessment when granting permission for a waste treatment facility, as required by Italian law, amounted to a violation of the environmental duty implied into the Art. 8 right.⁷⁰³ The Court expanded its reasoning on Art. 8 and environmental issues in *Guerra v Italy*. It held that the Art. 8 right imposes a duty on the state to actively protect individuals from the impacts of pollution. That duty includes the obligation to *establish* procedures to ensure the environment is adequately protected and to follow them to a sufficiently rigorous

⁷⁰⁰ Ben Pontin, "Environmental Rights under the UK's 'Intermediate Constitution'" 17 Nat. Res. & Envir. 21 (2002), p. 21

⁷⁰¹ *Lopez Ostra v Spain*, ECHR, App No. 16798/90, Series A no. 303-C, (1995) 20 E.H.R.R. 277; *Giacomelli v Italy*, App. No. 59909/00, ECHR 2006, (2007) 45 E.H.R.R. 38, judgement of 2nd November 2006

⁷⁰² *Lopez Ostra v Spain*, ECHR, App No. 16798/90, Series A no. 303-C, (1995) 20 E.H.R.R. 277

⁷⁰³ *Giacomelli v Italy*, App. No. 59909/00, ECHR 2006, (2007) 45 E.H.R.R. 38, judgement of 2nd November 2006

degree.⁷⁰⁴ Nevertheless, it would be difficult to argue that the court has found a positive “right” to a clean and healthy environment. At best, it is a procedural right and only appears to exist when domestic law already provides for protection for the environment. While the court clearly sees a human rights dimension to environmental issues, it cannot go beyond the scope of the European Convention on Human Rights, which does not include a right to a clean and healthy environment.

The right to environment has not been successfully applied to respond to climate change at regional level. Nevertheless, the roots of an international jurisprudence exist. In the Inuit case, a group representing indigenous peoples of Alaska, Canada and Greenland⁷⁰⁵ petitioned the Inter-American Commission on Human Rights. They argued that the USA had violated their right to a clean and healthy environment. The petitioners submitted that climate change was causing irreversible damage to their indigenous environment and, as the largest emitter of greenhouse gasses, the USA should be considered responsible⁷⁰⁶ for the damage.

The Inuit petition has been described as a failure because the Inter-American Commission refused the petitioners’ request for a hearing.⁷⁰⁷ Yet it can equally be considered a first step on the road to a recognised right against climate change. The Commission refused to hear the petition “specifically [because] the information provided

⁷⁰⁴ *Guerra v Italy*, ECHR, App No. 14967/89, Reports of Judgements and Decisions 1998-I, (1998) 26 E.H.R.R. 357

⁷⁰⁵ This case demonstrates another variation on standing in the case of solidarity rights. The case was brought by an individual acting as a representative for a people which was geographically in three different states. The representative body for the people in question, the Inuit Circumpolar Conference supported the petitioner’s suit. Sheila Watt-Cloutier with the Support of the Inuit Circumpolar Conference, “Petition to the Inter-American Commission on Human Rights, (7th December 2005)

⁷⁰⁶ Sheila Watt-Cloutier with the Support of the Inuit Circumpolar Conference, “Petition to the Inter-American Commission on Human Rights, (7th December 2005)

⁷⁰⁷ Kravchenko and Bonine, n. 600, p. 60

does not enable us to determine whether the alleged facts would tend to characterise a violation of rights protected by the American Declaration".⁷⁰⁸ This choice of words leaves the door open to future petitions. These could be based on more detailed evidence concerning the role of the US in causing climate change or a more developed legal argument in favour of the justiciable effect of the San Salvador Protocol. In response to the Inuit petition, the Commission set in motion an enquiry into the links between human rights and climate change. In 2007 it invited the petitioners to make their case before the Commission informally. Although the Inuit case had only minimal juridical legal impact, it is therefore difficult to deny that it had a persuasive impact. It caused the Inter-American Commission to begin an investigation into the human rights impacts of climate change, won the petitioners a hearing on a global stage, and raised international awareness of the impacts of climate change.

National

National courts and legislatures have taken more significant steps towards recognising a justiciable right to a clean and healthy environment. More than 100 states recognise such a right in their constitutions, along with five US states: Hawaii, Illinois, Massachusetts, Montana⁷⁰⁹ and Pennsylvania.⁷¹⁰ The right has been construed in a more authoritative manner at national level than it has at regional or international level. It has been used as a basis for orders for specific performance and, in some cases, for courts to

⁷⁰⁸ Quoted in Ibid, p. 60

⁷⁰⁹ *Cape-France Enterprises v Estate of Peed*, Montana Supreme Court, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011 (Mont. 2001)

⁷¹⁰ Kravchenko and Bonine, n. 600, p. 68

overrule the decisions of legislatures and executives.⁷¹¹ National courts have enforced a duty on states to take measures to protect the environment, both in relation to their own citizens and to those outside their borders.

In *Montana Environmental Information Centre v Department of Environmental Quality*, the Montana Supreme Court enforced the inward-facing duty. It overturned the decision of the state legislature to amend the Clean Water Act 1995. The Court based its decision on the right to a clean and healthy environment in the Montana constitution. The Court held that the right to environment was a "fundamental" right. Any legislation with the potential to violate the right should be subject to "strict scrutiny".⁷¹² Based on this test, the proposed amendment, which would have permitted contamination of certain water sources, was struck down.⁷¹³ Regional decisions have used the environmental right to regulate executive or municipal action. The Montana Supreme Court construed the right as a presumption with a high level of authority. In the Environmental Information Centre case, the right trumped the decisions of both the executive and the legislature.

In Asia, environmental rights in national constitutions have imposed similar inward-facing duties. In *Shehla Zia v WAPDA*, the Supreme Court of Pakistan held that the use of power lines that had been found to cause cancer should be reviewed. It took the additional step of appointing an independent consultancy to review the policy.⁷¹⁴ In *Dhungel v Godawari Marble Industries* the Supreme Court of Nepal issued an order for

⁷¹¹ Ibid, p. 68

⁷¹² Described by Wex Legal Dictionary as, "a form of judicial review that courts use to determine the constitutionality of certain laws. To pass strict scrutiny, the legislature must have passed the law to further a "compelling governmental interest," and must have narrowly tailored the law to achieve that interest." Available at https://www.law.cornell.edu/wex/strict_scrutiny, (last checked 4th May 2016)

⁷¹³ *Montana Environmental Information Center v Dep't of Environmental Quality* (USA) Supreme Court of Montana 296 Mont. 207, 988 P.2d 1236 (1999)

⁷¹⁴ *Shehla Zia v WAPDA* (Pakistan), Supreme Court of Pakistan, P.L.D. 1994 S.C. 693

specific performance, based on the environment right. The court order mandated that the government enforce existing regulations on environmental impact assessments. It also required the government to enact further legislation aimed at protecting "our air, water and environment".⁷¹⁵ This decision was based on both the right to a clean and healthy environment recognised in Nepalese domestic law and Nepal's international obligations relating to the protection of the environment. In both decisions, the right to a clean and healthy environment was construed as a political presumption with the authority to mandate positive action on the part of the executive.

National courts have also found outward-facing duties in constitutional rights to a clean and healthy environment. In *Gray v Minister for Planning*, the New South Wales Land and Environment Court invalidated the executive's grant of approval for an open cast mine. The Court found that the environmental impact assessment had been incomplete. The assessment included the emissions and other environmental destruction associated with the building of the mine, but omitted the emissions resulting from burning of the coal that the mine was intended to extract. The court held that, based on the seriousness of anthropogenic climate change, which engaged issues of human rights, approval for the mine should be invalidated. It ordered a new environmental impact assessment, taking into account the "downstream" emissions, be submitted for public consultation.⁷¹⁶

This decision undercuts critics who argue that climate policy, being a political problem, should be undertaken by political rather than legal fora.⁷¹⁷ The New South

⁷¹⁵ *Dhungel v Godawari Marble Industries*, Supreme Court of Nepal (Full Bench), WP 35/1992 (31 October 1995)

⁷¹⁶ *Gray v Minister for Planning*, New South Wales Land and Environment Court [2006] NSWLEC 720

⁷¹⁷ Such as Shubhankar Dam and Vivek Tewary, "Is a 'Polluted' Constitution Worse Than a Polluted Environment?", 17 J. of Env'tl. L. 383 (2005)

Wales court did not replace the political process with the right to a clean and healthy environment. It simply ensured that the process was conducted in a manner that properly respected the importance of the interest in preserving the environment. The most significant aspect of the ruling is that, in considering both upstream and downstream impacts of the mine in question, it construed the environmental interest in both a local and a global sense. The case, moreover, represents the first human rights based response to climate change in a developed state.

The case of *Gbemre v Shell Petroleum* directly addresses climate change. The High Court of Nigeria found that the practice of "gas flaring" (burning off gas released during the process of drilling for oil) contributed to climate change. Climate change was damaging the applicant's homeland,⁷¹⁸ so Shell and Nigeria were held, in part, responsible for the damage. Gbemre relied on Art. 24 of the African Convention. The Court found that the Nigerian government had not followed proper procedures in authorising the practice of gas flaring. The court ordered that the process of authorisation for the licence to extract gas be repeated with the proper impact assessments taken into account, and that gas flaring stop completely.⁷¹⁹ This suggests that the violation in question did not lie only in the failure to follow correct procedure, as it would if the right to a clean and healthy environment were a purely procedural right, but in the act of authorisation itself. The court thus applied the Art. 28 right as a substantive right against climate change. This is significant because it shows that the right to a clean and healthy environment can be used in court to respond to climate change directly.

⁷¹⁸ *Jonah Gbemre v Shell Petroleum* (Nigeria), Federal High court of Nigeria. Benin Judicial Division, 14th Day of November 2005, Suit No. FHC/B/CS/153/05

⁷¹⁹ Ibid

What would a duty to address climate change look like?

The Ogoni case notwithstanding, the right to a clean and healthy environment generally only addresses localised emissions. Climate change is the result of the accumulation of localised emissions.⁷²⁰ By creating a duty for governments to protect individuals from the impacts of localised pollution, the right to a clean and healthy environment already indirectly protects the rest of the world from the cumulative effects of those emissions.

Opponents of a right that addresses climate change argue that it is not possible to identify a clear harm, violation and victim in the case of climate change.⁷²¹ This means that the right, if recognised, could never be enforced. The emission of a tonne of CO₂ in the UK cannot be directly attributed to the melting of a particular iceberg, the contraction of a particular case of respiratory disease or any other specifically identifiable "harm" from climate change.⁷²² It is only possible to say that it contributes to a general rising temperature that, in turn, has general effects including melting ice bergs, and respiratory diseases. For opponents of the right, it would not be possible to prove in court that a particular applicant has suffered a particular harm caused by a particular violation on the part of the defendant.

This argument, however, misrepresents the nature of human rights. Recognising a human right and creating a cause of action can two different acts. Human rights impose duties on states. When a state fails in its first-level duty, other states may intervene to rectify the failure. Human rights are thus primarily enforced between states. States may,

⁷²⁰ Stern, n. 606, p. 4

⁷²¹ International Bar Association, Climate Change Justice and Human Rights Taskforce Report, *Achieving Justice and Human Rights in an Era of Climate Disruption*, (London; IBA, 2014), p. 40

⁷²² Stern, n. 606, p. 28

in part, respect their second-level duties by creating causes of action with respect to certain rights at international level. As shown in Chapter Six, action in the International Court of Justice can be based on the right to self-determination. A state may partially respect its first-level duty by passing laws that create domestic causes of action. In English law, the tort of nuisance helps fulfil the UK government's duty to protect the right to privacy and family life, while the criminal prohibition of murder is essential to fulfilling a government's duty to protect the right to life. These are, however, examples of the *respect* of the first-level duty, they are not the *right* itself. Justiciability at domestic level is thus not necessary for the recognition of a right addressing climate change. It is sufficient that it imposes first-level duties and, if a state fails to respect these duties, the international community can intervene. The above discussion of the application of environmental rights at regional and national level demonstrates that the right to a clean and healthy environment can impose first-level duties in relation to climate change.

Nevertheless, it is possible to envisage a right to a clean and healthy environment that addresses climate change and can be enforced by the international community by creating a cause of action for individuals in international (and, if necessary, domestic) courts. The right will impose a first-level duty on states to reduce their contribution to climate change to a reasonable extent. The precise extent can be ascertained by considering the state specific targets in various international climate change agreements. If a state fails in this duty it will be the second-level duty of the international community to intervene. The international community can partially respect this second-level duty by creating a cause of action, based on the right, at an international level. Any state which fails in its first-level duty will be liable to a suit from any individual who can prove that they have suffered a loss due to climate change. The duty will be both inward-facing and outward-facing. States will be vulnerable to litigation from citizens of other states. The

extent of the defendant state's liability for the harm will be calculated based on the extent of its contribution to climate change, balanced against the extent of the measures it has undertaken to respect the first-level duty. If individuals from Tuvalu, for example, bring a suit against the USA, then the court will consider the measures that the USA has taken to reduce its emissions. If the court decides that the USA has taken measures that are sufficient to reduce its contribution to climate change to a reasonable extent (such as reducing its emissions of greenhouse gasses to the extent prescribed by the state specific targets in the Paris treaty) then the suit will fail. If the court decides that the USA has not taken reasonable measures, then it will take the USA's long history of emissions into account when awarding damages.

This will make the richest states most vulnerable to suits, even if they were not the biggest contributors to climate change. Claimants will likely prefer to sue rich states because they have greater resources to pay damages. This will have a positive effect. It will mean that the states with the most resources have the greatest incentive to take measures to address climate change. This will mean that the interest that the right protects, a clean and healthy environment, is more likely to be protected.

Most governments have agreed to take measures to combat climate change. Yet many of these agreements are non-binding. Governments argue that they should not have to live up to their existing obligations because other states (generally developing states) are responsible for more emissions and thus make a greater contribution to climate change than they do.⁷²³ Developing states argue that the industrialised states have historically made a greater contribution to climate change so should cut their emissions first.⁷²⁴ This would allow developing states a greater share of the "carbon budget" to

⁷²³ A Chayes and A. H. Chayes, "On Compliance", 47 *International Organisation* 2 (1993), pp. 175-205

⁷²⁴ *Ibid*, pp. 175-205

facilitate their own development.⁷²⁵ This creates a vicious cycle with each state demanding that someone else "goes first". The result is that, despite recognising the action necessary to combat climate change, states have little incentive to be the first to take the necessary action. No one fulfils his or her obligations so no one else has an obligation to do so either. This means that emissions continue to increase and permanent climate change (and its fundamentally destructive consequences) becomes ever more likely.

Unlike multi-lateral climate treaties, rights address process as well as outcome and the duty for which they provide is both non-reciprocal and owed to individuals, not other states. As the court in *Gray* found, it didn't matter that the mine in question would make a relatively small impact compared to the full extent of climate change, the right to environment was violated because the government did not take it into account when conducting their environmental impact assessment.⁷²⁶ A right to environment that included protection from climate change would allow individuals to demand that their governments fulfilled the obligations, to which they have already agreed, about climate change regardless of what other states are doing.

Conclusion

The right to a clean and healthy environment is not yet recognised as a justiciable right at international level. Some scholars and organisations are sceptical about the case for recognising a right. Yet it nevertheless meets the criteria for recognition as a right

⁷²⁵ Padilla, n. 620 pp. 69-83

⁷²⁶ *Gray v Minister for Planning*, New South Wales Land and Environment Court [2006] NSWLEC 720

according to the political approach. The interest that the right protects is urgent because we, collectively and as individuals, have a responsibility to future generations. In effect, we hold the environment on trust for future generations. The environment faces a standard threat in the form of localised pollution and climate change. This threat is entirely caused by humans and can be addressed by human action. It is also transnational and, as such, no state can address the threat with unilateral action. Even from the perspective of Hayekian theory, opposed to the concept of solidarity rights, the fact that polluting and contributing to climate change amounts to coercion (in that it imposes costs on others that they have no choice but to accept and for which they are not compensated) demonstrates the urgency of the interest. This interest cannot be protected by the market. The human rights mechanism, however, is reasonably effective at protecting the environmental interest, as demonstrated by its effective application at regional and national level. In this sense, the right to a clean and healthy environment is enforced by individuals but experienced in a collective context and imposes duties on states to protect and provide for a clean and healthy environment. It therefore seems reasonable to conclude that the political approach supports the recognition of the right to a clean and healthy environment.

CHAPTER EIGHT: RIGHT TO PEACE

This chapter will examine whether the right to peace meets the Beitz criteria, of protecting an urgent interest, from a standard threat, to reasonable effect.⁷²⁷ In contrast to the rights considered in the previous two chapters, the right to peace does not, in my view, meet the Beitz criteria.

The right was first recognised in the UN Declaration on the Preparation of Societies for a Life in Peace in 1978⁷²⁸ and the Declaration on the Peoples' Right to Peace in 1984.⁷²⁹ These recognised that peace was a desirable goal, without justiciable effect. Since 1984, the right to peace has been the subject of a number of UN instruments, culminating in a three-year intergovernmental working group between 2013 and 2015,⁷³⁰ and a new Declaration on the Right to Peace.⁷³¹ This was approved by the General Assembly in 2017 ("the 2017 Declaration").⁷³²

The right to peace has proved controversial at the United Nations.⁷³³ While the 1984 Declaration espoused principles that were broadly accepted in the international community,⁷³⁴ that consensus does not extend to later iterations of the right to peace.⁷³⁵ The debate reflects a

⁷²⁷ Beitz, n. 5, p. 110

⁷²⁸ UN General Assembly, Declaration on the Preparation of Societies for a Life in Peace, 15th December 1978, A/RES/33/73 (the "1978 Declaration")

⁷²⁹ UN General Assembly, Declaration on the Right of Peoples to Peace, (12th November 1984), A/RES/39/11

⁷³⁰ Human Rights Council, Report of the Open-ended Inter-Governmental Working Group on the Draft United Nations Declaration on the Right to Peace, (2013) A/HRC/WG.13/1/2 (the "Working Group")

⁷³¹ UN General Assembly, Declaration on the Right to Peace, (2nd February 2017), A/RES/71/189

⁷³² Ibid.

⁷³³ Rosa Freedman and Philipp Lottholz, "Peace as a hybrid human right: A new way to realise human rights or entrenching their systematic failure?" in Nicolas Lemay-Herbert and Rosa Freedman (eds.), *Hybridity: Law, Culture, and Development*, (Oxford; Routledge, 2017), pp. 38-39

⁷³⁴ Ibid., pp. 38-39

⁷³⁵ Ibid., p. 46

clash of human rights ideologies.⁷³⁶ The later iterations of the right, which are mainly supported by states in the Global South,⁷³⁷ include a broad range of social entitlements, well beyond the 1984 Declaration's original focus on war and violence.⁷³⁸ They are therefore in tension with the human rights ideology espoused by states in the Global North,⁷³⁹ which values clearly identifiable and enforceable duties.⁷⁴⁰

The content of the right has changed since it was first expressed in the 1984 Declaration.⁷⁴¹ In that instrument "peace" was construed as purely the absence of physical violence.⁷⁴² In the intervening time the focus of the right has switched, from limiting war and violence, to addressing social and economic entitlements which purport to "create the conditions for peace".⁷⁴³

This chapter will first consider the nature of "peace", as it is construed in the right to peace at the international level (the "international expression"). It will argue that, while "peace" was originally construed as the absence of violence, it is now expressed as a bundle of social entitlements with limited focus on violence. This contrasts with its construction at national and regional levels, where violence remains central to the nature of the right. It will then turn to the Beitz criteria.

⁷³⁶ Ibid., p. 46

⁷³⁷ Ibid. pp. 46-7

⁷³⁸ Ibid., p. 46

⁷³⁹ Ibid, pp. 46-7

⁷⁴⁰ Ibid., pp. 46-7; States from the Global North have opposed the development of the right to peace in the Human Rights Council at every stage. This position arguably has as much to do with a concern for opening up the floodgates for a raft of ill-defined pseudo rights as it does with the specific deficiencies of the proposed right to peace. Western States are concerned that increasing the number of human rights, particularly with new rights that lack clear definitions, will dilute the authority of human rights as a normative structure. See Rosa Freedman, "Third Generation Rights: Is There Room for Hybrid Constructs Within International Human Rights Law?" [2013] 2 CJICL 4

⁷⁴¹ Ibid, pp. 45-49

⁷⁴² See discussion below at pp. 231-232

⁷⁴³ Freedman, n. 733, p. 48

The interest in peace, in the international expression, cannot, in my view, be considered urgent. The 2017 Declaration refers to a number of discrete interests that may be considered urgent in their own right. No urgency, however, exists at the level of the interest in “peace” itself. By contrast, a construction of the right in which “peace” is construed as the absence of violence, may be considered urgent. The constitutional jurisprudence of Japan⁷⁴⁴ and Costa Rica,⁷⁴⁵ and in the African Charter of Human and People’s Rights (“the Banjul Charter”)⁷⁴⁶ recognise a right to peace. Yet these focus on inter-state violence. The urgent interest in peace is an interest in the limitation of all forms of violence. The national-level construction of the right thus represents only a part of the interest.

Similarly, there is no standard threat to the interest in peace that exists at the level of “peace” in the international expression. If peace is construed as the absence of violence, however, the threat of globalised violence can be considered a standard threat to peace. Finally, the rights mechanism cannot be reasonably effective at protecting the interest in peace in the international expression. In encompassing too broad a range of entitlements and obligations, the international expression of the right to peace has little practical impact. By contrast, the national construction of the right is capable of protecting the interest in peace, construed solely in relation to inter-state violence, as demonstrated by its effective application in Japan and Costa Rica.⁷⁴⁷ This, however, fails to address the interest in peace beyond the sub-section of inter-state

⁷⁴⁴ See Hudson Hamilton, “Mori v Japan: The Nagoya High Court Recognises the Right to Live in Peace”, 19 *Pacific Rim Law and Policy Journal* 3, pp. 549-563

⁷⁴⁵ See Ethan Katz and Matthew Lackey, “Costa Rica as a Peaceful State: One Costa Rican Lawyer’s Odyssey v His Nation’s Establishment, Council on Hemispheric Affairs, 19th March 2010, available at <http://www.coha.org/archives/2885> (last accessed 12th July 2017)

⁷⁴⁶ Organisation of African Unity, African Charter on Human and Peoples’ Rights (“Banjul Charter”), (1981) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 23

⁷⁴⁷ See Katz and Lackey, n. 19 and Hamilton, n. 18

violence. Common points of critique of the right to peace, as construed at international level,⁷⁴⁸ do not apply to a right to peace if peace is construed purely as the absence of violence.

What is “peace”

When the right to peace was first expressed in 1978,⁷⁴⁹ “peace” was construed as the absence of violence. “Peace” is now presented as a bundle of obligations, aimed at creating an environment in which “peace” can flourish through enabling the fulfilment of other human rights.⁷⁵⁰

This evolution has progressed in three stages. In the first stage, between 1978 and 1997, peace was construed simply as the absence of war. In the second stage, between 1997 and 2015, expressions of the right referred to a wide range of interests and duties. These addressed war and violence but also included a variety of economic and social entitlements. In the third stage, exemplified by the 2017 Declaration,⁷⁵¹ the range of interests is more limited than the second stage, yet they are expressed in more general terms. There is no longer any reference to violence in the operative clauses.

⁷⁴⁸ See, for example, EU letter to the IGWG, 15th February 2013, and US letter to the IGWG, 18th February 2013, both available at

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGRightPeace/StatesGeneralComments.pdf>

(last accessed 12th July 2017)

⁷⁴⁹ The 1978 Declaration, n. 728

⁷⁵⁰ Ibid., p. 46-7

⁷⁵¹ UN General Assembly, Declaration on the Right to Peace, (2nd February 2017), A/RES/71/189

The first stage: Peace as the absence of war

The right to peace was first expressed at the international level in the 1978 Declaration on the Preparation of Societies for a Life in Peace.⁷⁵² This was followed by the General Assembly Declaration on the Right to Peace in 1984 (“the 1984 Declaration”).⁷⁵³ In this instrument, “peace” is presented as the absence of war. The preamble states that the purpose of recognising the right is to eliminate war between states.⁷⁵⁴ Its operative clauses recognise the “sacred” right to peace,⁷⁵⁵ assign duties to states to refrain from war and violence,⁷⁵⁶ and condemn these as tools of international relations.⁷⁵⁷ The tone of the Declaration is exemplified in its third article, which:

“Emphasizes that ensuring the exercise of the right of peoples to peace demands that the policies of States be directed towards the elimination of the threat of war, particularly nuclear war, the renunciation of the use of force in international relations and the settlement of international disputes by peaceful means on the basis of the Charter of the United Nations;”⁷⁵⁸

⁷⁵² UN General Assembly, Declaration on the Preparation of Societies for a Life in Peace, 15th December 1978, A/RES/33/73

⁷⁵³ UN General Assembly, Declaration on the Right of Peoples to Peace, (12th November 1984), A/RES/39/11

⁷⁵⁴ Ibid., Preamble

⁷⁵⁵ Ibid., Art. 1

⁷⁵⁶ Ibid., Art. 3

⁷⁵⁷ Ibid., Art. 3

⁷⁵⁸ Ibid., Art. 3

The Second Stage: A Right to Rights

The second stage of the right's development began with the Oslo Draft Declaration in 1997 ("the Oslo Draft").⁷⁵⁹ The Oslo Draft includes references to violence in a manner similar to the first stage instruments.⁷⁶⁰ It also introduces additional interests and duties under the overarching banner of "peace".⁷⁶¹ The first article is focussed entirely on violence:

"Every human being has the right to peace, which is inherent in the dignity of the human person. War and all other armed conflicts, violence in all its forms and whatever its origin, and insecurity also, are intrinsically incompatible with the human right to peace;"⁷⁶²

The second and third articles depart from the pattern established in 1984. Article 2 provides that that peace must be actively "maintained" and "constructed".⁷⁶³ This can be achieved by preventing violations of human rights and through addressing "inequalities,

⁷⁵⁹ Oslo Draft Declaration on the Right to Peace, in UNESCO, "Report by the Director General on the Human Right to Peace", (29th October 1997), UN Doc 29 C/59, (the "Oslo Draft"), Annex II

⁷⁶⁰ Ibid., Art. 1

⁷⁶¹ Ibid., Arts. 2 and 3

⁷⁶² Ibid., Art. 1

⁷⁶³ Ibid., Art. 2

exclusion, and poverty”.⁷⁶⁴ The Declaration suggests addressing these harms through working towards “social justice”⁷⁶⁵ and “sustainable human development”.⁷⁶⁶ “Peace” is thus construed an entitlement to respect for *other* human rights and a general guarantee of social justice and development.⁷⁶⁷ This is a broader, and more general, collection of duties than those expressed in the 1984 Declaration.⁷⁶⁸

Article 3 of the Oslo Draft mandates a “culture of peace”.⁷⁶⁹ The Draft indicates that this requires “recognition and respect for - and the daily practice of - a set of ethical values and democratic ideals which are based on the intellectual and moral solidarity of humanity;”.⁷⁷⁰ This broadens the scope of the right. Both the second and third articles of the Oslo Draft thus represent a broadening of the scope of the right to peace.

Subsequent international instruments reflected this broad interpretation. The Human Rights Council’s 2002⁷⁷¹ and 2005⁷⁷² Resolutions on the Right to Peace both echo the construction of peace in the Oslo Draft.⁷⁷³ The operative clauses of the 2002 Resolution remain focussed on limiting violence. In this they are closer to the 1984

⁷⁶⁴ Ibid., Art. 2

⁷⁶⁵ Ibid., Art. 3

⁷⁶⁶ Ibid., Art. 3

⁷⁶⁷ Freedman, n. 733, pp. 46-49

⁷⁶⁸ 1984 Declaration, n. 729

⁷⁶⁹ The Oslo Draft, n. 759, Art. 3

⁷⁷⁰ Ibid., Art. 3

⁷⁷¹ Commission on Human Rights, Resolution on the Promotion of the right of peoples to peace, (2002), UN Doc 2002/71 (the “2002 Resolution”)

⁷⁷² Commission on Human Rights, Resolution on the Promotion of peace as a vital requirement for the full enjoyment of human rights by all, (2005), UN Doc 2005/56 (the “2005 Resolution”)

⁷⁷³ The Oslo Draft, n. 759

Declaration⁷⁷⁴ than the Oslo Draft.⁷⁷⁵ Yet, while framed in the language of the right to peace, the 2002⁷⁷⁶ and 2005⁷⁷⁷ Resolutions propose duties seem to relate more closely to a range of interests recognised in other rights, such as the right to development.⁷⁷⁸ The preamble of the 2002 Resolution recommends that states embrace disarmament and use the money saved to narrow the gap between developed and developing states,⁷⁷⁹ while the preamble of the 2005 Resolution urges states to address global inequality.⁷⁸⁰

The proceedings of the Intergovernmental Working Group on the Right to Peace⁷⁸¹ represent a further turn away from the first stage expression of the right.⁷⁸² Meeting between 2013 and 2015, the working group produced a series of draft declarations that broaden the scope of the proposed right beyond even the Oslo Draft.⁷⁸³ The Advisory Committee's 2013 report, recommends provisions on "disarmament",⁷⁸⁴ but also "human security",⁷⁸⁵ "resistance to oppression",⁷⁸⁶ and a right to conscientious objection.⁷⁸⁷

⁷⁷⁴ 1984 Declaration, n. 729

⁷⁷⁵ Oslo Draft, n. 759

⁷⁷⁶ 2002 Resolution, n. 771

⁷⁷⁷ 2005 Resolution, n. 772

⁷⁷⁸ Contained in, *inter alia*, UN General Assembly, Declaration on the Right to Development, (1986), A/RES/41/128

⁷⁷⁹ 2002 Resolution, n. 771, Preamble

⁷⁸⁰ 2005 Resolution, n. 772, Preamble

⁷⁸¹ See the Working Group, n. 730

⁷⁸² Ibid.

⁷⁸³ See Ibid.

⁷⁸⁴ Ibid., p. 10

⁷⁸⁵ Ibid., p. 9

⁷⁸⁶ Ibid., pp. 11-12

⁷⁸⁷ Ibid., p. 11; The preamble to the UNESCO constitution states that "since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed." (UN Educational, Scientific

The Third Stage: A Bundle of General Obligations

The third stage of the development of the right to peace is encompassed in the 2017 Declaration.⁷⁸⁸ This does not refer to violence in its operative clauses.⁷⁸⁹ There are no obligations imposed in respect of war or violence and the preamble does not indicate that the right to peace is intended to limit war or violence.⁷⁹⁰ Duties to refrain from the

and Cultural Organisation (UNESCO), *Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO)*, 16 November 1945, Preamble) On this foundation, UNESCO has built its argument for “peace education”, a series of “teaching encounters” that focus on drawing out a desire for peace, non-violent methods for managing conflict, and analysis of structural inequalities. (Ian Harris and Jon Synott, “Peace Education for the New Century”, 21 *Social Alternatives* 1, pp. 3-6) Peace education is therefore a broad concept, addressing violence but also social, cultural, and political injustice. A number of UN instruments on the right to peace reference peace education. Yet a right to peace education (if such a thing exists) is not a right to peace *per se*. While peace education is, at least in the opinion of UNESCO, an important strategy for promoting peace, it is clearly a means to an end, not an end in itself. It is also broadly defined, encompassing violence, but also a range of other social goals. Peace education could, therefore, form part of a right that in which “peace” is construed purely as the absence of violence. Yet it could also form part of a right defined on much broader terms. Therefore, while it is mentioned in several iterations of the right to peace, the inclusion of peace education offers relatively little indication of the evolving construction of the right to peace.

⁷⁸⁸ The 2017 Declaration, n. 731

⁷⁸⁹ 2017 Declaration, n. 731, Preamble; It makes references to the undesirability of war but these are, respectively, in reference to the purpose of the United Nations and the desirability of peace education.

⁷⁹⁰ While the preamble acknowledges the general undesirability war, such language is common to a number of UN instruments (beyond those which address the right to peace) and so does not serve to distinguish the right to peace in any meaningful manner.

use or threat of violence, included in both first⁷⁹¹ and second⁷⁹² stage iterations of the right, are no longer present.

The interests addressed in the 2017 Declaration's⁷⁹³ operative clauses are expressed in general language. Article 1 describes "enjoying peace" as a state in which "all human rights are protected and promoted and development is fully realised".⁷⁹⁴ On this definition, it is difficult to see which interests would fail to fall within the concept of "peace". The second article includes obligations to promote equality, non-discrimination, the rule of law, and freedom from fear and want.⁷⁹⁵ The fourth article mandates that the University for Peace should "contribute to the great universal task of educating for peace by engaging in teaching, research, post-graduate training and dissemination of knowledge."⁷⁹⁶ The 2017 Declaration thus construes peace as a bundle of broad obligations.

Alternative expressions of the right to peace

At both national and regional levels, the right to peace is expressed in a manner that accords more closely with the first stage of its development at international level, focusing on limiting inter-state violence.⁷⁹⁷ In Costa Rica, the abolition of the army was enshrined in Article 12 of the state's constitution in 1948.⁷⁹⁸ The Costa Rican supreme court has interpreted this

⁷⁹¹ Such as in Art. 4 of the 1984 Declaration, n. 729

⁷⁹² Such as in Art. 1 of the Oslo Draft, n. 759

⁷⁹³ 2017 Declaration, n. 731

⁷⁹⁴ Ibid., Art. 1

⁷⁹⁵ Ibid., Art. 2

⁷⁹⁶ Ibid., Art. 4

⁷⁹⁷ See, for example, Art. 4 of the 1984 Declaration, n. 729

⁷⁹⁸ Constitution of Costa Rica, (1949), Art. 12

provision, when read with Costa Rica's international law obligations creating a constitutional right to peace.⁷⁹⁹

It is clear that, in the Costa Rican construction of the right, "peace" relates to limiting inter-state violence. The court based its finding of the right to peace on the constitutional abolition of the army and public international law norms that prohibit violence in international relations.⁸⁰⁰ It has been applied entirely in the context of inter-state violence, first in relation to the second Iraq war,⁸⁰¹ and then to constrain the potential development of nuclear weapons (even though these would not have been developed in Costa Rica itself).⁸⁰²

In Japan, Article 9 of the constitution renounces war and violence as a tools for international relations.⁸⁰³ It bans military forces completely and prohibits recognition of the "right of belligerence".⁸⁰⁴ This goes further than Costa Rica, which leaves space for the creation of an army if circumstances so demand.⁸⁰⁵ The Japanese right to peace was held to be a "concrete right",⁸⁰⁶ one that may be directly enforced by citizens, in a series of cases in Japan's regional courts.⁸⁰⁷ As with Costa Rica, this is clearly a right that is aimed at inter-state violence, imposing an obligation to refrain from the promotion of war or violence.

At regional level, Latin American states have led the promotion of a right to peace.⁸⁰⁸ Peace is, for many, an important norm of national culture.⁸⁰⁹ Latin American states, through their

⁷⁹⁹ See Katz Lackey, n. 745

⁸⁰⁰ Ibid.

⁸⁰¹ Ibid.

⁸⁰² Ibid.

⁸⁰³ Constitution of Japan, (1946), Art. 9

⁸⁰⁴ Constitution of Japan, n. 803

⁸⁰⁵ Constitution of Costa Rica, n. 798, Art. 12

⁸⁰⁶ See Hamilton, n. 744, pp. 549-563

⁸⁰⁷ Ibid., pp. 549-563

⁸⁰⁸ Freedman, n. 733, p. 49

⁸⁰⁹ Ibid, p. 49

UN group GRULAC,⁸¹⁰ have been prominent supporters of the right to peace in the Human Rights Council.⁸¹¹ The most explicit expression of the right to peace at regional level, though, is found in Article 23 of the African Charter on Human and Peoples' Rights (the Banjul Charter).⁸¹² This is also focused on inter-state violence. Article 23 frames "peace" as a corollary of "security", and both concepts are framed in the context of relations between states.⁸¹³ The expression of the right to peace at state and international levels thus offers a different, and more tightly focused, conception of "peace" than that found at international level.

Urgency

In Beitz's model, an interest must be sufficiently urgent if it is to be considered a right.⁸¹⁴ In my view, the interest in peace, in the international expression, does not meet this standard. A more compelling case can be made, however, for the urgency of the interest in peace if "peace" is construed solely as the absence of violence.

⁸¹⁰ See, United Nations, "Regional Groups", available at <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (last accessed 28th July 2017)

⁸¹¹ *Ibid.*, p. 49

⁸¹² Organisation of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter"), (1981) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 23 The second part of Article 23 refers to transnational violence, particularly the destabilisation of states by dissidents operating from neighbouring states. While this represents a broader expression of "peace" than found in the Costa Rican or Japanese jurisprudence, it is still very much focused on peace as an antithesis of violence, rather than a bundle of social entitlements or the realisation of existing human rights.

⁸¹³ Rosa Freedman suggests that the successive broadening of the scope of "peace" at every level is the result of the politics of the Practice. At each level, the framers of the right are compelled to balance a broader cross-section of interests. The construction of the right thus becomes broader at each level. See Rosa Freedman, *Failing to Protect: The UN and the Politicisation of Human Rights*, (London; OUP, 2015), pp. 47-56

⁸¹⁴ Beitz, n. 5, p. 110

An enabling right or an ultimate aspiration?

Proponents of the right to peace locate its urgency in its relationship with other rights. For De Zayas, all solidarity rights are “enabling” rights: they create the conditions necessary for the realisation of civil and political rights and economic social and cultural rights.⁸¹⁵ Peace, in De Zayas’ view, has an additional value: it is the ultimate goal of *all* human rights.⁸¹⁶ “Peace” describes a condition in which all human rights are realised:

“Indeed, we can understand the so-called third generation rights as “enabling rights”, empowering us to enjoy civil, political, economic, social and cultural rights. But peace is much more than just an enabling right: it is also an over-arching and an end right. It is alpha and omega, the starting point, the means and also the end of human endeavour.”⁸¹⁷

On this view, the argument for the urgency of the interest in peace has two limbs. The first is that peace enables the realisation of other human rights (“the enabling limb”). The second is that peace is the ultimate goal of all human rights (“the goal limb”). The two limbs are not mutually dependent, each could theoretically stand alone as an argument for the urgency of peace. The workshop, organised by the Spanish Society for International Human Rights Law, that led to the Lucara Declaration on the Right to Peace in 2006 embraced both limbs:

⁸¹⁵ Alfred de Zayas, “The Individual Dimension of the Right to Peace”, statement delivered to the closed expert meeting on the Advisory Committee Declaration on the Right to Peace, Caux-Montreux, 26-27 November, 2012, available at www.chchr.org/Documents/Issues/IntOrder/CauxStatement.doc (accessed 10th July 2017)

⁸¹⁶ Alfred de Zayas, “Peace as a Human Right: The Jus Cogens Prohibition of Aggression” in Asbjorn Eide, Jakob T. Muller and Ineta Ziemle (eds.), *Making Peoples Heard: Essays on Human Rights In Honour of Gudmundur Alfredsson*, (Leiden; Brill, 2011), p. 14

⁸¹⁷ Ibid., p. 14

“The workshop’s approach to peace saw it as an enabling right, empowering humanity to enjoy the other human rights. Moreover, peace was perceived as the reward, as a result of humanity’s many- faceted promotion of other human rights.”⁸¹⁸

Both limbs can be seen in the international expression. In his message to the UNESCO International Consultation of Governmental Experts on the Right to Peace,⁸¹⁹ the Secretary General, adopted the first limb, arguing that “respect for human rights is the best guarantee of peace and the establishment of a durable peace is a condition of the respect for human rights.”⁸²⁰

The Oslo Draft⁸²¹ and the Bamako Declaration on the Right to Peace⁸²² each adopt one of the limbs. In the preamble of the Oslo Draft peace is described in terms of the goal limb, as “the ultimate aim of the United Nations system as a whole”.⁸²³ The Bamako Declaration, by contrast, adopts the first limb, arguing that peace is essential for the realisation of human rights.⁸²⁴ Its signatories: “Remain convinced that without peace it is impossible to guarantee respect for human rights.”⁸²⁵

A number of UN instruments also adopt the enabling limb. The preamble of the 2005 Resolution proclaims that:

⁸¹⁸ Ibid., p. 12

⁸¹⁹ The Secretary General, Message to Message to the UNESCO International Consultation of Governmental Experts on the Human Right to Peace”, in UNESCO, Report by the Director General on the Results of the International Consultation of Governmental Experts on the Human Right to Peace”, (17th April, 1998), 145 EX/40, Annex IV, p. 1

⁸²⁰ Ibid, p. 1

⁸²¹ Oslo Draft, n. 759

⁸²² UNESCO, Bamako Declaration on a Culture of Peace (the “Bamako Declaration”), (1997), available at <http://www.culture-of-peace.info/annexes/declarations/Bamako.pdf> (last accessed 28th July 2017)

⁸²³ Oslo Draft Declaration, n. 759, para. 4

⁸²⁴ Bamako Declaration, in UNESCO, “Report by the Director General on the Human Right to Peace”, (29th October 1997), UN Doc 29 C/59, Annex III

⁸²⁵ Ibid, Annex III

“Life without war is the primary international prerequisite for the material well-being, development and progress of countries, and for the full implementation of the rights and fundamental human freedoms proclaimed by the United Nations.”⁸²⁶

This phrase is repeated in the preamble of the Human Rights Council Resolution on the Promotion of the Right of Peoples to Peace 2010 (the “2010 Resolution”).⁸²⁷ The 2005 Resolution makes a further reference to the enabling limb in its operative clauses.⁸²⁸ Article 1 states that “peace is a vital requirement for the promotion and protection of all human rights for all.”⁸²⁹

Problems with the two-limb argument

The two-limb argument fails to account for the urgency of the interest in peace *in and of itself*. Any urgency in this approach is located at the level of the discrete rights in the bundle collected under the umbrella of “peace”. Further, a “right to other rights”, is not necessary within Beitz’s model. Beitz adopts Joel Feinberg’s concept of “manifesto rights” to address the issue of realisation.⁸³⁰ In Feinberg’s view, rights contain a two-stage duty:⁸³¹ the first stage is to reach a point at which the conditions exist for the realisation of the right (such as developing the required economic, technological, or governmental capabilities).⁸³² The second stage duty is to exercise

⁸²⁶2005 Resolution, n. 772

⁸²⁷ Human Rights Council, Resolution on the promotion of the right of peoples to peace, (23rd June 2010), A/HRC/RES/14/3, preamble

⁸²⁸ 2005 Resolution, n. 772, Art. 1

⁸²⁹ Ibid., Art. 1

⁸³⁰ See Joel Feinberg, *Social Philosophy*, (Prentice Hall; Englewood Cliffs, NJ, 1973), pp. 41-67

⁸³¹ Ibid., pp. 41-46

⁸³² Ibid., p. 44

those capabilities to realise the right.⁸³³

A “right to other rights” adds nothing that is useful beyond Feinberg’s two stages. The duty to create the conditions in which human rights can be fully realised is already logically implicit, in a more focused form, in each right itself, as is the duty to protect and promote the interest that the right protects. A right to freedom of expression, for example, would be meaningless if it contained no obligation to ensure freedom of expression could be realised in a meaningful way. The same is true, in Beitz’s model, for any other right.⁸³⁴

The second limb, similarly, adds little that is useful. In this limb, the urgency of peace lies in the desirability of a condition in which all rights have been realised. Yet any urgency in this interest lies at the level of the discrete rights that have been realised. There is no specific urgency attached to the general condition beyond this.

Can “peace” be urgent?

This is not, however, to say that an interest in peace cannot be urgent. It is possible to identify the urgency of a right to peace if “peace” is construed as simply the absence of violence. As Bertrand Russell argues, violence dehumanises both the perpetrator and the victim.⁸³⁵

⁸³³ Ibid., p. 51

⁸³⁴ Although little theoretical urgency can be found in a right to peace, there is perhaps some practical utility. Perhaps the interest in the realisation of other rights is urgent because it generates a greater political impetus towards creating the conditions for the realisation of those rights. Such an argument, however, still fails to identify any urgency at the level of the interest in peace itself. Ultimately it still relies on the argument that the right to peace should be recognised because other rights are important, rather than because peace is important in and of itself. A right to create the conditions for the realisation of other rights adds nothing, then, in either theoretical or practical terms, that is not already present in the cumulative duties imposed by those other rights.

⁸³⁵ Bertrand Russell, “The Ethics of War”, 25 *International Journal of Ethics* 2 (January 1915)

Preventing it is therefore an urgent interest. Russell analysed the harm inherent in violence as part of his critique of the First World War.⁸³⁶

On the individual level, violence results in physical and psychological harm for both perpetrator and victim.”⁸³⁷ For Russell, the greater harm lies in the socio-cultural impacts of violence.⁸³⁸ To commit acts of violence one must see one’s victim as less human than oneself.⁸³⁹ Russell described the soldiers that returned from the First World War as “brutalized and morally degraded by the fierce business of killing, which, however much it may be the soldier's duty, must shock and often destroy the more humane instincts.”⁸⁴⁰ Russell continues, “As every truthful record of war shows, fear and hate let loose the wild beast in a not inconsiderable proportion of combatants, leading to strange cruelties, which must be faced, but not dwelt upon if sanity is to be preserved.”⁸⁴¹

Dehumanization of the “enemy” is an integral aspect of violence. As Russell noted, British soldiers were taught to hate their German opponents with such intensity that “it cannot be doubted that, if the troops of the Allies penetrate into the industrial regions of Germany, the German population will have to suffer a great part of the misfortunes which Germany has

⁸³⁶ Ibid

⁸³⁷ The psychological impacts of war and violence, on both soldiers and civilians, are well documented. It is estimated “that between 150 000 and 200 000 Vietnam veterans have committed suicide, three times as many soldiers than were killed in the war against Vietnam. During the Falklands/Malvinas war, 236 British troops were killed in battle, yet an estimated 260 have since committed suicide. As Paul Duckett puts it: “War is certain to result in increased incidence of such behavioural and emotional problems as drug and alcohol abuse, increased violence (both through trauma and through shifts in cultural norms around violence), suicide, self-harm and so on, as civilians learn new ways to cope with the ‘shock and awe’ that has brutalised their lives” (Paul Duckett, “Globalised Violence, Community Psychology and the Bombing and Occupation of Afghanistan and Iraq” 15 J. Community Appl. Soc. Psychol. (2005), p. 417)

⁸³⁸ Russell, n. 835, p. 3

⁸³⁹ Emanuele Castano and Mirosław Kořta, “Dehumanisation: Humanity and its Denial”, 12 Group Processes and Intergroup Relations 6 (2009), pp. 695-697

⁸⁴⁰ Russell, n. 835., p. 4

⁸⁴¹ Ibid., p. 4

inflicted upon Belgium.”⁸⁴² This is not limited inter-state conflict.⁸⁴³ In the violence following the break-up of Yugoslavia, Serbian soldiers rationalised their war crimes⁸⁴⁴ against Muslims by describing the latter as “dogs” or “rats”.⁸⁴⁵ Islamic extremists are taught to view non-Muslims as “infidels”, inferior in the eyes of God.⁸⁴⁶ Violence also dehumanizes the perpetrators in the eyes of the victims.⁸⁴⁷ The perpetrators seem “evil” or “monstrous”: they cannot be viewed as sharing the humanity of those they persecute.⁸⁴⁸

It might be suggested that the right to peace, as construed in the constitutions of Costa Rica⁸⁴⁹ and Japan,⁸⁵⁰ therefore meets the Beitz urgency criterion. Yet, while more closely focused on violence than the international expression of the right, these constructions remain unsatisfactory from the Beitz perspective. The interest in peace is urgent because violence is dehumanising.⁸⁵¹ Both the Costa Rican and Japanese constructions of the right focus on a particular kind of violence: inter-state violence.⁸⁵² They do not address violence in general. They, therefore, account for only part of the interest in peace. The dehumanising effect of violence is not limited to inter-state violence. *All* forms of violence dehumanise, whether perpetrated between states, groups, or individuals.⁸⁵³ That the violence is perpetrated between states does not, therefore, alter (except, perhaps, in terms of scale) the nature of the harm it causes. A right to

⁸⁴² Ibid., p. 5

⁸⁴³ G. O’Boyle, “Theories of Justification and Political Violence: Examples from Four Groups”, 14 *Terrorism and Political Violence* 2 (2002), pp. 23-46

⁸⁴⁴ See Payam Akhavan, “Justice in The Hague, peace in the former Yugoslavia? A commentary on the United Nations War Crimes Tribunal.” 20 *Hum. Rts. Q.* 4 (1998), pp. 737-816

⁸⁴⁵ Rorty, n. 127, p. 112

⁸⁴⁶ Boyle, n. 843, pp. 23-46

⁸⁴⁷ Ibid., p. 5

⁸⁴⁸ Ibid, p. 5

⁸⁴⁹ Constitution of Costa Rica, n. 798

⁸⁵⁰ Constitution of Japan, n. 803

⁸⁵¹ Russell, n. 835, pp. 3-9

⁸⁵² As argued in this chapter at pp. 10-12

⁸⁵³ See the argument in this chapter at pp. 17-18

peace that only addresses inter-state violence therefore only addresses part of the interest in peace. While limiting inter-state violence is arguably an important interest, it is only such because it is carved out of the broader urgent interest, in peace as a whole. The urgency lies at the level of the broader interest. The interest in limiting inter-state violence thus has no urgency in its own right.⁸⁵⁴

Standard Threat

The second Beitz criterion is that the interest in question must be faced with a “standard threat”.⁸⁵⁵ There is no identifiable standard threat at the level of the right to peace. As with the question of urgency, however, it is possible to identify a standard threat if the right is construed as relating purely to violence.

In Beitz’s model a standard threat is “reasonably predictable under the circumstances in which the right is intended to operate.”⁸⁵⁶ The right to peace, in its international expression, is a bundle of entitlements and obligations.⁸⁵⁷ Any reasonably predictable threat to such an umbrella right exists at the level of the discrete interests, not the umbrella interest. It is conceivable, for example, that an extremely conservative government might represent a threat to the interest in

⁸⁵⁴ It may be argued that, as human rights only impose duties on states, limiting inter-state violence is the furthest the rights mechanism can go in addressing violence. This position, however, ignores the full extent of states’ capabilities. In the Beitz model, a right can impose a negative obligation on a state (such as to refrain from violence), but it can also impose a positive obligation, such as to take action to limit or eliminate violence between individuals and groups. The rights mechanism therefore has the potential to address the interest in peace to an extent well beyond inter-state violence. The Japanese and Costa Rican expressions, however, do not achieve this.

⁸⁵⁵ Beitz, n. 5, p. 109

⁸⁵⁶ Ibid., p. 111

⁸⁵⁷ As argued in this chapter at pp. 8-9

non-discrimination,⁸⁵⁸ but that government might be highly effective at addressing the interest in development.⁸⁵⁹ This would represent a threat to a discrete interest but not the bundle of interests as a whole.

Standard threats may exist in relation to many of the constituent interests in the bundle. The 2017 Declaration identifies, *inter alia*, interests in development,⁸⁶⁰ non-discrimination,⁸⁶¹ the rule of law,⁸⁶² and the realisation of “all human rights”⁸⁶³. The threats to these interests, however, relate to them as discrete interests, not as a bundle. It is possible, perhaps, to argue that an economic or social system might represent a standard threat to some, or all, of the bundle, by systematically denying a raft of rights.⁸⁶⁴ There are, however, already rights that address such threats. The (proposed) right to a fair and equitable international order⁸⁶⁵ and the right to development⁸⁶⁶ address these structural issues specifically. If this is all the right to peace adds then it merely duplicates existing rights and is therefore not necessary.

The threat of transnational violence

As with the discussion of urgency (above) it is possible to identify a standard threat to the interest in peace if the interest is framed purely in terms of violence. The global

⁸⁵⁸ 2017 Declaration, n. 731, Art. 2

⁸⁵⁹ Ibid., Art. 1

⁸⁶⁰ 2017 Declaration, n. 731, Art. 1

⁸⁶¹ Ibid., Art. 2

⁸⁶² Ibid., Art. 2

⁸⁶³ Ibid., Art. 1

⁸⁶⁴ As, for example, Dustin Sharp does, see Sharp, n. [cross reference in another chapter]

⁸⁶⁵ Human Rights Council, Resolution on the promotion of a democratic and equitable international order, (2011), A/HRC/RES/18/6

⁸⁶⁶ UN General Assembly, Declaration on the Right to Development, (1986), A/RES/41/128

interconnection of the transnational age means that violence is increasingly transnational.⁸⁶⁷ This makes the threat of violence reasonably predictable in a global context. The United Nations Development Programme identifies several examples of transnational violence including “armed conflict, ethno-cultural violence, genocide, terrorism, violent crime, slavery, government repression, discrimination, environmental degradation, deprivation of basic needs, underdevelopment, and the spread of small arms, nuclear weapons, and other weapons of mass destruction.”⁸⁶⁸ The global nature of violence means that it cannot be addressed by unilateral state action.⁸⁶⁹

States no longer have a monopoly on violence.⁸⁷⁰ As Mary Kaldor notes, “the state’s monopoly over violence is challenged by an increasing number of non-state actors—rebels, terrorists, guerrilla fighters, warlords, activists and urban youth delinquents. The boundary between who is a military actor and who is a civilian is no longer clear cut”.⁸⁷¹ In the first half of the 20th century states were the primary exercisers of violence.⁸⁷² In the transnational age, multiple agents exercise violence, on an equivalent scale to states.⁸⁷³ Criminal gangs, for example, operate globally and, within affected communities, exercise violence in a similar manner to states.⁸⁷⁴ Terrorist groups strike at civilian populations, causing fear and disruption

⁸⁶⁷ Patrick Hayden, “Constraining War: Human Security and the Human Right to Peace” 6 Human Rights Rev 1 (2004), pp. 35-55

⁸⁶⁸ United Nations Development Programme, “Redefining Security: The Human Dimension,” Current History 94 (1994), pp. 229-236

⁸⁶⁹ Paul Duckett, “Globalised Violence, Community Psychology and the Bombing and Occupation of Afghanistan and Iraq” 15 J. Community Appl. Soc. Psychol. (2005), pp. 414-423

⁸⁷⁰ Mary Kaldor, *New and old wars: Organized violence in the global era*. (2nd Ed.), (Cambridge/Oxford; Polity Press, 2009), pp. 14-17

⁸⁷¹ Ibid, pp. 14-17

⁸⁷² Ibid., pp. 14-17

⁸⁷³ Ibid, pp. 14-17

⁸⁷⁴ Criminal gangs operate across continents. In the United States, for example, there are 760,000 recorded gang members, spread over 24 000 gangs. In Central America, there are between 69,000 and 200,000. In London are an estimated 270 gangs while in France there are around 480. Gangs are often organized along

similar to that caused by acts of war by foreign states.⁸⁷⁵ As a result, criminality and political violence are often interchangeable.⁸⁷⁶ Criminal gangs build networks of “civilian” supporters by employing quasi political discourses.⁸⁷⁷ In South Africa, for example, gangs use the language of the struggle against apartheid to build legitimacy amongst the communities in which they operate.⁸⁷⁸ The line between peace and war, civilian and soldier, has therefore become blurred.⁸⁷⁹

Violence is therefore no longer confined within or between states.⁸⁸⁰ Violent conflict is

lines of ethnicity. In London gangs known as the “Wembley Boys”, “East Side Boys”, “Tooting Tamils”, “Harrow Tamils”, “Rayners Lane”, “Snake Gang”, “Red Line”, “VVT”, “Jaffna Boys”, and “Ariyalai” all take their members from the Sri Lankan Tamil community. These engage in a variety of violent activities, attacking opposing gangs or other perceived threats with guns, knives, and katana; and extorting between £10 000 and £15 000 per year from local shops and business in the borough of Newham alone. (See Orjuela, n. 876, pp. 124-125) Other non-state actors exercise violence to an even greater extent. In Columbia, the Revolutionary Armed Forces of Columbia – Peoples’ Army (Farc) fought a 52-yearlong insurgency against the Columbian Government between 1964 and 2016 The Farc used terrorism and guerrilla tactics but also operated in an equivalent manner to a foreign state military power, administering and protecting significant swathes of territory and maintaining and defending a frontier against Government forces. (See James J. Brittain, and James Petras, *Revolutionary social change in Colombia: The origin and direction of the FARC-EP*. (New York; Pluto Press, 2010), pp. 70-81) In Pakistan, the Federally Administered Tribal Areas are dominated by Islamist warlords who, at times, have effectively excluded government forces from their provinces, while imposing their own government on the region. (See Shuja Nawaz, “FATA - a Most Dangerous Place: Meeting the Challenge of Militancy and Terror in the Federally Administered Tribal Areas of Pakistan”, Centre for Strategic & International Studies, (2009)) Significant territories in the Middle East are controlled by the group calling itself the Islamic State of Iraq and Syria, known to opponents as “Daesh”,⁸⁷⁴ which conducts conventional warfare against and within neighbouring states and, at the same time, operates a global terrorist network. This is by no means an exhaustive survey but it demonstrates that, while not states, such actors clearly exercise violence on an equivalent scale. (See Audrey Kurth Cronin, “ISIS Is Not a Terrorist Group: Why Counterterrorism Won’t Stop the Latest Jihadist Threat.” 94 Foreign Aff. 87 (2015))

⁸⁷⁵ Duckett, n. 869, pp. 414-423

⁸⁷⁶ Camilla Orjuela, “Violence at the Margins: Street Gangs, Globalised Conflict and Sri Lankan Tamil Battlefields in London, Toronto and Paris”, 48 International Studies 2 (2011), p. 120

⁸⁷⁷ Ibid, p. 126

⁸⁷⁸ Ibid, p. 122

⁸⁷⁹ Ibid, p. 120

⁸⁸⁰ N. Ball, “The Reconstruction and transformation of war-torn societies and state institutions: How can

internationalised.⁸⁸¹ Rivalry between regional powers can be played out in the theatre of local conflicts.⁸⁸² Warring parties tap into global economic systems.⁸⁸³ Sometimes parties to violent conflicts rely on international criminal networks to advance their interests or maintain their position in a conflict.⁸⁸⁴ In many cases, non-state entities, such as criminal gangs or terrorist organisations, operate on a transnational scale.⁸⁸⁵ Violence between individuals and groups, as well as between states, therefore manifests on a global scale.⁸⁸⁶

The transnational nature of the threat means that the right to peace, as construed in the constitutions of Japan⁸⁸⁷ and Costa Rica,⁸⁸⁸ is insufficient. In focusing purely on inter-state violence, the national-level construction fails to account for the change in the authors of violence in the transnational age, where states no-longer have a monopoly on violence. The threat of violence now extends beyond states. It cannot, therefore, be adequately addressed by a right that

external actors contribute?" In T. Debiel & A. Klein (eds.), *Fragile peace: State failure, violence and development in crisis regions*, (London; Zed Books, 2002), pp. 33–55

⁸⁸¹ See, for example, Benjamin Miller and Korina Kagan, "The Great Powers and Regional Conflicts: Eastern Europe and the Balkans from the Post-Napoleonic Era to the Post - Cold War Era," 41 *International Studies Quarterly* 1 (1997), pp. 51-85

⁸⁸² See, for example, *Ibid.*, pp. 51-85

⁸⁸³ Orjuela, n. 876, pp. 113-137

⁸⁸⁴ Ball, n. 880, pp. 33–55

⁸⁸⁵ F. Adamson, "Mobilising for the transformation of home: Politicized identities and transnational practices", in N. Al-Ali & K. Koser (Eds), *New approaches to migration? Transnational communities and the transformation of home*, (London/ New York; Routledge, 2002), pp. 155–168

⁸⁸⁶ In Sri Lanka, for example, the Tamil Tigers were able to continue their rebellion against the government by creating a highly organised funding network throughout the global Tamil diaspora. When the Tigers were defeated this created a power vacuum in the diaspora. Criminal gangs took over the functions in diaspora communities that the Tigers had once discharged, such as providing protection and an outlet for young men. This empowered those gangs to become prominent agents of violence in states in with large Tamil communities including the UK, France, and Canada. Globalised violence like this cannot be addressed solely by unilateral action because it transcends states. (See P. Richards, "New war: An ethnographic approach" In Richards (ed.) *No peace no war: An anthropology of contemporary armed conflicts*, (Oxford; James Currey, 2005))

⁸⁸⁷ Constitution of Japan, n. 803, Art. 46

⁸⁸⁸ See, Katz and Lackey, n. 745

focuses exclusively on inter-state violence. In misstating the threat, the domestic-level construction of the right would thus likely also fail to meet Beitz's third criterion (reasonable effect).

Reasonable Effect

As in the case of urgency and standard threat, the right to peace, as it is expressed at international level, does not meet the third Beitz criterion. The rights mechanism will not be reasonably effective in protecting the interest in peace if "peace" is construed as a right to rights or a set of general entitlements. In their responses to the Intergovernmental Working Group on the Right to Peace, the EU and USA each raised five issues in critique of the proposed right to peace.⁸⁸⁹ They argued that it (a) contains no practical obligations, (b) has no basis in international law, (c) undermines the legitimate use of force, (d) is promoted by and operates to protect non-democratic regimes, and (e) is already, and more appropriately, addressed in non-rights fora.⁸⁹⁰

The strongest point of critique is the first. The right to peace, as expressed in the 2017 Declaration, cannot protect the interest in peace to reasonable effect because (a) it does not include any clear definition of "peace" and (b) it does not contain any obligations with real practical value. In the first instance, many of the obligations it contains are too broadly drafted to be applicable in a practical sense. One outstanding example is the obligation for states to take "appropriate measures"⁸⁹¹ to guarantee "freedom from fear and want".⁸⁹² While the obligation to

⁸⁸⁹ EU letter to the IGWG, 15th February 2013, and US letter to the IGWG, 18th February 2013, both available at

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGRightPeace/StatesGeneralComments.pdf>
(last accessed 12th July 2017)

⁸⁹⁰ Ibid.

⁸⁹¹ 2017 Declaration, n. 731, Art. 4

⁸⁹² Ibid., Art. 2

take “appropriate measures” mirrors language common to many rights instruments,⁸⁹³ the 2017 Declaration contains no definition or description of what “freedom from fear and want” might look like. In the case of some human rights, the substance may be fleshed out through the application of the right.⁸⁹⁴ The prohibition on cruel and inhuman treatment, for example, has been clarified through a series of cases, primarily in the European Court of Human Rights, in which instances of “cruel and unusual treatment” have been identified as such.⁸⁹⁵ Yet the phrase “freedom from fear and want” is too broad and too vague even to admit the possibility of this type of clarification process. It simply includes too much. It is difficult to see what obligations or entitlements would *not* fall into the category of freedom from fear and want. This contrasts with the prohibition on cruel and inhuman treatment.⁸⁹⁶ While the term “cruel and inhuman” requires further definition, it clearly excludes the majority of treatment. In encompassing too much, by contrast, the right to peace it ends up meaning very little.

The more focused provisions, however, fail to add any real practical value because they simply duplicate entitlements or obligations found elsewhere. References to “all human rights”,⁸⁹⁷ “the rule of law”,⁸⁹⁸ or “non-discrimination”⁸⁹⁹ can all assign obligations that are enforceable in a practical sense. They are, however, already protected by other international law instruments⁹⁰⁰. This means that any obligations are also contained in those instruments. These

⁸⁹³ Such as, for example, Art. 1(2) of the UN Charter, n. 923

⁸⁹⁴ For a more complete examination of this see Dustin N. Sharp, “Reappraising the Significance of Third Generation Rights in a Globalised World”, SSRN working paper (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2635236 (last checked 9th September 2016), p. 14

⁸⁹⁵ Ibid., p. 14

⁸⁹⁶ Found, *inter alia*, in Council of Europe, European Convention on Human Rights, (1950), ETS 5, Art. 3

⁸⁹⁷ 2017 Declaration, n. 731, Art. 1

⁸⁹⁸ Ibid., Art. 2

⁸⁹⁹ Ibid., Art. 2

⁹⁰⁰ The rule of law, for example, is guaranteed in Arts. 1(1), 13(1)(a), and 84 of the Charter of the United Nations and discrimination is addressed in, *inter alia*, the General Assembly Declaration on the Elimination of All Forms of Racial Discrimination, (1963), A/Res/18/1904 and the General Assembly Declaration on the Elimination of All Forms of Discrimination Against Women, (1967), A/Res/22/263

references in the 2017 Declaration, therefore, repeat entitlements and obligations already found elsewhere and therefore add nothing of practical value to the protection of urgent interests.

The expression of the right at national level demonstrates that it is possible to frame a right to peace that protects, at least part of, the interest in peace to reasonable effect. The expressions of the right in the Costa Rican⁹⁰¹ and Japanese⁹⁰² jurisprudence demonstrates that, where the right is tightly constructed, it can be enforced by individuals against the state and applied by the courts. It remains to be seen, however, if a right that protected the entirety of the interest in peace could be enforced to similar effect. In the case of the right to peace, therefore, meeting the third Beitz criterion is perhaps not out of the question, but no current construction of the right adequately does so.

Legal Basis

The argument that the right lacks a basis in international law is, *prima facie*, less effective as a critique. It is nevertheless worth considering. Most obligations in the 2017 Declaration are replicated in other international law instruments.⁹⁰³ There is a legal basis, for example, for the obligation to respect the rule of law, human rights, and non-discrimination.⁹⁰⁴ It is more difficult, although not out of the question, to find a legal basis for a right to peace that focuses purely on prohibiting violence. While inter-state violence is clearly prohibited by international law (with a few, limited, exceptions), it is not clear that this prohibition amounts to

⁹⁰¹ See Katz and Lackey, n. 745

⁹⁰² See Hamilton, n. 744

⁹⁰³ See discussion at n. 900

⁹⁰⁴ This does not, however, redeem the 2017 Declaration to any real extent. Given that the obligations in the 2017 Declaration don't go beyond their expressions in other instruments, their legal basis is of little practical consequence: they merely replicate duties already recognised elsewhere.

a right exercisable by individuals.⁹⁰⁵ The interest in peace, as the absence of violence, is well established as a norm of international law.⁹⁰⁶ It was originally recognised in the Kellogg-Briand Pact in 1928⁹⁰⁷ and the 1931 US foreign policy doctrine prohibiting recognition of territorial changes achieved by force.⁹⁰⁸ This doctrine was given international recognition by the League of Nations' 1932 resolution on Manchuria.⁹⁰⁹ Non-aggression was subsequently recognised as a norm of international law in, *inter alia*, the 1934 Budapest Articles of Interpretation for the Kellogg-Briand Pact,⁹¹⁰ the 1945 London Agreement,⁹¹¹ Articles 2, 4, 33-38 and 55 of the UN Charter,⁹¹² the Universal Declaration of Human Rights,⁹¹³ the 1978 General Assembly Declaration on Friendly Relations,⁹¹⁴ the 1977 Declaration on the Deepening and Consolidation of International Détente,⁹¹⁵ and the 1993 Vienna Declaration and Programme of Action.⁹¹⁶ The US and EU responses argue that these instruments (and the others in which peace is recognised) establish peace as a right of states, but not a right of individuals.⁹¹⁷ The majority of the above instruments refer exclusively to inter-state violence. An individual right to peace has primarily been recognised in soft-law instruments.⁹¹⁸ It is therefore difficult to argue that a legal basis for an individual right to peace exists in international law as it currently stands (particularly as the US and EU's scepticism prevents any international consensus). There is clearly potential for a

⁹⁰⁵ De Zayas, n. 815, p. 12

⁹⁰⁶ Ibid., p. 4

⁹⁰⁷ Ibid., p. 4

⁹⁰⁸ Ibid., p. 4

⁹⁰⁹ Ibid., p. 6

⁹¹⁰ Ibid., p. 4

⁹¹¹ Ibid., p. 4

⁹¹² Ibid., p. 4

⁹¹³ Ibid., p. 4

⁹¹⁴ Ibid., p. 4

⁹¹⁵ Ibid., p. 4

⁹¹⁶ For a more detailed examination of the legal basis of the right to peace see De Zayas, n. 817 and, n. 815

⁹¹⁷ See the EU Letter to the IGWG, n. 889

⁹¹⁸ Freedman, n. 733, p. 46

more tightly defined right to emerge from the soft-law expressions and the *jus cogens* prohibition of inter-state violence. This would, however, require bridging the gap between peace as a norm of inter-state behaviour and peace as a right exercisable by individuals. At present, it is not clear how this will be achieved.

The Use of Force

It is incorrect to say that the right to peace will outlaw the use of force entirely, either as it is expressed in the 2017 Declaration⁹¹⁹ or in a more focused construction. Indeed, the criticism, that the right will leave no room for legitimate force in international relations, seems to conflate the right to peace with a complete prohibition of intervention. This is not the case. All iterations of the right to date have leave space for humanitarian intervention, the use of force in discharging the responsibility to protect, or in self-defence, according to international law and the UN Charter. The 1984 Declaration, for example, sets the right in the context of existing international law⁹²⁰, as do the 2005⁹²¹ and 2008⁹²² Resolutions. Article 5 of the 2017 Declaration states:

“Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations. The provisions included in the present Declaration are to be understood in line with the Charter of the United Nations, the Universal Declaration of Human Rights and relevant international and regional instruments ratified by States.”

International law, and the UN Charter in particular, permits the use of force, including for

⁹¹⁹ 2017 Declaration, n. 731

⁹²⁰ 1984 Declaration, n. 735, Preamble

⁹²¹ 2005 Resolution, n. 739, Arts. 5, 6, and 8

⁹²² Human Rights Council, Resolution on the promotion of a democratic and equitable international order, n. 865, Preamble

humanitarian intervention,⁹²³ discharging the responsibility to protect,⁹²⁴ or for self-defence.⁹²⁵ If the entitlements and duties contained in the right to peace are to be construed in accordance with existing international law and/or the UN Charter, then it should be assumed that they do not infringe on the space for the legitimate use of force set aside in international law. There is no reason that a right focused purely on violence could not be similarly structured.

The Role of Non-Democratic States

While a number of democratic states, such as Costa Rica and South Korea, supported the 2017 Declaration, the votes it received in the Human Rights Council were primarily from non-democratic states.⁹²⁶ This raises the question of whether the right is truly aimed at establishing peace (concerns about the definition of that concept aside) or whether it was aimed at legitimising non-democratic regimes.⁹²⁷ This criticism seems valid in relation to the 2017 Declaration. While states support the right to peace for various different reasons,⁹²⁸ states like Sri Lanka could undoubtedly use the 2017 Declaration to shield themselves from international critique or intervention in response to its repression of the Tamil minority.⁹²⁹

It is not correct, however, to suggest that the right to peace is solely or primarily the preserve of non-democratic states. The idea of a right that focuses on limiting violence has

⁹²³ United Nations, Charter of the United Nations, (1945), 1 UNTS XVI, Art. 42

⁹²⁴ See for example, United Nations, *Implementing the Responsibility to Protect: State Responsibility and Protection*, (2013), A/67/929-S/2013/399

⁹²⁵ UN Charter, n. 923, Art. 51

⁹²⁶ Human Rights Council, Declaration on the Right to Peace, (2016), A/HRC/Res/32/28, “votes in favour”

⁹²⁷ Freedman, n. 733, pp. 48-9

⁹²⁸ Ibid., p. 47

⁹²⁹ Ibid., p. 48

incubated in Western democratic states.⁹³⁰ The Spanish Society for International Human Rights, which developed a comprehensive expression of a right to peace in the Lucara Declaration.⁹³¹ This was supported by over 500 civil society organisations.⁹³² Before that, the idea of peace as an individual right had been approved by the International Committee of the Red Cross in the Istanbul Declaration in 1967.⁹³³ The norm of non-aggression has also been endorsed and applied by “people’s tribunals”, such as the Russell Tribunal in 1967⁹³⁴ and the Clark Tribunal in 2004,⁹³⁵ which came together to both declare and castigate their governments for acts of aggression. If Western governments have not yet embraced the right to peace, Western civil society has certainly done so. An expression of the right focussed on violence could not, therefore, be legitimately subject to the criticism of being primarily advocated by non-democratic regimes.

Better addressed through other mechanisms

The argument that the right to peace is better addressed by other mechanisms seems, *prima facie*, to misstate the utility of human rights. Rights disperse power. Other, non-rights, mechanisms that address issues of war and peace are dominated by governments and therefore concentrate power. The interest in peace is an interest of individuals as well as governments. The

⁹³⁰ Carlos Villan-Duran, “The Human Right to Peace: A Legislative Initiative from the Spanish Civil Society”, 15 Spanish Yearbook of International Law 1, p. 2

⁹³¹ Ibid., p. 8

⁹³² Freedman, n. 733, p. 48

⁹³³ Norwegian Institute for Human Rights in Cooperation with UNESCO, “The Human Right to Peace: Oslo Draft Declaration 6-8th June 1997”, General Conference, 29th Session, Report by the Director-General, Paris 1997, Doc29 C/59, para. 7

⁹³⁴ De Zayas, n. 815, p. 22

⁹³⁵ Ibid, p. 22

rights mechanism disperses power to demand the protection and promotion of the interest in peace to individuals. This makes it more likely that the interest will be protected. Even if the interest in peace is addressed by other mechanisms, the rights mechanism therefore plays a useful role.⁹³⁶

In the case of the right to peace (as it is construed at international level), however, this defence does not hold up. The bundle of interests addressed in the 2017 Declaration are generally already protected by other rights. They are thus already protected by the rights mechanism. Even given the argument in the previous paragraph, there is no utility in protecting an interest with the rights mechanism twice. The mechanism does not, therefore, add any new utility to the protection of peace as expressed in the 2017 Declaration.

Conclusions

The right to peace, as it is currently construed at international level does not meet the Beitz criteria. The international expression, as exemplified in the 2017 Declaration, construes peace as a bundle of social entitlements, an “umbrella” right, rather than as a protection against violence (as it was originally construed). Such an interest cannot be urgent in itself, nor can it face an identifiable standard threat, because any urgency or threat takes effect at the level of the discrete rights in the bundle rather than the umbrella “right to rights”. In containing obligations that are either too broad to be meaningful or already duplicated by other rights, the international expression has no meaningful impact in protecting the interest in peace (however it is defined).

⁹³⁶ This argument is made in more detail at pp. 280-284

The rights mechanism cannot, therefore, be described as reasonably effective at protecting the interest in peace.

The right, as construed at domestic and regional level, also fails to meet the Beitz criteria. At this level, as expressed in the constitutional jurisprudence of Japan and Costa Rica and the Banjul Charter, the right is focused tightly on inter-state violence. While it is arguable that limiting violence is an important interest, any urgency lies at the level of violence as a whole, not with particular subsets of violence (such as inter-state violence). The national and regional level constructions of the right also fail to address the globalised nature of violence in the transnational age. They do not, therefore, satisfy the Beitz criteria.

By contrast, if the “peace” is construed as the absence of violence, the right to peace has the potential to meet the Beitz criteria. Prohibiting illegitimate violence is an urgent interest because violence dehumanises both the perpetrator and the victim. The interest is faced with the standard threat of globalised violence. Any argument for such a right will, however, need to overcome the hurdle of the absence of a basis in international law for peace as an individual right. It seems, therefore, that the right to peace, in any of its current constructions, does not meet the Beitz criteria and should not be considered a right in the Practice. The potential remains, however, for the development of more satisfactory version of the right.

CHAPTER NINE: CRITIQUES OF SOLIDARITY RIGHTS

Introduction

In the final substantive chapter of this thesis I will consider the principal critiques of solidarity rights and argue that they are satisfactorily addressed by Beitz's political approach, as I have applied it in Chapters Four to Seven. There are four chief critiques of solidarity rights. (1) They are incompatible with other classes of rights (the "compatibility critique"). (2) They are impractical as a tool for protecting important interests (the "practicality critique"). (3) They are unnecessary because other, non-rights, mechanisms already protect common-good interests (the "necessity critique"). (4) The "hybrid" nature of solidarity rights, combining rights discourses with discourses around other classes of political norms, means they are not an appropriate addition to the Practice (the "hybridity critique"). In this chapter I will argue that these critiques are only sustainable if common-good interests are either less urgent than independent-good interests, or it is impossible to effectively protect common-good interests with the rights mechanism. The main critiques of solidarity rights are thus addressed by applying two of Beitz's three criteria for recognition as a right. In chapters four to seven I demonstrated that common-good interests can be both urgent and protected to reasonable effect by the rights mechanism. The principle critiques of solidarity rights are therefore answered by applying the political approach.

The Compatibility Critique

The compatibility critique of solidarity rights is that they are incompatible with the accepted classes of human rights. There are three versions of the compatibility critique. The first is that solidarity rights can be used by states to subvert other individual rights. The second is that solidarity right clash with other individual rights. The third is that solidarity rights “politicise” the rights discourse. In my view, all three versions of the critique rely on the premise that common-good interests cannot be of equal urgency to independent-good interests. As I have demonstrated in the previous chapters, this premise is mistaken.

Rights of peoples or states?

The first version of the compatibility critique is that solidarity rights can be used to subject the interests of the individual to the interests of the state. This version, however, assumes an interpretation of solidarity rights that is not reflected in international law. This critique is a by-product of the controversy regarding the definition of a “people” (analysed in Chapter Three). For Donnelley, solidarity rights are exercised by peoples rather than individuals. A people has no legal definition so, in practice, solidarity rights must be exercised by some form of institution.⁹³⁷ The most obvious candidate is a state.⁹³⁸ Donnelley cites the right to self-determination as a demonstration of this analysis, claiming there is no evidence of the right to self-determination being

⁹³⁷ Donnelley, n. 2, pp. 473-509

⁹³⁸ Ibid, p. 498

exercised by a people *against* the state in which it resides.⁹³⁹ Self-determination is therefore a right exercised by states against domination by other states.⁹⁴⁰ This is incompatible with the nature of human rights, which are held *against* states not *by* them. In Donnelley's words "the very idea of a human right held by the state is incoherent".⁹⁴¹ If solidarity rights are exercised by states, then they cannot be human rights. Treating them like human rights devalues the Practice. It enables states to benefit from a mechanism that was specifically designed to limit their power. Furthermore, if states can exercise human rights in a manner equivalent to individuals, then states can use solidarity rights to undermine other individual rights. The United States withdrew from UNESCO in 1984 on a similar premise, claiming, *inter alia*, that UNESCO's development of "peoples' rights" was merely a means of advancing undemocratic forms of government and minimizing the impact of individual rights.⁹⁴²

This critique, however, misstates the nature of solidarity rights. As argued in Chapter Three, a "people" is not the holder of a solidarity right. It refers to the condition in which a common-good interest is meaningfully experienced by the individual. Individuals are the holders of solidarity rights. Solidarity rights, therefore, need not be exclusively exercised by states. Indeed, contrary to Donnelley's assertion, solidarity rights, including self-determination, can be and are exercised *against* states. In *Bernard Ominayak and the Lubicon Lake Band v Canada* the right to self-determination was

⁹³⁹ Ibid, pp. 499-500

⁹⁴⁰ Ibid, pp. 499-500

⁹⁴¹ Ibid, p. 498

⁹⁴² Executive Summary of the US Department of State's Policy Review of US-UNESCO Relations, 432 Aust. Int. Law. News. [1984], pp. 432-440

exercised by members of a first nation tribe against the state of Canada⁹⁴³. In *Social and Economic Rights Action Centre v Nigeria* the right to a clean and healthy environment was exercised by individuals (although the litigation was conducted by an NGO) against the state of Nigeria.⁹⁴⁴ In *Comunidad de Chanaral v Codelco Division el Salvador* the right to a clean and healthy environment was exercised by an individual (acting as a representative for future generations) against the state of El Salvador.⁹⁴⁵ Donnelley's assertion, that solidarity rights are only exercised by states, is clearly not supportable.

Donnelley is right to say that institutions can play a role in the exercise of solidarity rights. Yet institutions play a role in the exercise of all classes of rights. Exercising a human right requires articulating a claim against one or more states. Institutions can, on occasion, articulate a claim more effectively than individuals acting alone. States can access greater resources, more prominent platforms, or greater political authority. When institutions articulate human rights claims, however, those claims are based on the rights of individuals. Institutions, such as NGOs, often undertake litigation based on civil and political rights. Amnesty International and the International Commission of Jurists (both NGOs), for example, both intervened in litigation between former Guantanamo Bay detainees and Poland.⁹⁴⁶ The litigation concerned the prohibition on torture or cruel, inhuman, or degrading treatment, enshrined in Art. 3 of the European Convention on Human Rights⁹⁴⁷ and Art. 7 of the International Covenant on Civil and Political Rights. This does not mean that the Art. 3 right is held by NGOs.

⁹⁴³ *Bernard Ominayak and the Lubicon Lake Band v Canada*, Communication No. 167/1984, UN Doc. CCPR/C/38/D/167/1984, 10 May 1990, para. 2.1

⁹⁴⁴ *Social and Economic Rights Action Centre v Nigeria*, African Commission on Human and Peoples' rights Case No. ACHPR/Comm/A044/1, Decision Regarding Comm. No. 155/96 (2001)

⁹⁴⁵ (1988) S/Recurso de Proteccion Corta Suprema

⁹⁴⁶ *Al Nashiri v Poland*, European Court of Human Rights, App. No. 28761/11, 24th July 2014

⁹⁴⁷ Ibid

The right is held by individuals but NGOs play a role in enforcing the duties for which the right provides.

The same is true for solidarity rights. When one territory secedes from another, it may appear as if the right to self-determination is exercised by the new state or territorial government. In such cases, however, the internal limb of the right to self-determination requires that the state or territory respect the collective will of the individuals it claims to represent.⁹⁴⁸ When South Sudan seceded from Sudan, it made arguments based on the right to self-determination.⁹⁴⁹ International practice generally requires that secession can only be legitimately accomplished if it is demonstrated that it is the genuine will of the people in the relevant territory.⁹⁵⁰ International practice generally requires a referendum of the citizens of a territory that wishes to secede. This was the case on South Sudan.⁹⁵¹ Solidarity rights, like self-determination, can be exercised by states. This is only legitimate, however, when the exercise of the right is the collective will of the individuals in that state. The individual is the holder of the right.⁹⁵² A better understanding is thus that the citizens of a state use the state as a tool by which to exercise their solidarity rights. This version of the compatibility critique seems to be largely based on an interpretation of solidarity rights that does not generally match the way they manifest in the Practice.

Clash of rights

⁹⁴⁸ See the discussion of the internal limb of self-determination on pp. 176-185

⁹⁴⁹ Cassese, n. 78, pp. 201-225

⁹⁵⁰ See discussion of internal self-determination at pp. 176-185

⁹⁵¹ Ibid. pp. 201-225

⁹⁵² See the discussion of “internal ” in Ch. 7 of this thesis and Cassese, n. 78, pp. 201-225

An alternative version of the compatibility critique is based on the risk of a clash of rights. If solidarity rights clash with other individual rights they can be used to empower the collective at the expense of the individual, even if the collective is not represented by a state. This version of the critique is, however, ultimately based on the premise that common-good interests cannot be urgent in the same way as independent-good interests.

Sieghart argues that rights should protect individuals, not abstract concepts (like “solidarity” or “a people”). If the latter are given protection ahead of the former, then this will inevitably lead to injustice:

"abstract concepts have in the past only too often presented great dangers to the enjoyment by individuals of their human rights and fundamental freedoms. Some of the worst violations of those rights have been perpetrated in the service of some inspiring abstractions, such as 'the one true faith', 'the nation', 'the state' (including, as a recent example, 'das Reich'), 'the economy' (including 'a strong dollar or pound'), and indeed 'the masses'. A 'people' is no less an abstraction than any of these: it cannot, in reality, consist of anything more than the individuals who compose it. If any of the individual rights and freedoms protected by modern international human rights law ever came to be regarded as subservient to the right of the 'people' - there would be a very real risk that legitimacy might be claimed on such a ground for the grave violation of the human rights of individuals."⁹⁵³

Yet Sieghart is not comparing like with like. The abstractions cited by Sieghart are all rhetorical devices used to win political arguments. That is not how the concept of

⁹⁵³Sieghart, n. 342, Ch. 5

a people is applied in solidarity rights discourse. Individuals are not subservient to the “people”: “The people” describes the context in which individuals experience certain *individual* interests. The case for solidarity rights is that common-good interests are important *to individuals* in a manner equivalent to independent-good interests (as was argued in Chapter Four). Solidarity rights, like all human rights, are important because the individual is important. This is not an abstraction; it is a specific agreement amongst all participants in the Practice (see Chapter One).

Sanders presents an alternative version of the clash of rights argument. For him, it is inevitable that, in a practical sense, individuals must sometimes rely on representatives to articulate their solidarity rights:

“Collective rights cannot be satisfactorily recognised without the existence of representatives or institutions designed to further a collectivity’s goals, and so individual members of the collectivity play subordinate roles. And while group rights organisations have standing to promote the group’s interests, collectivity representatives and institutions have almost exclusive legitimacy to assert and manage the collective rights.”⁹⁵⁴

Sanders accepts the conduct of litigation by representatives of a group will not necessarily lead to injustice. Yet it may, he suggests, have the effect of concentrating power in the hands of a small elite. Which can then pursue its own ends, using the authority conferred by the claim that it is articulating a right on behalf of the group. In the name of respect for a right belonging to the people as a whole, an elite can thus compromise the rights of individuals.⁹⁵⁵

⁹⁵⁴ Douglas Sanders, “Collective Rights”, 13 Hum. Rts. Q. 368 1991

⁹⁵⁵ Ibid, p. 368

The *Shah Bano*⁹⁵⁶ case in India can, *prima facie*, be seen as an example of this. In that case, both the claimant and defendant belonged to India's Muslim minority. Indian law stated that a man must pay maintenance to support an indigent wife after they have separated.⁹⁵⁷ Muslim law limits the period that a man must make maintenance payments to three months and ten days. It also imposes the condition that the woman remains celibate to protect the paternity of any possible child.⁹⁵⁸ The Indian Supreme Court, applying Indian law,⁹⁵⁹ held that the husband should pay maintenance indefinitely,⁹⁶⁰ India's (then) ruling Congress Party, however, had made protection of minority and cultural rights was a major theme in its election campaign.⁹⁶¹ The court's decision in *Shah Bano* provoked an outcry from leaders of the Muslim Community, exclusively wealthy males. In response, the Congress Party legislated to overturn the court's decision in *Shah Bano*.⁹⁶² The resulting law protected the "cultural rights" of the Islamic community by strictly limiting the rights of a divorced woman to claim maintenance money from her husband. These limits apply even when she has invested her own money in the family home, or is left with the responsibility of raising the couple's children alone.⁹⁶³

The *Shah Bano* episode demonstrates how a small elite can appeal to a supposed "group interest" to subvert the individual interests of the less powerful members of that group. It does not, however, demonstrate that solidarity rights necessarily lead to such a

⁹⁵⁶ *Mohammad Ahmed Khan v Shah Bano*, 3S.C.R.844 (India,1985)

⁹⁵⁷ *Ibid*, at 844

⁹⁵⁸ *Ibid*, at 844

⁹⁵⁹ *Ibid*, at 844

⁹⁶⁰ *Ibid*, at 844

⁹⁶¹ Sanders, n. 832, p. 368

⁹⁶² Art. 44, (India) Muslim Women (Protection of Rights on Divorce) Act 1986

⁹⁶³ *Ibid*

conclusion. The episode resolved as it did because a rights-based analysis was abandoned rather than applied. The courts applied a rights-based analysis, in which the interest of the woman trumped the interest of the leaders of the Muslim community. The Congress Party abandoned a rights-based analysis. It legislated in favour of a particular group, Muslim men, because this was the best way to guarantee political support. The Shah Bano episode demonstrates the limitations of majoritarian democracy in protecting groups (like Muslim women) that are traditionally excluded from the democratic process.⁹⁶⁴

Tension between rights is an inevitable feature of the Practice. It is certainly not unique to solidarity rights. As Eugene Kamenka puts it: "Claims, whether presented as rights or not, conflict."⁹⁶⁵ Civil and political rights can also conflict with each other, with economic, social, and cultural rights and with solidarity rights. In *Open Door and Dublin Well Woman v Ireland*⁹⁶⁶ the Irish government defended its ban on the transmission of information about abortions, relying, *inter alia*, on Art. 2 of the European Convention on Human Rights (the right to life). The government argued that the ban on the transmission of information about abortions was necessary to protect the Art. 2 right of unborn children. The applicants relied on Art. 10 of the European Convention (freedom of expression). They argued that the government's measure violated their right to freely express information about abortions. Two "civil and political" rights thus clashed. The courts resolved the clash by analysing the balance of interests involved in relation to the

⁹⁶⁴ Helen Rizzo, Abdel-Hamid Abdel-Latif, and Katherine Meyer, "The Relationship Between Gender Equality and Democracy: A Comparison of Arab Versus Non-Arab Muslim Societies", 41 *Sociology* 6, pp. 1151-1170

⁹⁶⁵ Eugene Kamenka, "Human Rights, Peoples' Rights" in James Crawford (ed), *The Rights of Peoples*, (Oxford; Clarendon Press, 1992), pp. 127-139

⁹⁶⁶ *Open Door and Dublin Well Woman v Ireland*, (14234/88) [1992] ECHR 68 (29 October 1992)

particular circumstances of the case. This process has continued through Irish political discourse.⁹⁶⁷

Tension will always exist between rights, but it may be resolved in the courts by consideration of the individual circumstances of the dispute on a case by case basis.⁹⁶⁸ In *Gerhardy v Brown*⁹⁶⁹ the Australian High Court considered a clash between a solidarity right and a civil right. It upheld the exclusion of an aboriginal man from certain lands in South Australia because he was not a member of the Pitjantjatjara nation. The court weighed the civil right (of the claimant to access the land in question) with the solidarity right (of the members of the Pitjantjatjara nation to self-determination). It held that the Pitjantjatjara nation was the traditional owners of the land. In the light of a history of marginalisation, their survival as a nation depended on continued exclusive access to that land. The court also held that the exclusion of the non-Pitjantjatjara man was a violation of his rights under both national and international law. Yet the violation was justified because the loss he suffered was, in the context, less significant than the loss the Pitjantjatjara nation would suffer if they were not able to maintain their exclusive use of the land. *Gerhardy* demonstrates that solidarity rights can be balanced against civil and political rights and a just resolution found. Alternatively tension between rights might be worked out through the political discourse. Arguments about the balance of rights are used by both sides in Ireland's ongoing public debate about abortion.⁹⁷⁰

If the clash between two civil rights is not inimical to the legitimacy of civil and political rights as a class, then it is difficult to justify the position that a clash between a civil right and a solidarity right must undermine a legitimacy of the latter class. A clash

⁹⁶⁷ Siobhan Mullaly, "Debating Reproductive Rights In Ireland", 27 H.R.Q. 1 (2005), pp. 78-104

⁹⁶⁸ Brownlie, n. 67, pp. 1-17

⁹⁶⁹ *Gerhardy v. Brown*, 57 A.L.R. 472 (Austl., 1985)

⁹⁷⁰ Mullaly, n. 845, pp. 78-104

between a civil right and a solidarity right only becomes problematic if solidarity rights are, inherently, less important than other classes of rights. In that case, balancing the rights would be unjust because it would mean giving an unimportant interest equivalent status to an important interest. The crux of the compatibility argument is, therefore, the urgency of common-good interests. If solidarity rights can be urgent then they can be balanced against other classes of rights without inevitable injustice, in the same way as civil and political rights and economic, social, and cultural rights are balanced against each other. If, however, common-good interests *do not* have equivalent urgency to the interests protected by other classes of rights, then it is unjust to balance them against each other on equal terms.

Politicisation

It has been argued that solidarity rights represent the interests of powerful agents rather than the interests of the individuals they claim to protect. For Bilder, few governments see political value in opposing the creation of new rights outright.⁹⁷¹ Even when governments do not believe that the interest in question merits protection with the rights mechanism, it is often more politically expedient to accept the right formally but ignore it in practice.⁹⁷² The norms of the Practice do not, therefore, represent the true will of the international community, even after they have been enshrined in international law.

This creates space for interest groups to manipulate the Practice to advance their own partisan agendas. If states do not take the formal mechanisms for the identification of human rights seriously, it is much easier for interest groups to advance partisan claims

⁹⁷¹ Bilder, n. 210, pp. 171 - 217

⁹⁷² Ibid, pp. 171 - 217

and have them protected as “rights”.⁹⁷³ For Bilder, recognition of rights often “represent[s] the vagaries of current UN politics rather than widespread and significant popular demands”⁹⁷⁴. He cites, as an example, cooperation between Arab states at the Tehran conference to focus human rights discussions on Israel for abuses in Palestine.⁹⁷⁵ This is not an isolated phenomenon. The Organisation of Islamic Cooperation states have, on multiple occasions, combined to focus debate in the UN Human Rights Council on Israel.⁹⁷⁶ In doing so they have used the Council to advance a particular political agenda. Regional human rights treaties can also reflect political agendas. The Arab Charter of Human Rights was adopted in 2004 after the first draft was rejected as being too far from international norms.⁹⁷⁷ Although the second draft was closer to international standards of human rights it retained certain highly politicised aspects.⁹⁷⁸ Art. 2 of the Arab Charter, the right to resist occupation,⁹⁷⁹ is specifically aimed at the Israel-Palestine conflict.⁹⁸⁰ It therefore reflects a particular political agenda, not a generally important interest.

International Human Rights treaties are negotiated by states, on the understanding that states are the best representatives of their citizens at international level. There is, however, little guarantee that this is the case. Access to UN or regional human rights

⁹⁷³ Ibid, pp. 171 - 217

⁹⁷⁴ Ibid, pp. 171 - 217

⁹⁷⁵ Ibid, pp. 171 - 217

⁹⁷⁶ Heinze, n. 187

⁹⁷⁷ Meruat Rishmawi, “The Revised Arab Charter of Human Rights: A Step Forward?”, 5 Hum. Rts. L. Rev. 361 2005

⁹⁷⁸ Ibid, p. 361

⁹⁷⁹ League of Arab States, Arab Charter on Human Rights, 15 September 1994, Arts. 2(3) and 2(4)

⁹⁸⁰ Rishmawi, n. 855, p. 361

organisations is not limited to democracies.⁹⁸¹ It is difficult to have confidence that rights protect the genuine interests of individuals if they are identified with mechanisms which afford equal influence to dictators as they do to democracies.

If Bilder's critique is correct then it must apply to all human rights, not merely to solidarity rights. If rights are created by a process that represents the interests of certain political elites, rather than the general will, then all rights must be considered "politicised". Yet Bilder⁹⁸² and Alston,⁹⁸³ the chief proponents of the "politicisation" critique, generally embrace civil and political and economic cultural and social rights⁹⁸⁴ when, in the Practice, all human rights are identified and protected with the same flawed mechanism. There is a significant body of literature arguing that civil and political rights are, themselves, tools designed to advance the political agenda of western elites rather than the general interests of individuals.⁹⁸⁵ For Susan Brophy⁹⁸⁶ and Zehra F. Kabasakal Arat.⁹⁸⁷ the international human rights discourse has been manipulated to focus disproportionately on civil and political rights in a way that benefits a neo-liberal

⁹⁸¹ cf. H. W. O. Okoth-Ogendo, "Constitutions Without Constitutionalism: Reflections on the African Political Paradox", in D. Greenberg, S. N. Katz, M. B. Oliviero, S.C. Wheatley (eds.), "Constitutionalism and Democracy: Transitions in the Contemporary World" (Oxford; OUP, 1993), pp. 101 - 120; Udombana, n. 178, p. 1208

⁹⁸² Bilder, n. 210, pp. 171 - 217

⁹⁸³ Alston, n. 229, p. 307

⁹⁸⁴ cf. Ibid, p. 307 and Bilder, n. 210, pp. 171 - 217

⁹⁸⁵ cf Susan Dianne Brophy, "Freedom, Law and the Colonial Project", 24 Law Critique (2013), pp. 39-61; Zehra F. Kabasakal Arat, "Human Rights Ideology and Dimensions of Power: A Radical Approach to the State, Property and Discrimination" 30 Hum. Rts. Q. 906 (2008); Paul O'Connell, "On Reconciling Irreconcilables: Neo-Liberal Globalisation and Human Rights", 7 Hum. Rts. L. Rev. 483 p. 207

⁹⁸⁶ Brophy, n. 863, pp. 39-61

⁹⁸⁷ Arat, n. 985, p. 906

economic agenda.⁹⁸⁸ If solidarity rights lack legitimacy because they reflect political agendas, then all rights lack legitimacy, because all rights reflect political agendas.

It is inevitable that the rights recognised in the Practice are the result of political agendas because the Practice is a political undertaking. Claims to objectivity invite scepticism.⁹⁸⁹ Any proposition that “x interest merits recognition as a right” is therefore a subjective statement. It is also a political statement because it proposes a certain norm for application to the rest of society. Beitz’s political approach accepts that all statements about rights are political statements. All proposals for rights represent one or more political agendas. A proposal is successful in the Practice if the proposer can convince a sufficiently broad cross section of the other participants to endorse her proposal. In other words, to accept that aspect of her political agenda.

Civil and political rights and economic, social, and cultural rights generally reflect the political agendas of, respectively, western liberals and Eastern Bloc socialists.⁹⁹⁰ If the interests recognised by the Practice are limited to those classes of rights, then the Practice, as a whole, is purely a vehicle for two political agendas. In the absence of objective knowledge about what interests are more important than others, the Practice can only have widespread authority if it is open to all political agendas. When no agenda can be completely satisfactory, it is rational to open the Practice to the widest possible cross-section. It is imperfect and, occasionally, even unjust. Yet, when any political interest can be protected by a right, those of all political persuasions have a reason to participate in the Practice. All political positions must have the chance to make

⁹⁸⁸ cf Brophy, n. 863, pp. 39-61; Arat, n. 985, p. 906 O’Connell, n. 985, p. 207

⁹⁸⁹ See the discussion of this point at pp. 51-54

⁹⁹⁰ Marks, n. 184, p. 44

the case that their interests are of sufficient importance to protect with the rights mechanism.

In summary, if the interests protected by solidarity rights can be of equivalent importance to the interests protected other classes of rights, then solidarity rights are compatible with the Practice. Solidarity rights are held by individuals and protect the interests of individuals. They do not protect abstract concepts. All rights express political agendas. Excluding certain agendas from competition for recognition in the Practice delegitimises the Practice. It is only justifiable if the interests that are excluded cannot be as urgent as the interests protected by the accepted classes. As I have argued in Chapters Four to Seven, common-good interests can be of equal urgency as independent-good interests. Beitz's political approach, therefore, offers a satisfactory response to the compatibility critique.

The Practicality Critique

The second major critique of solidarity rights is that they have little or no practical impact in safeguarding the interests they are intended to protect. This is, in essence, a question of the reasonable effect of the rights mechanism in protecting common-good interests. As I have demonstrated in Chapters Six and Seven, the rights mechanism can be, and is, effective in protecting common-good interests. The application of Beitz's political approach thus answers this critique.

The leading proponent of the practicality critique, Philip Alston, charges the supporters of solidarity rights with failing to properly develop the practical implications

of the concept.⁹⁹¹ For Alston, solidarity rights are too “vague” to be enforceable either in a political or judicial framework.⁹⁹² The value of human rights lies in the potential to enforce them in a court of law. If rights cannot be enforced in court, then they are not human rights. So-called “rights”, which are too vague or imprecise to be used in court, may be authoritative moral claims, but they have no place in international (or domestic) human rights law.⁹⁹³ Furthermore, opponents of human rights often dismiss the Practice as utopian.⁹⁹⁴ Endorsing rights that cannot be enforced in any practical sense lends credence to this critique.⁹⁹⁵ Solidarity rights are thus doubly problematic: they lack legitimacy in themselves, and their very existence undermines the legitimacy of the entire concept of human rights as a body of law.⁹⁹⁶

It can be argued that human rights have authority even if they are not justiciable. For Abdullahi Ahmed An-Na'im⁹⁹⁷, critiques like Alston's show insufficient appreciation for the “political and discourse value”⁹⁹⁸ of describing interests as rights. International law does not take effect in the same way as domestic law. The latter is enforced in a direct manner by domestic institutions such as the police and the courts. These institutions can enforce domestic law effectively because they wield coercive power. There are no equivalent institutions to enforce international law. International law

⁹⁹¹ Alston, n. 229 pp. 259-293

⁹⁹² Ibid, p. 280

⁹⁹³ Alston, n. 177, p. 308

⁹⁹⁴ Marks, n. 177, p. 435

⁹⁹⁵ Alston, n. 177, p. 307

⁹⁹⁶ Ibid, p. 322

⁹⁹⁷ Abdullahi Ahmed An-Na'im, “The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to Self Determination” in D. Greenberg, S. N. Katz, M. B. Oliviero, S.C.Wheatley (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford; OUP, 1993), pp. 134 - 160

⁹⁹⁸ Ibid, p. 440

may be applied by international courts or institutions, but these both lack coercive power equivalent to that wielded by the institutions that enforce domestic law. Sometimes international law may be enforced by other states, through intervention. These mechanism, however, are not applied with equivalent consistency to the methods of enforcement available for domestic law. International law, therefore, often takes effect through an international relations discourse. It is cited to put diplomatic or, occasionally, military pressure on another state. This is often occurs on an *ad hoc* basis rather than because of consistent judicial decision making.⁹⁹⁹ Enshrining a claim as a right in international law gives it greater political influence, even if it is difficult to articulate in court.¹⁰⁰⁰ Indeed, the latter may never actually need to happen for the right to have the intended effect.¹⁰⁰¹

An-Na'im's argument relies, however, on the assertion that human rights have a persuasive impact that is independent of their legal impact. For An-Na'im, the justiciable impact of rights can be separated from the persuasive impact and discarded. Yet this is not possible in the Practice. Human rights have value in international political discourse precisely because they are law. Enshrining human rights in international law indicates that the international community considers human rights to be norms of high importance. When state A appeals to an aspect of international law in pursuance of a diplomatic disagreement with state B, the implication of that appeal is that state B is legally obliged to concede to state A's demands. If State B refuses, State A is entitled to seek punitive measures, either in court or through political action. If this were not the case, then there would be no point in appealing to international law rather than some other normative

⁹⁹⁹ Ibid, p. 437

¹⁰⁰⁰ Ibid, p. 434 - 461

¹⁰⁰¹ Ibid, p. 434 - 461

structure, such as natural law or a religious doctrine, as states did before the development of international law.¹⁰⁰² The assertion that rights need not be judiciable is therefore an insufficient response to the practicality critique.

We must, instead, engage with the veracity of the critique itself. The practicality critique relies on the assertion that solidarity rights cannot be enforced in a court of law. Donnelley suggests a version of the practicality critique. For him, the absence of a clear agent who can enforce the right makes solidarity rights effectively unenforceable.¹⁰⁰³ While rights are not immediately enforceable in courts of law, governments can, collectively or unilaterally, create structures that give them legal effect. This is part of discharging the first-level duty. In the UK, the Human Rights Act 1998 makes the European Convention on Human Rights justiciable in English law. In turn, Section II of the European Convention makes the rights contained therein justiciable in the European Court of Human Rights. Chapters Six and Seven have demonstrated that, if appropriate provision is made, solidarity rights can be enforced in courts of law in the same way as the rights in the accepted classes. Donnelley's version of the practicality critique is thus answered by the application of Beitz's third criterion in this thesis,

Alston's posits a different version of the practicality critique. In his version, solidarity rights fail to place definable obligations on states. This means that the duty provision in the right, if it exists at all, is weak.¹⁰⁰⁴ Alston's critique, however, holds the duty element of solidarity rights to a higher standard of precision than that which is expected of civil and political rights or economic, social and cultural rights. Rights are

¹⁰⁰² See Jeremy Larkin, *From Hierarchy to Anarchy: Territory and Politics Before Westphalia*, (London: Springer, 2009)

¹⁰⁰³ Donnelley, n. 2, p. 495

¹⁰⁰⁴ Alston, n. 229, pp. 590-595

mid-level norms. They contain a general duty, not the specific steps required for that duty to be fulfilled.¹⁰⁰⁵ If solidarity rights contained specific obligations, then they would be something other than human rights. As Dustin Sharp points out, the accepted classes of rights only contain general duties. The steps necessary to respect those duties must be clarified through further political and judicial processes.¹⁰⁰⁶ The prohibition of torture and cruel, inhuman and degrading treatment is vague if one merely looks at the initial expression of the right (such as in the Universal Declaration,¹⁰⁰⁷ International Convention in Civil and Political Rights¹⁰⁰⁸ or European Convention on Human Rights).¹⁰⁰⁹ It does not specify, for example, which actions constitute “cruel, inhuman or degrading treatment”.¹⁰¹⁰ The specific tests for such treatment have been worked out through, *inter alia*, judicial consideration, domestic legislation and further international law instruments. Such a process is required to give clarity to any human right, not merely solidarity rights.¹⁰¹¹

As Eugene Kamenka puts it, the recognition of any right, whether civil and political right, economic, social, or cultural right, or solidarity right, is a “journey from the abstract to the practical”.¹⁰¹² As mid-level norms, Rights do not contain the steps

¹⁰⁰⁵ See the discussion of mid-level norms at pp. 35-37

¹⁰⁰⁶ Dustin N. Sharp, “Reappraising the Significance of Third Generation Rights in a Globalised World”, SSRN working paper (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2635236 (last checked 9th September 2016), p. 14

¹⁰⁰⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 5

¹⁰⁰⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art. 7

¹⁰⁰⁹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Art. 3

¹⁰¹⁰ Sharp, n. 884, p. 14

¹⁰¹¹ *Ibid*, pp. 10

¹⁰¹² Kamenka, n. 843, pp. 127-139

required for their realisation, merely the duty to take *some* steps. That is why the respective international covenants provide for an obligation for states to adopt laws and measures necessary to ensure the realisation of the rights contained therein.¹⁰¹³ If rights contained the mechanisms for their realisation, then this provision would be unnecessary. There would be no barrier to “immediate realisation” because the rights themselves would provide the mechanism.

It may be argued that Alston’s critique is better construed as a critique of *any* right that contains positive duties. Any right that imposes an obligation beyond the duty to refrain from a certain action, is too vague to be practical. Yet no right is entirely negative. Even the most ostensibly “simple” right contains positive obligations. The rights to life and privacy, for example, might be described as containing precise, negative mechanisms for their realisation. They, *prima facie*, require that the state refrain from killing its citizens or interfering in their private lives. Yet even these apparently simple rights include elements of vagueness. The right to privacy requires further definition between the “private” and the “public”. The right to life requires qualification in the case of the death penalty¹⁰¹⁴ and abortion.¹⁰¹⁵ Beyond this, both rights have been construed as including positive obligations to take measures to ensure that non-state actors do not infringe upon the rights of citizens.¹⁰¹⁶ These aspects of the rights have all been worked

¹⁰¹³ ICCPR, Art. 2(2); ESCR, Art. 2(1)

¹⁰¹⁴ See, for example, the discussion conducted by the European Court of Human Rights in *Soering v United Kingdom* [1989] 11 EHRR 439 and *Öcalan v Turkey* [2005] 41 EHRR 45
Vo v France (Application no 53924/00) Judgment of 8 July 2004 and *Evans v United Kingdom* [2006] 43 EHRR 21

¹⁰¹⁵ For example, *Vo v France* (Application no 53924/00) Judgment of 8 July 2004 and *Evans v United Kingdom* [2006] 43 EHRR 21

¹⁰¹⁶ For example *Osman v United Kingdom* [1998] EHRR 245

out in both political and judicial fora through the development of further instruments, opinions and the application of the rights in specific contexts.

The question for solidarity rights is not “do they contain precise duties *ab initio*?” It is “can we identify precise steps by which to respect the general duty for which they provide?” This is, ultimately, a question of reasonable effect. Imposing appropriate general duties is essential to effective protection of an interest. As demonstrated by chapters Six, Seven, and Eight, such steps can be discerned in the case of solidarity rights. Rights, such as the right to self-determination and environment, have been applied by international, regional and domestic courts. In Chapter Five I explored the steps that the international community has developed to respect the general duty in the right to self-determination. These include the international law principle of non-interference, customary international norms that regulate the recognition of new states by the international community and justiciable rights that allow groups to pursue their claims for greater independence or secession. States have also developed measures to respect the inward-facing aspect of the duty for which self-determination provides. These include giving certain territories partial autonomy (such as in the Alto-Adige),¹⁰¹⁷ taking steps to protect the cultural institutions of self-identifying groups (as in Canada),¹⁰¹⁸ and developing systems of governance that respect the governance traditions of the various different political groups in the territory (as in Nigeria),¹⁰¹⁹ Chapter Seven argued that the right to a clean and healthy environment is moving towards a similar status and postulated further measures that might be taken to respect the general duty to protect the environment. In relation to pollution, states have respected the general duty by creating

¹⁰¹⁷ See Cassese, n. 78, pp. 104-5

¹⁰¹⁸ See discussion at pp. 157

¹⁰¹⁹ See discussion at p. 169

justiciable legal rights that enable individuals to hold polluters accountable in domestic courts. In relation to climate change, I postulated that a justiciable right at international level that would facilitate individuals in holding states accountable for their failure to address climate change. These case studies demonstrate that solidarity rights can, and do, have a tangible impact as part of the Practice.

The Necessity Critique

The necessity critique is that solidarity rights do not add anything useful to international law. Where solidarity rights protect interests, this protection is already provided by non-rights mechanisms. This, however, misstates the purpose of human rights. As I have argued in the previous chapters, rights disperse power. The role of rights is not only to provide specific protections for an interest, but to give individuals the power to demand those measures from states.

For Carl Wellman, the increasing interdependence of international relations makes international solidarity necessary for the realisation of all human rights.¹⁰²⁰ He accepts that this could be a basis for an argument for a new generation of rights.¹⁰²¹ For Wellman, however, new rights are unnecessary because human dignity is already adequately protected by other classes of rights.¹⁰²² If human dignity is still violated it is because the rights civil and political rights and economic, social, and cultural rights are not adequately protected.¹⁰²³ Proponents of international solidarity should, for Wellman,

¹⁰²⁰ Wellman, n. 177, p. 639

¹⁰²¹ Ibid, p. 639

¹⁰²² Ibid, p. 639

¹⁰²³ Ibid, p. 639

focus on the realisation of civil and political rights and economic, social, and cultural rights.¹⁰²⁴

Sigrun Skogly develops Wellman's argument with an analysis of the necessity of the proposed right not to be poor.¹⁰²⁵ She argues that poverty already violates a range of existing human rights.¹⁰²⁶ There is no need for a specific right not to be poor because every interest it might protect is already protected by other existing rights.¹⁰²⁷ Attention should instead be focused on properly realising those rights which already exist.¹⁰²⁸ A specific right not to be poor risks “diminishing regard that the HR system enjoys and risk using too much energy on getting something adopted, rather than using the already existing structures which, if implemented, would make a real difference in poverty alleviation”.¹⁰²⁹

¹⁰²⁴ Wellman, n. 177, p. 639

¹⁰²⁵ UN Commission on Human Rights: Resolution 2000/12 on Human Rights and Extreme Poverty, E/CN.4/RES/2000/12; Resolution 1999/26 on Human Rights and Extreme Poverty, E/CN.4/RES/1999/26; Resolution 1998/25 on Human Rights and Extreme Poverty, E/CN.4/RES/1998/25; Human Rights and Extreme Poverty, Report of the independent expert, Ms. Lizin, E/CN.4/1999/48; Report of the Independent Expert, Ms. Lizin, E/CN.4/2000/52; Report of the Workshop on Human Rights and Extreme Poverty, E/CN.4/2000/52/Add.1; Follow-up to the 4th World Conference on Women: Review of mainstreaming in organisations of the UN System, E/CN.4/1998/22; (ii) UN Sub-Commission on the Promotion and Protection of Human Rights: Final Report on Human Rights and Extreme Poverty, submitted by Special Rapporteur Mr. Leandro Despouy, E/CN.4/Sub.2/ 1996/13; Resolution 2001/8 on Implementation of existing human rights norms and standards in the context of the fight against poverty, E/CN.4/Sub.2/RES/2001/8; (iii) General Assembly: Resolution on Human Rights and Extreme Poverty, 8 March 1999, A/RES/53/146; Implementation of the first United Nations Decade for the Eradication of Poverty (1997- 2006), Report of the Secretary-General, 7 September 1999, A/54/316; (iv) UN Committee on Economic, Social and Cultural Rights: Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights adopted on 4 May 2001, E/C.12/2001/10.

¹⁰²⁶ Sigrun I. Skogly, “Is There A Right Not To Be Poor?”, 2 Hum. Rts. L. Rev. 59 2002

¹⁰²⁷ Ibid, p. 59

¹⁰²⁸ Ibid, p. 59

¹⁰²⁹ Ibid, p. 59

Alston posits an alternative version of the necessity critique. For him, even if solidarity rights protect important interests, they remain unnecessary because those interests are already addressed by non-rights mechanisms in the international system.¹⁰³⁰ In Alston's words "the world is unlikely to be a less peaceful place as a result of the failure to find a meaningful formulation of the right to peace."¹⁰³¹

A response to this critique comes from Van Boven.¹⁰³² He begins with the proposition that human rights are universal, and interdependent.¹⁰³³ For Van Boven, it makes practical sense that certain human rights are created to ensure the practical realisation of others.¹⁰³⁴ Solidarity rights create the conditions necessary for the realization of civil and political rights and economic, social, and cultural rights.¹⁰³⁵ For Van Boven, human rights are indivisible. This suggests that they are conceptually designed contribute to the realisation of each other.¹⁰³⁶ This argument, however, casts solidarity rights as a second class of rights. It implies that solidarity rights only have value because they facilitate other, more important, interests. This thesis aspires to an argument that justifies solidarity rights because they are valuable *in themselves*. My case is that solidarity rights protect interests that are urgent in a manner that is equivalent to those protected by other classes of rights. Van Boven's response to the necessity critique is therefore unsatisfying for the purposes of this thesis.

¹⁰³⁰ Alston, n. 229, pp. 290-293

¹⁰³¹ Ibid, p. 292

¹⁰³² Theodore Van Boven, "A Universal Declaration of Human Responsibilities", in *Reflections on the Universal Declaration on Human Right: A Fiftieth Anniversary Anthology*, (Copenhagen; Martinus Nijhoff, 1998), p. 461

¹⁰³³ Ibid, p. 461

¹⁰³⁴ Ibid, p. 461

¹⁰³⁵ Ibid, p. 461

¹⁰³⁶ Ibid, p. 461

As argued in the Chapter One, human rights disperse power by giving individuals recognised demands on their state. This transfers power from a concentrated form (concentrated in the hands of the state) to a dispersed form (shared between millions of individuals). It doesn't matter that non-rights mechanisms already exist to address the interests protected by solidarity rights. The non-rights mechanisms, to which Alston and others refer, are generally international institutions. International institutions are generally dominated by states. All the power to respond to a standard threat is in the hands of states. Human rights put that power in the hands of the holders of the interests. The right to peace may not create a new mechanism for achieving world peace. But it places the power to recognisably demand action towards peace in the hands of individuals, where it was previously concentrated in the hands of states.

An increase in the number of recognised rights will not devalue the concept of rights as a whole unless the new rights recognized have, in some way, less merit than those currently recognized. As Beitz argues, the Practice is evolving. Although common-good interests may be addressed by other mechanisms, rights have a different function. Rights serve to place the power to demand action to protect certain interests in the hands of individuals, thus protecting an interest with a right has utility even if that interest is already addressed by other mechanisms. As was demonstrated in Chapter Seven, with the example of the right to a clean and healthy environment, the rights discourse puts the power to protect urgent interests in the hands of the holders of those interests, individuals, where non-rights measures often concentrate power in the hands of states. The Practice will only be devalued if rights are used to protect interests that do not merit that level of authoritative protection. The recognition of new interests as rights will undermine the practice only if those interests are not sufficiently urgent.

The Hybridity Critique

The most original critique of solidarity rights comes from Rosa Freedman. She applies hybridity theory as a lens through which to analyse solidarity rights. Freedman does not dismiss solidarity rights *in totum*, but rather identifies areas in which they require further scrutiny. Solidarity rights are, for Freedman, hybrid rights: resulting from a process of resistance and creation between the Global North and Global South.¹⁰³⁷ In hybridity theory, new cultural phenomena are created by the process of resistance between dominator and dominated. Homi Bhabha, describes a metaphorical “third space” in which socio-cultural memes are created through the tensions between dominant and subaltern cultures, yet are the product of neither.¹⁰³⁸ In Freedman’s words: “Bhabha's ‘Third Space’ is a metaphor for the meeting of cultures—where the colonised and coloniser intertwine and from where the distinct hybrid identity emerges.”¹⁰³⁹

Freedman’s applies Bhabha’s theory of hybridity to analyse the Practice. For Freedman: “By engaging with the system of ‘rights’, and by seeking to promote their own objectives within that framework, states from the Global South are using hybridity theories to inform their actions and to create processes and constructs that both meet and challenge the dominant ideology.”¹⁰⁴⁰ The result is solidarity rights, which are “hybrid not only in terms of their substance, subjects and scope, but also in terms of the areas that they seek to bring into the human rights system.”¹⁰⁴¹ Solidarity rights thus challenge dominant ideologies of rights.

¹⁰³⁷ Freedman, n. 3, pp. 935-959

¹⁰³⁸ Homi K. Bhabha, *The Location of Culture*, (Routledge: London, 1994), p. 10

¹⁰³⁹ Freedman, n. 3, p. 940

¹⁰⁴⁰ Ibid, p. 943

¹⁰⁴¹ Ibid, p. 944

Freedman does not assign all solidarity rights to the class of “hybrid rights”. She posits two “waves” of development of solidarity rights.¹⁰⁴² The first “wave” was a direct reaction to colonialism. Rights such as self-determination and permanent sovereignty over natural resources were “crucial to the decolonisation process, enabling newly self-governing states to assert collective rights to matters previously used by colonisers to subjugate and oppress those peoples.”¹⁰⁴³ The “second wave” of solidarity rights developed after decolonization.¹⁰⁴⁴ Freedman calls these “hybrid rights”. They represent “the intertwining of a range of national and regional—local—ideologies as well as the broad range of those states' colonial experiences. It is that merging of ideologies and experiences that brings different hybrid constructs to the fore within each new right. Each ideological construct depends on the states that create and promote the right, their own human rights objectives and values, and their experiences of the dominant, Western human rights ideologies.”¹⁰⁴⁵

¹⁰⁴² Ibid, p. 941

¹⁰⁴³ Ibid, p. 948

¹⁰⁴⁴ I would challenge Freedman’s assertion that hybridity is unique to the “second wave” of solidarity rights. Hybridity is a fact of all human rights. Human rights are the product of centuries of resistance between individuals and states. Between elites, that have an interest in the concentration of power, and individuals, who have an interest in dispersing power (see Brownlie, n. 67, p. 205). Rights are only established in international law through negotiation, political trade off, cultural pressure, judicial interpretation and activist promotion. Every right, indeed the Practice as a whole, is the product of multiple and diverse socio-cultural, economic and political inputs. Civil and political rights and economic, social, and cultural rights have roots in western and socialist political culture (see Marks, n. 184, p. 255). But within those (broad) bands they are the product of a myriad of oppressions and resistance. Furthermore, human rights, as a concept, are ultimately the product of a process of oppression and resistance. Rights are only necessary due to unequal distributions of power. In Beitz’s model, rights respond to standard threats (see Beitz, n. 5, p. 129). This process of threat and response, worked out through discourse, is analogous to Bhabba’s model of hybridity. The Practice is, itself, effectively a “third space”.

¹⁰⁴⁵ Ibid, p. 949

Solidarity rights, for Freedman, challenge the dominant ideologies of rights (represented in the accepted classes) in their substance, subjects, and scope. Hybrid rights challenge traditional understandings of the *substance* of rights by bringing issues into the rights matrix that were previously addressed through non-rights mechanisms. These issues tend to reflect the interests promoted by states in the Global South. Hybrid rights also challenge dominant understandings of the *subjects* and *scope* of rights. They expand the nature of the duties that rights impose so that “states are made responsible for the behaviour of other states”.¹⁰⁴⁶ As a result, “human rights become a collective responsibility for all states”.¹⁰⁴⁷

Freedman does not distinguish between first level and second level duties in her discussion of the subjects and scope of rights. Her analysis, however, coheres with Beitz’s model. While rights have always, to a certain extent, made states “responsible for the behaviour of other states”, solidarity (or “hybrid”) rights alter the extent of this duty. The accepted classes of rights make states responsible for the behaviour of other states only when “other states” fail to respect their duties to their citizens. Solidarity rights concern duties that cannot be respected except by engaging with other states, because they concern transnational issues.

For Freedman, the hybrid nature of solidarity rights does not make them necessarily problematic. It does, however, invite scepticism. Freedman’s hybridity analysis leads to a three-point critique of solidarity rights. For Freedman, hybrid rights create ambiguity as to the substance of rights¹⁰⁴⁸ and the subjects of rights.¹⁰⁴⁹ Further,

¹⁰⁴⁶ Ibid, p. 953

¹⁰⁴⁷ Ibid, p. 954

¹⁰⁴⁸ Ibid, p. 949

¹⁰⁴⁹ Ibid, p. 952

they can be used by non-democratic states to avoid the duties imposed by the accepted classes of rights.¹⁰⁵⁰

Substance ambiguity

Solidarity rights bring interests into the rights matrix that were not protected by the norms of the Practice under the dominant ideologies behind the accepted classes. This, for Freedman, means that the substance of hybrid rights can be vague. The substance of rights in the accepted classes, for Freedman, can be reduced to a “freedom from” or a “freedom to”. Solidarity rights do conform to an equivalent formulation. Yet, in my view, while the interests protected by solidarity rights differ in substance from those protected by the accepted classes, they all, ultimately, belong to the same class on a more fundamental level: the class of urgent interests.

Solidarity rights do not alter the fundamental nature of the interests that may be protected by the rights mechanism. By encompassing inputs from the Global South, they, rather, represent the expansion of the discourse regarding urgent interests, to encompass a wider range of perspectives. Furthermore, as demonstrated in Chapters Six, Seven, and Eight, it is possible to specify the substance of solidarity rights without excessive vagueness. Like members of the accepted classes of rights, the substance of solidarity rights is clarified and specified through the rights discourse, such as through identifying specific steps that states can take to respect their first-level duty. The substance of the right to peace, for example, is specified in the steps detailed in the draft declaration. The substance of the right to a clean and healthy environment can be found in the network of international and regional environmental treaties.

¹⁰⁵⁰ Ibid, p. 955

Subject ambiguity

The collective nature of the interests protected by solidarity rights mean that rights claims can be articulated by states. This creates a danger, Freedman suggests, that solidarity rights may begin to take effect as rights belonging states rather than the rights of individuals. For example:

“The right to international solidarity and the right to a democratic and equitable order are aimed at states as an entity—rather than a group of people—and at groups of states, as they are collectives or groups of individuals. The Human Rights Council mandate on international solidarity, for example, requires the Independent Expert ‘to promote and consolidate international assistance to developing countries in their endeavours in development and the promotion of conditions that make the full realization of all human rights possible’. Although that responsibility discusses the individual as the rights holder, it is only in relation to secondary rights rather than to the right of international solidarity. It appears that states are the primary rights holders and that the realisation of the right to international solidarity will enable those rights holders—the states—to implement all human rights for individuals under their control.”¹⁰⁵¹

States are necessary to represent the common-good interests of individuals at the international level. This does not, however, make states the holders of solidarity rights. While aid to states may play a role in the realization of various human rights, this does not make states the holders of those rights. States give aid to other states to respect their outward-facing duties under solidarity rights. The states that receive aid have an inward-

¹⁰⁵¹ Freedman, n. 3, p. 952

facing duty, imposed by the rights in question, to use the aid to benefit the holders of the rights: individuals. When a state withholds the aid, it receives from its citizens, this represents a violation of their rights. When it is framed in human rights terms, the obligation to provide aid to developing states does not make states the holders of rights but, rather, the conduit through which the interests of their citizens can be more effectively protected.

The Human Rights Council mandate on a democratic and equitable international order, for example, does not establish the right.¹⁰⁵² The mandate is part of the process by which states identify the steps necessary to respect the general duty for which the right provides. Nor does the mandate mean that the right is held by states. It rather indicates that distributing aid to states is one step by which the general duty can be respected. States are convenient institutions through which to distribute aid to individuals. It is certainly arguable that they are not the most effective structure by which to do so, but that is an issue for a different project.

Non-Democratic States

Freedman's third point of critique is that solidarity rights facilitate non-democratic regimes in minimising the impact of the accepted classes of rights.¹⁰⁵³ Non-democratic states, for Freedman, engage in the rights discourse in bad faith. They attempt to dilute the Practice by increasing the number of interests protected, thus obscuring their abuse of their own citizens. Yet the involvement of non-democratic states

¹⁰⁵² The right to a democratic and equitable international order was originally recognised by the United Nations General Assembly. (See UN General Assembly, Resolution on the Promotion of a Democratic and Equitable International Order, A/RES/65/223, 10th December 2010)

¹⁰⁵³ Ibid, p. 955

is not unique to solidarity rights. Most economic, social, and cultural rights were supported by members of the Warsaw Pact, few of which were democratic. Questions of the urgency of an interest are distinct from the nature of the states that support recognising that interest as a right. A dictatorial state may support protecting an urgent interest with the rights mechanism, or a democratic state may support protecting an urgent interest: the nature of the supporting party does not necessarily determine the urgency of the interest. Further, it is not possible, within the United Nations system, for an interest to gain recognition as a right (to the same level as the rights in the accepted classes) without broad support. An interest is unlikely to gain recognition as a right with the support of non-democratic states alone. While some non-democratic states undoubtedly engage in the discourse in bad faith, this should be understood as an aspect of the discourse that touches all rights, rather than as fatal to solidarity right as a class. Indeed, as Freedman argues, it is only by engagement in the discourse, particularly in relation to solidarity rights, that democratic states can effectively respond to the bad faith of non-democratic states.

Conclusion

The aim of this chapter was to argue that the principle theoretical objections to solidarity rights can be answered with the application of Beitz's political approach. I have argued that all the principle critiques ultimately rely on assumptions about the urgency of common-good interests and whether they can be protected to reasonable effect by the rights mechanism. As chapters Four to Seven have shown, common-good interests can be urgent and in a manner equivalent to independent-good interests and they can be protected to reasonable effect by the rights mechanism.

The compatibility critique is that solidarity rights either empower the state or group in oppressing the individual, attempt to protect the relationship between individuals with a mechanism only appropriate for protecting the interests of individuals, or attempt to raise political propositions to the status of rights. Yet, in recognizing solidarity interests, one is not raising them above individual interests, only to the same level. This is only problematic if they are not of equivalent importance. According to Beitz's approach, all rights are political propositions and thus will inevitably clash. The only reason a clash between rights that protect independent-good interests, and rights that protect common-good interests, would be problematic is if common-good interests do not merit being treated with equal authority to independent-good interests. Once again, it is a question of the urgency of the interests. Furthermore, to divorce the "relationships between individuals" with the same mechanism as "individuals" is only problematic if the relationship between individuals does not merit the same protection. The question of compatibility is thus, ultimately, a question of whether common-good interests are of equivalent urgency to independent-good interests. As demonstrated in Chapter Four, common-good interests can be essential to individual dignity in the same way as individual good interests. Thus, the compatibility critique is answered.

The necessity critique is that solidarity rights devalue the Practice as a whole, by using it to protect interests that do not require the protection of the rights mechanism. This is often because they already receive sufficient protection from other mechanisms. But this mistakes the effect of rights. Rights give individuals the power to demand that states take action to address standard threats. As the Practice is emergent it is to be expected that it will address new interests as human society evolves. Thus, the question is one of whether the interests that are protected merit the protection of the rights mechanism. In other words, whether the interests are sufficiently urgent. As

demonstrated by Chapter Four the urgency of common-good interests can be equivalent to that of individual good interests. As demonstrated by Chapter Five, this can be understood even from non-sympathetic perspectives.

The practicality critique is that solidarity rights cannot have a practical impact equivalent to other classes of rights because they are not justiciable in a similar manner. But it is incorrect to suggest that solidarity rights cannot have a practical impact. Methods of justiciability evolve to fit the interests that must be adjudicated. This is ultimately a question of reasonable effect. As demonstrated by chapters six and seven, the rights mechanism can, and does, protect common-good interests with reasonable effectiveness.

Finally, the hybridity critique recognises that solidarity rights represent the evolution of the Practice, but suggests it is evolution in the wrong direction. Hybrid rights are often proposed by undemocratic regimes and devalue the Practice by adding rights that are better addressed by other methods. But if the interests in question are sufficiently urgent then the states that propose them matter less than the individuals that will be protected. Similarly, adding interests of sufficient urgency to the Practice will strengthen and broaden its appeal, rather than devaluing it. The question is, once again, one of urgency. Chapters Four to Seven have demonstrated the urgency of common-good interests both in theory and in practice. As such, in addressing Beitz's criteria for the recognition of interests as rights, this thesis has successfully to answers the principle critiques of solidarity rights.

CONCLUSION

In this thesis, I have argued that solidarity rights can be justified using Charles Beitz's political approach to human rights. I have used Beitz's innovative theoretical approach, construing human rights as political presumptions, to argue for solidarity rights and address scepticism from orthodox rights scholars. It has been demonstrated that common-good interests, as a class, can be urgent, address standard threats, and can be protected to reasonable effect by solidarity rights. This argument has been strengthened with case studies of the right to self-determination, the right to peace, and the right to a clean and healthy environment. It has demonstrated convincingly that solidarity rights should be recognised as a legitimate class of rights in the Practice.

I began with the identification of the key tenets of Beitz's political approach, to apply it to solidarity rights in the subsequent chapters. The starting point was Beitz's approach. This was initially explored as it relates to civil and political rights and economic, social, and cultural rights, because the aim of this thesis is to justify solidarity rights on the same terms as those other classes of rights. In Beitz's approach, rights are political presumptions, worked out at international level. They make the individual a subject of global concern and thereby empower the individual in relation to the state. In doing so, rights protect the urgent interests of individuals from standard threats. They do this by imposing a two-level duty: The first-level duty requires states to protect and provide for the interests recognised by rights. The second-level duty imposes a *pro tanto* obligation to intervene, as part of the international community, when another state fails in its first-level duty. An interest merits this protection if it is urgent, faced with a standard threat, and can be protected reasonably effectively by the rights mechanism. The interest must be of such high importance that even those who do not share the

interest can appreciate that it would be, for the interest holders, a bad thing if the interest were to be set back. The strongest version of this argument will set out the whole case from both the interest-holder and the non-interest-holder perspectives.

Having set out the key tenets of Beitz's approach, it was explained why this is preferable to orthodox theories of human rights. Orthodox approaches tend to begin by attempting to establish moral foundations for rights. This both invites scepticism and means that they cannot account for the full range of rights recognised in the Practice as it stands. In Chapter Two I addressed three classes of orthodox approach: Agreement theories, naturalistic theories and juridical theories. Agreement theories model rights based on an implied underlying cultural agreement on certain norms. This is problematical because they imply empirical statements which are not supported by anthropological research. Naturalistic theories model human rights based on abstract goods. This is problematical because it assumes an objective platform which is impossible to achieve. Neither agreement theories nor naturalistic theories can satisfactorily account for the full range of rights recognised in the Practice. Both approaches are, therefore, of limited utility in analysing solidarity rights in relation to the Practice as it stands. Juridical approaches, the third class of orthodox approach, do not suffer from the same conceptual problems as naturalistic and agreement theories. Yet they are more appropriate for analysing rights in domestic legal systems than as part of the Practice, which includes both international law and international politics. By contrast, Beitz's political approach analyses the Practice based on its role in international politics. It is pluralistic and agnostic as to the foundations of rights. In Beitz's model, rights are mid-level norms, supported by the participants in the Practice for a plurality of different reasons. The legitimacy of rights is derived, not from the moral authority of their foundations, but rather from the political authority accorded by state practice, discourse,

and international law. As this thesis intends to analyse solidarity rights in relation to the Practice as it stands, Beitz's approach is the most appropriate model for its purpose.

In Chapter Three a working description of solidarity rights was established. These are human rights, that protect common-good interests of individuals, by imposing duties on states that are both inward-facing and outward-facing. I departed from Karal Vasak's initial definition, and definitions based on Vasak's, because they do not reflect the application of solidarity rights in international law and politics. I also departed from attempts to identify a legal entity called a "people" as the holder of solidarity rights. The application of solidarity rights clearly demonstrates that they are rights held by individuals. The term "people" should, instead, be understood as referring to the context in which individuals experience the common-good interests protected by solidarity rights. Unlike other classes of rights, solidarity rights impose duties that face both inward and outward. They require that states cooperate with each other to secure common long-term interests.

Chapters Four and Five made the case for solidarity rights as a class according to Beitz's model. In Chapter Four I argued that common-good interests can be urgent, faced with standard threats, and protected, to reasonable effect, by the rights mechanism in a manner equivalent to the individual-good interests protected by the accepted classes of rights. Individual good interests are based on the dignity of the individual. The status of an "individual" is a necessary status: in the central range of cases we cannot help but be an individual agent, regardless of how we identify. Common-good interests can be important to individual dignity in a manner similar to independent-good interests. The status in which the individual experiences common-good interests is this also a necessary status. In the transnational age, individuals are necessarily part of a global community and common-good interests therefore manifest on a global scale. The interconnected

nature of the transnational age means that standard threats can transcend state boundaries, thus impacting on common-good interests. Transnational interconnection can disempower individuals and states in relation to unaccountable transnational agents. The rights mechanism provides reasonably effective protection in the form of solidarity rights. The outward-facing duty in solidarity rights obliges states to cooperate to address threats. It is only by cooperating, that states can address transnational threats and protect common-good interests. The rights mechanism gives individuals the power to recognisably demand that their state exercise this duty of cooperation. It thus empowers individuals and makes the transnational common-good interests of individuals a subject of global concern.

Chapter Five made the case for solidarity rights, as a class, from a non-sympathetic perspective. To demonstrate that solidarity rights can be justified from the widest possible range of perspectives, I undertook an *argumentum a fortiori* exercise, making the case from the most conceptually hostile perspective possible: the political theory of Freidrich Hayek. Hayekian theory rejects solidarity as a concept. It is sceptical of activist states, embraces inequality and views appeals to collective interests as dangerous to liberty.

Yet, although Hayekian theory begins as hostile to solidarity rights, the case can nevertheless be understood from this perspective. Hayekian political theory is based on the premise that it is impossible to gain or process sufficient knowledge to make decisions on a societal scale. The measures adopted by a society must, therefore, be allowed to emerge naturally through a process of competition. To artificially pick a winner requires coercion, which must be limited. Coercion stymies the development of alternative measures, which may be more effective. Different measures and ideas must be allowed to compete freely to objectively determine the most appropriate for a

particular society. Protecting common-good is essential if coercion is to be minimised. Solidarity rights promote the diversity necessary for alternative practices to emerge and compete. Yet the market, the preferred method of social organisation in Hayekian theory, cannot address transnational standard threats. An alternative mechanism is therefore required. The rights mechanism is the best mechanism for protecting common- good interests, from the Hayekian perspective, because it does so by dispersing power, thus limiting the ability of states and transnational agents to coerce individuals.

Having outlined the theoretical case for solidarity rights as a class, I then demonstrated that Beitz's political approach can justify solidarity rights in practice. In the Political approach, rights are emergent. A class of rights must be able to evolve to protect new interests. To demonstrate that solidarity rights fit this pattern, I selected, as case studies, an established solidarity right, an emerging solidarity right, and a right that is yet to be formally recognised at international level. The established right was the right to self-determination. In my view, the right to self-determination protects the urgent common-good interest in political autonomy. It is recognised in treaty law and as a peremptory norm of international law. Political autonomy exists when an individual has agency in relation to her social and political context on both a day-to-day and a structural level. The right to self-determination responds to the threat of domination by one people of another.

Political autonomy is also important to the Hayekian perspective. It is an essential prerequisite for the mechanisms by which Hayek proposes to organise society on a non-coercive basis. The rights mechanism is reasonably effective in protecting political autonomy. It imposes an outward-facing duty to refrain from domination of peoples outside a state's borders (external self-determination) and an inward-facing duty to avoid coercion of peoples and protect peoples from coercion within a state' borders. It

also imposes an inward-facing duty (internal self-determination) not to unreasonably exclude any individual from the governance of the state. Self-determination can therefore be seen to meet the Beitz criteria required, from both sympathetic and non-sympathetic perspectives: it protects an urgent interest from a standard threat and does so with reasonable effect.

Chapter Seven addressed the emerging right to a clean and healthy environment. This imposes a duty on states to refrain from damaging the environment and to take reasonable measures to prevent those under their control from doing so. The urgency of the interest in the environment lies in intergenerational justice. The environment is a resource we share with future generations. We must preserve this resource so that future generations can also benefit from it. The right responds to the threat of anthropogenic damage to the environment. This manifests in the form of both localised pollution and climate change. The application of the right to a clean and healthy environment, and other human rights approaches to the environment, at regional and national level, demonstrate that the human rights mechanism is reasonably effective at protecting the environment from localised pollution. While the application of the right to a clean and healthy environment has not been successfully applied to climate change, it is possible to theorise about a duty that effectively responds to climate change within the existing right to a clean and healthy environment.

Chapter Eight addressed the right to peace. It was argued that this has developed, from an original conception, in which it was aimed purely at limiting physical violence, to a point at which it has become a “right to rights” that is difficult to define. As such, it was argued that the right to peace, as it currently manifests in the discourse, does not meet the Beitz criteria.

Solidarity rights have hitherto been treated with scepticism by rights scholars. In Chapter Nine, I identified the four main critiques of solidarity rights. These were the compatibility critique, the practicality critique, the necessity critique and the hybridity critique. These critiques all, ultimately, rely on assumptions about the urgency of common-good interests, and the effectiveness of rights as a mechanism for protecting them. The main critiques of solidarity rights are therefore satisfactorily addressed with the application of the political approach.

The arguments explored in this thesis can be applied to other solidarity rights, beyond the case studies considered here. The right to development, for example, meets the Beitz criteria. The urgency of the individual's interest in development lies in, what Amartya Sen calls, "capabilities".¹⁰⁵⁴ Sen's theory of capabilities, while of limited utility for analysis of the Practice as a whole¹⁰⁵⁵, offers a persuasive account of the right to development. Sen distinguishes between "functions" and "capabilities".¹⁰⁵⁶ A function is an achievement, such as riding a bike, or a state of being, such as happiness. A capability is a "real possibility". A "capability set" denotes the range of functions that it is possible for an individual to perform or experience. An individual will not necessarily make use of every capability in a capability set. Similar capability sets can, therefore, facilitate vastly different functions in practice. Two individuals may both enjoy, for example, a capability to engage in play. One might exercise their capability by playing tennis, while the other exercises the same capability by volunteering at an animal shelter.

¹⁰⁵⁴ See generally Sen, n. 20; Martha Nussbaum also merits recognition as a leading proponent of the "capabilities" approach. Her version of Sen's theory, however, identifies ten "central capabilities" that all humans share. It is thus more prescriptive than Sen's. (See Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Boston; Harvard University Press, 2011))

¹⁰⁵⁵ See discussion at pp. 43-46

¹⁰⁵⁶ See Amartya Sen, "Development as Capability Expansion," 19 *Journal of Development Planning* (1989), pp. 41-58

The interest in development is an interest in expanding, as far as reasonably possible, one's capability set. Numerous arguments might be made for the importance of expanding the capability sets of individuals. From the individual perspective, it increases one's potential for economic gain, new experience, self-realisation, and to contribute to one's family, community, or society. From the social perspective, it enables society to benefit from the cumulative capabilities of individuals and thus enjoy greater economic, cultural, and political progress.¹⁰⁵⁷ This argument can also be appreciated from the Hayekian perspective. Societies in which individuals enjoy broad capability sets will benefit from a broader range of ideas and measures. Competition between such measures will mean that society benefits from a higher quality of ideas and measures than it otherwise would.¹⁰⁵⁸

The individual interest in development faces a standard threat from a variety of sources. The expansion of an individual's capability set may be stymied by, *inter alia*, historic injustice, global structures, or geography. Colonialism, for example, stymied the development of individuals in colonised territories. Inhabitants of colonies were seen as resources, to be used for the benefit of the metropole.¹⁰⁵⁹ They were thus deprived of the space required to develop greater capabilities. The effects of colonialism continue to be felt even after a former colony has become an independent state. Centuries of treatment that retards the capability sets of individuals leaves inhabitants of former colonies at a disadvantage compared with individuals in states that did not suffer colonial

¹⁰⁵⁷ Amartya Sen, *Development as Freedom*. (London; Oxford University Press, 1999), pp. 35-53

¹⁰⁵⁸ See Hayek, n. 356, pp. 38-47

¹⁰⁵⁹ See Matthew Lange, James Mahoney, and Matthias Vom Hau, "Colonialism and Development: A Comparative Analysis of Spanish and British Colonies." 111 *American Journal of Sociology* 5 (2006), pp. 1412-1462

domination.¹⁰⁶⁰ Economic arrangements can also limit capability sets. Protectionist economic policies prevent individuals competing on equal terms in the marketplace.¹⁰⁶¹ Economic measures and structures that privilege companies in the Global North¹⁰⁶² make it more difficult for individuals in the Global South to expand their capability sets.¹⁰⁶³ Geography can also limit capability sets. Individuals living in territories with poor soil, little water, or in remote locations face greater barriers to expanding their capability sets because the basics of life, such as food and water, and essential tools for expanding capability sets in the 21st Century, like access to the internet, are more difficult to come by.¹⁰⁶⁴

The right to development responds to these threats with reasonable effect. The United Nations General Assembly Declaration on the Right to Development imposes both inward-facing and outward-facing duties on states.¹⁰⁶⁵ Article 2 of the Declaration imposes an inward-facing duty to facilitate the development of the domestic population. Article 3 imposes a duty to cooperate with other states to create international conditions that will facilitate the development of individuals on a global scale, in other words: an outward-facing duty. Global cooperation is necessary to address the threat to the interest in expanding one's capability set. Colonialism, economic measures, and geographical

¹⁰⁶⁰ Jutta Bolt and Dirk Bezemer, "Understanding long-run African growth: colonial institutions or colonial education?." 45 *Journal of development studies* 1 (2009), pp. 24-54.

¹⁰⁶¹ See Michael E. Porter "Location, competition, and economic development: Local clusters in a global economy." 14 *Economic development quarterly* 1 (2000), pp. 15-34.

¹⁰⁶² Such as international intellectual property rules allowing companies to extend patents for life saving medicines. See Gaurav Dwivedi, Sharanabasava Hallihosur, and Latha Rangan, "Evergreening: a deceptive device in patent rights." 32 *Technology in Society* 4 (2010), pp. 324-330

¹⁰⁶³ *Ibid*, pp. 324-330.

¹⁰⁶⁴ J. Henderson, Vernon Zmarak Shalizi, and Anthony J. Venables, "Geography and development." 1 *Journal of Economic Geography* 1 (2001), pp. 81-105

¹⁰⁶⁵ UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128

inequalities are all transnational phenomena. They can, at most, only partially be addressed by unilateral action. If individuals are to experience expanded capability sets, states must cooperate to facilitate this.

The right to humanitarian disaster relief also meets the Beitz criteria. Humanitarian disasters prevent individuals and societies functioning effectively for extended periods of time. There can be little doubt that the interest in receiving relief aid is urgent. Yet humanitarian disasters, whether the result of natural or man-made causes, are rarely neatly confined within the borders of a single state. They cannot, therefore, be addressed by purely unilateral action. A right to humanitarian relief entitles individuals who have suffered from a humanitarian disaster to the benefit of international cooperation in providing relief.

Other solidarity rights have been discussed throughout this thesis. The right to the common heritage of mankind and the right to access communication technologies were discussed at length in Chapter Five. States respect the duties imposed by the right to common heritage with a network of treaties and norms, including international law mechanisms to prosecute those who destroy common heritage. Not all common-good interests merit protection with the rights mechanism. The right to access communication technologies does not meet the Beitz criteria because the standard threat to which it responds does not exist beyond the level of freedom of expression. The case studies in this thesis have, however, demonstrated that a significant number of candidates meet the Beitz criteria for inclusion in the class of “human rights” as solidarity rights.

My conclusions are, therefore, as follows: Beitz’s political approach offers the most satisfactory model for the analysis of the Practice as it stands. In Beitz’s approach, an interest must be urgent, faced with a standard threat, and protected to reasonable effect by the rights mechanism, to be recognised as a human right. Solidarity rights are

rights that protect common-good interests of individuals by imposing inward and outward-facing first-level duties on states. They have the potential, as a class, to meet the standard for recognition as a right. Common-good interests can be as important to individual dignity as independent-good interests. In the 21st century, common-good interests manifest on a global scale. This makes common-good interests potentially urgent. Standard threats to common-good interests transcend political borders. Solidarity rights, as a mechanism, provide a reasonably effective remedy, because the outward-facing duty obliges states to act in a cooperative manner, thus addressing the transnational nature of the relevant interests and threats. The validity of this case can be understood even from the, non-sympathetic, perspective of Hayekian political theory. Solidarity rights protect individuals from coercion on a transnational scale. Standard threats to those interests can't be addressed by the market. The rights mechanism is the least coercive alternative method of protection.

The practical application of my argument is demonstrated by examination of the (established) right to self-determination, the (emerging) right to peace, and the (yet to be recognised) right to a clean and healthy environment. Self-determination protects the urgent, common-good interest in political autonomy from the standard threat of domination by other peoples or states by placing an outward-facing duty on states to avoid and regulate domination and an inward-facing duty to involve all members in the governance of the state. The right to peace protects the urgent, common-good interest in human security from the standard threat of transnational violence by imposing the inward-facing and outward-facing duties set out in the 2016 Declaration. The right to a clean and healthy environment protects the common-good interest in the environment, the urgency of which lies in an intergenerational responsibility to preserve the environment. It responds to the threat of anthropogenic damage in the form of localised

pollution. Although not yet recognised at international level, the application of the environment right at regional and domestic level demonstrates the reasonable effectiveness of the rights mechanism in responding to the threat of localised pollution. It indicates that the right could evolve to address climate change. The political approach to human rights of Charles Beitz thus justifies solidarity rights as a legitimate class of rights in the Practice.

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