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Ave Maria International Law Journal

Volume 3, Spring 2014

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ISSN 2375-2173

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Cite this volume as: 3 Ave Maria Int’l L.J. __ (2014).

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AVE MARIA INTERNATIONAL LAW JOURNAL

The Ave Maria International Law Journal is dedicated to the research and publication of articles that address issues in international law, from a natural law perspective. Ever mindful of international law’s foundational concept of *jus cogens*, and recognizing the Catholic Church’s contribution to its development, the Ave Maria International Law Journal endeavors to continue the contribution of the Catholic Intellectual Tradition in the development of international law.

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“RESTAVEKS” CHILD SLAVERY IN HAITI:
HOPE SEEMS RIGHT OUTSIDE THE
CHILDREN’S FINGERTIPS

Autumn Barionnette†

INTRODUCTION

Although Haiti’s overthrow of slavery and declaration of independence might have won their freedom from slavery from the French, ironically, it did not generate a freedom from enslavement of each other, and the sad truth is over 200 years later enslavement of the Haitian children has launched into a direct child human trafficking issue with no end in sight. These children are known in the Haitian community as Restaveks. This means, “to stay with.” Currently, at this minute and hour in Haiti, severely impoverished families are faced with the decision of sending their children away with blinders on that the outcome is forcing them into a life that equates to modern day slavery. A country that fought tooth and nail to free themselves of slavery now has

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4 Id.
different battle at the forefront that can no longer be overlooked by the Haitian people and can no longer endure a blind eye of the world.

Haiti’s children are sent by their real birth families to other families in hopes of being provided with food, shelter, and an education for the trade-off of doing little housework. These children are forced to give up the opportunity of education due to lack of opportunity, forced to give up the endearment from a parent to a child, never having the opportunity to play and imagine. In the place of love, dreams, imagination, aspirations, the Restavek children are at the mercy of early rises to start their workday, cooking, dressing the other children of the house for school, and cleaning the home.⁵ The problem is that they are not given inadequate food, but are made to sleep on cold filthy floors and are most likely never given the opportunity to go to school or ever shown any compassion or love.⁶ The few that do get to go to school might attend for a year here and there missing several years in between or going for a few weeks or months and then being forced to quit by the families they live with known as the “host” family.⁷ The matron of the host house or the male is habitually very cruel to the Restavek children and punishes them often if not daily with beatings. This goes on in several hundred thousand homes every day.⁸

The domestic enslavement of children in Haiti is an issue that presents a three-fold cause that must be recognized and conquered morally, ethically, and legally. The effect that the need for biological parents to make the decision of sending their children off into the lives of slavery whether knowing they are or not, the continued acceptance of the practice, largely due to the legal loophole of the government law allowing the slavery to occur without punishment such as child cruelty laws, provides a barrier of such treatment and in fact promotes the

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⁵ Id.
⁶ Id.
⁷ The term “host family” is used to designate the family in which the Restavek child is given to stay. It does not describe how the family treats the child or how the child perceives the family to which they are sent. The child is viewed as source of labor, not as a child to be raised and nurtured.
⁸ Bell, supra note 3.
However, the results of the continued cycle are just as sad as the cycle itself. Families are forced with the decision to send one or more of their children, usually into a main city like Port-au-Prince, due to the lack of common life needs. These needs are the family’s ability to financially survive to feed and support their own children, this includes, food and water, shelter, school, and transportation to school. The most tragic reality is that these families send their children away in hopes of them being provided with the needs they cannot provide, but in reality they suffer more and most times are completely deprived of the most basic civil rights.

In 2011, the Haitian Government made an attempt to eliminate the Restavek system of child slavery. However, the Haitian Government lacks adequate legislation to address their immense child slavery issue, because there is not an enforced minimum age restriction for domestic service workers. Therefore, employers “host homes” are easily able to sneak by and avoid any penalties which allow the continuance of child slavery.

The solution is to attack the issue from the root which is when the decision by the children’s families arises. Therefore making the effort to understand and research the main reasons that put those particular families in the situation, and provide the “life fertilizer” to nourish the families’ needs in order to exterminate the desperate need to make the decision in the first place. The internal acceptance of the Restavek process also needs to be tackled in a manner that would allow the Haitian population to understand the severity of treatment and the outcome of the children’s lives even once they escape the Restavek life.

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9 The term “Restavek cycle” is used to indicate there is a process that occurs to facilitate the Restavek system. The Restavek system is a circle of never ending battle for the children involved that does not end even once they escape the enslavement. The turmoil in ongoing and many times, if left to the streets, it gets worse. Unfortunately, there is a social and class stigma that is attached to being a Restavek child.
10 Bell, supra note 3.
11 Id.
13 Id. at 285.
14 ILAB, supra note 12, at 285.
has always been proven that being properly informed about a situation allows for a better and more accurate response to an issue. This is what this article intend to do. Provide the insight as to the past of the Restavek cycle of life, the current situations which include a true insight on how these children live in 2014 and how the Haitian government and others are currently trying to ameliorate the heartbreaking and real problem. A possible solution for undertaking and tackling the situations in practical and potentially very effective methods will also be presented.

I. Slavery: Just An Inescapable Issue Woven Into the Country’s Fabric?

The island of Haiti is the poorest country in the western hemisphere. Currently, Haiti’s population consists of approximately 9.9 million. Haiti became a French colony in 1697, and inevitably slavery has been woven into the fabric of Haiti’s culture. For more than a century, the territory was populated by a small group of French colonists who lorded over a mass of mostly African-imported slaves. The slaves worked the plantations; the French exported the crops and reaped their profits. However, on January 1, 1804, Haiti was born a free country, making it the “first black” republic in the world and the second oldest

20 Id.
21 Id.
22 Bell, supra note 3.
23 Haiti was deemed the “first black” republic because the black slaves had become soldiers in a victorious revolution, and those who survived demanded as their reward as part of the rich land on which their labor suffered. The plantations were broken up and given to the former slaves thereby establishing Haiti as a nation of small landowners whose isolated countryside remained largely African. Mark Danner, To Heal Haiti, Look to History, Not Nature, N.Y. TIMES (2010).
republic in the Western hemisphere.\textsuperscript{24} Once Haiti finally overthrew their enslavement and won their freedom of slavery from the French when they declared of independence, however paradoxically, it did not prevent the freedom from enslavement of the Haitian children and thus has launched a new born slavery issue for the country of Haiti into a direct human children trafficking issue with no end in sight.

Even though slavery has been illegal for more than hundreds of years, slavery did not disappear. There are 21-30 million people in slavery today.\textsuperscript{25} However, slavery is not the booming money making industry that some may think. With there being as many as 21-30 million slaves, the slaves trade only makes about $32 billion dollars in profits.\textsuperscript{26} The word “only” is used because Americans spend $32 billion dollars in profits on junk food like potatoes chips.\textsuperscript{27} Therefore, what most Americans’ spend on junk food, most of the slaves in the world, not just Haiti could be freed.\textsuperscript{28}

“The right to protection is an urgent issue for Haiti’s children.”\textsuperscript{29} UNICEF estimated an upwards of over 300,000\textsuperscript{30} children victims to domestic slavery in Haiti today.\textsuperscript{31} Children of this stature are given a distinct name or reference by the term “Restavek.”\textsuperscript{32} This is a derogatory creole term generated by the Haitian population that means, “to stay with.”\textsuperscript{33} There are additional two to three thousand\textsuperscript{34} Restavek children from Haiti trafficked for forced slave labor to the Dominican Republic.\textsuperscript{35}

\textsuperscript{24} Bell, supra note 3.
\textsuperscript{26} Ending Slavery, supra note 25.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Bell, supra note 3; see also International Labour Organization, Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, available at http://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182.
\textsuperscript{30} J. COMM. REP., 110TH CONG., VOL. 2, COUNTRY REP. ON HUMAN RIGHTS PRACTICES 2619 (Dep’t of State 2007), available at http://www.gpo.gov/fdsys/pkg/CPRT-110PRT41228/content-detail.html.
\textsuperscript{31} Id.
\textsuperscript{32} Haiti (Special Case), supra note 2.
\textsuperscript{33} See supra text accompanying note 12.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
Children’s legal rights in Haiti are set out in several areas of law, the Haitian Constitution, the National Legislation, and the Labor Code. The Constitution sets forth the right to education and teaching in Articles 32 through 34, highlighting that the state must make schooling available to all, free of charge, educate by the masses, and primary schooling is compulsory under penalties by law. Under the right to life and health the state recognizes the right of every citizen to decent housing, education, food and social security. “Family Rights,” the Constitution provides that the state, “must protect all families . . . and must endeavor aid and assist mothers, children and the aged,” and protection of all children by the entitlement to love, affection, understanding, moral and physical care.

The child labor law in Haiti is recorded in a code system. “Haiti’s Labor Code Article 335 states that the minimum employment age in all sectors is 15 years, except in the case of children working in domestic service.” The Labor Code Article 341 sets the minimum employment age for domestic work at 12 years of age. All working children the ages of 15-18 must be registered with the Ministry of Social Affairs. “The Labor Code prohibits minors from working under dangerous conditions and prohibits children under the age of 18 from

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36 International Human Rights University of Toronto Faculty of Law, Children's Legal Rights in Haiti: Law and Armed Conflict Working Group, 8 (2008).
37 Id. at 8.
38 Id. at 10.
39 Id. at 17.
41 Id. at art. 33-1.
42 Id. at art. 33-2.
43 Id. at art. 33-3.
44 Id. at art 22.
45 Id. at art 260.
46 Id. at art 261.
49 Id.
working at night in industrial enterprises; penalties for child labor violations are 1,000 to 3,000 gourdes (US$42 to US$126).”

Article 2 of the 2003 law on child labor sets out a “soft” provision regarding that status of Restaveks: A child may be entrusted to a host family in a relationship of assistance and solidarity, benefiting from the same rights and privileges as the other children in the family . . . and be treated as a member of the host family.” The true effect of this provision for the welfare of the enslaved Restavek children is completely dubious.

After the catastrophic 7.0 earthquake on January 12, 2010, approximately more than 3 million people were affected thereby tremendously exacerbated the Restavek issue. “An assessment after the earthquake found that 51 percent of the houses were safe for habitation, with another 26 percent classified as dwellings that could be made safe with repairs, and remaining 23 percent deemed unsafe for habitation and requiring major repairs or demolition.”

II. THE LIES THAT LAY BENEATH THE TRUTH (MANTI YO KI KOUCHE ANBA LAYVERITE)

A. Restaveks Process

The Restavek system in Haiti constitutes one of the worst and most widespread manifestations of child domestic servitude found anywhere in the world. The Restavek System process habitually begins with Haitian families enduring significant poverty with several children

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52 U.S. DEP’T OF STATE, supra note 17, at 18.
53 Id.
54 Id.
55 Id. at 1.
56 Id. at 1.
57 Id. at 14.
that are not able to care for all their children.\textsuperscript{59} Children are brought into the system by several different avenues, one being by recruiters that promise the biological families a better life for their children.\textsuperscript{60} Either the host family or the biological family pays the recruiters, or often times there can be a recruiter for both ends. Once, an agreement is made, the biological family sends their child by bus, a scooter type motorcycle called “tap-tap,”\textsuperscript{61} back of a pick-up truck which usually hauls about 13 people called a “tap-tap,” and sometimes by a friend with a vehicle or the recruiter. It is amazing how much trust by the biological families is given to complete strangers and the public at large, to allow their young child to travel such a great distance without them. But, it appears that desperate times call for desperate measures and due to the lack of resources and the virtual wide spread acceptance of the Restavek system, the cycle continues.

\textbf{B. Lack of Resources}

Due to the economic and ecologic trends that have been going on in the country of Haiti for decades if not centuries, the rural poverty areas have made it very difficult for the families to provide for their children.\textsuperscript{62} Haiti’s land has been rated as one of the highest ratios in the Caribbean of populated arable land.\textsuperscript{63} Much of the land is mountainous or deforestation areas and area with very significant soil erosion.\textsuperscript{64} Lack funding or help from the government to change the land reforestation or help for the ecological crisis, encourages the Restavek system to stay in cycle because families feel helpless.\textsuperscript{65} The desperate families are forced to send a selected child or several of their children to the home of a relative,

\textsuperscript{60} Id. at ¶18.
\textsuperscript{61} Term “tap-tap” was heard from the locals when author took several trips to Haiti in 2006-2013.
\textsuperscript{62} MINNESOTA LAWYERS INT’L HUMAN RIGHTS COMMITTEE, RESTAVEK: CHILD DOMESTIC LABOR IN HAITI 7 (1990), available at http://www.theadvocatesforhumanrights.org/publications_by_country.html#HAITI.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
friend, or friend of a friend and many times a complete stranger, in hopes
them being afforded the increased opportunity to go to school and eat
well. The Restavek System continues because, families are left with no
alternative than to rely in a system that has been in place for centuries.

1. No Public Schools within the Area

Even if these families were to overcome the issues with their land
and food shortage, they are still faced with the huge obstacle of lack of
school within their area. Most schools are built within the urban city
areas; creates and leaves the issue for the outskirts countryside children
with no transportation to get to school. Many times if there is a school
in a nearby enough area for these children, they are more and likely
private and the fees are completely unattainable for the impoverished
family to ever think about affording. This contributing factor of the
Restavek system is addressed later in the article in further detail.

2. Cultural Acceptance and Shift

There is a social norm associated with the Restavek system.
“Haitian society has for the past 300 years, been divided into two strata: a
tiny, affluent, urban elite and the rural peasants, many of whom in the
last 20 years have migrated to the cities where by and large they live
marginal lives in the slums.” However, there has been a shift from
wealthier families owning Restaveks to more poor families taking them
on. Therefore, the placement from significantly poor homes into slightly
less poor homes is going to cause an exacerbation of the issue because
most host families do not even have the resources to feed their own
children or to send them to school. It can now be inferred that there is a
divide of three classes of people, the urban elite, the impoverished urban

67 Id.
68 See generally, U.S. Department of State, Haiti, Port-au-Prince: Union School, www.state.gov,
http://www.state.gov/m/os/1550.htm. (Also, information obtained by interviews conducted during a
personal trip to Haiti by the author in 2011).
69 MINNESOTA LAWYERS, supra note 62, at 6
70 Press Release, Office of the High Comm’r for Human Rights, UN expert on Slavery Expresses Concern
Over Restavek System in Haiti (June 10, 2009).
71 See CODE DU TRAVAIL, supra note 51.
slums living peasants, and the outskirt rural peasants. “In fact, the PADF and USAID study found that . . . 11% of host families themselves send their children into Restavek placement.” While the government recognizes that the Restavek system is serious and children should not be exploited in this manner, the Haitian community has become accustomed to its practice. Host families rationalize the Restavek System as they are being generous and the system is beneficial to children that would most likely have to live on the street without food and shelter. “Where the pigs feast, the children starve” (Kote kochon fête, timoun yo ap mouri grangou).

C. The Truth

The truth however is that these children are forced to work as live-in child domestic workers to work all day every day at the expense of their education and childhood. They are particularly vulnerable to beatings, sexual assault and other abuses by their host families. A host family is the term given to the family that uses a Restavek child in their home as their slave. Many Restavek children are compelled to 10-to-14-hour workdays. Unfortunately, not only are their days riddled with hard, hot, physically labored hours, they are “mistreated, neglected, and abused emotionally, physically, and sexually.”

1. The Effects

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72 The outskirt peasants are also known to be those who live in the country-sides on the island of Haiti.
73 Restavék Freedom, supra note 59, at ¶22.
75 See CODE DU TRAVAIL, supra note 51.
76 See Id.
77 See Id.
78 See Id.
80 See Restavék Freedom, supra note 59, at ¶12.
Many Restavek children are sent from their families at a young age, sometimes as young as four, and usually do not have any further contact with their family.\(^81\) Therefore it is quite likely that the Restavek children only have a vague notion of their surname or age, or even where he or she comes from.\(^82\) This results in a child simply relying on the host family, which “owns” him or her; unfortunately, as it is well documented, children are in reality left to depend upon themselves to solve their own problems.

Other effects of former Restavek children that they are either dismissed or simply run away from their abusive host families is that they become street children.\(^83\) Street children are exposed to a wide variety of hazards, such as severe weather and accidents, crime, very dangerous gangs, and forced prostitution.\(^84\) “[B]eyond the devastating impact on the children themselves, the restavek practice has profound negative repercussions throughout Haitian society in terms of family structure and gender and power relations as well as perpetuating the cycles of poverty and violence in one of the world’s poorest nations.”\(^85\)

a. Sexually, Emotionally, and Mentally

“The majority, approximately two-thirds, of Restaveks (sic) are girls.”\(^86\) “Female restaveks are particularly vulnerable to the sexual abuse of males in the host family.”\(^87\) If a girl becomes pregnant through the abuse by one of the males in the home, she will generally be released into the streets.\(^88\) A survey done by the UNICEF revealed that between 2004 and 2006, approximately 35,000\(^89\) females were assaulted, half of who were under the age of eighteen. Three quarters of Restavek children are

\(^81\) MINNESOTA LAWYERS, supra note 62, at 4.
\(^82\) Id.
\(^83\) See supra text accompanying note 9.
\(^84\) See supra text accompanying note 9.
\(^85\) See Anti-Slavery, supra note 58.
\(^86\) Restavek Freedom, supra note 59, at ¶13.
\(^87\) Id. at ¶13.
\(^88\) See supra text accompanying note 14.
girls and are especially vulnerable to sexual abuse because it is accepted as a sexual outlet for men or boys of the household. Most times the children suffer from emotionally abuse encompassing neglect and isolation. Many of the Restaveks have stunted child development in which they lack imagination; fail to develop personal dreams, and goals.

b. Young Country Population

Another significant issue that seems to feed into the Restavek system is that fact that Haiti population is significantly young with the approximately 42% of the population under the age of 15.

D. Haitian Children’s Participation in School

1. Attendance in School

Primary schooling is supposed to be free and compulsory, however due to poverty even free seems too costly to some families. School expenses for most low income families account for about 40 percent of their annual income, in which serves as a tremendous financial burden to allocate money to put their children in school.

2. Lack of School

As many as 600,000 or more children in Haiti do not attend school and are illiterate or functionally illiterate. This astounding number is most likely due to the fact not only Restavek children are not provided with the opportunities to attend school by as addressed above many host families do not have the resources to send their own children to school due to the “dearth” of free public education. Private institutions,
account for 90% of primary schools located in Haiti. However, private schools are neither accredited nor often unregulated. This means that the families with young children must pay a fee for their children to attend. The enrollment and attendance of schools are only 75 percent full, showing that space is available, however due to lack of funds or lack of transportation limits the ability for children to get to schools. The key issue at hand that is adding to the promotion of the Restavek system is lack of schools in the areas that the children in the most need live. To top of the issue of lack of schools in many areas, after the 2010 earthquake about 50 percent of the schools were either damaged or demolished.

Even when there are schools in the area that children could make it to, a shockingly small amount of money prevents children from attending school. There are not supposed to be fees to attend public school, but there are cost of uniforms, books, and the required contribution of 50 gourdes (US$2) per school year that prevents many parents from sending their children to school. Whether if public school is actually free is argued for both sides, however even if public schools are free children are not able to get to them due to the area they are located. Most public schools are located in the major cities. The children need to have public schools provided for them in the areas that the majority of Restavek children are coming from. According to the Haitian Constitution children are to be provided with the right to public schools free of charge.

Articles 32 through 34 of the Haitian Constitution guarantee children their educational rights. The most important Articles to the Constitution relating to schooling that guarantee specific rights to

98 Id.
99 U.S. Dep’t of State, supra note 17, at 22.
100 Interview with Paul Bien, supra note 94.
101 See Id.
103 Interview with Paul Bien, supra note 94.
104 See Id.
105 See HAITI CONSTITUTION, supra note 40, at art. 31-1.
106 Id. at art. 32-4.
children and would drastically diminish the Restavek system if they were actually enforced or really guaranteed are:

Article 32: “The State guarantees the right to education. It sees to the physical, intellectual, moral, professional, social and civic training of the population.”\(^{107}\)

Article 32-1: “Education is the responsibility of the State and its territorial divisions. They must make schooling available to all, free of charge, and ensure that public and private sector teachers are properly trained.”\(^{108}\)

Article 32-2: “The first responsibility of the State and its territorial divisions is education of the masses, which is the only way the country can be developed. The State shall encourage and facilitate private enterprise in this field.”\(^{109}\)

Article 32-3: “Primary schooling is compulsory under penalties to be prescribed by law. Classroom facilities and teaching materials shall be provided by the State to elementary school student free of charge.”\(^{110}\)

Haiti’s adult literacy rate at the time it was last updated in December 2013 was only at 48.7 percent.\(^{111}\)

E. Documented Stories

Real stories that provide the tragic picture that describes and affords a behind the scenes look into the sad developments of the Restavek life.

1. Cam-suz

Cam-suz is a rescued Restavek child and was fifteen years old when she did an interview recollecting her life as a Restavek.\(^{112}\) Her
mother sent her when she was only six years old. She expressed how she lived in misery, and remembered getting up at 4 o’clock in the morning, before anyone else would awake to begin chores right away until it was time to wake the children of the house and tend to their needs to get them ready for school. Sadly, she would take them to school, but couldn’t attend herself. Recalling from her memories she states, “I did a lot of work; I would carry water, I would sweep; I would take the children to school [and] they would beat me, they hit me; if I took too long, I would come back and they would beat me.” Unbelievably, her days would end at one in the morning.

2. Nehemie

Nehemie, a thirteen year old without living birth parents was sent to live with her aunt and uncle at a young age. "She gets up at 6:00 a.m. to light the cooking fire and prepare breakfast—most often cornmeal gruel—for her "family." Afterward she accompanies the three younger of the family’s six children to their school. The streets in Cité Soleil are not considered safe. The week before our interview, in the sort of occurrence for which the slum has a reputation, eighteen young men died in a gang war. Returning to the house, while the children are out, Nehemie picks up their used clothes and washes them in a basin of cold water placed on the floor. Later she will press the garments with an iron that has been heated with coals from the charcoal brazier on which she cooks.”

She washes the dishes in the same basin and sweeps the floor. This is a task she repeats many times a day because dust permeates everything in Port-au-Prince. Every day Nehemie must also walk several blocks to the water depot. There she will lift a five-gallon can of water onto her head in order to carry it home. This should be enough for the

113 Id.
114 Id.
115 Id.
116 Id.
117 Id.
119 Id.
household’s daily supply, but if it runs out she will have to go back for more.

3. Fabiola

As address previously Restavek girls so often fall victims to sexual abuse to their host families. The girls are frequently times referred to as, “la pou sa,”\(^\text{120}\) in which means that they are there for that. Recalling the la pou sa Restavek life was a girl named Fabiola. She suffered most of her life starting as early as three. She lost her natural mother and was sent to live with her aunt and godmother. However, the household contained other male members in which harmed Fabiola.

One night the godmother’s boyfriend tried to rape Fabiola. A neighbor heard her screaming and came to her rescue. Once everyone became aware of the incident, the man lost face and left the home. Fabiola was blamed for the man leaving and her life became more miserable than ever. She was so badly mistreated that a neighbor offered to take her. In the beginning the neighbor treated her decently, but after a time she began to slap Fabiola across the face and beat her. Fabiola eventually ran away from this house and went to live with a woman she barely knew. The woman had a boyfriend that lived nearby and Fabiola was required to take him food every afternoon. The man was a man of authority and had a gun; he knew he could manipulate Fabiola. On one occasion he asked her to get something for him inside his room; he then followed her and attacked her. He threw her on his bed and raped her. He threatened to kill her if she told anyone of the incident. Fabiola was also afraid that no one would believe her story. Fabiola tried to get others to take the food to the man, but when he realized what she was doing he made things worse for her. This went on for two years before Fabiola finally managed to escape.\(^\text{121}\)

E. Current Laws:

1. Current Rape Laws

\(^\text{120}\) See Restavèk Freedom, supra note 59, at ¶13.

\(^\text{121}\) See Restavèk Freedom, supra note 59, at ¶13.
The penalty for rape is a minimum of 10 years for forced labor, which increases to 15 years if the victim is younger than 16.\textsuperscript{122} Prosecution however is normally not pursued due to the lack of reporting and follow-up on victim’s claims and actual sentences once reported are often less rigorous.\textsuperscript{123} Anecdotal evidence suggests their family members often raped younger girls\textsuperscript{124} Substantial disincentives discourage victims from reporting rapes often times the girls are the ones shun and tacit cultural acceptance more in likely plays the biggest role for the Restavek girls.

2. Current Labor Laws

However, the Labor Code and Laws do not prohibit trafficking of persons.\textsuperscript{125} It also does not require children under the age of fifteen to be a registered worker, therefore sliding by the laws and promoting the Restavek system. The issue here is the articles of law are only protecting the registered for employment of children between the ages of 15 and 18, yet providing a loophole for children younger than 15. In essence the matron of the home that has a Restavek does not have to register the child as an employee if they refer to the child as a commodity of the family in other words, “a family member”; however, not treated as such. Government has tried to implement and enforce child and labor laws regulating the Restavek system called the Institute of Social Well-Being and Research (IBESR), they lack the adequate funding and therefore are unable to function effectively.\textsuperscript{126}

3. Avoidance of Law

The Restavek system is acquainted to an avoidance of the law. An employer (matron of the host house) can avoid paying their “Restavek” a

\begin{footnotesize}
\begin{enumerate}
\item U.S. Dep’t of State, supra note 17, at 18.
\item Id. at 19.
\item Id.
\item Id.
\item County Reports 1999-Haiti at section 6(d).
\item U.S. Dep’t of State, supra note 17, at 27.
\end{enumerate}
\end{footnotesize}
salary or agreed on rights\textsuperscript{127} by simply not equating the child’s duties to that of domestic employment and simply avoid registry of a domestic worker due to age. “Slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and seldom and forced or compulsory labor” are all forms of labor implicated in the Restavek system. The term is for the practice of child slavery in domestic setting.\textsuperscript{128} They are usually of the age as early as 4 or 5\textsuperscript{129} and are usually dismissed when they become teenagers.\textsuperscript{130} The inference can be made that the children become Restaveks at such an early age due the lack of registry requirement the Labor Code Article 341 and are dismissed by the time they are of the age of registry.\textsuperscript{131} This appears to be a convenient loophole nourishing the Restavek system. However, once released the children’s turmoil does not end. These children make up a significant population of street children, where girls are frequently forced to work in prostitution and boys are often forced into committing street crimes in violent gangs.\textsuperscript{132}

4. Government Recognition

The Haitian government does recognize that the exportation of the Restavek children is an increasing problem especially post-earthquake.\textsuperscript{133} There is a 35 person unit responsible for the protection of children to help remove them from child labor and other dangerous situations;\textsuperscript{134} however 35 people in a population of over 9.9 million cannot be said to be effective. The Haitian government tried to take action in December 1999, when they signed a Memorandum of Understanding with the International Program on the Elimination of Child Labor (ILO-

\begin{footnotes}
\footnotetext{127}{The agreement between the family taking the child and the child’s birth family is the oral contract stipulating the opportunity of education, food, and care in exchange for the child’s light housework duties.}
\footnotetext{128}{Haiti (Special Case), supra note 2.}
\footnotetext{130}{See CODE DU TRAVAIL, supra note 51.}
\footnotetext{131}{See Id.}
\footnotetext{132}{See CODE DU TRAVAIL, supra note 51.}
\footnotetext{133}{Haiti (Special Case), supra note 2.}
\footnotetext{134}{U.S. Dep’t of State, supra note 17, at 28.}
\end{footnotes}
IPEC). There has been outside assistants from programs set up by several religious groups to help withdraw children from abusive households. July 2007 and the Minimum Age Convention (Convention 138), June 2009, in which prohibit child slavery and protect the right of children to have access to free basic education. However, there is little evidence that this is solving or providing the correct avenue to solve this overwhelming issue. The issue starts with the true facts behind the reason why children become Restaveks in the first place and the process that the family undertakes.

III. THE WAY OUT

Haiti ratified the ILO Convention for the Elimination of the Worst Forms of Child Labor (Convention 182) in July 2007 and the Minimum Age Convention (Convention 138) in June 2009, both of which prohibit child slavery and protect the right of children to have access to free basic education.

F. Enhancing the Movement Against Child Slavery

The Ministry of Social Affairs is working in collaboration with “Service de la Protection de Mineurs” to withdraw children from the life modern day slavery through a programs that have registered several hundred calls, assist with withdraw of children of domestic slavery from abusive situations having some be replaced and reunited with their parents.

Finally it appears the Haitian government is actively taking a role in rebuilding Haiti after the earthquake, which radically increased the already intensifying problem of child labor within Haiti.

135 Id.
136 United States Department of Labor, supra note 79 (Due to suspension of Federal government services, this website is not being updated).
138 Restavek Freedom, supra note 59, at ¶1.
139 Dep’t of Labor, supra note 79, at ¶4.
G. The Proposed Plan

1. Enforce Current Laws and Make New Ones More Narrowly Tailored

Enacting legislative criminalizing all forms of forced labor, including involuntary domestic servitude, with penalties that reflect the heinous nature of the human rights abuse; in partnership with NGOs, adopt and employ formal procedures to guild officials in proactive victim identification and referral of victims to available services; provide in-kind support for victim services; improve access to quality education for all children.¹⁴⁰

2. Funds from the Earthquake

A way to accomplish the needs of the Haitian people to end the unbreakable Restavek cycle, while also working toward the reduction of poverty, is to use a portion of the vast amounts of monetary aid donated as a result of the 2010 earthquake to promote an educational system of opportunity (train build school, train teachers, an implement a law requiring attendance), and not only write laws and codes on paper but for the government to actually enforce them with penalties that the Haitian people will recognize. The 2010 Action Plan for National Recovery and Development of Haiti outlines immediate key initiatives that address the countries underdevelopment in which they plan to show their emergence as a better country by 2030.¹⁴¹ The 2010 Haitian Government’s Plan sounded great but what has really been accomplished?

3. Schools in the Outskirts (Building or making school in the outskirts where the majority of the Restavek children are coming from.)

¹⁴⁰ Haiti (Special Case), supra note 2.
After the 2010 earthquake there were more than 1,300 educational institutions that collapsed or were unstable.142 Lack of schools was already one of the fore fronting effects that lead to the Restavek system and loosing over 1,300 due to the earthquake only exacerbated the problem. However, the country received more than $9 billion dollars from the international response to the 2010 earthquake.143

4. Encompassing the 2010 Plan

The long-term plan stated to establish free and universal access to primary education. To accomplish this goal the Haitian Government must provide support as stated in their Constitution144 to ensure attendance. With promised and followed through with support, it would help all families, but most importantly the vulnerable families that are susceptible to the Restavek system. The 2010 Haitian Government Plan stated a concrete promised to establish more than 4,000 shelters, organizing the reception of students in areas that were directly and indirectly affected by the earthquake, setting up packages for each affected area, and for the short term, school fees will be paid by the state.145 An 18-month budget that provided for education concerns on the 2010 plan was estimate at $470 million.146 However, four years later in 2014, it is unknown as to how many school have actually been built.

The government needs to keep with the plan. It appears that the Haitian government needs help managing the monies contributed for the post-earthquake relief and needs help implementing their own plan. Therefore, outside government assistance is the only option at this point or sadly not enough will be accomplished. Outside help should set attainable yearly goals and follow up on the accomplishment of the goals. However, setting goals is not enough, certain appointed people to

144 See HAITI CONSTITUTION, supra note 40, at art. 32-2.
145 See Government Republic of Haiti, supra note 141, at 36.
146 Id. (Aid was guaranteed to return all students affected as well as those who migrated to other areas, necessary support to teachers and other educational personnel.)
form a group, must be form to carry out the mission of the yearly goals. This can be accomplished by organizing a board of set amount of Haitian officials that are directly elected for this position. This should be looked at as a government position. Outside government possibly by the UN or other countries that individually want to provide intellectual input must also elect some officials to be on the board to help provide and insure transparency of the monies that are allocated to the mission.

The plan and mission encompasses a set amount of schools being built in a wide range of areas that include a good portion in the outskirt areas that are prone to the Restavek system. The set amount of school must be built by the end of that mission year, whenever the start of the plan occurs. For instance, if it occurs in June, then June of the following year the set amount of schools must be completed. The same board of official directors will be in charge appointing a set of organizers to schedule the different units to complete the task, (i.e. plumbers, construction workers, electricians, roofers, etc.). This could also provide jobs for the people that are struggling in the areas that the schools are being built.

There should be a set of elected individuals in charge of educating the teachers to provide an accredited and regulated education for the children. Their job would include recruitment from possible current colleges and possible recruitment for teacher’s aid from the communities, which the schools are built, thereby providing work for those in that community.

a. Combat Poverty

Following the “2010 After the Earthquake Plan” in part, there must be an allocation of the post-earthquake monies to combat rural poverty. Ultimately, the government must directly address the food insecurities and extreme poverty. This affects forty percent of the households in Haiti. In other words, nearly half of the country is concern about food and the lack of it. Again, this is why families must make the hard decision to ship their children off into the Restavek system in the hopes of their children eating. If they were not able to provide their children let alone themselves with the basic need of food, what would the government have them do? Therefore, the government now equipped with the capital to provide the help, they need to disperse support teams to not only the main cities, but also the outskirts where the
poverty levels are to the point that there is no hope. There are several methods to combat poverty. There are three distinct ways that are recognized by sheer common sense. The first would be to educate the people about their land in order to make their land work for them, instead of sending their fragile children off to work as slaves for less than meager meals if any at all. Next, they can provide families with basic support similar to a welfare system. This is not proposing hand out, money in; this is simply proposing providing the ability to purchase items that the families need to prosper effectively in the long run. These items would include tools, like shovels, fencing, stakes, wood, blocks, and other items of similar need to start development of their land to provide food for themselves and possible to sell to others. This could create jobs and businesses.

5. Transportation

Transportation needs by the children in the outskirt countryside is a huge contributing factor that promotes the use of the Restavek system for many families forced with the decision.¹⁴⁷

Due to many of the Restavek children coming from rural families, not only are they fighting against the need for more schools in their area, they are fighting the opportunity to even get to a school that could be close enough for them to attend. By providing school within the rural area, two issues could be combated with one act. If school are built or even constructed in a matter to just provide a place to get an education, these poor families would not be faced with stacking obstacles in their way of being able to provide their children and even a simple education. Remembering that a significant segment of society is illiterate, being able to provide children with basic education such as reading, writing and arithmetic concepts would equipment these people with the needs that they are most wanting. This may perhaps be a crucial step in combatting the Restavek cycle.

Therefore, along with building schools within the rural communities in which feed into the Restavek system, there needs to be a

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transportation method for the children to get to school. Even if the transportation means is a few buses, maybe as few as two to provide transportation from two of the very outskirt areas where a few dozen children live to the area that was chosen for the school to be built in a central location in the rural outskirt area. In other words, the school or schools should be built in a central area in the rural outskirt area so that all the children in that community can make the journey to school on foot and those that are too far to make it on foot should be provided with transportation from a central pick up spot in their area to transport them to their community school or schools.

If the Haitian government argues that their ability to provide children with the “proper” education by building schools and providing the support of paying the fees to attend the schools, as proposed above, the simple implementation of basic education be provided even in make shift in the huge illiteracy level. This basic request cannot be argued with. The elected board can set up a designated plan to immediately set up even tent-like shelters that can be put up on a daily basis to provide basic educational beginnings such as basic arithmetic and reading.

6. Christian Perspective

The Catholic and Christian faith among the Haitian population is strong. With help from the churches, the Restavek System could be effectively challenged and outright diminished greatly. The church can advertise to educate the public of the abuse of the Restavek system and the risks facing Haitian children. Providing a moral understanding to the Restavek system could also help combat the mentality that the system is morally acceptable and tolerable. If Haitians are couched to understand that they are not helping these children but stunting and affecting their lives gravely, thus potentially curving the effect. As addressed above that there has been a slight turn in the recognition by the wealthier families that the current treatment of Restavek children is morally and ethically wrong. This could be due to the effect that wealthier families are more likely to be properly informed. Since the Haitian community

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involvement with their faith is so great with constant participation and attendance, it would make sense that educating the community in their church could provide proper education about the Restavek system in large volumes, providing that many people are touched.

Missionaries make it a point to educate about God; they must also make it a point to educate the morally internal grasp that the Christian faith feels about treating children or the manner that host families treat the Restavek children. There are several amazing missionaries from the United States that make it a center of their mission to address the Restavek system and document their research, ideas, and results on the internet. They are truly making a dent in the continued cycle; however, they alone cannot put an end to it.

There are current Catholic Outreach organizations that in 2012 raised $131,600 to help benefit the Restavek children. They developed a partnership between Cross International and Cross Catholic Outreach in Ohio. Money was allocated to benefit special schools that provide Restavek children with an education and daily meals. The annual gala to raise money began seven years ago in order to increase the awareness of the plight of Restavek children in Haiti. Through the years they raised over $530,000 toward the cause. “In addition to providing material aid such as food, clothing, shelter, and medicine,” this group supports programs that help the poor lift themselves out of poverty and “thus break the vicious cycle.” The group works with local pastors, missionaries and churches around the world to help ensure the aid raised reaches those it is intended for and need it most.

Currently there is a National Day for the Elimination of Restaveks held every November 17 since 2006. There are thousands of Haitian

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150 Id.
151 Id.
152 Id.
154 Beyond the Boarders, supra note 153.
leaders that include pastors from churches that are building a movement to end child slavery. Amazingly, this is a Haitian-conceived, Haitian-led, Haitian-organized event in the hopes of ending the Restavek system. They usually begin the day with a mass at the Episcopal Cathedral of Port-au-Prince and sometimes continue through until November 20. Their movement includes a teachers union, representatives from the Prime Minister’s office, and leaders from the Catholic Church, as well as radio and television journalists. They recognize that families do not want to send their children away into the Restavek system, however the families feel that social norms support it and it is in the best interest of their child.

IV. CONCLUSION

H. Combat the Issue by Striking at the Root of the Evil to Lessen the Unbreakable Cycle

The child slavery Restavek system is a never-ending cycle that seems to have its roots within the Haitian culture. For a country that fought so hard to win its freedom from slavery it is unable free itself from itself and unfortunately it is the children of Haiti that are suffering. However, due to the system it is not only the children that are effected by the system but the country itself as a hole feels the effects, through illiteracy, crime, violence, and corruption. Once these Restavek children leave the enslavement they are prone to live their lives on the streets either becoming involved in crimes such as stealing and gangs, or more often the girls fall victims to prostitution possibly increasing the AIDS/HIV statistics within the country.

To combat the Restavek issue it must be attacked at the roots of the problem. People must understand how and why the Restavek system at some point was established and the reasons it flourishes to a never-ending battle.

The problem starts with families that are unable to provide basic essentials for their children, such as food, shelter, and schooling.

155 Id.
Therefore, they are faced with the decision to send one or several of their children to other families in hopes of providing them with a “better” life or opportunity. Sadly, these children better known as “Restaveks” are made to become the new family’s essential slave. The new family is often referred to as the “host” family and is often very abusive to the Restavek child. They often do not provide the child with any more food than the child’s natural parents would have been able to provide and often times they provide less if at all. Most Restavek children are not provided with the opportunity to attend school, which is one of the main reasons their biological families send them away: they have hopes of them attending school. Many times the host families themselves cannot afford to send their own children to school, so the Restavek child has no hope for attending school.

The Haitian Government at this point seems to recognize that the Restavek system is an issue that needs to be address however, has done little to combat it. They must start with attacking the poverty issue because extreme poverty stricken area is feeding the Restavek cycle. The government must provide even a “simple education”\(^\text{156}\) to the affected areas so that the families are less likely to send their young children into the Restavek system. By addressing the root of the problem the families are more likely to feel as though they are able to provide for their children with the “basic essentials”\(^\text{157}\) that government already promises is their right under the Haitian Constitution.\(^\text{158}\) The government must also actually enforced laws with punishments that the host families would be deterred from the abuse.

The current addition to the problem is that there was a catastrophic earthquake that hit the country causing millions to be affected and increasing the Restavek system dramatically. Now, it has been four years since the earthquake and little has been done to actually put a dent in the Restavek issue. Although, it appears that the illiteracy problem of the country has improved. Literacy alone could help the

\(^{156}\) “Simple education” refers to basic arithmetic, reading, and writing.

\(^{157}\) “Basic essentials” refers to the basic needs to live and survive, e.g., water, food, education, and shelter.

\(^{158}\) See generally HAITI CONSTITUTION, supra note 40.
current children of Haiti by promoting the opportunity for societal advancement, even if coming from the Restavek system.

The Restavek system is a cycle that more in likely starts with the culture not being educated enough to understand the moral problem with the system. Ironically, lack of education and poverty feed the system, and lack of morally understanding promotes the system and lack of legal penalties keeps the cycle turning.

Education could even be a source to help combat poverty. It is well known in all countries that one who strives to become educated opens the doors in their life to great things. Educated people tend to be inquisitive to learn how to do certain things that will help them and others prosper.

Once the three main contributing factors are recognized the plan discussed above must be implemented. Although, Haiti had a plan in 2010, no enough has been accomplish in the four years. Therefore, at this point a board needs to be elected with not only Haitian officials but also outside country officials as well to provide guidance and assurance that deadlines are being accomplished. By implementing a board, more committees can be appointed to several different aspects of the countries issues that need to be addressed and very importantly the Restavek issue at hand.

The Restavek system cycle must be put to an end to free the country once and for all from slavery that people of Haiti fought so hard for so many hundreds of years ago to be free from.
FOR PROHIBITING POSSESSION OF
VIOLENT PORNOGRAPHY

Mark B. Rasmuson†

INTRODUCTION

Prohibitions on the possession of obscene materials have traditionally been outside the reach of the states,¹ although obscenity is not a form of speech protected under the First Amendment.² The test for obscenity requires a consideration of contemporary community standards.³ The variability of contemporary community standards and the question of which community standards apply has invited harsh criticism⁴ of the contemporary community standards test.

Criticism, however, does nothing for curbing the production, distribution, and possession of harmful violent pornographic content, which is most surely obscene.⁵ Since there exists a right to “maintain a decent society,”⁶ and some obscene material is so harmful that its possession must be restricted,⁷ then the effort of the State in prohibiting possession of violent pornography must be constitutionally upheld if such possession is similarly harmful.

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³ Id. at 24.
In Part Two, this paper reviews prohibitions on possession of violent pornography in the United Kingdom and obscenity law in the United States. The subsequent section considers criticisms of violent pornography. Part Three provides an analysis of whether a prohibition on violent pornography would pass constitutional muster. In Part Four, some of the challenges of a model statute are reviewed.

I. THE LAW AND VIOLENT PORNOGRAPHY

A. Current Law

1. Regulating Possession of Violent Pornography

   a. U.K. Laws on Possession of Obscene Images and Extreme Pornography

   On July 22, 2013, Prime Minister David Cameron publicly addressed the need to criminalize the possession of violent pornography “as a matter of urgency.”8 The Criminal Justice and Immigration Act of 2008 (“the Act of 2008”) already prohibited possession of extreme pornography in England, Wales, and Northern Ireland9 but, unlike the Criminal Justice and Licensing (Scotland) Act of 2010 (“the Scotland Act”),10 did not explicitly prohibit possession of “obscene pornographic images which realistically depict rape or other non-consensual

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9 Criminal Justice and Immigration Act, 2008, c. 4, §63 (Eng., Wales, N.Ir.) (This Act criminalizes the possession of an image that is both “pornographic” and “extreme.” An image is “pornographic” when “produced solely or principally for the purpose of sexual arousal” and “extreme” when “in an explicit and realistic way” it portrays “an act which threatens a person’s life,” “an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals,” “an act which involves sexual interference with a human corpse,” or “a person performing an act of intercourse or oral sex with an animal (whether dead or alive).” A reasonableness standard is used to determine whether an image is pornographic and whether a person or animal is real.), available at http://www.legislation.gov.uk/ukpga/2008/4/part/5.
penetrative sexual activity, whether violent or otherwise.”11 Prime Minister Cameron acknowledged the absence of a provision prohibiting the possession of violent pornography as a “loophole” 12 in the Act of 2008 because “pornography that is violent and that depicts simulated rape,”13 while readily available on the Internet,14 “can only be described as extreme.”15

The Criminal Justice and Licensing (Scotland) Act of 2010, which prohibits the possession of images which are pornographic, extreme, and obscene,16 makes no offense the possession of images not already illegal to publish, sell, import, or possess with intent to sell in the U.K. 17 under the Obscene Publications Acts (OPA) 195918 and 1964,19 as well in Scotland, under section 51 of the Civic Government (Scotland) Act (CG(S)A) 1982.20 Instead, the Scotland Act of 2010, was passed in response to “the wide range of extreme pornography available via the Internet which cannot, in practice, be controlled by . . . existing laws,”21

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12 See Cameron, supra note 8.
13 Id.
14 See Campaign Briefing, Rape Crisis South London, Closing the Loophole on Rape Pornography (indicating that “[i]n the top 50 Google results for ‘rape porn’, 77% of results were accessible porn sites with rape content” and “[o]f the top ten Google search results for ‘free porn’, half the websites host free rape pornography”), available at http://www.endviolenceagainstwomen.org.uk/news/102/call-on-the-pm-to-ban-rape-porn-100-sign-letter.
15 Cameron, supra note 8; see also Campaign Briefing, supra note 14 (Rape Crisis South London lobbied the Prime Minister for a prohibition on “rape pornography” but more narrowly defined the “loophole in legislation” as the “freely, legally accessible” depictions of rape “alongside simulations of incest and child sexual abuse” where images “explicitly defined themselves as being rape, non-consensual or forced sex” with descriptions like “young schoolgirls” abducted and cruelly raped. Hear her “screams.”; “little schoolgirl raped by teacher” and “little girls cruelly raped at home”; “tiny girl sleep rape” and “girl raped at gunpoint”.”).
21 Consultation, supra note 17, at 1.
which laws were thought to “obviate[] the need for a possession offence”22 by “[c]losing down sources of supply and distribution.”23 The objective of the prohibition on possession of extreme pornography is “[t]o help ensure the public are protected from exposure to extreme pornography that depicts horrific images of violence.”24 Cameron similarly noted in his July 2013 address that while “a free and open internet is vital,”25 there is no other market or industry upon which the government has such a “light touch” for regulation.26

Furthermore, “the [violent] material depicts activities which are illegal in themselves and the participants may in some cases have been the victims of criminal offences. It goes well beyond what is available for sale in licensed sex shops, classified R18 by the British Board of Film Classification. Thus our mainstream entertainment industry, which works within the obscenity laws, would not be affected by the proposals in this document.”27

A case brought against a person for obscene publications28 will first outline the test for obscenity, which is a modification on the Hicklin doctrine.29 Under Regina v. Hicklin,30 the test for obscenity was articulated as “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral

22 Id.
23 Id.
25 Cameron, supra note 8.
26 See Cameron, supra note 8, (arguing “there is extreme pornography” that is “so bad” it cannot be sold in sex shops but is nonetheless available online and “what you can’t get in a shop, you shouldn’t be able to get online.”).
27 Consultation, supra note 17, at 1.
29 Compare Obscene Publications Act, 1959, supra note 18, c. 66, §1 with Regina v. Hicklin, [1868] L.R. 3 Q.B. 360 (in Hicklin the obscene nature of materials was determined by considering whether material would deprave or corrupt those who “may” be exposed thereby where OPA 1959 is concerned with material that might deprave or corrupt a person who is “likely” to be exposed thereby).
influences, and into whose hands a publication of this sort may fall.”

Under the OPA 1959, material is obscene where it has a tendency to depreve or corrupt the minds of those who are “likely” to hear, see, or read it. Distribution of an image might be justified, however, where under “the opinion of experts” the image has “literary, artistic, scientific or other merits” but the test for obscenity relies on questions of fact determined by a jury “without the assistance of expert evidence.”

Where a person may not be prosecuted for distribution or publication under OPA 1959, the Crown Prosecution Service advises prosecutors to “consider charging suspects with the new offence of possession of extreme pornographic images.”

b. Defining Pornographic, Obscene, and Extreme in the U.K.

In the U.K. generally, “pornographic” describes that which is produced principally for the purpose of sexual arousal; “obscene,” that which tends to depreve and corrupt persons exposed to it; and “extreme,” that which depicts life-threatening violence, sexual injury, rape, necrophilia, and bestiality.

Under the Scotland Act of 2010, the “possession” of an “extreme pornographic image” is prohibited. An extreme pornographic image is “obscene,” “pornographic,” and “extreme.” An image is obscene where its “effect” is “such as to tend to depreve and corrupt persons who

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31 Id.
32 Obscene Publications Act, 1959, supra note 18, c. 66, §1.
34 R v. Barker (Will), [1962] 46 Cr. App. R. 227 (“the first issue for the jury is whether the effect of the article was such as to tend to depreve and corrupt the individual to whom it was published”).
36 Id.
37 See Criminal Justice and Licensing (Scotland) Act, 2010, supra note 10, § 42(2)[6]; Criminal Justice and Immigration Act, 2008, supra note 9, § 63(7); and Obscene Publications Act, 1959, supra note 18, c. 66, §1.
38 Criminal Justice and Licensing (Scotland) Act, 2010, supra note 10, § 42(2)[1].
39 Id.
40 Id. § 42(2)[2].
41 Id.
42 Id.
are likely” to see it.\textsuperscript{43} The test for obscenity is a question for the jury,\textsuperscript{44} based on the Hicklin doctrine.\textsuperscript{45}

As defined by the Act, “[a]n image is pornographic if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal.”\textsuperscript{46} Both the content of “the image itself” and the “context for the image” are to be considered.\textsuperscript{47} If “an image forms an integral part of a narrative constituted by a series of images, and having regard to those images as a whole, they are not of such a nature that they must reasonable be assumed to have been made solely or principally for the purpose of sexual arousal,”\textsuperscript{48} then the image, as part of a whole, would not be pornographic.\textsuperscript{49}

The third element requires the image to be “extreme.”\textsuperscript{50} An extreme depicts “in an explicit and realistic way any of the following— (a) an act which takes or threatens a person’s life, (b) an act which results, or is likely to result, in a person’s severe injury, (c) rape or other non-consensual penetrative sexual activity, (d) sexual activity involving (directly or indirectly) a human corpse, (e) an act which involves sexual activity between a person and an animal (or the carcase of an animal).”\textsuperscript{51}

Under the Act of 2008,\textsuperscript{52} it is similarly an offense in England, Wales, and Northern Ireland to possess an “extreme pornographic image,”\textsuperscript{53} which means an image is both “pornographic” and “extreme.”\textsuperscript{54} An image is “pornographic” when “produced solely or principally for the purpose of sexual arousal”\textsuperscript{55} and “extreme” when “in an explicit and realistic way”\textsuperscript{56} it portrays “an act which threatens a

\textsuperscript{43} Obscene Publications Act, 1959, supra note 18, c. 66, §1; see also Consultation, supra note 17, at 6.
\textsuperscript{44} See Barker, supra note 34.
\textsuperscript{45} See Hicklin, supra note 29.
\textsuperscript{46} Criminal Justice and Licensing (Scotland) Act, 2010, supra note 10, § 42(2)[3].
\textsuperscript{47} Id. § 42(2)[4].
\textsuperscript{48} Id. § 42(2)[5].
\textsuperscript{49} Id.
\textsuperscript{50} Id. § 42(2)[2].
\textsuperscript{51} Id. § 42(2)[6].
\textsuperscript{52} Criminal Justice and Immigration Act, 2008, supra note 9, § 63.
\textsuperscript{53} Id. § 63(1).
\textsuperscript{54} Id. § 63(2).
\textsuperscript{55} Criminal Justice and Immigration Act, 2008, supra note 9, § 63(5)[b].
\textsuperscript{56} Id. § 63(7).
person’s life,”57 “an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals,”58 “an act which involves sexual interference with a human corpse,”59 or “a person performing an act of intercourse or oral sex with an animal (whether dead or alive).”60 An objective standard of reasonableness is used to determine whether an image is pornographic and whether a person or animal is real.61

Notably, the Scotland Act of 2010 is similar to the Act of 2008 (England, Wales, and Northern Ireland) in nearly every aspect, except the former requires a separate evaluation regarding whether an image is obscene and includes a prohibition on depictions of rape or other non-consensual penetrative sexual activity. In the 2008 Act, specific enumerated prohibitions might have been thought to make unnecessary an obscenity clause, but the lack of a prohibition on pornography that depicts rape is a “loophole”62 that Parliament will be “closing,”63 thus “making it a criminal offense to possess internet pornography that depicts rape.”64

2. U.S. Law on Possession of Obscenity

Presently, obscenity law in the United States prohibits possession of obscenity only where there is also intent to sell or distribute65 or where the obscenity is defined as child pornography.66 Other attempts to regulate possession of obscenity and pornography have been held unconstitutional because they were found to be overbroad,67 vague,68 proscribing “mere possession” of obscene material,69 or failing to require

57 Id. § 63(7)[a].
58 Id. § 63(7)[b].
59 Id.
60 Id. § 63(7)[d].
61 Id., § 63(7).
62 Cameron, supra note 8.
63 Id.
64 Id.
scienter. There is no federal or state statute prohibiting possession of violent pornography, though producers have violent pornography have been prosecuted for production and distribution of obscenity.

a. U.S. Anti-Obscenity Statutes

Similar to Great Britain’s Obscene Publications Act of 1964, under 18 U.S.C. § 1460, a person may not possess with intent to sell “any obscene visual depictions.” Materials that are “obscene, lewd, [or] lascivious” are “nonmailable matter” and may not be imported (even by an “interactive computer service”). The production, transportation, distribution, and transmission of “obscene, lewd, lascivious, or filthy” media are likewise prohibited. Persons “engaged in the business” of producing, distributing, and selling obscene material may be prosecuted under the same law.

b. U.S. Obscenity Jurisprudence

The Supreme Court has held that possession of obscenity is prohibited where there is specific intent to sell or distribute but the Supreme Court has held that prohibitions on “mere possession” of obscenity are unconstitutional, though prohibitions on the receipt of obscene materials may be constitutional.

Until 1957 obscenity law in the U.S. followed the Hicklin Doctrine. Then, in Roth v. United States, the United States Supreme

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71 See e.g. infra Part I.A.2.c.
74 Id.
77 18 U.S.C. § 1466 (2006) (defining “[the person] engaged in the business” as “the person who produces [sic] sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit . . . ); see id.
78 Miller, 413 U.S. at 25.
79 Stanley, 394 U.S. at 568.
81 Boyce, supra note 4, at 313–317; see Hicklin, supra note 29.
Court upheld a lower court’s rejection of the Hicklin test, which was summarized as a standard based on “susceptible persons,”\textsuperscript{83} in favor of a new standard based on “the average person, applying contemporary community standards.”\textsuperscript{84} The trier of fact must determine whether “the dominant theme of the material taken as a whole appeals to prurient interest.”\textsuperscript{85} Though, “[i]n the years after Roth, the Court struggled to formulate a [different] definition of obscenity,”\textsuperscript{86} it nonetheless provided in dicta helpful language for understanding what was meant by “prurient interest.”\textsuperscript{87}

In writing for the Court, Justice Brennan clarified the difference between “sex and obscenity” by saying that “[o]bscene material is material which deals with sex in a manner appealing to prurient interest.”\textsuperscript{88} He attempted to clarify obscene material, which by definition appeals to a prurient interest, in a footnote to the opinion as “material having a tendency to excite lustful thoughts” and appealed to Webster’s New International Dictionary (1949) which defined prurient as “[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings, of desire, curiosity, or propensity, lewd.”\textsuperscript{89}

Justice Brennan, in the same footnote, clarified there was no “significant difference” between the majority’s understanding of obscenity and the meaning giving in the Model Penal Code.\textsuperscript{90} The current edition of the Uniform Model Penal Code defines obscenity almost identically to that referred to in the majority opinion:

Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a

\textsuperscript{82} Roth v. United States, 354 U.S. 476 (1957).
\textsuperscript{83} Id. at 489.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1052 (4th ed. 2011).
\textsuperscript{87} Roth, 354 U.S. at 489.
\textsuperscript{88} Id. at 487.
\textsuperscript{89} Id. at 488 n.20.
\textsuperscript{90} Roth, 354 U.S. at 488, (“We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, s 207.10(2) (Tent.Draft No. 6, 1957), viz.: ‘[. . . ]A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters[ . . ].’”).
shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.91

This current definition of obscenity in the Model Penal Code utilizes both the “average person” standard adopted by Roth and the “susceptible persons” standard from the older Hicklin test.

As noted above, the Court struggled over time with the Roth test for obscenity. “[I]n Redrup v. New York, the Court essentially gave up trying to devise a test that a majority could support. In Redrup, the seven-Justice majority simply issued a laconic per curiam opinion that reversed, with little analysis, the defendant’s conviction for selling pulp pornographic fiction. During the next six years, the Court ‘systematically Redrupped—reviewed and reversed summarily, without further opinion—scores of obscenity rulings by lower state and federal courts.’”92

In 1973, the Court articulated a new test for obscenity in Miller v. California,93 which requires the trier of fact to determine: “(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”94 Here, the trier of fact must determine whether both the elements “appeals to prurient interest” and “patently offensive” are obscene after applying “contemporary community standards.”95 The Miller decision has never been overruled and, though

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91 Model Penal Code § 251.4.
92 Boyce, supra note 4, at 318 (internal citations omitted).
94 Id. at 24 (internal citations omitted).
95 Boyce, supra note 4, at 319.
fraught with complications, continues to be the standard used by the Court.

A major problem posed by the *Miller* test is that it permits a variable application of law not only over time but across communities. There is no national standard for obscenity. This is problematic at a time when obscene content is readily available through the internet. Law enforcement officials struggle to develop protocol for prosecuting obscenity and juries struggle to understand the meaning of “contemporary community standards.”

Though the conviction of one or several defendants for violating obscenity laws might curb their own behavior, such convictions, due to the variability of the obscenity standard, may not apply in the future. This highlights the need for strict liability statutes which prohibit the possession of violent pornography.

Attorneys and legal counsel for major pornographers have prepared guidelines for avoiding the violation of obscenity statutes. For example, one of the leading attorneys for the pornography industry, Paul Cambria, advised his client *Hustler* to stay within the bounds of the *Miller* Test by avoiding the production of media which included certain acts, which are now commonplace in pornography. The “Cambria List” was created through the cooperation of the major pornographers in an effort to avoid producing and distributing depictions of “sexually

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96 See, e.g., Boyce, supra note 4, at 338–51.
99 Id.
100 See “The Cambria List.” *Frontline: American Porn* (Feb. 2002), http://www.pbs.org/wgbh/pages/frontline/shows/porn/prosecuting/cambria.html (the Cambria List, published by *Frontline*, advises against producing films with scenes “that depict any unhappiness or pain” and strictly advises producers to exclude scenes depicting any of the following: the “appearance of pain or degradation”; ejaculation on the face; ejaculation on a body if the act is revolting (“nasty”); several men ejaculating on a single woman or man; “spitting or saliva mouth to mouth”; the use of “food used as sex object”; urination “unless in a natural setting, e.g., field, roadside”; “coffins”; “blindfolds”; “wax dripping”; oral sex with two penises “in/near one mouth”; deformation of a vagina by “stretching”; brachiovaginal or brachioproctic insertion; visible female ejaculation; “bondage-type toys or gear unless very light”; females “sharing same dildo” orally or vaginally; use of “toys” when such use is revolting; use of two persons hands for vaginal manipulation; male-to-male penetration; “transsexuals”; bisexuals; “degrading dialogue”; “menstruation topics”; “incest topics”; “forced sex, rape themes, etc”; “black men-white women themes.”).
explicit acts that often attract prosecutors’ attention,” which are obscene.

Likewise, prosecutors and investigators have used shorthand to identify which materials are probably obscene. Deborah Sanchez, former Deputy L.A. City Attorney, now a judge for the Superior Court of California, County of Los Angeles, used the acronym CURB-FHP as a prosecutor to aid in evaluating which acts violated statutes prohibiting obscenity: “children involved,” “urination or defecation in conjunction with a sex act,” “rape scenes,” “bestiality,” “fisting or foot insertion,” “homicide or dismemberment in conjunction with a sex act,” and “severe infliction of pain.”

c. Violent Pornography as Obscenity

In 2003, a federal grand jury indicted Extreme Associates., Inc, Robert Zicari, and Janet Romano for violating federal obscenity statutes, 18 U.S.C. §§ 1461, 1462, and 1465. In United States v Extreme Associates, the Third Circuit reversed the ruling of the District for the Western District of Pennsylvania, which attempted to apply a novel standard, and held that the constitutionality of federal obscenity statutes regulating distribution of obscenity were to be evaluated under the First

102 California Court, California Trial Court Roster (April 2014), http://www.courts.ca.gov/2948.htm.
104 Id.
105 Id.
106 Id.
107 Id.
108 Id.
109 Id.
110 Id.
Amendment and substantive due process privacy rights. Extreme Associates conceded that the material in question was obscene.115

In a 2002 behind-the-scenes Frontline interview114 with pornographers and owners of the adult entertainment company Extreme Associates, husband Robert Zicari (“Rob Black”) and wife Janet Romano (“Lizzie Borden”), the latter explained that prior to shooting a particular pornographic film depicting rape and murder, they would not be informing the actress prior to the filming that the male actors during filming would actually assault her.115 According to Borden, the plot of the film was of “a girl being kidnapped, then forced to have sex against her will, [and finally] being butchered at the end.”116 During the assault she would be beaten [“she’s going to be hit”],117 “spit on”118 and “degraded.”119 Borden thinks making these films is “therapeutic”120 and “good”121 for her122 because she can “exploit[] people”123 and “take [her] aggression out on other people.”124

Prior to filming, one member of the crew encouraged the actress to “just go with the flow [and] [l]et happen what’s gonna happen.”125 In the course of filming, the actress was “kicked and beaten,”126 and subjected to “oral, vaginal, and anal sex” with each of the two men,127 followed by a simulation of her throat being cut,128 then left for dead in a pool of [fake] blood.129

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114 Frontline: American Porn, supra note 97.
115 Frontline: American Porn, supra note 97.
116 Id.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
122 Id.
123 Id.
124 Id.
125 Id.
126 Id.
127 Id.
128 Frontline: American Porn, supra note 97.
129 Id. A determination of its criminality cannot be known without more facts, but that the Frontline camera crew withdrew themselves from the filming speaks to the violent nature of they saw, though to them it “appear[ed] what was happening was “legally consensual.” According to Frontline in
Without active prosecution of producers and distributors “the major players in the multi-billion dollar pornography industry” will continue “unscathed” by prosecution for obscenity even at the expense of “undermin[ing] respect for the rule of law.” Such a result is “strange” but accurately describes the present laws regulating obscenity.

B. Criticisms of Violent Pornography

1. Feminist Critique

Among the most well-known antipornography statutes, and a good example of the feminist critique, is the Indianapolis ordinance influenced by Catharine MacKinnon and Andrea Dworkin and later found unconstitutional for vagueness, which defined all pornography as violent pornography:

Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (1) Women are presented as sexual objects who enjoy pain or humiliation; or (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) Women are presented being penetrated by objects or animals; or (5) Women are presented in scenarios of degradation, injury, abusement, torture,


130 Boyce, supra note 4, at 368 (concluding that the community standards approach to exempting obscenity from constitutional protection “cannot be justified or salvaged and should be scrapped”).


132 Id.


shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; and (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display. The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.\textsuperscript{136}

Such an ordinance was unconstitutional for vagueness because “[p]ersons subjected to this Ordinance cannot reasonably steer between lawful and unlawful conduct, with confidence that they know what its terms prohibit.”\textsuperscript{137} The phrase of particular concern to the court was “subordination of women,” an element essential to the definition of pornography in the ordinance.\textsuperscript{138}

a. Violent Pornography Objectifies Women

Both the production and possession of violent pornography require the objectification of the women involved and women generally.\textsuperscript{139}

The first and most important way pornographers get men to buy into [extreme pornography] is by depicting and describing women as [] objects who are deserving of sexual use and abuse. It is especially important for the pornographers to shred the humanity of the women in the images. . . . To erode any empathy that many men may have for the women in porn—an emotion that would most likely end up derailing the porn experience as they might feel sorry for her—the porn needs to construct porn

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{136} \textsc{Indianapolis, Ind., Code ch. 16, § 16-3(q) (1984), cited in Am. Booksellers Ass’n v. Hudnut, 598 F. Supp. 1316, 1320 (S.D. Ind. 1984), aff’d, 771 F.2d 323 (7th Cir. 1985), aff’d, 475 U.S. 1001 (1986) (emphasis added).}
\item \textsuperscript{137} \textit{Am. Booksellers Ass’n}, 598 F. Supp. at 1339.
\item \textsuperscript{138} \textit{Id.} at 1338.
\item \textsuperscript{139} See \textsc{Gail Dines, Pornland: How Porn Has Hijacked Our Sexuality} 1065 of 2777 (Beacon Press, Kindle Edition, 2010).
\end{itemize}
\end{footnotesize}
women in ways that clearly demarcate them from the women men know and love.\footnote{Gail Dines, Pornland, supra note 139.}

b. Violent Pornography Subjugates Women to Men

A recent essay\footnote{Robert Jensen, \textit{Stories of a Rape Culture: Pornography as Propaganda}, in \textit{Big Porn Inc: Exposing the Harms of the Global Pornography Industry} 25, 30 (Melinda Tankard Reist & Abigail Bray eds., 2011).} “combines quantitative studies with qualitative analyses” to summarize the “main propaganda messages of pornographic films”\footnote{Id.}:

1. All women always want sex from men;
2. Women like all the sexual acts that men perform or demand, and
3. Any woman who does not at first realize this can be persuaded by force. Such force is rarely necessary, however, for most of the women in pornography are the ‘nymphomaniacs’ of men’s fantasies. Women are the sexual objects whose job it is to fulfill male desire.\footnote{Id.}

Depictions of “persuasion by force”\footnote{Id.} are depictions of violent pornography, where a person, usually a woman, is raped, coerced, or otherwise forced to have sex against her will.

2. Criminal Law Critique

a. Violent Pornography May Involve Real Violence\footnote{Frontline: American Porn, supra note 97.}

In the legal guide prepared by the Crown Prosecution Service, they stated that “the extreme pornography offence” was meant to “strengthen controls on extreme pornographic material” because there was both “a desire to protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victim of crime in the making of the material, whether or not they
notionally or genuinely consent to take part” and “a desire to protect society, particularly children, from exposure to such material, to which access can no longer be reliably controlled through legislation dealing with publication and distribution, and which may encourage interest in violent or aberrant sexual activity.”

b. Pornography and the Brain

In recent jurisprudence, whether using pornography is harmful to an isolated individual alone with the internet or with a book or with a film is not a question for the Court, which refuses to adjudicate on the “moral content of a person’s thoughts.” In Stanley v. Georgia, the Supreme Court found that the interest of the state in “protect[ing] the individual’s mind from the effects of obscenity” through legislation was tantamount to legislating the “moral content” of that individual’s mind. Such an inferential leap, however, may be unjustified in light of modern neurology, which evaluates the effects of obscenity on the brain, because the “effects of obscenity” are not relegated only to a consideration of morality. Rather, there is a real threat to a person who experiences stimuli of violence and pornography simultaneously because neural connections are reinforced when the pleasure centers of the brain produce dopamine. The neural connections formed and reinforced as a result of viewing violent pornography become similar

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147 Id. at 557.
148 Id. at 565.
149 Id.
150 Id.
151 Id.
154 Id. at 54.
155 Id. at 122.
156 DODGE, THE BRAIN THAT CHANGES ITSELF, at 106–07.
157 Id. at 108.
158 Id. at 109.
to the “maps” formed when individuals use drugs like cocaine.\textsuperscript{159} This can lead to troubling consequences. For example, one person was asked by his partner to strike her during sex and he found he enjoyed the violence and sex together; this thought concerned the man and was one of the reasons he sought a physician’s help.\textsuperscript{160} “One of his most tormenting symptoms was the almost perfect fusion in his mind of sex with aggression. He felt that to love someone was to consume her, to eat her alive, and that to be loved was to be eaten alive. And his feeling that sexual intercourse was a violent act upset him greatly, yet excited him. Thoughts of sexual intercourse immediately led to thoughts of violence, and thoughts of violence, to sex. When he was effective sexually, he felt dangerous. It was as though he lacked separate brain maps for sexual and violent feelings.”\textsuperscript{161} Similar results have been observed as a result of exposure to violent pornography.\textsuperscript{162}

II. PROHIBITING POSSESSION OF VIOLENT PORNGRAPHY

Violent pornography is probably already unprotected speech and, therefore, subject to statutory prohibitions as obscenity. However, the major constitutional barrier to a prohibition on possession of violent pornography is the content-based restriction it requires, which must be analyzed by the Courts under strict scrutiny\textsuperscript{163} and, therefore, rarely pass constitutional muster. For a restriction on violent pornography to be a constitutional restriction, the content must fall within one of the special exceptions permitting content-based speech discrimination.\textsuperscript{164}

\textit{A. Constitutional Analysis: Violent Pornography is Probably Already Unprotected Speech under Miller}

\textsuperscript{159} See id. at 112–15; see also Porn is Like a Drug, FIGHT THE NEW DRUG, http://www.fightthenewdrug.org/get-the-facts#brain/porn-is-like-a-drug (last visited April 1, 2014).
\textsuperscript{160} BRAIN THAT CHANGES ITSELF, supra note 153, at 93–94.
\textsuperscript{161} Id. at 122.
\textsuperscript{164} 16B C.J.S. CONSTITUTIONAL LAW § 827.
A recent online article from an official blog of a well-known American publisher remarked concerning the recent speech by David Cameron on prohibiting possession of extreme pornography. The writer opines, “On the plus side, ‘extreme’ pornography which involves violent scenes or simulated rape, is going to be outlawed [in the UK] . . . although that one kind of seems like a no brainer.”

Under Miller v. California, material is obscene if 1) the average person, applying contemporary community standards, would find that the material taken as a whole appeals to the prurient interest; 2) the average person, applying contemporary community standards, would find that the material depicts or describes sexual conduct in a patently offensive way; and 3) a reasonable person would find, taking the material as a whole, that it lacks serious literary, artistic, political or scientific value. All three elements of the test must be met for the material to be obscene.

Here, we will consider the following content reported by Rape Crisis South London, which was used to appeal to the Prime Minister Cameron:

In our own research into the freely available content on ‘rape porn’ websites, we found many of the videos’ themes to be endorsing and promoting various criminal acts including kidnapping [and] additional physical violence. . . . These images are explicitly defining themselves as being rape, non-consensual or forced sex. Our research found video descriptions like ‘young schoolgirls abducted and cruelly raped. Hear her screams.’; ‘little schoolgirl raped by teacher’ and ‘little girls cruelly raped at home’; ‘tiny girl sleep rape’ and ‘girl raped at gunpoint’. The websites hosting the content included words like brutal rape, real rape, savage rape, etc.

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165 See Cameron, supra note 8.
167 Miller, 413 U.S. at 24.
168 Id. at 24–25.
only rape, in their web address[es]... The viewers of these sites are encouraged to believe these images are real, that they are watching ‘real rape’. The loophole in legislation means that alongside images of rape, simulations of incest and child sexual abuse are freely, legally accessible in England and Wales as long as all participants in the image can be identified through digital imaging as being 18 or over, regardless of young appearance or contextual factors. Watching randomly selected videos on each site, we discovered there were two forms of ‘rape’ video; one where realistic violence or drugging was used to force sex, and the other of staged “positive-outcome rape” scenarios, both of which we believe to be sending out profoundly damaging messages.169

For indictment before a federal grand jury of the United States under 18 U.S.C. § 1460, which prohibits the production, distribution, or possession with intent to distribute any obscene material,170 a determination must be made whether under contemporary standards, the average person would find that violent pornography that depicts the rape of young girls, who are not in fact minors, appeals to the prurient interest, that is, “material having a tendency to excite lustful thoughts”171 or “a shameful or morbid interest, in nudity, sex or excretion.”172

Under the first prong of Miller, the finder of fact would probably find that the average person would consider the depiction of graphic rape of a young girl, which includes video of actual sexual penetration made to look forced or video of actual sexual penetration made to look forced but staged as a “positive-outcome rape”173 scenario, taken as a whole, as appealing to (1) pedophiles—a “specially susceptible audience”174—in order to excite lustful thoughts, or (2) adults who

169 Campaign Briefing, supra note 14.
171 Roth, 354 U.S. at 488 n.20.
172 MODEL PENAL CODE § 251.4.
173 Campaign Briefing, supra note 14.
174 MODEL PENAL CODE § 251.4.
recognize the actresses are not minors but who are excited by sexual domination and penetration regardless of scenario, or (3) any group with a shameful or morbid interest in the rape of young girls.\textsuperscript{175}

Under the second prong of Miller, the finder of fact would probably find that the average person, applying contemporary community standards, would think that graphic depictions of rape, taken as a whole, and which are advertised as such, are patently offensive because rape is illegal, has historically been a tool of oppression and violence against women,\textsuperscript{176} and many women have been raped or are likely to be victims of rape today.\textsuperscript{177}

Under the third prong of Miller, the finder of fact would probably find that a reasonable person would consider viewing depictions young girls being raped, which contain actual sexual penetration, taken as a whole, to lack serious literary, artistic, political or scientific value because such depictions reinforce dangerous distortions of sex—for example, that rape is enjoyed or consent is unimportant, which viewing may be coupled with a sexual response by the viewer, that is, through masturbation.\textsuperscript{178} Such depictions have no artistic value because their purpose is solely for sexual arousal and gratification. They do nothing to support a political cause since there are no pro-rape/anti-consent caucuses that attempt to garner political support for the such interests. Furthermore, any scientific value in studying the effects of such viewings would necessitate the furtherance of a potential harm against the view in order to gather reliable data.

Therefore, violent pornography, which depicts acts of violence, rape, or aggression, combined with graphic depictions of sexual penetration would be probably found obscene under the Miller test and, therefore, subject to the statutory provisions under 18 U.S.C. § 1460,

\begin{itemize}
\item \textsuperscript{175} Id.
\item \textsuperscript{177} See Diane L. Rosenfeld, \textit{Who Are You Calling a ‘Ho’?: Challenging the Porn Culture on Campus}, in BIG PORN INC: EXPOSING THE HARMs OF THE GLOBAL PORNOGRAphy INDUSTRY 41, 43 (Melinda Tankard Reist & Abigail Bray eds., 2011) (“Government studies in the United States estimate that 1-in-4 or 1-in-5 women will be sexually assaulted during her time in college”).
\end{itemize}
which prohibits the production, distribution, or possession with intent to distribute any obscene material.\textsuperscript{179}

However, the federal statutory provision prohibiting the production, distribution, or possession with intent to distribute obscene material,\textsuperscript{180} and corresponding state statutes, do not appear to have been passed for the purpose of reaching “mere possession”\textsuperscript{181} of obscenity.\textsuperscript{182} Therefore, for a prohibition on the possession of violent pornography, another standard must apply. Such a prohibition must be upheld through an exception to the traditional \textit{Miller} standard, as in \textit{New York v. Ferber},\textsuperscript{183} where the Court held that child pornography is unprotected by the First Amendment,\textsuperscript{184} even though “the test for child pornography is separate from the obscenity standard enunciated in \textit{Miller”}.\textsuperscript{185}

\textbf{B. Even if Violent Pornography Failed Under Miller, It is Unprotected Speech under New York v. Ferber as Analogous to Child Pornography}

In \textit{New York v. Ferber},\textsuperscript{186} the Supreme Court held child pornography to be unprotected speech under the First Amendment because 1) the State had a compelling interest in protecting minors from victimization of child pornography,\textsuperscript{187} 2) child pornography is “intrinsically related” to the sexual abuse of children,\textsuperscript{188} 3) the availability of child pornography provides an “economic motive” for “conduct in violation of a valid criminal statute,”\textsuperscript{189} 4) the “value” of permitting the conduct prohibited by statute “is exceedingly modest, if not \textit{de minimis},”\textsuperscript{190} 5) the content of the speech, “as an evil to be

\begin{footnotes}
\textsuperscript{181} \textit{Stanley}, 394 U.S. at 568.
\textsuperscript{182} Such overt legislative intent would presumably violate the rule laid down in \textit{Stanley v. Georgia}, 394 U.S. 557 (1969).
\textsuperscript{183} \textit{Ferber}, 458 U.S. 747.
\textsuperscript{184} \textit{Id.} at 764.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.} at 747.
\textsuperscript{187} See \textit{Ferber}, 458 U.S. 756–58.
\textsuperscript{188} See \textit{id.} at 759–61.
\textsuperscript{189} See \textit{id.} at 761–62.
\textsuperscript{190} See \textit{id.} at 762–63.
\end{footnotes}
restricted...outweighs the expressive interests,” and 6) restrictions on child pornography are not unconstitutionally overbroad because the “legitimate reach” of the statute “dwarfs its arguably impermissible applications.”

Violent pornography is analogous child pornography insofar as the nation and the states have a compelling interest in “maintain[ing] a decent society,” which includes protecting children and unsuspecting adults from exposure violent pornography possessed by another but advertised in a public forum like the internet, as well as the victims who have been made to be part of the production of violent pornography, which includes victims of sex trafficking, forced prostitution, and domestic sexual abuse.

There is an intrinsic relationship between viewing violent pornography and sexual assault because 1) there is a strong correlation between viewing violent pornography and a subsequent sexual assault by the viewer and 2) violent pornographic material is admissible in trial as evidence of a perpetrator’s state of mind and relevant to crimes of sexual assault.

The availability of violent pornography provides an economic motive for conduct in violation of a valid criminal statute because its production may be accomplished through adult-victim pornography, where the perpetrators commit crimes against others, videotape the acts, and sell the pornography in sex shops. For example, in 2012, two Miami men were convicted on sex trafficking charges for drugging women,

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191 See id. at 763–64.
192 See id. at 772–73.
193 Jacobellis, 378 U.S. at 199.
196 See, e.g., State v. McCormick, 37 Kan. App. 2d 828, 843 (2007) (videotapes showing bondage and gagging were admissible to show defendant’s intent); State v. Caes, No. 17917, 2001 WL 227356 (Ohio Ct. App. Mar. 9, 2001) (photographs depicting women held in sexual bondage, nude and bound, were admissible to show intent and plan where the defendant was charged with kidnapping and rape similar to violent pornographic depictions).
raping them, videotaping the acts, and selling the pornography on the internet, to pornography stores, and to other businesses across the country.\textsuperscript{197} This example highlights the problem with distinguishing violent pornography produced by actors and actresses with violent pornography produced by criminal acts.

**CONCLUSION: MODEL STATUTE**

Like the Scotland Act of 2010, a statute prohibiting the possession of violent and pornographic material must unambiguously define "violent" and "pornographic." The definition of pornography under the Scotland Act and the definition of prurience in U.S. jurisprudence are similar enough that the term "pornographic" could be introduced into a statute prohibiting the possession of violent pornography because it comports with traditional definitions of obscenity but would be more clearly defined, thus avoiding some of the traditional problems associated with regulating obscenity.

The term violent needs to be clearly circumscribed. The content especially difficult to define is that which contains words that indicate consent but clash with violent scenarios or acts. Violent pornography would be defined like "extreme pornography" in the Scotland Act, as pornography that depicts "in an explicit and realistic way any of the following—(a) an act which takes or threatens a person’s life, (b) an act which results, or is likely to result, in a person’s severe injury, (c) rape or other non-consensual penetrative sexual activity, (d) sexual activity involving (directly or indirectly) a human corpse, (e) an act which involves sexual activity between a person and an animal (or the carcass of an animal).

By clearly defining the material to be prohibited, a statute would not be found unconstitutional for overbreadth or vagueness. By defining pornography so it is the same as prurient interest in U.S. jurisprudence, any difficulty with introducing that term into a statute is avoided;

likewise, the need to include in a definition of violent pornography the difficult term “obscene” is thereby obviated.
A MORAL AND LEGAL DUTY IGNORED:  
WHY THE INTERNATIONAL COMMUNITY’S RESPONSE TO THE RWANDAN GENOCIDE OF 1994 WAS INAPPROPRIATE, INEFFECTIVE AND UNACCEPTABLE

Brandelyn Morgan Carran†

PREFACE: A 20th Anniversary to the Rwandan Genocide Remembered

It is 20 years almost to the day—that the horrific events which will be told and unfold throughout this article—occurred. One takes pause—and one reflects—on the atrocity, which still should rock the world more than recent earthquakes or seismological activity. There are memorials that remain as horrific sites of massacre within our churches, as if the devil himself decided to physically thrash in and quote scripture. But there—in what was once dark—shines through a light—of God, forgiveness—which gives us even greater pause; that God is there in the most unseemly of times, to save us.1 And an indelible Catholic religion and faith—that does not forget—and does not ignore, but regrets and seeks to restore—faith, forgiveness, acknowledgement and awareness of

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a stark reality when brainwash and fear turned to evil destruction of its very own peers. Our very own current Pope Francis—spoke on such facets recently—at St. Peter’s Square—and called on all of society to pray to Mother Mary, Our Lady of Kibeho—as our dear mother who tried to warn seers of the atrocities that sought to arrive there.

INTRODUCTION

In this paper, I will address whether the international community—predominantly the UN (United Nations)—acted appropriately and effectively in dealing with the Rwandan Genocide of 1994. I will show why they did not. I will further show why they in fact had a legal and moral duty to do so, but failed to carry this duty out.

In order to look at this issue, I feel one must first look at the history of Rwanda, leading up to the genocide movement; the attempt at peace which was destroyed by the Hutus; proof that the world knew what was going on; how the world reacted; what the law says could have been, and should have been done about it; reactions and remedies instituted since the 3 month holocaust, including the establishment of the Rwandan International Criminal Court; and finally, what Catholic Social Teaching has to say about interceding into such an atrocity.

Genocide has been defined as “a crime under international law, which seeks to destroy a national, ethnic, racial, or religious group.”

Genocide can be committed in various ways, which includes the destruction of an entire group of people: killing members of a group, causing them severe mental or bodily harm, intentionally imposing conditions that will bring about a group’s physical destruction, forcing measures on a group to prevent births, and mandating the transfer of children from one group to another.

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3 Id.
5 Id.
The term “genocide” was first coined by a Polish scholar of International Law—named Raphael Lemkin; it was derived from the Greek word “genos” meaning “race” and the Latin term “cide” meaning “killing.” Lemkin first defined the word as “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”

In order to understand the massacre that occurred in Rwanda in 1994, I feel it is important to understand a basic history of Rwanda, and what led up to this horrific occurrence in 1994 that killed around 800,000 Rwandans; the tensions, the conflicts, the anger that built up over years and years, between two distinct groups of Rwandans that came to be known as the Hutus and the Tutsis.

Tensions had been festering and festering needing only an opportune moment to blow. Tensions that were manifested on the part of extremist Hutus who planned to exterminate the Tutsis entirely, and who almost all but accomplished their goal, due to unhindered massacre; a lack of intervention on the rest of the world. Only the Tutsis’ own army who had sought exile—to Uganda—years before—would finally end the holocaust of Rwanda of 1994.

I. Factual and Historical Background

When Rwanda was first settled, the Rwandan people were labeled by how much cattle they owned. The people who owned the most cattle became labeled the Tutsis. And the other group became the Hutus.

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6 RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (Joseph Perkovich, 2nd ed. 2008).
7 PAUL RUSESABAGINA, AN ORDINARY MAN, AN AUTOBIOGRAPHY x—xi (Viking Adult, 2006)
10 Des Forges, supra note 9.
When Europe colonized the area, and Rwanda was German-owned, the Hutus and Tutsis took on a racial role. The Germans thought the Tutsis looked more European—taller with lighter skin—and because of this, put them in roles of responsibility. After WWI, Germany lost its colonies, and Rwanda became Belgium-owned. In 1933, the Belgians mandated that every Rwandan have an ID card which labeled them either as a Hutu, Tutsi, or TWA—which was a very small group of “hunter-gatherers” that lived in Rwanda.

Notwithstanding the fact that the Tutsis only represented 10% of the population the Belgians gave them all the positions of leadership. This made the Hutus angry. One could say—for lack of a better word—they were jealous.

But then there was again - a switch in roles. When the Hutus (which again, was a majority of the Rwandan population) began a revolution, seeking freedom from Belgian rule, the Belgians allowed the Hutus to take charge of the new government. This, now, made the Tutsis angry. As you can imagine, hostility between the two groups that had begun long before—remained, and continued—and grew.

For a long time, the Hutus remained in control; their President as of 1973, Habyarimana, ran a totalitarian government with all control in the hands of the Hutus; excluding the Tutsis completely. In 1990, a civil war broke out between the Hutus and Tutsis. And in 1993, one year before the genocide massacre, Hutu President Habyarimana, persuaded by the U.S., France and the African Union, signed a document entitled

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12 Destexhe supra note 12, at 38; PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 50, 55 (1998). (Discusses physical features of Hutus and Tutsis discusses measuring the length of Rwandans noses to determine whether they were Tutsis); Keane, supra note 12, at 12. (stresses the “tallness” and “aquiline facial features” being “synonymous” with what was considered “superiority” in pre-Colonial Rwanda).


14 Gasana supra note 14, at 207; Destexhe, supra note 11, at 40.

15 Gasana, supra note 14, at 208


17 Gasana, supra note 14, at 208.

the Arusha Accords in order to again restore peace to the country. These Arusha Accords actually weakened the Hutus hold on the government, and allowed Tutsis to participate—once again—in their government. This—again—angered the Hutu extremists.

Habyarimana had been pushed to implement these “power sharing” Arusha Accords, which would make the Hutus share governmental power with the Tutsis, and end President Habyarimana’s 20 year one party rule over Rwanda. HUTU extremists angrily opposed the accords. They were signed nonetheless. But on April 6, 1994, upon President Habyarimana’s return from Tanzania on an airplane—an air missile shot the plane down—while it flew over Rwanda’s capital city of Kigali. All on board the plane were killed, which included President Habyarimana and the President of Burundi.

There is no proof as to who shot the plane down—but it is apparent from the events to come—that the Hutus would benefit the most from the apparent assassination. Details forthcoming from released memos, between Romeo Dallaire and the UN, would reveal the Hutus’ plan to annihilate the Tutsis. One theory is that if in fact Commander Romeo Dallaire broached the Hutu President with his suspicions of a Hutu “extremist” future attack, then the President who had recently signed the Arusha Accords may try to prevent it and stop them. Thus he would be considered—in the way—to Hutu extremists. The need to remove him before their planned slaughter would become imminent. For within 24 hours of the plane crash, Hutu extremists took over the Rwandan government, blamed the Tutsis for the assassination,

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19 Gasana, supra note 14, at 209; Rosenberg, supra note 17.
22 Rosenberg, supra note 21.
23 Id.
24 Gasana, supra note 14, at 209.
25 Id.
26 Des Forges, supra note 9.
and began their massive slaughter that would kill approximately 800,000 Tutsis in 3 months.28

The killings began in Rwanda’s capital city of Kigali.29 “Hate radio” broadcasts helped to expedite their mission.30 The Interahamwe, which means “those who strike as one,” were an organization of anti-Tutsi youth who were commissioned by the Hutus.31 They began to set up roadblocks, checking the IDs of everyone; anyone listed as a Tutsi was killed.32 A majority of the killing—was not done by guns—no, bullets were expensive—and thus, a majority of the killing was done by machetes, clubs, and knives.33 Brutal, brutal killing included the chopping up of bodies: a most inhumane method of killing.

Not only the Tutsis, but anyone in the government that was a Hutu “moderate”34—was also killed, including the opposing Belgian Prime Minister of the country.35 And when Belgian UN peacekeepers stepped in to protect the Prime Minister—they too were killed.36 Anyone who was considered to oppose the genocide by the Hutus—was killed immediately—including the president of the constitutional court, priests,

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28 Jolyon Mitchell, Remembering the Rwandan Genocide: Reconsidering the Role of Local and Global Media, GLOBAL MEDIA JOURNAL, Vol. 6, Issue 11, Art. No. 4 (Fall 2007), http://lass.purduecal.edu/cca/gmj/fa07/gmj-fa07-mitchell.htm; Russell Smith, The Impact of Hate Media in Rwanda, BBC NEWS (December 3, 2003): http://news.bbc.co.uk/2/hi/africa/3257748.stm; Rusesabagina, supra note 8, at x—xi; Rosenberg, supra note 17; Keane, supra note 12, at 88. (After Habyarimana’s plan was shot down, personal accounts and testimony of Tutsis—that they knew it was bad—and there were lists of Tutsis being created weeks ahead of time—and militia that had been training).

29 Rosenberg, supra note 17.

30 Id.

31 Fax from Maj. Gen. Romeo Dallaire, United Nations Assistance Mission for Rwanda, to Maj. Gen. Maurice Baril, United Nations Department of Peacekeeping Operations, Request for Protection for Informant (January 11, 1994), (archival materials available at National Security Archive) http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/rw011194.pdf; Gourevitch, supra note 13, at 93. (discusses the process at which the extremist Hutu militia and Hutu youth militias were formed) [hereinafter Fax from Dallaire].

32 Human Rights Watch, supra note 18.

33 Discussion Paper, Office of the Deputy Assistant Secretary of Defense for Middle East/Africa Region, Department of Defense (May 1, 1994). (Secret, reclassified as unclassified and on file with the National Security Agency archive), http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/rw050194.pdf; Rosenberg, supra note 17.

34 Rusesabagina, supra note 8, at xii.

35 Rosenberg, supra note 17.

36 Rosenberg, supra note 17.
leaders of the Liberal Party and Social Democratic Party, the Information Minister, and the negotiator of the Arusha Accords.\textsuperscript{37}

However, instead of Belgium rising up against this radical extremist group, in a country they had so-called control over, this havoc caused them to remove their troops from Rwanda.\textsuperscript{38} And as the days proceeded, the violence and deaths got worse. Based on the fact that the government had record of every Tutsi and Hutu, because of the Belgian ID card requirement, they virtually had the names and addresses of every Tutsi living in Rwanda; they could go door to door slaughtering them.\textsuperscript{39} Men, women, children—were killed. Some victims were given the option of purchasing a bullet so their death would be quicker.\textsuperscript{40}

These details are not for the faint of heart: many Tutsi women and girls were repeatedly raped, then killed, or raped, then kept as sex slaves for weeks.\textsuperscript{41} Such abhorring brutalities, as cutting off women’s breasts, and shoving sharp objects up their private regions were done as well.\textsuperscript{42} An evil destruction—slaughter—massacre; not just war, no—not just combat or a fight between two groups; no, this was an intentional annihilation and killing off of an entire group of people; a denigrating, abusive, terror on the people; a torture—a deliberate, hateful destruction—on the entire Tutsi population.\textsuperscript{43}

Churches, hospitals, and schools were no longer refuges as they once would have represented; especially, churches now had become

\textsuperscript{37} Human Rights Watch, \textit{supra} note 18; Rosenberg, \textit{supra} note 17.

\textsuperscript{38} Des Forges, \textit{supra} note 9; Rusesabagina, \textit{supra} note 8, at xii-xiii.

\textsuperscript{39} Des Forges \textit{supra} note 9; Rusesabagina, \textit{supra} note 8, at xiii; Keane, \textit{supra} note 12, at 85-86. (account of disturbing details found in the “Office of the Bourgmestre of Rusomo, Sylvestre Gacumbitsi.” Amongst them, ID cards of the Tutsis.)

\textsuperscript{40} Rosenberg, \textit{supra} note 17.

\textsuperscript{41} MAHMOOD MAMDANI. \textit{WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA} (2002). (references burying people alive, cutting open wombs of pregnant women, roasting bodies).


\textsuperscript{43} Nowrojee, \textit{supra} note 43; Rosenberg, \textit{supra} note 17; Keane, \textit{supra} note 12, at 29. (states the genocide was a “crime of mass complicity.” They were “drowning in the blood of their fellow countrymen”).
slaughter-houses.\textsuperscript{44} One of the worst massacres during that three-month period occurred on two days, from April 15—16\textsuperscript{th}, at the Nyarubuye Roman Catholic Church, located sixty miles east of the capital city Kigali.\textsuperscript{45} The mayor of the town—a Hutu himself—encouraged Tutsis to seek refuge inside the church, telling them they would be safe. He then betrayed them to the Hutus. A \textit{massive} slaughter began—with grenades and guns—but then soon changed to machetes and clubs. So many Tutsis—thousands of them—had gathered, and the Hutus were brutally killing them by hand with their machetes and clubs.\textsuperscript{46} The Hutus actually had to work in shifts—for they actually grew tired of the killing by hand—of thousands of Tutsis.\textsuperscript{47} It took two days straight to kill them all.\textsuperscript{48}
But this was only—one of the many—massacres. The worst are reported to have occurred between April 11 and the beginning of May.49 And to further denigrate and belittle the Tutsi tribe—not even their dead were allowed to be buried. They forced Tutsis to leave their deceased loved ones where they were slaughtered—exposed to the elements—to be eaten by rats and dogs.50

The biased media did not help the situation at all. A newspaper entitled *Kangura*, had been spewing hate against the Tutsis for years.51 Around December of 1990, they published “The Ten Commandments for the Hutu.”52 In essence, any Hutu that had anything to do with a Tutsi was a traitor. And later, Radio Television Libre des Milles Collines—known as RTLM—who had previously been spouting and spewing hate against the Tutsis, (but that had masked its hate by playing popular music and speaking like any other conversational radio broadcaster, in normal soothing tones);53 once the president had been shot down—they took an active role in the slaughter,54 and called for the Hutus to start cutting down “the tall trees”55—which was code for Tutsis, because as I mentioned—they were taller than the Hutus.56 They were the tall, slender trees for which the Hutus’ hate would blind them, and make them not see the forest for the trees.

The RTLM broadcasts had previously referred to the Tutsis as “cockroaches”57—and now were proclaiming to “crush the cockroaches!”58 RTLM went so far to name the Tutsi individuals, and

49 Id.
50 Id; Gourevitch, supra note 13, at 31. (in a more than disturbing visual the text states, “They cut Achilles tendons and necks, but not completely, and then they left the victims to spend a long time crying until they died. Cats and dogs were there, just eating people.”)
51 Rosenberg, supra note 17.
52 Mitchell, supra note 29; Gourevitch, supra note 13, at 87.
53 Mitchell, supra note 29.
54 Human Rights Watch, supra note 18.
55 Rusesabagina, supra note 8, at xv.
56 Des Forges, supra note 9; Rosenberg, supra note 17.
58 See generally RTLM Radio Broadcast Transcripts, http://migs.concordia.ca/links/RwandanRadioTrascripts_RTLM.htm (See April 14, 1994, in English; April 15, 1994, in English. Note that the term “inyenzi” means cockroach; and “inkotanyi” is a
addresses—of the Tutsis that should be killed; and once they were, they would announce their murder over the radio.\footnote{Rusesabagina, \textit{supra} note 8, at xv; Rosenberg, \textit{supra} note 17; Keane, \textit{supra} note 12, at i. (Quotes Radio Mille Collines, Rwanda, April 1994, as saying, “The grave is only half full. Who will help us fill it?”)} This was not war—this was slaughter; massacre; butchery; a blood bath; a holocaust—in essence.

A holocaust not so different from what the world had experienced and had to live with after Hitler’s Nazi Germany sought to kill off every Jew, country by country. This was the intentional killing of an entire group and Jews were not able to stand up and fight for themselves, as the Tutsis were unable to stand up and fight for themselves.

And so—why on earth and in heaven—did the whole world simply stand by and watch? This wasn’t cattle being slaughtered—these were human beings—dignified, innocent human beings; an event that the very UN Resolution\footnote{G.A. Res. 96 (I), U.N. GAOR, 1st Sess., Supp No. 55 A/RES/96(I) (Dec. 11, 1946).} following World War II sought to prevent—pointedly—for which the “crimes against humanity” term was adopted at the Nuremberg Trials, and prosecutions of Nazi generals were carried out; the very reason for which the United Nations was established—and its charter—with \textit{jus cogens} (preemptory norms) listed first; norms universally accepted by all - that a country cannot participate in under any circumstances; and one of those norms is the illicit act of genocide (as interpreted by case law).

Genocide was considered a violation of international law—across the board—from the moment of the UN’s inception; a wrong that two countries could never contract or treaty to. And it would become such a strong point that a UN Resolution would be adopted on December 11, 1946—wherein genocide would be officially designated as a crime under international law and the need for a Convention to cover this prevention would be established.\footnote{Id.} A UN Resolution that would become a Convention 2 years later—on December 9, 1948: \textit{The Convention on the Prevention and Punishment of the Crime of Genocide,\footnote{Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278, \textit{available at}} which would enable a
country that had ratified it - to step in to another country that was performing the genocide—and attempt to stop them.

I will discuss this Convention further later in my paper: the law enabling and compelling the international community to interject into such an atrocity of genocide, especially when they were well aware of it for some time. This Convention, which called for an active duty of the parties to it—parties which were aware of the genocide in Rwanda—but which instead, stood idly by.

But first let us review Rwanda’s initial attempt at peace with the signing of the Arusha Accords, and then the extremist Hutus blatant disregard for such peace, which led to the genocide movement; how the world knew about the genocide taking place in Rwanda between those three months, along with the lead up to the genocide massacre, through the eyes of the UN Commander Romeo Dallaire; and documents from UN archives that prove the world knew. Knew, yet remained passive at the sidelines, standing passively by.

II. FIRST LAW DOCUMENT: A PEACE AGREEMENT—THE ARUSHA ACCORDS;
AN ATTEMPT AT PEACE COMPLETELY STOMPED OUT BY THE HUTUS

The Arusha Accords were five protocols signed in Arusha, Tanzania on August 4, 1993 by the Hutu government of Rwanda and the rebel Tutsi army—the Rwandan Patriotic Front (RPF)—in a peaceful attempt to end a three-year Rwandan Civil War. The mediation between the groups was organized by the United States, France and the Organization of African Unity. It began on July 12, 1992, and lasted until June 24, 1993.

The Arusha Accords established a Broad-Based Transitional Government (BBTG), including the RPF (which was primarily Tutsi), along with the five political parties that had composed a temporary government since April 1992 in anticipation of general elections.
Accords included other points that sought lasting peace - including the merging of government and rebel armies.  
However, as you will see - great in theory and a disaster in practice.

The Hutus didn’t want to agree and compromise. They wanted ultimate control. Hence, the genocide movement.

III. PROOF THAT THE WORLD KNEW: FROM A MAN ON THE GROUND, U.N. MAJOR GENERAL ROMEO DALLAIRE, AND DOCUMENTS FROM THE NATIONAL SECURITY ARCHIVE

A. Romeo Dallaire

What better witness to this extreme event then someone who was on the ground floor; someone placed there specifically, but with hands tied. Major General Romeo Dallaire—sent to Rwanda in 1993 to secure the peace keeping mission of UNAMIR [United Nations Assistance Mission for Rwanda] after the Arusha Accords had been signed, was left devastated as continued requests for help from the UN went unaided. And a massacre of 800,000 Tutsis and moderate Hutus unfolded right before his eyes.

During his interview with Frontline entitled, “Ghosts of Rwanda,” he discusses his book, “Shake Hands with the Devil,” and reveals quite an in-depth, visual explanation of what was really going on; what it was like to know something horrific was going to occur, when no one would listen. And those that listened said to step aside.

As I stated, Romeo Dallaire was assigned to the Rwandan peacekeeping operation—an operation entitled UNAMIR—under the

66 Id.
69 Rusesabagina, supra note 8.
70 Frontline, supra note 68.
72 Id.
UN Department of Peacekeeping Operations—the DPKO. The three main figureheads of the department included: Kofi Annan—the U.N. under-secretary general for peacekeeping operations; Iqbal Riza—Kofi Annan’s chief of staff; and Maurice Baril—the military adviser. Dallaire called them the “triumvirate”—because they worked together—the three of them; they were considered the heart of the DPKO—synergistic.

To sort of timeline the events, as they can be best understood, on the 8th of August, Dallaire got a phone call saying the Arusha Accords had been signed. On the 17th of August—they went for 2 weeks on a “tactical mission” to Rwanda to determine how much the peacekeeping operation of the UN presence there would cost.

This peacekeeping mission had begun as a Chapter VI—Peacekeeping mission—whose mandate was no use of force except for self-defense; and only mediating and monitoring what either side told them. Unfortunately, it remained a Chapter VI when what was to come was undoubtedly requiring a Chapter VII—the ability to use force.

Dallaire was optimistic at first—when he left after the first 2 weeks—optimistic that they could make this peace keeping mission work. However, knowing what we know now, it is important to note what Dallaire said, of his first visit that August to Rwanda, “There was an operation being planned . . . I think it was eliminating that moderate political side. There was no doubt. The killing of others and the continued killing of the others could have been just as fortuitous because they had a structure in place, as it could have been deliberate.”

Dallaire—still wonders—why it took the RPF [Rwandan Patriotic Front]—the Tutsi’s own army whom had gone into exile in Uganda - so long to come back and stop it. He wonders this because no one else stopped it first. It took the Rwandan Tutsi’s own exiled army to halt the killing.
Dallaire came back to New York after the two week August visit, to lobby different countries with representatives regarding the mission. No one was interested apart from the Belgiques and the French.  

When Dallaire returned to Rwanda—he held a welcoming ceremony, raising the UN flag in the demilitarized zone [DMZ]. He felt their known presence was important. However, that night, massacres involving the killing of 40 people occurred just south of the DMZ. Later it would be determined that the Hutu extremists were trying to set up the RPF (Tutsi army), claiming they killed these people; lessening their credibility. And this would later be used in the Hutu extremists’ propaganda broadcasted from the “hate radio” during the time of the genocide.

As of November, Dallaire was reporting that “this was not going to be a classic Chapter VI” as “[r]umors in regards to the extremists having signed under duress started to come out. [And] [t]he presence of the militias or, let’s put it this way, the youth movements . . . were becom[ing] more vociferous and more brazen . . . The tone of what was happening was shifting from evident goodwill to an atmosphere that was less than stable, or less than solid. We were starting to get a whiff of the complexities that might be ahead . . . ”

Dallaire continued that by New Year’s Eve a “sort of gloom came in.” He knew that they were not getting the support from the U.N. they needed. He was becoming aware of rumors but his hands were tied. Under a Chapter VI no covert operations could be conducted. He could simply monitor, not gather intelligence information, which in this case, was not doing him any good. Sensing something was building required the ability to do more than simply monitor.

Finally, a confirmation of what Dallaire had been suspecting, on January 11th—an informant stepped up—belonging to one of the extremist parties. He told Dallaire that “he simply wasn’t going to
continue to work in that atmosphere. That they were undermining the whole [peace] process and were ultimately planning the evilest of deeds: attacking not only Tutsis, but also the whole attitude or philosophy of reconciliation between the two different ethnic groups that had been going on for a while, and as such decapitate all the moderate Hutu leaders also.”

Dallaire covertly had meetings with the informant. He was able to “confirm that there were arms [caches].” Dallaire insisted that “the quality of the information and the correlation at that point within that very short time was way solid enough for me to take action.” Hidden covert actions of the extremists were confirmed. Now Dallaire just needed permission to unveil these—and stop the deadly plans.

He sent a fax to General Maurice Baril, which is mentioned later as well in my paper, as proof that the UN knew what was going on. But after most likely his “best night’s sleep,” as Dallaire termed it, feeling that the much-needed action would now be able to take place, instead he awoke to a reply fax from Kofi Annan that “essentially said cease and desist. Conduct no such operations. It’s out of your mandate.”

Dallaire was beyond upset and outraged. He admitted he couldn’t even fathom the term “genocide” at that time, but knew that large-scale killings could ensue, and ethnic cleansing like that of Yugoslavia; significant killings and massacres “that would destabilize the whole political process.” Even after multiple requests during the next month—the only operations he could conduct were at arm’s length. Only the “local gendarmerie” [military] could conduct what Dallaire felt he needed to do; and the problem with that - was that although there were some very good people, it had been infiltrated by the extremists.

Frustrated with the whole process, as Dallaire’s hands were essentially tied—he took leave in March to return to New York to clean some things up. When he returned he was astonished to find that the

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87 Id.
88 Id.
89 Frontline, supra note 68; Fax from Dallaire, supra note 32.
90 Frontline, supra note 68.
91 Id.
92 Id.
93 Id.
President had shifted the peace process to include—the “overt, extremist, super-rightwing Coalition for the Defense of the Republic [CDI] party and the Muslim party”; the very CDI who had not signed the Arusha Accords and were not willing to tolerate a peaceful arrangement with the new government it was calling for.94

But rather than recognize their willfulness, the government once again blamed the RPF—the Tutsi’s army. And the RPF was being put in an impossible position because they couldn’t accept the CDI’s position—a party who would not sign the peace agreements; a party who would not accept a share of the government’s power with the Tutsi’s; a party who would not reconcile to the peace agreement with the Tutsis.

But they flipped it; they flipped the facts. And they used it, later against the Tutsis. But who was listening? Even the international community may have been fooled. Fooled, or they turned a blind eye. Why not, it still goes on today.

What came next was what Dallaire most feared: The genocide of 1994, which was a three-month slaughter of innocent human beings with no support from the international community.

B. Documents from the National Security Archive

1. The Genocide Fax, January 11, 1994

As I mentioned above, in a famous fax that came to be titled, the “Genocide fax,” from Major General Romeo Dallaire, Force Commander of UNAMIR, to Major General Maurice Baril, of the UN Department of Peacekeeping Operations, on January 11, 1994 (almost 3 months before the genocide) wherein Dallaire warned Baril of a plot that he knew of to assassinate Belgian UN Peacekeepers, Rwandan members of Parliament, and Tutsis. He knew there was a plan by the Hutus. He knew that secret lists of Tutsis to be killed existed, and he was seeking help and assistance.95

Dallaire told New York that he intended to raid these secretly stored plans of the Hutus—but Kofi Annan, who was Secretary General,

94 Id.
95 Fax from Dallaire, supra note 32.
and the Department of Peacekeeping Operations, told Dallaire that this was outside UNAMIR’s limited mandate.\textsuperscript{96}

Instead of the help and assistance Dallaire was looking for—they told Dallaire to inform the then President Habyarimana of these facts [remember this is little under 3 months prior to his assassination]—\textit{even though} the genocide plans Dallaire spoke of - were those of government officials in Rwanda working right next to the President.

Interestingly—President Habyarimana was then shot down on April 6—which opened the door for the plans to be executed. And they were.

But instead of stepping in at this point—the Belgian government withdrew any men they had left from UNAMIR—and within two weeks—the UN Security Council voted to reduce UNAMIR; the very last hurdle to the Hutu’s planned slaughter. The only hope the “sitting duck” Tutsi victims had. The UN voted to diminish these forces.\textsuperscript{97}

There was a plethora of communication regarding the genocide—to back-up that the U.S. was well aware not only of the conflict between the groups prior to the genocide movement, but also once it had begun. They were aware of the atrocity of the event—taking it from a previous civil war and attempt at peace—to clearly a complete takeover by extremist Hutus and a holocaust of Tutsis; a genocide movement.\textsuperscript{98}

\textbf{2. Memorandum, April 6, 1994}

A Memorandum from Prudence Bushnell, Principal Deputy Assistant Secretary of the Bureau of African Affairs, was delivered to Secretary of State Warren Christopher, regarding the death of the Rwandan president, Habyarimana, and the Burundian president, Ntaryamira, in a plane crash outside of Kigali on April 4. The Memo informed the Secretary of State that “widespread violence is likely upon the death of the President . . . the military intends to take over power and

\begin{footnotes}
\item[96] Id.
\item[97] Ferroggiaro, \textit{supra} note 28.
\item[98] Fax from Dallaire, \textit{supra} note 32. (Dallaire tries to explain the immediate and imminent threat approaching); Discussion Paper, \textit{supra} note 34.
\end{footnotes}
they are resistant to working with the current Prime Minister.”

3. Memorandum, April 11, 1994

A Memorandum prepared by the Deputy Assistant Secretary of
Defense for Middle East/Africa; a document produced to brief Under
Secretary of Defense Frank Wisner, the 3rd ranking official at the
Pentagon, along with former Secretary of State Henry Kissinger, on April
11; only 5 days after the assassination of President Habyarimana, which
gave an assessment of the event going on in Rwanda within these 5 days.
The Pentagon Africa analysts claimed that “if the peace process fails, a
massive bloodbath (hundreds of thousands of deaths) will ensue.”

4. Telegram, April 15, 1994

A telegram on April 15, 1994, that forwarded information from
the Department of State to the US Mission to the UN in New York, telling
US diplomats to withdraw all of UNAMIR personnel “as soon as
possible;” and that the withdrawal did not require a UN security Council
Resolution.

This decision was then communicated to the Rwandan
ambassador during a two day UN Security Council debate over what to
do next with Rwanda—which encouraged him to report back to the
“interim government” in Rwanda that such decision was made. The
“interim government” then made their decision to take their genocide
mission to the rest of the country.

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99 Memorandum from Prudence Bushnell, Principal Deputy Assistant Secretary, Bureau of African
Affairs, to Secretary of State Warren Christopher (April 6, 1994) (Regarding Death of Rwandan and
Burundian Presidents in Plane Crash Outside Kigali located at National Security Archives at
100 Memorandum from Deputy Assistant Secretary of Defense for Middle East/Africa, to Under
Secretary of Defense for Policy (April 11, 1994). (Regarding Talking Points On Rwanda/Burundi.
Located at National Security Archive at
101 US Department of State cable number 099440 to US Mission to the United Nations, New York,
Talking Points for UNAMIR Withdrawal (April 15, 1994) (Confidential, Freedom of Information Act
release by Department of State, National Security Archive, George Washington University) available
at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB53/rw041594.pdf.).
102 Id.
5. Press Release, April 22, 1994

A statement by the White House issued in a Press Release from the Office of the Press Secretary on April 22, 1994, is evidence of about the furthest the US went towards aiding the Rwandan crisis; which was to call on Human Rights Watch to urge internal Rwandan military leaders to cease. To reason with them. Of course this did nothing. There was nothing to reason with. There was no peace to “maintain.”


In a Memorandum from Frank Wisner, number 3rd ranking official at the Pentagon, replying to Sandy Berger, Deputy Assistant to National Security Adviser Tony Lake, that undertaking the initiative to counteract the “hate radio” in Rwanda (which ended up being a huge tool in the Hutu’s “extermination program”) would be ineffective and expensive.

. . . AND THE LIST GOES ON.

Nonetheless—aside from this knowledge - nothing was done.

IV. HOW THE WORLD REACTED

As killing in Rwanda intensified—and with information of the attack—the international community left. Western countries that had brought in troops within the first week to evacuate their own citizens—did so, and then left.

Astoundingly, on April 21, 1994 - weeks after the massacre began—the United Nations Security Council, at the advice of the United States, which had no troops in Rwanda or Belgium, voted to withdraw all but a skeleton crew of UNAMIR; UNAMIR—the UN Mission created in

105 Ferroggiaro, supra note 28.
October of 1993, almost 6 months prior—to help keep the peace between the governmental transitions that were occurring in Rwanda. A mission based on the creation of the Arusha Accords to maintain peace during the transitional government; peace between the Rwandan Patriotic Front consisting of Tutsis and the already in existence Rwandan Army of Hutus. However, the UN Security Council voted on this—even as a representative of the genocidal scheme sat with them as a non-permanent member.

After media and reports began to broadcast on the situation, finally on May 16—over a month after the killings had begun—the UN was compelled to intervene with UNAMIR II, which was supposed to be a more tough and forceful group of 5,500 troops.

However—astoundingly again—things did not go as such. The full number of troops and material did not arrive in Rwanda until months after the genocide ended.

Finally—on June 15—France decided to get involved. Mind you, this is 2 months into the genocide. France had been a prior arms supplier to the deceased President Habyarimana’s regime—and very likely considered they had better get involved at this point. A vote on June 22—with the UN Security Council—gave its ok for France to intervene, and France set up a humanitarian zone in the southwest corner of Rwanda (near the Zaire border) which resulted in saving thousands of lives.

106 Ferroggiaro, supra note 28.
107 Id.
108 Id.
110 Ferroggiaro, supra note 28.
Tutsis, but also aided genocide conspirators who had been allies of the French—a safe exit—out.\textsuperscript{112}

That being said, France’s Southwest post wouldn’t end the genocide. Fighting from the sidelines of the arena was not sufficient. It took the Tutsi’s own army—the Rwandan Patriotic Front (as has been referred to throughout this paper as the RPF) for which a majority had been exiled in Uganda from prior conflict, to reenter the country and take over—to enter the arena and win the battle for the Tutsis. First in the capital city of Kigali on July 4, and then 2 weeks later, around July 18\textsuperscript{th} they were finally able to announce a new government, consisting of members that had originally been meant to share power with the Hutus based on the Arusha Accords.\textsuperscript{113}

So once again, other than France at the end (and for reasons which are up for debate) why didn’t the world step in? I will now review the relevant international law that would have allowed us to; allowed the world to; and truly called for the world to—something—more than maintain peace; and oversee a peace which because of Hutu hatred - simply didn’t exist.

V. LAW: THE GENOCIDE RESOLUTION AND CONVENTION

Based on the horrific exterminations of Jews by Hitler in WWII, the United Nations passed a resolution in 1946 which became the Convention on the Prevention and Punishment of the Crime of Genocide on Dec. 9, 1948. It declared genocide a crime under international law and provided for punishment of such.\textsuperscript{114}

It was originally proposed by, and partially formulated by Raphael Lemkin, Polish international law scholar who I mentioned

\textsuperscript{112} Ferroggiaro, supra note 28.

\textsuperscript{113} Id; Prunier, supra note 112, at 288 (the text cites of what was termed Operation Turquoise, “Of course, there was a problem which had not been much discussed: the French intended to carry out a humanitarian operation in a country at war while avoiding any armed confrontation”). (I have something slightly different)—RdH: Id.; Prunier, supra note 112, at 288 (citing what was termed Operation Turquoise, “Of course, there was a problem which had not been much discussed: the French intended to carry out a humanitarian operation in a country at war while avoiding any armed confrontation.”).

previously had coined the term “genocide.” 115 He determinedly lobbied
nations for its adoption, and sought recognition of the term at the
Nuremberg Trials. 116 Genocide was defined as the intent of a person or
persons to destroy a national, ethnic, racial, or religious group. 117
Therefore, casualties of war that result in being groups of particular
people are not necessarily victims of genocide, but if the intent is not
simply to go to war, but rather to destroy an entire group based on their
nationality, ethnicity, race, or religion, it meets the definition. The
convention requires signatory nations to enact laws to punish those
found guilty of genocide, and allows any signatory state to ask the
United Nations to help prevent and suppress acts of genocide. 118

As of 2012, 142 states have ratified or acceded to the treaty. 119 Most
notably—members of the UN Security Council—China ratified it in 1983,
France ratified it in 1950, Russia ratified it in 1954, the U.S. ratified it in
1988, and the United Kingdom acceded to it in 1970. 120 The treaty closed
for signature on January 12, 1951; all these countries listed had signed
and thus were able later to ratify. The United Kingdom had not yet
signed, and thus was only able to accede to it in 1970. 121

A. Leading up to the Convention: United Nations General Assembly
Resolution, 1946

The UN met on December 11, 1946 and adopted a resolution
stating that genocide was a crime, and stating, “Genocide is a denial of
the right of existence of entire human groups, as homicide is the denial of
the right to live of individual human beings; such denial of the right of
existence shocks the conscience of mankind, results in great losses to

115 Lemkin, supra note 3.
118 Id.
119 Prevention and Punishment of Genocide, CRIMINAL JUSTICE DEGREE ONLINE,
120 Prevention and Punishment of Genocide, UNITED NATIONS TREATY COLLECTION,
121 Nonparties to Genocide Convention (by ICC status), PREVENT GENOCIDE INTERNATIONAL,
humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.”

It was further determined, “[m]any instances of such crimes of genocide have occurred when racial, religious, political, and other groups have been destroyed, entirely or in part . . . [and] the punishment of the crime of genocide is of international concern.”

The General Assembly—then—“Affirm[ed] that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable . . .”

Finally, the General Assembly requested that the Economic and Social Council draw up a “draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.”

Not long after, only 2 years later, derived from this UN Resolution 96(I), The Convention on the Prevention and Punishment of the Crime of Genocide came into force.

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948. Under Article 1, “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” Article 2 further defines genocide as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b)

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123 G.A. Res. 96 (I), U.N. GAOR, supra note 122.
124 Id.
125 Id.
126 Id.
128 Id.
129 Id. at art. 1.
Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.¹²⁹

Article 3 then mandates the following acts punishable: “(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.”¹³⁰ Article 4 calls for these “Persons committing genocide or any of the other acts enumerated in Article 3 [to be] be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”¹³¹ And notably, Article 6, calls for “Persons charged with genocide or any of the other acts enumerated in Article 3 [to be] be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”¹³² Rwanda now has a Criminal Tribunal, which I will discuss below.

Last of the pertinent Genocide Convention articles to this paper, and of extreme importance, is Article 8, which gives authority for “Any Contracting Party [to] call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.”¹³³ There are 19 articles in total, but these I have addressed are the most pertinent in speaking to this issue.

All of this synergistic convention activity—this document—article by article—yielded, formed, created - to produce an entire document with a purpose to compel nations that have signed on to it—to step in and stop an atrocity like Rwanda. And yet, it appears a smear of dust

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¹³⁰ Id. at art. 3.
¹³¹ Id. at art. 4.
¹³² Id. at art. 6.
¹³³ Id. at art. 8.
must have covered the document’s etched print, for no one saw and no one listened, and no one certainly - felt it etched on their hearts.134

“Those who have eyes to see.”135 In this instance, the world - who chose to look the other way - would be held responsible and have to sleep with the fact - that under their allowed authority—hundreds of thousands of innocent humans would die.

VI. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Based on an un-negotiated reality that this was a wrong—that should have been righted; a wrong that now must be accounted for, and individuals held accountable for - the United Nations Security Council assembled to set up the International Criminal Tribunal for Rwanda (ICTR) in 1995, in Arusha, Tanzania.136 The court was set up to face, deal with, and attempt to remediate this unaided atrocity of the Rwandan genocide of 1994—that was allowed to occur and unfold and manifest into an evil disease, before their very eyes. A disease for which they could have had the cure. Or even a prophylactic form of medicine. Something, had the doctors stepped in with their antidotes—they would have been able to halt, to stop. But which instead—went unaided, and quite ignored through the lens of their microscope. They saw the illness. But they let it fester in the petrie dish. And fester and kill everything around it—it did.

The ICTR was the second only of its kind, after the International Criminal Tribunal for Former Yugoslavia—the ICTY—was set up in 1993 in the Hague, in the Netherlands, for atrocities of a similar kind.137 These

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134 Natural Law Reference: CCC, Part Three Life in Christ, The Natural Moral Law, 1954-1960; citing St. Augustine and St. Thomas Aquinas (God’s law is written on the hearts of man; it is not learned; it is innate).
135 See generally Mark 8:18 (Those who have eyes to see, and ears to hear). See also Ezekial 12:2; Jeremiah 5:21; Proverbs 20:12; Acts 28:25-27 (speaking to the heart understanding as well, as an important ingredient and key focal point in the synergy of eyes seeing and ears hearing and hearts understanding.).
are the first courts of their type since the World War II Nuremberg Trials were conducted to prosecute Nazi war generals for their contribution to the extermination of the Jews.\footnote{\textit{Id.}}

The Rwandan court was set up to prosecute those involved in the genocide. How is it working? Not very rapidly, as the crimes of genocide are found difficult to prosecute, and the genocide trials had to wait for the perpetrators to return to the country. Many Hutus—around 2 million—fled the country following the Rwandan Patriotic Front takeover, to avoid Tutsi revenge.\footnote{\textit{Id.}} But based on bad conditions in nearby countries in the Democratic Republic of Congo (based on the Congo War in 1996) which the Hutu presence actually contributed to - many Hutu refugees returned to Rwanda in 1997.\footnote{\textit{Id.}}

\textit{A. ICTR Controversy}

That being said, the ICTR has been the subject of much criticism and controversy based on various factors: it sits outside the country so Rwandans feel it is not as personal to the location of the crime and its victims; it is slow to action, taking too long to bring the intended justice; has proscribed too light of sentences on its offenders, and is costly to carry out the whole process.\footnote{\textit{Id.}}

Head of the army at the time of the genocide, Augustin Bizimungu, was just handed over in 2002 (a mere 8 years after the genocide) and only sentenced to 30 years.\footnote{\textit{Id.}} Bagosora, lead man in the extremist movement had his sentence mitigated from life to 35 years.\footnote{\textit{Id.}} Many suspects are on the run. And in terms of prosecuting, you need lots of lawyers, evidence and witnesses to prosecute, which can be time-consuming and costly. Additionally, the court's location has been a subject of controversy because it is in Tanzania, not Rwanda, and Rwandans feel that local witnesses' presence, a more speedy process, and
more just sentences would be better served and carried out by Rwandan criminals in their own home country. Bagosora has even now, recently, been moved to Mali, where he will finish out his sentence.144 Even further from Rwanda. This is a point of contention with local Rwandans because they feel that he should be imprisoned in the country where he committed his atrocities; Mali not being as personally vested in his sentencing and punishment.145 Interestingly, Rwanda has “expressed readiness” to take in criminals from the genocide, but even one has yet to be transferred to their home country; the locus in quo—the site of the destruction.146 Minister of Justice, Tharcisse Karugarama stated, “We signed a convention with the ICTR to have convicts transferred to Rwanda but so far not a single one has been brought here. If these convicts are sent here, we would strictly keep in the provisions of the laws and agreements.”147 Additionally, the ICTR’s mandate did not include compensation for the victims that are left from the Rwandan genocide, and Rwanda’s Justice Minister said that he regrets this.148

On the upside however, is the statement the Tribunal makes to all. These wrongs will not be left unpunished. And that is very important, says Rwanda’s Justice Minister Tharcisse Karugarama.149

As of Spring 2012, the Court has completed 35 trials and convicted 29 people of war crimes, acts of genocide, rape, and the creation of “hate media.”150 The ICTR has become the first international court in history to hand down a conviction for genocide.151 Unfortunately, by analogy to the almost 1,000,000 slain, it seems not quite the justice that should be had. The court is said to be closed by 2014, in hopes that justice will be achieved by then.152 Of course, that depends on the measure of scale you’re using; no sentence can bring back a mother, a father, a baby,
a brother, a sister, a friend, a neighbor. An almost entire Tutsi population. Only, as Immaculee Ilibagiza has impressed upon the world, forgiveness of heart, peace with God, and faith, can bring redemption and calm to one’s soul in light of such evil and torment.153

B. The Other Court—Gacaca

Other courts that administer justice in Rwanda—besides the International Tribunal of Rwanda—are local courts called “Gacacas.”154 Gacaca means “justice in the grass,” and consists of local courts held in “open-air assemblies” by the community.155 They have existed for a very long time in the country. Since the Rwandan genocide, they have been used, along with the ICTR, to prosecute those responsible for the genocide, in what many Rwandans consider a “speedier” route to justice than the ICTR.156

As I will address in more detail below, under the sad realities of Rwanda’s catholic community during the genocide, Catholic clergy that were found guilty have been tried in these local courts. One example, Sister Theopister Mukakibibi, a Catholic nun, was sentenced to 30 years in prison by a Gacaca court on November 10, 2006.157 A Rwandan newspaper reported that she was in denial of all charges because she claimed “her conscience did not condemn her.”158 “So there is no need to seek forgiveness,” she said.159 But the court found that along with denying Tutsis care and food, she threw them out of a hospital she worked at, to be slaughtered.160 The court found that the nun did not even spare pregnant women and had even been responsible for dumping

153 IMMACULEE ILIBAGIZA, LEFT TO TELL: DISCOVERING GOD AMIDST THE RWANDAN HOLOCAUST (Carlsbad, Hay House 2006).
155 Id.
156 Id.
157 Id.
158 Id.
159 Id.
160 Id.
a baby in a toilet.\textsuperscript{161} Further to that, she actually held meetings with militiamen and had an army officer as her “escort” during the killings.\textsuperscript{162}

For all of this, the local court gave her 30 years, which seems a mild sentence—and seems the status quo sentence for the most malicious of killers—even when weighed against the harms and horrors she, and they, must have contributed to—the plethora of murders of innocent lives she helped the extremists achieve.\textsuperscript{163}

\textit{C. Immaculee—Survivor, Witness, and Strong Catholic from Beginning to End}

To mention a personal testimony of a renowned survivor of the Rwanda genocide - Immaculee Ilibagiza, a miraculous survivor of the Rwandan genocide told her personal story of survival and forgiveness in a TV interview given by Simon on 60 minutes.\textsuperscript{164} She spoke of her neighbor, Alex, a man whom her family had been friends with their entire lives, but a murderer almost over-night.\textsuperscript{165} He was sentenced to only 11 years in prison after admitting to, and being convicted of, killing 6 people.\textsuperscript{166} He admitted to using machetes and clubs to chop up and beat the Rwandans to death.\textsuperscript{167} He admitted he had nothing personal against the folks, two of whom were Immaculee’s second cousins, but that he was told he would be given a piece of land and a banana plantation for the killings.\textsuperscript{168} Of course he never received such thing. He admitted that had he found Immaculee, he would have killed her. He said, “Because of the way I was, I would have attacked her, definitely.”\textsuperscript{169} He was that, for lack of a better word, brainwashed. He was that overcome and infiltrated by the evil exhaust that filled the air; the smoke of ignorance,
propaganda, hate. He was convinced and he killed people brutally. And he was given 11 years in prison. An international oversight; a continuation of watered-down justice, in my opinion. You could say many of the young men—Hutus—were brainwashed. And perhaps they were. God is the judge. But similarly, those who chose to follow Hitler and not stand against him—brainwashed? Or weakness. And those in the Nazi concentration camp—one person that gave away their last piece of bread and another who stole another’s last piece of bread; both in the same camp on the same side of the fence, so to speak. Perhaps minutely different circumstances, but mainly—the big picture—would find them in the same situation.

Viktor Frankl—concentration camp survivor—in his book, *Man’s Search for Meaning*—a must read [along with Immaculee Ilibagiza’s *Left to Tell* et al.] argues that it is man’s will—that conducts how he acts. Put two men in the same situation—one may do something quite the opposite than the other. And although the word “choice” has gotten a bad buzz-word reputation for a conservative like myself in these days of arguing a stance of Pro-Life, rather than Pro-Choice, I would like to use it here in the positive and affirmative. Man has a choice. He can choose to do good and choose to do bad. And I would agree with Mr. Frankl on this point. It is simply a matter of who will make what decisions; the right decisions—in the situation, and under the given circumstances.

So, now—after looking at proof that nations knew—and civil law that compelled action—and then at the establishment of a court set up to right the obviously unjust reality of an ignored crime with prosecutions of genocide contributors—we ask, what does Church law have to say? More specifically, what does the Catholic Church have to say about it?

First, let us address how the local Rwandan Catholic Church handled the crisis—and then let us go to how it should have been handled—by looking at the teaching of the Catholic Church (Catholic Social Teaching) and statements made by the hierarchy of the church—

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170 *Id.*
171 VIKTOR FRANKL, *MAN’S SEARCH FOR MEANING* (Boston, Beacon Press 2006) (detailing a psychologist who studied amidst the horror, and would give himself lectures outside as if he was teaching what he was learning, to keep himself sane, and found that two people—could act very differently under a certain situation—and thus, it was his will.).
172 *Id.*
Bishops and Pope’s pleas of intervention; pleas that something like this never occurs again.

VII. THE ROMAN CATHOLIC CHURCH

A. Prophetic Apparitions in Kibeho

Even though prophetic apparitions by the Blessed Virgin Mary appeared in Kibeho, Rwanda 14 years prior—in which Mother Mary warned seers and showed them visions of a horrific and terrifying, forthcoming event that was to occur in the near future—wherein the seers saw images of rivers of blood, people killing one another, dead and decapitated bodies lying on the ground, unburied - Rwanda did not heed the warnings. In Father Gabriel Maindron’s book, Kibeho, the first one of its kind, he described the visionaries “sometimes cried, their teeth chattered, they trembled. They collapsed several times with the full weight of their bodies during the apparitions, which lasted nearly eight hours without interruption. The crowd of about 20,000 present on that day was given an impression of fear - indeed, panic and sadness.”

Our Catholic survivor and witness to the faith, Immaculée Ilibagiza, who we’ve spoken of previously, wrote another book, along with Left to Tell, entitled, Our Lady of Kibeho. There would be a total of eight seers, but she writes of a particular seer, Alphonsine Mumureke, who tried singing to Mother Mary, in an uplifting tone, ‘We Come Here to Thank You, Faithful Mother,’ but who was cut off after only three words. Mother Mary told her, ‘I am too sad to hear my children sing.’ When Alphonsine attempted to sing the song again, Mother Mary stopped her again, and after some time of mournful silence, the Blessed

174 Id. (including information excerpted from Fr. Gabriel’s book, KIBEHO.).
175 Brown, supra note 173 (including information excerpted from IMMACULEE’s book, OUR LADY OF KIBEHO).
176 Id.
Mother began to cry. Alphonsine asked Mother Mary why she was crying, and with no verbal response, she began to weep more.

It gives me pause. And makes me reconsider something I have heard rung in my own heart. No words in the world can sum up a tear. And many, many tears flowed from Mother Mary’s eyes that day. When words cannot describe, tears do.

Ilibagiza writes of Alphonsine’s gut-wrenching scream and words of terror, “I see a river of blood! What does that mean? No, please! Why did you show me so much blood? Show me a clear stream of water, not this river of blood!” The seer was witness to so many horrific visions that she repeatedly pled to Mother Mary, “Stop, stop, please stop! Why are those people killing each other? Why do they chop each other?”

Alphonsine gushed tears at the sight, a Niagara Fall of terrorized vision, as Immaculee writes she was shown,

a growing pile of severed human heads, which were still gushing blood. The grotesque sight worsened still as Our Lady expanded Alphonsine’s vision until she beheld a panoramic view of a vast valley piled high with the remains of a million rotting, headless corpses, and not a single soul left to bury the dead.

Eerily—the site of the seers’ sight of the visions—a school in Kibeho—would become a massacre sight during the Rwandan genocide where some of those same seers, would be murdered.

B. Sad Realities of the Local Catholic Church’s Role in Rwanda During the Genocide

Sounds eerily reflective—down to the detail—of what was to come; like Mother Mary was putting up a mirrored reflection of a time—that no one chose to stop; and a warning that no one chose to heed. Not
all, but too many of a good portion of Catholic nuns and priests—of this very same faith—turned a blind eye, or even actively participated in the evil destruction of their fellow man. Why on earth or in heaven, would they be complicit? Perhaps a build-up of brain-wash on their part as well. Different theories—suggest based on their education they were taught to believe that the Tutsi truly were bad. Whatever the case, you can’t imagine a true Christian, a true Catholic, if practicing the faith—to ever consider any fellow man as deserving of this. And still, it happened.

1. Theories and Studies as to Why the Complicity

Initially, the Belgians had put Tutsis in power in government structures and educated them at Catholic schools in Belgium. But that changed in the Fifties, when the Belgians and the Catholic Church made a shift to give more power to the majority Hutus.

Timothy Longman in his book, Christianity and Genocide in Rwanda, argues that churches—including Catholic—had partaken in “ethnic politics” when they shouldn’t have; favoring the Tutsis first, and then switching gears to the Hutus in 1959. Apparently this sent a message of church teaching approval that ethnic discrimination was consistent with the church. He further argues that Church leaders in Rwanda had close ties with the political leaders, and so after the genocide movement began—they tried to convince Rwanda to support this “interim government” or what I would term—take-over, the very same government that was supporting and carrying out the genocide.

2. Disturbing Personal Accounts of Complicity

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184 Nieuwoudt, supra note 155.
185 Id.
186 TIMOTHY LONGMAN, CHRISTIANITY AND GENOCIDE IN RWANDA (New York, Cambridge University Press 2010).
187 Id. (In this case I would have to agree—that mixing with the politics—with such intent—was a bad idea. However, to mix with politics in order to stop such a thing—could have been wise—and worked to their advantage. Much like current times—when the government oversteps the line of the church—when they cause the two separate circles to overlap—then I say the church has a right to also overstep into the politics—but for the good of society, for protecting God’s law. This certainly was a sickly twisted ideology if it is true that some Catholic religious carried it.)
Sadly, based on the contributions of some Catholic priests and nuns in the genocide, and catholic parishes actually being designated places of massacre, many Rwandans have turned away from the Catholic faith.

As mentioned above briefly - when discussing sentences of the local Gacaca court of Rwanda, Sister Theopister Mukakibibi, the Catholic nun who worked in a hospital and contributed to murders of Tutsis, and was sentenced to 30 years in prison on November 10, 2006 - to re-impress here - was not only accused of “dumping a baby in a latrine,” and not being sorry, but was accused of denying food, medicine, and medical care to Tutsi patients at the University Central Hospital in the Butare district of southern Rwanda.188 Not only did she deny them, but she forced them back out onto the streets with the knowledge that the Hutu extremists were out there waiting to kill them.189

Another example of a Catholic contributor is Athanase Seromba, a Rwandan priest who was sentenced to jail for life after the ICTR extended his sentence for ordering militiamen to burn and bulldoze a church with 1,500 people inside.190 He was convicted for “his role in the destruction of the church in Nyange Parish, and the consequent death of approximately 1,500 Tutsi refugees sheltering inside.”191 He actually led the militia in attacking the people and pouring fuel through the roof of the church, while police threw grenades inside. After failing to kill everybody inside the church, Seromba ordered it to be demolished.192

“Bone museums” sit quietly, but speak volumes, as they are a shocking reality of the many clergymen who were involved in the genocide. Some of the clergy who have been accused of aiding the killers have been indicted by the ICTR and some by the Gacacas, and others in national courts in Belgium.193 Both accused Roman Catholic priests and nuns have been tried in these courts.

188 Nieuwoutd, supra note 155.
189 Id.
191 Id.
192 Id.
193 Nieuwoutd, supra note 155.
Rukundo was the Catholic chaplain in the Rwandan Armed Forces.\textsuperscript{194} The ICTR prosecution found that Rukundo was openly extremist and showed his hatred of Tutsis in "words and action."\textsuperscript{195} He "was fully conscious of his authority, and abused it by promoting hatred, death and mass victimization."\textsuperscript{196}

The reasoning for such hatred? You may ask yourself again, regardless of party affiliation, God’s law supersedes—and so why on earth would the Catholic Church of Rwanda contribute to a massacre of innocent human beings? For certainly God would never condone such activity—as He is believed to exist - under the Roman Catholic faith. Even here in this country, if one’s party begins to preach and mandate things against God, then it is time to switch one’s party. As Abraham Lincoln so famously and eloquently stated, “Sir, my concern is not whether God is on our side; my greatest concern is to be on God’s side, for God is always right.”\textsuperscript{197}

But as I noted in a previous footnote, unfortunately, the political sphere played an increment role in brainwashing and building up hatred between the Hutu and Tutsi tribes, with these individuals too - Catholic or not. The political sphere had a direct effect on the religious sphere. Unfortunately if one was to look at a diagram, it appears the two circles crossed—or overlapped—but for wrong reasons, rather than for the good. And one must be mindful, as well, as we pose many theories—that seem on their face, to be earthly (but entirely naught so) because one must not forget, there is the VITAL spiritual theory (I speak of spiritual warfare in which we must put on the armor of God); a spiritual theory that unfortunately (based on its evil attempting to take over good)—weaves in the backdrop of it all—the theory that there is evil infiltration in almost anything, and especially the Catholic Church. (We have seen attempts in recent allegations of pedophilia, etc.). (We know Good always wins out over evil) but evil would like to take it down and

\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
consume it; get its hands on it; fool it; deceive it; mislead it; and drag it down so far that it does not recognize itself anymore; certainly questions itself, and why it even exists at all. We know from scripture, the devil is the master of deception, and inciting hate—is one of his primary tools in the evil toolbox—to build his dark empire. Unfortunately, I can say, most unfortunately, we have even witnessed and seen this here in this country as well. But, “those with eyes to see, and ears to hear.” Have seen and heard. That is. Alert, aware and listening, with eyes wide open. If only Mother Mary’s apparitions had incited such an upright knowledge and heeding.

And if General Romeo Dallaire called these extremists with such hate “the devil” then surely it also sought to manipulate God’s strongest alliance—the Catholic Church, and its members.

C. And Yet: Good in the Face of Evil

However, in spite of such abhorring evil, we also witness and see—the good; that there was good, in spite of evil. And that much like in Hitler’s time—we see it brings out the best and worst in people. As I said, Viktor Frankl witnessed while at the concentration he was in during WWII—the will of the person—is certainly there in any situation. He witnessed one person steal someone’s bread, and another give their last piece away.198

Similarly, here, there was good and bad in the face of evil as well. Most importantly—there was good. And they certainly deserve and must be mentioned—some like a war veteran—some whom have passed on—for their extreme efforts at fighting for the good.

Fr. Lennsen says he and other clergy at the Nyerambo church in Kigali sheltered a group of Tutsis and Hutus for more than a week before the Interahamwe eventually struck.

They chased out the people in the church and started killing them outside,” he said. "We tried to intervene, holding on to those who were being killed. I don’t know how I survived. There was a gun in my back. I don’t

198 FRANKL, supra note 172.
remember any feelings of fear. Uppermost was to try and be of service to the frightened Tutsis.199

About 50 people were slaughtered at Father Lennsen’s church.200 The wounded people left behind were cared for by the clergy.201 There was a two-month old baby who had been shot by the militia and was dying.202 A Tutsi woman came during the night, looking for her baby—and she recognized the dying child.203 She put him to her breast, and the child recovered. “It was a miracle,” Lennsen said.204

Timothy Longman, in his same book, Christianity and Genocide in Rwanda, wherein, as I stated in a previous passage, that he recognized unfortunate Rwandan Catholic Church affiliation with the genocide—at the same time—stresses and makes sure to mention (as I am glad and feel compelled to as well) that there were certainly the good religious clergy and religious that stood against and came to the forefront—at the risk of their own lives.205 They indeed need to be recognized and in the eyes of God. For—as much as media would like to act like all is bad and has turned away from God—it certainly has not. And accounts—tell us that.

He explains that during the period leading up to the genocide, beginning in 1990—there was a major division in the church—moderates who were considered to promote “democratic change” and professed human rights (this would be the good side), and then the conservatives who “allied with the Habyarimana regime.” (This would be the bad side).206 I am sorry but I must say that I find it ironic that this side was called “conservative.” Nothing about the acts they proscribed too—was conservative—in the least.

199 Nieuwoudt, supra note 151.
200 Id.
201 Id.
202 Id.
203 Id.
204 Id.; Prunier, supra note 112, at 250 (including Tutsi priests and priests who spoke out on human rights were killed. Some did question—why no one spoke out—why, namely bishops, did not speak out—in which they claim this may have helped stopped the genocide from ever happening. Text includes a quoted passage of two priests to a French Journalist which begins, “Why did not the bishops react?...”).
205 LONGMAN, supra note 183, at 189.
206 Id. at 322.
At any rate—many clergy were Tutsi and supported the “reform”—which in this case—was a good thing, and the good side. Most moderate Hutus did too. New human rights groups that came to be during the couple of years prior to the genocide, were provided by and supported by many Catholic Churches. But unfortunately, and for this reason—these were some of the first targets of the genocide. Those who stood against them—in the face of religion.

Longman recounts,

Some of the early targets included progressive elements in the churches. One of the first places the death squads hit on April 7 was the Centre Christus, a Jesuit retreat center which had a mission of seeking ethnic reconciliation and helping the poor and vulnerable. Around 7 a.m., a group of six soldiers arrived at the center and rounded up those present. They divided the Rwandans from the European priests and nun, and in a separate room they shot all seventeen Rwandans, a mixed group of Hutu and Tutsi.

But in the face of evil, good sought to stand—and win out—against all fear and horror. As reported in the Human Rights Watch document, Leave None to Tell the Story (as has been cited as an integral reference throughout this paper), Mgr. Thaddée Ntihinyurwa from Cyangugu, risked his own life—continuing to speak out against the genocide from the pulpit and even tried to rescue three religious brothers from an attack, albeit unsuccessful, and Sr. Felicitas Niyitegeka of the Auxiliaires de l’Apostolat in Gisenyi was executed in retaliation by a militia man, after smuggling Tutsis across the border into Zaire.

And at the St Paul Pastoral Centre in Kigali, Fr. Célestin Hakizimana provided refuge to almost 2,000 people, most of whom survived. He states that the priest intercepted every try by the military

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207 Id.
208 LONGMAN, supra note 183, at 189.
209 Des Forges, supra note 9.
to abduct or murder these refuges he was providing safety to.\footnote{Id.} He would try his hardest to persuade and bribe them at every chance he could—to ward off the machetes and slaughter that frequently awaited these individuals.\footnote{Id.}

Miracles of human spirit and strength to stand strong in the face of evil, even in the sight and midst of such horror. Horrific casualties—and yet—the strength to still help the fellow man. To give him the last piece of your bread—rather than stealing another man’s piece to keep yourself going. This is the true Catholic spirit and will we all aspire to be like.

We also witness the Pastor Murinzi who sheltered 7 women for 3 months in the bathroom of his house, (which is why Immaculee is still with us to tell her story) as the now famous, and previously mentioned, Immaculee Ilibagiza tells us in retreats on forgiveness and Catholicism; and as she tells the world in her book, Left to Tell. Her faith is stronger than ever.\footnote{Id.} Even after her entire family minus one brother was killed. By people she knew, whom she thought were her friends.\footnote{Id.} Even as she had been terrorized by a frightful change in human nature—which seemed to have appeared overnight—through her faith in God, even this she was able to accept while keeping her head above despairing waters. Faith the size of a mustard seed—indeed often referenced as only needing the smallest bit of faith—as small as a mustard seed—in Matthew 17:19-20;\footnote{Matthew 17:19-20.} but I add in, that these are strong—I assume even in the most minutest of quantity or size—small—but I say, extremely potent if anyone knows mustard seeds at all—strong enough to move a mountain. To move one’s heart and soul to handle a most excruciatingly painful crisis as this was.

So it cannot be said that all Rwandans have lost their faith. In fact, quite in juxtaposition, we see in some, that faith has grown even stronger.

One may question; one may say why—but true Faith knows that God has the master plan.
What one can learn from such a situation is that one must not surrender to earthly pressure, and be wise and prudent to not be deceived by the evils of the earth. And to hang on to one’s faith, no matter the earthly cost.

Now let us look at the Catholic Church’s Social Teaching on the issue.

D. Catholic Social Teaching in Relation to the Rwandan Genocide

1. The Catechism of the Catholic Church and the “Just War” Theory

The Catechism of the Catholic Church and the “Just War” theory discussed below reviews the church’s stance on war when it is just, when it is purposeful and necessary; when one can most likely achieve what they have set out to do; as explained by Colin B. Donovan, STL. Mr. Donovan is Vice President for Theology at EWTN. He is a layman, with a Licentiate in Sacred Theology, and a specialization in moral theology, from the Pontifical University of St. Thomas Aquinas (Angelicum) in Rome, where he wrote on the Donation of the Spouses in Marriage. He earned the BTh from the Seminary of Christ the King in Mission, British Columbia, Canada and the BA in Biological Science from Northwestern University, Evanston, Illinois. Prior to joining EWTN in 1995, he taught Theology at Aquinas College in Nashville.

The pertinent paragraphs of the Catholic Catechism to this subject, involve those contained between: 2302—2317. In paragraphs 2303—2317, the Catechism of the Catholic Church firmly addresses what it considers a just defense for a nation against an aggressor nation. The “Just War Doctrine” as it has come to be called, was first proscribed by St.
Augustine of Hippo (who lived from the years 354—430 AD). Doctors of the church, notably St. Thomas Aquinas, along with the official teaching of the Catholic Church, have formally accepted it. And adapted it to modern warfare scenarios.

a. Paragraphs 2302-3 speak to Righteous versus Unrighteous Anger

Colin B. Donovan explains, “Consider the just anger of the Lord to the presence in the Temple of the money-changers and the action He took (John 2:13-17). Provoked by this offense against His Father, Jesus formed whips and drove them from the Temple. Righteous anger, and the acts which flow from it, intend the correction of vice (both for the good of the individual sinner and the common good), the restoring of the order of justice disturbed by sin, and the restraint of further evil.”

“As St. Thomas Aquinas notes, vice may be by defect, as well as excess. So, the presence of evil should provoke a righteous anger, which if absent constitutes a sinful insensitivity.”

b. Paragraphs 2307—17 speak to cases of Just War

i. Paragraph 2308:

2308: “All citizens and all governments are obliged to work for the avoidance of war.”

As explained by Dr. Donovan,

Despite this admonition of the Church, it sometimes becomes necessary to use force to obtain the end of justice. This is the right, and the duty, of those who have responsibilities for others, such as civil leaders and police forces. While individuals may renounce all violence those

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223 Id.
224 Donovan, What is Just War?, supra note 221.
225 Id. (referencing John 2:13-17).
226 Id.
227 Id. see also Matthew 21:12-13 (for Biblical reference to Jesus driving out money changers in the temple).
228 Id.
who must preserve justice may not do so, though it should be the last resort, ‘once all peace efforts have failed.’

He explains that under the Catechism the use of force to obtain justice must comply with three conditions to be morally good.

First, the act must be good in itself. “The use of force to obtain justice is morally licit in itself.” Second, the act must be performed with a good intention; “to correct vice, to restore justice or to restrain evil, and not to inflict evil for its own sake.” Third, it must be appropriate in the given circumstances. “An act which may otherwise be good and well-motivated can be sinful by reason of imprudent judgment and execution.”

Having met such conditions, the “Just War Doctrine” allows for situations when use of force is licit, moral and even necessary. The Catechism describes it in the following criteria listed below:

ii. Paragraph 2309:

1. the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain; 2. all other means of putting an end to it must have been shown to be impractical or ineffective; 3. there must be serious prospects of success; 4. the use of arms must not produce evils and disorders graver than the evil to be eliminated. The power of modern means of destruction weighs very heavily in evaluating this condition.

To determine whether these conditions are met belongs to "the prudential judgment of those who have responsibility for the common good." The Church sees its role as “enunciating clearly the principles, in forming the consciences of men and in insisting on the moral exercise of just war.”

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230 Id.
231 Id.
232 Id.
233 Id. (quoting CCC 2309).
234 Donovan, *What is Just War?*, supra note 221.
235 Id.
Mr. Donovan continues, that the Church clearly has a strong respect for those persons who have dedicated their lives to the defense of their nation when they state, "If they carry out their duty honorably, they truly contribute to the common good of the nation and the maintenance of peace."\textsuperscript{236}

Actions which one must not perform include: “attacks against, and mistreatment of, non-combatants, wounded soldiers, and prisoners; genocide, whether of a people, nation or ethnic minorities; indiscriminate destruction of whole cities or vast areas with their inhabitants."\textsuperscript{237}

And in saying so, performing them is illicit, and thus as strongly stated, must also be guarded against. “Given the modern means of warfare, especially nuclear, biological and chemical, these crimes against humanity must be especially guarded against.”\textsuperscript{238}

iii. Paragraph 2317:

Of course the Church recognizes that underlying causes need to be addressed before simply resorting to war. Paragraph 2317 states: "Injustice, excessive economic or social inequalities, envy, distrust, and pride raging among men and nations constantly threaten peace and cause wars. Everything done to overcome these disorders contributes to building up peace and avoiding war.”\textsuperscript{239}

The United States Conference of Catholic Bishops has even expressly recognized that there was a moral duty to act on the atrocity of the Rwandan Genocide. Let's read what they had to say.

\textit{E. Statements by U.S. Catholic Bishops and Pope John Paul II}

In a letter dated April 7, 2004, by Most Reverend John H. Ricard, SSJ, Chairman of the Committee on International Policy of the United Stated Conference of Catholic Bishops, he addressed the Rwandan genocide of 1994, on its 10\textsuperscript{th} anniversary.\textsuperscript{240} He acknowledged that the
“international community stood by and watched with horror,” as a “blow was struck at the heart and soul of humanity.” Acknowledging that the Rwandans have the “daunting” task of rebuilding a society where justice and peace reign, he also acknowledged something much more poignant:

We, too, have a daunting task. We must come to terms with the fact that our nation, and other nations, failed in our moral and legal obligation to act to stop the genocide in Rwanda. ‘Never again!’ cannot be just a slogan; it must be a statement of our resolve to do all that we can to prevent and stop genocidal conflicts. If ‘Never Again!’ is a statement of resolve, memory of Rwanda, Bosnia, Cambodia, and other recent cases must stir us to act today in places like the Darfur region of Sudan, where threats of ethnic cleansing exist . . .

Yet, it does exist.

And in a letter from Archbishop Theodore E. McCarrick, of Newark, and Chairman of the International Policy Committee for the U.S. Conference of Catholic Bishops, which was directed to the U.S. Department of State on the Congo, Honorable Susan Rice, on October 28, 1997, he addressed the atrocities that were occurring in the Great Lakes Region of Central Africa (the Democratic Republic of the Congo), while revisiting the horror of Rwanda. He stated:

In 1994 as violence raged in Rwanda, the former chair of the U.S. bishops’ International Policy Committee, Bishop Daniel P. Reilly asked, and we ask today, ’ . . . how many more must die before the United States and the rest of the world are willing to act?’ Despite many significant efforts, the international community has thus far failed in its obligation to help prevent the spread of deadly violence throughout the region . . . We urge the U.S. government to assist the governments of the region, particularly Rwanda and the

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241 Id.
242 Id. (emphasis added).
DRC, in breaking the cycle of impunity by encouraging dialogue and negotiation as well as finding and prosecuting those responsible for these egregious violations of human rights ... In 1994 when it became clear to many that genocide was occurring in Rwanda, the international community did nothing as close to one million ethnic Tutsis were brutally massacred over a 100-day period ... The inadequate measures enacted thus far have served only to weaken the international community’s credibility in the Great Lakes.243

And lastly, but certainly not least, in an address to people gathered in St. Peter’s Square in 2004, Pope John Paul II stated:

“Ten years have passed since, on 7 April, 1994, in Rwanda, serious confrontations broke out between Hutus and Tutsis, which culminated in genocide, in which hundreds of thousands of people were brutally killed ... Let us pray to the Lord that such a tragedy will not be repeated ever again ...” He pleaded for peace to be taken to the region.244

F. Application of Catholic Church Teaching

And so, in recognizing the Catholic Catechism, the Just War position, and the United States Catholic Bishops’ and Pope’s position, and in recognizing that indeed there had been an exhaustion of peaceful remedies with the extremist Hutus, we must also recognize what is staring us straight in the face: that we did nothing. And that we had a legal and moral duty to do something. That in the case of Rwanda, when the peace had been breached in such an obtuse and horrific fashion as the extremist Hutus did—complete disregard for the Arusha Accords; the UNAMIR peacekeeping mission; the country’s attempt at a peaceful


244 CathNews; a service of church resources (March 30, 2004), http://cathnews.acu.edu.au/403/172.php (excerpted from source: No More Genocides Like Rwanda’s, John Paul II Insists (Zenit 28/3/04); Rep of Rwanda, supra note 17.
transition - then it should have been deemed licit and morally necessary to intervene into the Hutu’s brutality on the Tutsi’s to again restore peace to the population. To stop the evil that would not listen to reason.

If it is armed force intervention from other countries that would stop such evil—then I would argue under the Church’s Catechism and these arguments, that such would be viewed as absolutely just; an intervention with good intention, to save helpless, innocent people; that the damage being done in Rwanda was grave and certain; that the attempted negotiations like those in the Arusha Accords, and then pleas from UN officials to the internal Hutu government to stop and maintain peace had failed severely; that had the powerful Western countries joined together there would have been immediate prospect of success; and that the well-intentioned use of arms as a last resort could in no way would produce more evil than the intent of the extreme Hutu savages with machetes that were waging on an entire Tutsi population, simply out of hate.

G. Does Spiritual Warfare Allow for Negotiations with the Devil?

Mr. Donovan notes,

The Church has no illusions that true justice and peace can be attained before the Coming of the Lord. It is the duty of men of good will to work towards it, nonetheless. In the words of the spiritual dictum, we should work as if everything depended upon our efforts, and pray as if everything depended upon God.245

But, I suggest, sometimes that means the courage to tread, where even Angels may fear to go—for the safety of our fellow man. Indeed, the Arch Angels—always envisioned with a sword—know when a battle is imminent and necessary, in the face of evil, to stand for good.246 And the

245 Donovan, supra note 222, at 46.

246 There are a plethora of pictures, paintings and statues depicting the angels, but notably—Guido Reni’s painting, from 1636, of St. Michael the Archangel with his sword, crushing the devil, is in Santa Maria della Concezione, Rome, but is also reproduced in mosaic at the St. Michael Altar in St. Peter’s Basilica, in the Vatican; see also The Victory of St. Michael the Archangel [once again shown with sword crushing the devil] by famous painter Raphael, of the 16th century; Painting by Francesco Botticini, done in 1470, of Archangel Michael carrying his sword, alongside Archangels
image of the devil with his pitchfork is not so far removed from a machete—or other weapons being used for evil purposes—like a gas chamber—to destroy an entire population of people. As spiritual warfare dictates, no negotiation with the devil; so to it follows, that physical warfare must dictate the same.

Even Commander Romeo Dallaire—questions whether or not he should have “shook hands with the devil” that fateful day in Rwanda. Dallaire said he was all set to negotiate, to meet with the Interahamwe, “I’ll meet with them and we’ll talk face to face and then we’ll sort this out, hopefully.”247

He continues, upon arrival to the Diplomat Hotel that had been bombed out in part, now being used as the extremist headquarters in Kigali,

[T]here were these three guys, three Rwandans, one tall, one medium and one smaller who stood up when I entered. Bagosora, member of the extremist party, introduced them and as I was looking at them and shaking their hands I noticed some blood spots still on them. And all of a sudden they disappeared from being human. All of a sudden something happened that turned them into non-human things . . . 248

He continues,

But everything that was coming out was not words of a human negotiating or discussing, it was evil blurtting out their positions and their arguments. I didn’t see humans anymore; I was totally overcome by the evil. These three

Raphael and Gabriel, as they accompany Tobias; Icon of Michael the Archangel by Jaime Huguet in 1456; statues of St Michael the Archangel in his battle clothes—shield and sword—ready to combat: St Michael’s Fountain, on Boulevard Saint-Michel, Paris; At Castel Sant’Angelo, Rome, 1753; University of Bonn, Germany; Hamburg, Germany. Biblical Scripture passage to accompany the depiction: Revelation 12:7-9: “Now war arose in heaven, Michael and his angels fighting against the dragon. And the dragon and his angels fought back, but he was defeated and there was no longer any place for them in heaven. And the great dragon was thrown down, that ancient serpent, who is called the devil and Satan, the deceiver of the whole world—he was thrown down to the earth, and his angels were thrown down with him.”

247 Frontline, supra note 68.
248 Id.
guys just brought it into reality, brought evil into reality and by my religious background; the only way I could qualify that was being the devil. That son of a . . . had come on earth, in that paradise, and literally taken over. And these three guys were the right hand people of Lucifer himself, Bagosora. And I couldn’t shake that . . . 249

He proceeds,

My instinctive reaction had me starting to pull my pistol, because I was facing evil. I wasn’t facing humans I was facing something that had to be destroyed. . . . It even became a very difficult ethical problem. Do I actually negotiate with the devil to save people? Or do I wipe it out, shoot the bastards right there? I haven’t answered that question yet. What if I’d killed them? Objectively their structure was such that if I’d wiped out these three guys the structure would have sustained itself and then I would have put the whole lot of us in guaranteed danger of being wiped out. But for a long time I felt that I wouldn’t have been killing humans, I would have been actually destroying the devil. 250

But he hadn’t. And on his way back that fateful day to headquarters, feeling sick, having negotiated with them and allowing them to “take pride” in their “disgusting work,” he felt ashamed. 251 He said, “I felt that I had shaken hands with the devil.” 252

VIII. COMPARISONS TO OTHER COUNTRIES: SIMILAR AND DISTINGUISHED; AND WHEN PEACE OPERATIONS ARE IRRELEVANT AND FUTILE

Unfortunately evil exists in the world, and what to do about it isn’t always an easy answer. There are different opinions on war and when to get involved; or when it is simply someone else’s problem. But I

249 Frontline, supra note 68.
250 Id.
251 Dallaire, supra note 72.
252 Id.
would argue morally, to those that much is given, much is expected; and argue lawfully that we had the necessary tools in place to do something about this tragedy, if only the world had listened. But those who do not choose to see, I’m afraid never will. There are different theories as to why the world did not step in; not wanting to spend the money, personal interests, a failed attempt in Somalia—personally for the U.S.—a bad taste left in the mouth after Black Hawk Down.253

However, when attempts at peace have been exhausted in such a region as built up in tension as Rwanda (Romeo Dallaire’s set-up of peace-keeping operation, UNAMIR, along with the presidential signing of the Arusha Accords),254 logically, legally and morally one would argue that something more must be done; the peace accords and the UNAMIR operation—serving as a proof in and of itself that the world knew there was a pot brewing in which required assistance and intervention was needed. A pot brewing that if not put on simmer may quite boil over the top and blow. Which we know—it did. And when aggressive parties intentionally stomp out these peaceful attempts and begin to stomp out their own people methodically and intentionally—quite diabolically—in order to literally wipe their entire group out - simply because of their “label”—this becomes a genocide movement. To quote the law, when such an aggressive atrocity that “shocks the conscience of mankind... result[ing] in great losses to humanity in the form of cultural and other contributions” of one particular group—here, the Tutsis—that is “contrary to moral law and to the spirit and aims of the United Nations” as the UN Resolution 96 states, it needs to be stopped; and “international organization [needs to] be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide.”255

This was not civil war, as is being defined in Syria currently, but rather complete extreme rebel take-over (after assassination of their own Hutu President), to wipe an entire label of people off the map. Extermination—like we saw in the Nazi Occupation. In this case Hutu

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254 Gasana, supra note 14, at 209; Rosenberg, supra note 17.
extremists wanted every Tutsi gone; and every moderate Hutu gone as well. In the Nazi Occupation, Hitler wanted every Jew gone. Every single one; not to mention other groups that seemed distasteful to him, like gypsies. Every member of a particular group - Gone.

At the point of the Rwandan genocide movement in 1994—after President Habyarimana was shot down—it wasn’t simply two sides fighting each other equally—a civil war—as had been going on prior, and hence the international involvement in the political push for the signing of the Arusha Peace Accords. No, the civil war bad enough, and why certain U.N. countries pressed the president to sign the Peace Accords and restore balance to a very turbulent atmosphere. But this—rather—had become a full-out take-over by one side— the Hutus, who were fully armed— against a very helpless and unarmed side—the Tutsis— to annihilate, destroy and wipe every member of the Tutsi population from the face of the Earth. With no bending president left, the rabid gorillas and their weapons roared straight through the streets.

Whether one should step in during a civil war—is quite a topic for another discussion. In such case—one cannot be sure—who is the avenger and who is the avenged; who is the oppressor and who is the oppressed (other than the innocent civilians). Obviously—if you have two bad sides (as is being speculated in the current tragedy in Syria) the rules are different. For a bad ruler, and perhaps worse (very, very likely just as bad, if not worse) rebels (as we’ve seen in previous riots in countries like Egypt, Libya, the Congo, Cuba, and the list goes on; and

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256 Gasana, supra note 14, at 209.
257 Id; Rosenberg supra note 17.
258 Gasana, supra note 14, at 209; Rosenberg, supra note 17.
specifically in the Middle East—where rebel, extremist Muslims, such as
the Muslim Brotherhood and Al Qaeda, and the list goes on, most
unfortunately)—then who do you help? But you must take down both
sides—put them out of business—help the innocent civilians, and set up
a democracy—which unfortunately has been tried and not very
successful in Africa. At this juncture, as I write this law review - this is
what we know, and things are still developing, and information unclear
in the Syrian region, but I would not be surprised if the situation too in
Syria, begins to mimic its predecessors.

But as I mentioned we cannot simply take down an alleged evil
ruler to let evil rebels roam and run rampant. And as we have seen in
Egypt, Libya, the Congo, even back to Cuba with Castro—taking down
a dictator and replacing him with another radical dictator or radical
group—is not the solution. A group of just as bad, or worse, violently

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262 UNHCR, supra note 256, 257, and 258.
takes over. What we have seen in the past is that the rebels take anyone in their way—including their leader—down first—the leader who is, albeit perhaps not a Saint by any means, but willing to bend to political pressure—the UN and other nations. Rebels that don’t want to bend—break these people so they cannot, to get them quite out of the way. And then they take over. And no one at a negotiating table can reach them.

History has shown leaders to bend to other country’s pressures for peace; but rebels not to. They continue to fight for an unGodly cause, at any cost. These are the individuals—you simply cannot reason with. If they choose to rule and annihilate at any cost—then you have quite a different situation.

In such situations where there is clearly no longer any attempt at, or peace, to maintain, more must be done. A Chapter VII mandate must be given in such situations, because unfortunately in such areas of concern—African regions, in addition to Rwanda, where rebels take-over and begin to annihilate, we have seen Ch. VI “peace-keeping missions” to be a severely failed attempt. Just a year ago, Rwanda’s neighbor—the Congo [or Democratic Republic of the Congo] was published in a New York Times article, because they were facing a deadly rebel take-over of helpless, innocent civilians. The rebels were storming the streets, seizing the capital, gutting the Congolese army, and letting loose some “1,200 killers, rapists, rogue soldiers and other criminals.” These were severely dangerous rebels—now raiding the streets of GOMA.

There were mob riots blowing up all over the country. Mob rioting in the streets—burning down government buildings, insisting on the overthrow of their weak and greatly detested president, Joseph Kabila. Is this the definition of Democracy? It certainly isn’t the definition of a Republic. Once again a severe example of extreme hate—conducting an entirely dangerous and one-sided rebel take over. When you read that bodies of soldiers belonging to the Congo’s government “litter[ed] the roads around Goma, someone’s father or son rotting in the

264 Id.
265 Id.
266 Id.
bush, eye sockets and mouth sizzling with flies, [and] [v]illagers trudge past, looking away; [villagers] [f]or [whom], misery [has become] a familiar face;” no one can say that history does not repeat itself.

Similarly, around the same time in Libya we had great conflict and rising up of terror and rebel activity on our US Embassy; and a US Ambassador was raped, dragged through the streets, and killed. And this even involved our own men, and still the current Vice President, in an Election Debate claimed that they “we weren’t told they wanted more security there.” We now find out from numerous Intelligence reports [released, much like those of the Rwandan National Security Archive] that confirmed requests were made for increased security a month prior to the attack. Overhead Drones telecasted the activity. But such requests and visions were ignored. Once again, statements that we “didn’t know,” we know, simply aren’t true.

Interestingly, it appears to be a repeat—here as well - the same answers to the same questions, ending in, “We didn’t know.” After the Rwandan Genocide, when President Clinton made a trip to Rwanda in 1998, he claimed, “Oh, I didn’t know. We didn’t realize.” You cannot deny a strong parallel with what is going on today. We didn’t know? Or we didn’t care.

The million dollar question was posed within the New York Times article that cited to The Congo’s debacle. A picture shows a young boy wounded and bandaged lying in what appears to be a dilapidated

267 Id.
269 See Dean Garrison, The Butcher of Benghazi . . . Leaked Libyan Intelligence Documents Implicate Morsi (June 27, 2013), http://dcclthesline.com/2013/06/27/the-butcher-of-benghazi-leaked-libyan-intelligence-documents-implicate-morsi/ (article also references a Libyan security document that was leaked).
270 See Doug Hagmann, The hidden real truth about Benghazi (Canada Free Press, Oct. 28, 2012) (Douglas Hagmann [is] founder & director of the Northeast Intelligence Network, and a multi-state licensed private investigative agency. Doug began using his investigative skills and training to fight terrorism and increase public awareness through his website).
271 Dallaire, supra note 72, at 13.
272 Gettleman, supra note 264 at 58.
hospital bed; and the ever-reigning question hangs in the backdrop of his hospital room:

[O]ne pressing question is, why — after all the billions of dollars spent on peacekeepers, the recent legislation passed on Capitol Hill to cut the link between the illicit mineral trade and insurrection, and all the aid money and diplomatic capital — is this vast nation in the heart of Africa descending to where it was more than 10 years ago when foreign armies and marauding rebels carved it into fiefs?273

Why, we say? Indeed, a scary, very close reality to what their dear neighbor Rwanda was forced to undergo not so long ago prior. Peace, they say. I say, let’s do more. More must be done. In these cases, more must be done.

IX. CONCLUSION

Rwanda—with one side—the Hutu extremists - completely and entirely massacring the innocent Tutsis—and the moderate Hutus - with no defense for themselves until the very end—that is the subject of this discussion, and that is a warranted interception by other nations to step in and help the helpless. Much like taking down Hitler was a necessary mission. Jews were not fighting back at Hitler—Hitler was massacring the Jews; Hitler was gassing, and brutally destroying the Jews. He had his Nazi soldiers—and he had them annihilating. If any red lines can be drawn, it is on the Hitler exterminators of history.

The Tutsis stood, tall, but alone, and one by one, were cut down. And to restore power to the Tutsis was a peaceful and good option—as we see today—with Kagame - the Commander of their RPF army in charge of the country. And he maintains a peace.

My argument is that clearly we should have done something to stop 800,000 Tutsis from being massacred. We see, clearly by the facts of the Rwandan genocide that the world knew, that they attempted a peaceful remedy, but that tragically failed into a devastating tragedy.

273 Gettleman, supra note 264 at 58.
Warnings were ignored by the UN’s top man in the Rwandan peacekeeping mission, Romeo Dallaire. And as embellished on in the previous section, this attack by the Hutus was genocide, not a civil war, which makes it an international crime, on its face; a non-derogable norm for which there is no room for compromise. It was a purposefully planned extermination of every Tutsi that existed within the walls of the country. And they just about accomplished it. And as I said, opinions can sway as to whether one or another country should step in to someone else’s “problem” or “business,” but based on Civil International Law, and I argue as well, based on Moral and Church Law, this atrocity should not have been ignored.

My recommendation is that should something like this come to the UN’s attention again, it will not be treated with such indifferent disdain. What reason have we for instituting the United Nations, with its Charter, and General Assembly, and Security Council; with its resolutions and conventions, if not to enact them and use them for their correct purpose? What of the strong statement the UN tried to impress after the Nazi holocaust, that something like this would never be able to happen again? Exterminations of entire groups of people—helpless innocent human beings—simply because of what they were labeled. And because one side has the weapons to do so, and the other side has no defense. What of the responsibility of those that much is given, much is expected? A powerful league of nations that has the ability to fight evil—has a responsibility to do so—when it is staring them in the face. By Law and By Morals. I believe there was a responsibility here.

A famous quote reiterated: “The only thing necessary for the triumph of evil is for good men to do nothing.”

You can’t just maintain peace where there is hate, peace where there is no peace to maintain. There is hate to wipe out first. There is evil that needs to be put back where it came from. Christ did not say, let’s make peace with these demons. He drove them out.

274 Attributed to Edmund Burke, Irish Philosopher and Statesman.
evil to slither like the snake it was. And I’m not saying, but it is certainly written in Scripture that God parted the seas and closed them back up on the people who had done wrong. And saved those whom hadn’t. He closed the seas up. And there were people in there. He wasn’t messing around.

So I say, more than Cat Steven’s “peace train” needs to come rolling through these countries; when peace has been tried and isn’t true; when an entire rebel army is chopping up thousands of people in the streets; when heads of nations—like the President—has been killed, or seized, and cannot control his own nation from massacre. Not to use an old cliché, but sometimes there is no peace to maintain until things are nipped in the bud. To step-up certainly for self-defense has always been justified. And certainly to come to the aid of another’s defense who is helpless, should as well. I say, Chapter VII, use of force, to put certain of these countries back in line.

History undoubtedly repeats itself. That is part of the reason we study it. And eerily, for one reason or another, extreme rebel takeover—seems to keep repeating itself—unhindered.

As a final insight, with regard to genocide and the very reason the term “crimes against humanity” was established, the very reason the UN was established, the world would be wise to re-reflect on the Nazi holocaust; the horror, the evil of such a “wipe out” of millions of innocent people, simply because they were Jewish. Simply because of a methodical madman’s ability to do so. I can’t stress enough, that if one is not careful, history repeats itself. As the old Chinese philosopher, Confucius, who lived from 551 BC - 479 BC, so insightfully stated “Study the past, if you would divine the future.”

276 Revelation 20:2-5.
277 Exodus 14: 21-31 (crossing the Red Sea).
THE SCOTTISH SECESSION: CENTURIES IN THE MAKING

John Lamont†

I. INTRODUCTION: GETTING TO THE EDINBURGH AGREEMENT

“EDWARDUS PRIMUS SCOTTORUM MALLEUS HIC EST. PACTUM SERVA.” Translated, this means “This is Edward the First, Hammer of the Scots. Honour the Vow.”¹ These words are indicative of the historical tension between England and Scotland and demonstrate the fragility of that union. And, on September 18, 2014, it appears that many in Scotland may vote to secede from the United Kingdom, thus continuing the centuries-long episodes of union and divorce between the two nations.²

This note will briefly recapitulate the historical developments regarding the independence and subsequent union between Scotland and England. Next, the focus will be on the events leading up to the Edinburgh Agreement in 2012. Then the primary focus of this article will examine the legality of Scottish secession under the Edinburgh Agreement, other remedies the Scots may have for secession if the Edinburgh Agreement fails to provide the necessary legal framework, and what international implications will occur if Scotland becomes independent from the United Kingdom.

A. The First Independence

For the past two millennia there has been an inherent border dividing England and Scotland. This border is due to both natural

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† John Lamont is a graduate of Ave Maria School of Law. He would like to thank to Kevin Govern, Ligia De Jesus, Ulysses Jaen, Lori Campbell, and the Ave Maria International Law Journal staff and editors for their assistance in writing this note. John Lamont is dedicating this note to his family.

geography\textsuperscript{3} and cultural strife. However, throughout these two millennia there has also been constant struggle between the creation of two independent nations and the creation of a united Britain. From the Roman conquest to the Edinburgh Agreement this struggle has played out in a variety of fashions. For much of the past two thousand years, this struggle has manifested itself in the forms of military conquest or political necessity. But, in the twenty-first century the drive for Scottish independence has come in the form of nationalism, while the enemy of Scottish nationalism appears to be the law.

Northern Britain has historically been an area nearly impossible to tame and consequently kept free of turmoil. The Romans conquered modern day England easily enough, but as they came closer to the current Anglo-Scottish border they only encountered more and more trouble.\textsuperscript{4} The Romans struggled so immensely to pacify northern Britain that they eventually erected Hadrian’s Wall in order to provide stability and safety against the native resistance\textsuperscript{5}. After Roman troops retreated from Britain in 410 A.D., the area that marks the modern Anglo-Scottish border did not become any more peaceful.\textsuperscript{6} Struggles amongst the kingdoms of Northumbria, East Anglia, Mercia, Wessex, the Picts, and the Britons made violence a common occurrence on the island.\textsuperscript{7} With the arrival of marauding Vikings in the late eighth century, the native people of Britain struggled to preserve their heritage and lives.\textsuperscript{8}

Eventually, Alfred the Great, the King of Wessex, was able to find military and diplomatic success the Vikings and “establish” the nation that would become England.\textsuperscript{9} However, the formation of the kingdoms of England and later Scotland did not cause violence to cease. Almost every Plantagenet king waged a military campaign in one form or another


\textsuperscript{4} See generally, Magnus Magnusson, SCOTLAND: THE STORY OF A NATION, c. 2 (Grove Press 2000).

\textsuperscript{5} Michael Grant, THE ROMAN EMPERORS, A BIOGRAPHICAL GUIDE TO THE RULERS OF IMPERIAL ROME 318BC-AD 476, 78 (Barnes & Noble Press 1985).

\textsuperscript{6} Magnusson, supra note 4, at 21.

\textsuperscript{7} See generally, Justin Pollard, ALFRED THE GREAT: THE KING WHO MADE ENGLAND (John Murray Publishers 2006).

\textsuperscript{8} Pollard, supra note 7.

\textsuperscript{9} Id.
against the vassal Scots during their reign.\textsuperscript{10} With the exception of Edward I’s campaign, the battles between the English and the Scots did nothing but maintain an uneasy stalemate.\textsuperscript{11} England and Scotland remained hostile and divided.

In 1314 Robert the Bruce’s Scottish forces won a decisive victory over the English at the Battle of Bannockburn.\textsuperscript{12} The victory for the Scots was a major step for gaining their independence. Six years later in 1320 Pope John XXII supported an independent Scotland by recognizing the Declaration of Arbroath.\textsuperscript{13} The Pope’s support for the declaration overturned the previous claim his predecessor, Pope Clement V, granted to Edward I as overlord of Scotland in 1305.\textsuperscript{14} In 1328 Edward III signed the Edinburgh-Northampton Treaty that renounced all English claims to Scotland and paved the way for a sovereign Scotland to exist unimpeded for nearly 300 years.\textsuperscript{15}

\textbf{B. The Union}

After almost 300 years of independence the Scots and the English were to be untied by royal bloodline. The death of Elizabeth I of England in 1603 left the English without a direct heir to the English throne.\textsuperscript{16} In order to avoid the pattern of civil war that plagued England in the past, the English had to find a legitimate and respectable monarch. With a legitimate bloodline claim to the English throne, James VI of Scotland, the great-grandson of Margaret Tudor became the choice of the English to succeed the late Queen.\textsuperscript{17} However, the smooth accession of James to the English crown did not mean Scotland would reconcile itself with England. With neither England nor Scotland in favor of establishing a

\footnotesize
\begin{enumerate}
  \item See generally Jones, supra note 1.
  \item Id.
  \item Id. at 362.
  \item The Declaration of Arbroath, 1320, BBC.co.uk, http://www.bbc.co.uk/history/scottishhistory/independence/features_independence_arbroath.shtml
  \item Jones, supra note 1, at 432.
  \item See generally Magnusson, supra note 4.
  \item PAULINE CROFT, KING JAMES, 49 (Palgrave Macmillan 2003).
  \item Id.
\end{enumerate}
single united kingdom, James was forced to rule as sovereign of both England and Scotland under the Union of Crowns.\footnote{Id.}

The Union of Crowns began in 1603 and a quasi-united Scotland and England continued until 1707.\footnote{Britt Cartrite, The Impact of the Scottish Independence Referendum on Ethnoregional Movements in the British Isles, 50 Commonwealth and Comparative Politics 512 (November 2012).} However, with the aging and childless Queen Anne on the throne, there was no known successor that would be able to definitely maintain the Union of Crowns.\footnote{LINDA COLLEY, BRITONS: FORGING THE NATION 1707-1837, 12 (Yale University Press 2012) (1992).} Politicians in London feared that, upon the death of Queen Anne, the Scots might offer their throne to the Catholic James Edward Stuart. Fearing a return of Stuart kingship in Britain, it was decided that a union between Scotland and England should be formalized and secured in the hands of Protestant rulers.\footnote{Id.} On May 1, 1707, the Acts of Union \textit{(i.e., Union with Scotland Act 1706 and Union with England Act 1707)} became effective.\footnote{Cartrite, supra note 19.} The Acts of Union, which united the Parliaments of Scotland and England, formed what would be called the United Kingdom.\footnote{Union with Scotland Act, 1706, 6, Ann., ch. 11, art. I (Eng.) available at http://www.legislation.gov.uk/aep/Ann/6/11; Union with England Act, 1707 (R.S.P. 1706/10/257) art. 1st (Scot.) available at http://www.rps.ac.uk/trans/1706/10/257.}

\textit{C. De Facto and De Jure Divisions}

 Though law united Scotland and England, Scotland was able to maintain its national identity and exceptionalism. Important for many Scots was the status that the Church of Scotland retained after the Union.\footnote{Union with England Act 1707, Ann ch. 7, § 15 (Eng.), available at http://www.legislation.gov.uk/aosp/1707/7/contents.} Since the reign of James I, the Scots had struggled to maintain the independence of their national Church in the face of Anglican clerical encroachments.\footnote{See MICHAEL BRADDICK, GOD’S FURY, ENGLAND’S FIRE: A NEW HISTORY OF THE ENGLISH CIVIL WARS, ch. 1 (Penguin Books 2009).} Retaining their national Church allowed the Scots to preserve their heritage and on a political level, made the acceptance of a union with England possible. In addition to the Union allowing for the continuation of legally mandated political and religious institutions, the
Scots were also able to develop a national identity through progress in industry and the arts. During the 1700s Scotland became an intellectual leader in areas such as commerce, law, and philosophy. In fact, Scotland was able to boast that it produced two of the greatest intellectuals of the age in David Hume and Adam Smith.

Another important area of autonomy the Scots retained under the Acts of Union was the Scottish legal system. Since the Union of Crowns, James I wanted to rule his kingdom under one rule of law. However, the great champion of the common law, Sir Edward Coke, and other influential lawyers at the time, feared a possible infiltration of Roman law into the common law. Consequently, the possible merger of the Scottish and English legal systems floundered. A century later The Act of Union specifically allowed for the continuation of the Scottish legal system. The Scots retained their national systems of civil and criminal law, as well as their own courts and judges. While the English were not anxious to acquire features of the Scottish civil law, the English imposition of the common law on Scotland appeared impracticable. Robbing the Scots of their centuries-long legal tradition would not help incline the Scots to unite with their neighbors to the south. Furthermore, the costs of transplanting the entire Scottish legal system would be enormous. Additionally, even if the Scots wanted to acquire the English legal system, it seems the process of overhauling the entire Scottish legal system could not be accomplished easily. With an established civil law tradition the use of reception statutes, such as those used by American states after independence, would be inapplicable. Whether the retention of the Scottish legal system was for the sake of convenience or for

26 Scotland Analysis: Devolution and the Implications of Scottish Independence, Presented to Parliament by the Secretary of State for Scotland by Command of Her Majesty, February 2013, sec. 0.2.
27 Adam Smith was a leading moral theorist and authored *The Wealth of Nations*. Smith is regarded as the forefather of modern capitalism. David Hume was an eminent British empirical philosopher who authored *A Treatise of Human Nature*. Hume’s philosophy is known for its skepticism.
28 J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 34 (Oxford University Press 4th ed. 2007).
29 BAKER, supra note 28, at 34.
30 Union 1706, supra note 21, art. 23.
32 Lecture by David Hackney, Florida State Law, at Oxford (July 2012).
appeasement, countless factors ensured that the unique Scottish legal system remained. Nearly four hundred years after the Union of Crowns, the retention of the Scottish legal system would make Scottish devolution a far easier task.

Since the Union of Crowns in 1603, the Scots have been able to maintain a unique culture based on social custom, academic excellence, and legal tradition. However, for many in Scotland a definable culture was not sufficient. The only way to be truly Scottish was to be independent of all other nations.

Almost as soon as Scotland was united with England in 1707 cultural movements arose both to retain Scottish identity and seek autonomy. The eighteenth century saw unsuccessful revolts by Jacobites that led to attempts to suppress aspects of Scottish culture by British authorities. In the nineteenth century, groups such as the Celtic Society of Edinburgh (1820), Vindication of Scottish Rights (1853), the Gaelic Society of Inverness (1871), and Scottish Home Rule Association (1886) were formed. But, these groups were mostly in the business of pushing for political reforms under the current governmental structure, not independence. The dawn of the twentieth century arrived and with it the Young Scots Society (1900), the Scottish Patriotic Association (1901), and the Scottish National League (1904). Like their nineteenth century predecessors, these groups did not contest for true political power, but pushed for cultural identity. It was not until 1934 when the National Party of Scotland merged with the Scottish Party to form the Scottish National Party that the push for Scottish nationalism took on a serious political form.

D. The Failed Devolution of 1979

In November of 1967 the Scottish National Party (SNP) won its first seat at Westminster. Seven years later in the February 1974 general
In the 1970s with the major parties in Scotland backing devolution, a variety of bills calling for devolution were proposed in Parliament. However, each bill failed for different reasons. The initial legislation treating devolution for Scotland and Wales failed in the House of Commons. The second attempt passed the legislature, but the referendums in both Wales and Scotland failed. The Scottish referendum carried a pro-devolution vote of nearly fifty-two percent. However, the referendum failed because the requisite of 40 percent of the electorate did not come out to vote on the matter. Shortly after the referendum failed the Conservatives, led by Margaret Thatcher took control of Parliament. Unlike their predecessors, the Conservatives had...
no sympathy for devolution and the cause for greater autonomy in Scotland and Wales would be dead for nearly two decades.49

E. The 1997 Devolution

David Butler referred to the results of the 1997 referendum as a “turning point in the history of the United Kingdom.”50 After a failed referendum in 1979, Scottish voters went to the polls to decide if the country should have its own national Parliament.51 The Scottish Parliament would be answerable to the Scots under certain powers devolved from Westminster, which previously contained all Parliamentary power. In the referendum, the Scots with a seventy-four percent margin voted in favor of establishing a new Parliament in Scotland.52 The result of the 1997 referendum seemed to be a foregone conclusion.53 The political climate in Scotland had changed significantly since the last referendum in 1979.54 In general, the new generation of voting Scots had more nationalistic feelings than the previous generation. Across Scotland in the 1990s, more Scots identified themselves as Scottish rather than British, which could only mean more sympathy for devolution.55 With pro-devolution measures the Scots would gain the most autonomy they had since the Acts of Union in 1707.56 However, many scholars think that the 1997 referendum may have demonstrated a watershed in Scottish political thought, but it did not change their constitutional status.57 Devolution was not a serious concern for the Scots in 1997; the political objective for the Scots was to bring the government closer to the people.58 For many in London acquiescence to a Scottish Parliament took place because it was the best way to “tame the beast of

49 Id.
51 Id.
52 Kernohan, supra note 50, at 226.
53 Id.
54 Id. at 227.
55 Id.
56 The Acts of Union dissolved the Scottish Parliament, See Act of Union 1707, supra note 22, §3.
57 Kernohan, supra note 50, at 226.
58 Id. at 228.
Scottish Nationalism.”⁵⁹ For both the Scots and English the 1997 referendum was a measure of political ideology that dictated a subsequent legislative compromise upon that ideology. But, the result of the referendum was by no means an attempt to bring about a constitutional overhaul. Neither the Scots nor English were contemplating such a dramatic action.

Due to the results of the 1997 referendum the Scotland Act of 1998 was enacted.⁶⁰ The Act provided for the establishment of a Scottish Parliament that would have the power to legislate over matters devolved to it from Westminster.⁶¹ The simplest way to understand what power the Scots had to legislate over would be to look at what matters were still reserved to Westminster and what powers were specifically given to the Scottish Parliament at Holyrood. Those areas reserved to Westminster, which the Scottish Parliament cannot legislate upon, are:

(a) the Crown, including succession to the Crown and a regency,
(b) the Union of the Kingdoms of Scotland and England,
(c) the Parliament of the United Kingdom,
(d) the continued existence of the High Court of Justiciary as a criminal court of first instance and appeal,
(e) the continued existence of the Court of Session as a civil court of first instance and of appeal.⁶²

Even with the stipulation of enumerated powers in the Scotland Act there is nothing in the initial Act that would prohibit Westminster from legislating upon matters that were devolved to Holyrood. Westminster still retains all legislative power, even though Holyrood can legislate upon certain matters. Section 28, clause 7 of the Scotland Act specifically states that “This section does not affect the power of Parliament of the United Kingdom to make laws for Scotland.”⁶³ By law, Westminster could at any time repeal the Scotland Act and abolish the Scottish Parliament and Executive. However, during the passage of the

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⁶⁰ King, *supra* note 31, at 190.


⁶² *Id*.

⁶³ *Id.* at § 28 cl. 7
Scotland Act it was announced that a convention would be called to establish that the Westminster Parliament would not normally legislate upon the matters devolved to the Scottish Parliament.64 The agreement became known as the Sewel Convention.65 The purpose of the Sewel Convention was to reflect and respect the devolution settlement and the role of the devolved institutions.66 The Sewel Convention ensures that Westminster will legislate upon devolved matters only with the express agreement of the Scottish Parliament and after proper consideration and scrutiny of the proposal in question.67

While there are enumerated and reserved powers clearly established between the Parliaments of Westminster and Holyrood, as well as the agreement of the Sewel Convention being in effect, it is acknowledged that there will be instances where the demarcation between what is devolved and what is reserved is blurred. “It has been recognized that the scheme of devolution means that it is not possible for reserved and devolved areas to be divided into precisely defined, watertight compartments. Some degree of overlap will be inevitable.”68 However, it was well understood, especially after the agreement of the Sewel Convention, that the Scottish Parliament was meant to be a legislative body subordinate to Westminster and not its equal.69

In 1999 the devolved Scottish Parliament established itself at Holyrood.70 Legally speaking, the Scottish Parliament at Holyrood is entirely a statutory creation from a single piece of legislation.71 The power of the Scottish Parliament is entirely due to a grant of power from Westminster in the Scotland Act of 1998. The power of Holyrood is largely found in exercises of tax and police power. All exercises of power by the Scottish Parliament are subject to judicial review by the United Kingdom Supreme Court solely on statutory grounds and not on

64 The Sewel Convention: Key Features, SCOTTISH GOVERNMENT, http://www.scotland.gov.uk/About/Government/Sewel/KeyFacts (last visited October 18, 2013)
65 Id.
66 Sewel Convention, supra note 64.
67 Id.
68 Hood, supra note 59, at 104.
69 Id.
70 King, supra note 31, at 190.
71 Hood, supra note 59, at 104.
common law grounds. The powers granted to Holyrood under this act include everything that is not reserved to Westminster in the 1998 Act. In regard to reserved matters, Westminster retains absolute sovereignty. Furthermore, all potential legislation from Holyrood could be struck down if it is deemed to have an effect that would violate a reserved matter. Of particular importance from the aspect of Scottish independence is Schedule 5 paragraph subparagraph (b) of the Scotland Act which states that the Union between the Kingdoms of Scotland and England is a reserved matter. Under the terms of the 1998 Act only the power of Westminster could allow for a separation of the Kingdoms. Neither a referendum nor a piece of legislation from Holyrood bring about any type of action that would further Scottish independence since such actions would likely be deemed to violate reserved matters.

F. 2007 Minority and 2011 Majority

After the success of the 1997 referendum nationalism became a bigger player in Scottish politics. Momentum for Scottish independence received a tremendous boost in the 2007 election. The SNP won 47 seats and formed a minority party in Holyrood. That same year the Scottish Parliament elected Alex Salmond as First Minister. As the newly elected First Minister, Salmond made his agenda clear when he told Members of the Scottish Parliament at his instillation, "I believe Scotland is ready for change, ready for reform." But, the power of the SNP was extremely limited because an informal parliamentary alliance of the British parties in Holyrood continued vetoing any legislation from the SNP that could have provoked conflict with London.

However, in May 2011 the electorate seemed to react with hostility to the British alliances maintained by some members of Holyrood after the 2007 election and voted out many members of the

72 Id.
73 Id. at 105.
74 Hood, supra note 59, at 105.
76 Id.
77 Hood, supra note 59, at 105.
Labour and Tory parties. As a result, the SNP won an absolute majority in Holyrood after the 2011 election. With an absolute majority in Holyrood the SNP gained the ability to legislate how it liked within the constitutional limits of Holyrood’s devolved powers. The electoral success of the SNP under the guidance Alex Salmond set a clear agenda for Holyrood to exercise its devolved power to the fullest and if possible to gain more power. This is the crux of Scottish independence question, namely, whether the independence agenda of the SNP can be realized through the current constitutional agreements between Holyrood and Westminster. And if not, what can the Scots do to gain independence.

II. THE EDINBURGH AGREEMENT

A. The Provisions

On October 15, 2012 Prime Minister David Cameron and First Minister Alex Salmond met in Edinburgh and agreed to the terms of the Scotland Act of 2012, also known as the Edinburgh Agreement. The Edinburgh Agreement is believed to be the legislation that gives the Scots the ability to determine their national status. This Agreement allows the Scots to vote in a referendum that could change their constitutional status.

The guidelines for the referendum are that it should:

- have a clear legal base;
- be legislated for by the Scottish Parliament;
- be conducted so as to command the confidence of parliaments, governments and people; and

79 Id.
80 Kernohan, supra note 78.
81 Id.
• deliver a fair test and a decisive expression of the views of the people in Scotland and a result that everyone will respect.\textsuperscript{84}

The agreement also states the Scottish Parliament has the authority to legislate for the referendum, which will be in the form of a single question (i.e., Yes or No for Scottish independence), and be conducted before the end of 2014.\textsuperscript{85} The agreement creates a legal basis for the Scots to hold a referendum, but a basis for gaining independence is less that certain. The pertinent legal language of the Act states that “[t]he Order will put it beyond doubt that the Scottish Parliament can legislate for that referendum” and “[i]t will then be for the Scottish Government to promote legislation in the Scottish Parliament for a referendum on independence.”\textsuperscript{86} The language of the Agreement restricts Holyrood in that it provides legal power for holding a referendum only, not for any subsequent independence legislation. Under both the Scotland Act of 1998 and the Edinburgh Agreement the Scottish Parliament is not empowered to unilaterally legislate for independence.\textsuperscript{87}

The question remains as to what is the legal power in the Edinburgh Agreement? The power seems to be limited to holding a referendum and the ability to regulate it. The Agreement grants power to hold a referendum including its purpose and principles.\textsuperscript{88} Additionally, the Agreement outlines how to the referendum is regulated in terms of time and substance.\textsuperscript{89} The other major features are the rules on the Electoral Commission and campaign finance.\textsuperscript{90} The only section of the Agreement that shows any possibility of potential future independence legislation is paragraph 30. Paragraph 30 states:

The United Kingdom and Scottish Governments are committed, through the Memorandum of Understanding

\textsuperscript{84} Id.
\textsuperscript{85} Lallands Peat Worrier, supra note 83.
\textsuperscript{87} See generally “Memorandum of Agreement,” Edinburgh Agreement, supra note 82, para. 1,2,\& 6.
\textsuperscript{88} See id.
\textsuperscript{89} See id. “Memorandum of Agreement” at para. 4.
\textsuperscript{90} See id.
between them and others, to working together on matters of mutual interest and to the principles of good communication and mutual respect. The two governments have reached this agreement in that spirit. They look forward to a referendum that is legal and fair producing a decisive and respected outcome. The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom.\footnote{“Memorandum of Agreement,” supra note 82, at para. 30.}

The lingering question remains as to whether this paragraph requires either government to promote independence legislation after a successful referendum. From the text of the paragraph there seems to be no legal requirement for any type of independence legislation. Paragraph 30 seems to allow for a dialogue on independence, but has no legal basis. So, the power of the Edinburgh Agreement remains to holding a regulating a referendum. However, it may be implied that Westminster is obliged to legislation in due regard to the results of the referendum.

\textbf{B. The Legal Impediments}

\textit{1. The Power of Holyrood Under the Referendum}

Nothing in the Edinburgh Agreement expressly overrules any reserved matters set out in the 1998 Act, namely altering the Union of the Kingdoms of England and Scotland.\footnote{Id.} Therefore, the issue of independence seems to still be reserved to Westminster even though the Scottish Parliament has been given the ability to hold a referendum. Furthermore, the results of the referendum are only a barometer of political opinion, that is, the results of the referendum have absolutely zero legal effect.\footnote{Hood, supra note 59, at 102.} The referendum essentially is a public opinion poll sanctioned by a piece of legislation.\footnote{Id. note 59, at 102.}
While not having legal effect, the results of the referendum are not insignificant. If the voting results show that the majority of Scots are against independence then essentially the issue dies there. There will be no grounds for any legislation related to Scottish independence. However, if the requisite sixty percent of the population votes in favor of independence then more work will need to follow to get independence legislation. Under the current agreement even with the necessary amount of votes cast in favor of independence it is still up to Westminster to empower Holyrood to legislate for independence. Legally, speaking it is within the power of Holyrood to legislate for independence or not to legislate for independence after the referendum has produced the needed majority. So the possibility exists where the Scots vote in favor of independence but the Scottish Parliament, if *ipso facto* empowered, could decide not to enact independence legislation. Such a result would be a political catastrophe for Holyrood, but nonetheless a possibility and a further (yet non-legal) obstacle to Scottish independence.

2. Is the Edinburgh Agreement *Ultra Vires*?

The potential for an act from Holyrood to be declared *ultra vires* is found in section 29(3) of the Scotland Act of 1998 which states:

> For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

The gray area includes when the substance of legislation and whether it will be deemed to have an effect that infringes on reserved matters.

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95 *Id.* at 105.
96 See BLACK’S LAW DICTIONARY 1559 (8th ed. 2004) (in this context *ultra vires* means beyond the scope of power).
By legislating for something that would be *ultra vires* the act of legislating itself would be *ultra vires*. Legislation from Holyrood for independence can be viewed as *ultra vires* in two ways. The most explicit way legislation can be *ultra vires* is by the fact it is altering the union between the Kingdoms of Scotland and England, since such an act is specially enumerated as a reserved power to Westminster.\(^98\)

The second and more difficult way of determining when legislation is *ultra vires* is due to its effect. The note in the Modification Order makes it clear that legislating for an independence referendum is no longer forbidden as a reserved matter.\(^99\) Simply put, the current Scottish Parliament can only legislate for a referendum. The significance of the *ultra vires* aspect of the referendum is its effect on legislation. As section 29(3) says legislation can interfere with reserve matters due to its effect.\(^100\) The issue we now face is what is the effect of the referendum? Would a successful referendum cause *ultra vires* actions in Holyrood? Legally speaking the referendum does nothing but gage political opinion on independence and gives no consequent power. But, a successful referendum may embolden the Scots to legislate upon matters which are still reserved, that is, the effect of the referendum violates a reserved matter. However, these assumptions are highly speculative and it seems the powers granted in the Edinburgh Agreement are well defined and restricted to holding a referendum. Additionally, the absolute power of Westminster to legislate for independence could preempt any contrary legislation from Holyrood.

3. International Implications

The Scotland Act of 1998 clearly reserves matters of international affairs to the Parliament in Westminster. Schedule 5 Part I Paragraph 7 (1) states: “International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organizations, regulation of international trade, and development assistance and co-operation assistance are reserved

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\(^98\) *Id.*

\(^99\) Scotland Act 1998 (Modification of Schedule 5) Order 2013, Explanatory Note (reserved matters are laws that can only be legislated upon by the UK Parliament in London).

\(^100\) Scotland 1998, *supra* note 61, § 29(3).
Therefore, the Edinburgh Agreement clearly cannot constitutionally be considered an international obligation because international relations are a matter reserved to the UK Parliament. Accordingly, Holyrood cannot enter into a binding international agreement. Consequently, this provision should make it clear that the Edinburgh Agreement cannot be enforced as an international treaty or agreement.102

The Edinburgh Agreement cannot be viewed as a treaty under international law. The Vienna Convention on the Law of Treaties states that a treaty is “an international agreement concluded by states.”103 This requires that each party to a treaty is a sovereign state. In the case of the Edinburgh Agreement only one party, UK Prime Minister David Cameron, was the head of a sovereign state.104 However, the Vienna Convention does make concessions for “international agreements concluded between states and other subjects of international law”.105 But, the ‘subject of international law’ is not defined, and the parties need for their obligation to be binding internationally.106 In the case of the Edinburgh Agreement, it seems obvious the effect is simply to change the constitutional status of Scotland, not to change international relations with the United Kingdom or add any to Holyrood.

An additional question is whether by holding a referendum and conferred legislative powers to declare independence, Holyrood has been given an exercise of international relations and thus ultra vires power. Any action that involves the erection of a new independent nation has international implications. Therefore, one could argue that with Holyrood being granted the power to legislate for independence after the referendum, a legal problem emerges because the power over international relations is still reserved to Westminster. However, this implies the Edinburgh Agreement allows for independence legislation, which it does not specifically. But, section 29(3) of the 1998 Scotland Act could come back into play if the Agreement is seen to effect international

101 Scotland 1998, supra note 61, § 29(3) para. 5.
102 Bell, supra note 97.
103 Id. supra note 97.
104 Id.
105 Id.
106 Bell, supra note 97.
relations, that is, enabling the erection of a new sovereign nation. If Scotland can become an independent due to the results of the referendum, then there is no doubt that the UK’s international relations will be altered. If that is the case, the question remains whether Schedule 5 Part I Paragraph (1) of the 1998 Scotland Act opens the door for independence legislation coming from Holyrood. It seems the Holyrood could legislate for independence, but Westminster has the ultimate say. Therefore, any independence legislation must originate in Westminster, regardless of which governmental body actually declares Scotland independent.

4. European Impediments

If Scotland is able to overcome the various domestic obstacles in its path to independence it will then face a new set of potential international obstacles. The first question is Scotland’s status in the EU. All indications are that the SNP assumes Scotland will become a full member of the EU. However, some political ministers in Scotland have raised the possibility of membership in the European Free Trade Association (EFTA). Considering the option of EFTA membership is practical because many commentators believe that the Scots are a bit naïve in their assumption of almost automatic full EU membership. The Scots would benefit from EFTA membership by gaining access to the internal EU market without the requirements of membership. The downside is the Scots would have no say in the EU Parliament and be absent from EU policy decisions in areas of importance to the future of the Scottish economy, such as green energy. Consequently, Scotland is likely to pursue EU membership and take the steps necessary to achieve that goal.

Another potential impediment to Scottish independence is its practical implementation of Scottish independence. While current

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107 Scotland 1998, supra note 61, § 29(3).
108 Id. at sched. 5.
110 Id.
111 Id.
international or EU law may in theory give the Scots the ability to gain independence, bodies such as the EU and NATO are concerned what a Scottish independence could mean in terms of stability, finances, and defense in the region.\textsuperscript{112} The EU is particularly concerned that if its protective umbrella recognizes Scottish independence to go along with full and automatic EU membership, then other nations may follow suit.\textsuperscript{113} The “contagion” effect, as it is called, is the belief that other European separatist movements will opt for independence because it seems they have all to gain and nothing to lose in pursuing such a course of action.\textsuperscript{114} With potential separatist movements in countries like Spain, Cyprus, and Kosovo, the “contagion” effect could destabilize many nations, and the EU as a whole.\textsuperscript{115}

The Scottish independence could have a significant impact on UK military organization and NATO membership.\textsuperscript{116} British military resources are shared amongst the Scots and the rest of the UK in terms of both locations and personnel.\textsuperscript{117} An independent Scotland may call for the removal of all UK military resources from the region. Such a move will have a significant impact on both Scottish and UK military strategies. Without a military presence in Scotland there would be a tremendous threat of terrorism and Scotland may initially struggle to provide adequate protection of its economic resources and citizens. For the UK militarily, the breakup of the former kingdom will have little effect on its status as a member of NATO and the EU. However, without Scottish resources the capabilities of the new UK (\textit{i.e.} the nations of England, Wales, and Northern Ireland) military will need to be reevaluated.\textsuperscript{118} While it is likely Scottish independence will not significantly affect the status of the UK, the adjustment process for the UK within the EU, NATO, and the UN will be cumbersome.

\textsuperscript{113} Id.
\textsuperscript{114} Parkes, Discussion Paper, \textit{supra} note 112.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
III. THE CASE FOR UNILATERAL INDEPENDENCE

A. Self-determination

If the terms of the Edinburgh Agreement impede the Scots from legally seceding under British law does that mean the Scots’ independence push is over? Constitutionally, the answer is probably yes. Without future legislation from Westminster the Scottish independence begins and ends with the referendum. However, given the circumstances surrounding the referendum and the philosophy of international law, the Scots may seek independence through a different medium, that medium being international law.

After World War II there was a tremendous push for self-determination and decolonization in which the British government was heavily involved due to its expansive colonial possessions.119 The Charter of the United Nations recognized the concept of self-determination in international law.120 Chapter 1 Article 1 Clause 2 of the U.N. Charter states, “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”121 While being much more of an ideal rather than law, the concepts of international law could help bolster the case for Scottish independence.

The spirit of the Edinburgh Agreement seems to be on very favorable terms with international principles. The Edinburgh Agreement clearly wants to provide for peace in the United Kingdom by harmonizing the politics of Scotland with a constitutional reality.122 By using the referendum process, the terms of the Agreement give the people of Scotland an appropriate forum to determine their national future. For example, Montenegro seceded from Serbia after a majority in Montenegro voted for independence in a referendum.123 By complying and legislating with deference to the results of the referendum, as the

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119 Bell, supra note 97.
120 See U.N. Charter.
121 U.N. Charter ch. 1, art. 1, cl. 2.
122 See generally Edinburgh Agreement, supra note 82.
case was in Montenegro, one would believe that peace and justice would necessarily follow amongst the Scots and the English if the results of the referendum are honored. On its face it would appear that the Edinburgh Agreement is in compliance with the spirit of international law and these “universal” and international principles should supersede any legal technicalities. On these grounds it may seem that the Scots have a strong internationally recognized foundation to base their claims of independence to overcome any possible obstructions in found in domestic law.

Furthermore, the Scots already have the elements needed to be recognized as a sovereign nation under international law. The criteria for statehood are (1) a permanent population; (2) a defined territory; (3) a government; and (4) a capacity to enter international relations with other states. Meeting these criteria is neither necessary nor sufficient for a group of peoples to become a state. In the case of Scotland, the first element is not an issue. The second element is not issue either especially after devolution. For the third element, the Parliament at Holyrood more than suffices to demonstrate that Scotland has a capable government. The fourth element also seems to be already satisfied by Holyrood through their engagement with the government at Westminster. After an examination of the four elements of statehood it seems that Scotland already has the necessary characteristics of statehood. Meeting the criteria of statehood along with internationally recognized principles of self-determination, it seems Scotland’s demand for independence on its face could easily be accomplished.

However, self-determination does not legally give a group of peoples the ability to unilaterally declare independence. In fact, the U.N. Charter explicitly states that threats or shows of force should not be used against the territorial integrity or independence of a state. Here, the Scots’ threat of unilateral secession would be rather benign, but a political threat nonetheless. But, a recent advisory opinion by the International Court of Justice stated that a unilateral declaration of independence is not prohibited by international law, but at the same time

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124 Parmar, A Critical Analysis, supra note 123, at 207.
125 Id. at 201.
126 Id.
this right is nowhere near absolute.127 The right for unilateral secession should be exceptional and a last resort that usually requires the parent state to be participating in “grave human rights violations.”128 These violations require a high threshold to prompt unilateral independence. Moreover, recent secession movements have no bearing on international secession law. There is no precedent or international statute to follow for self-determination. International law looks at each situation on a case-by-case basis not by any black letter law.129

While international law gives the Scots a basis for independence, European Union (EU) law seems to provide the Scots with more leverage in a bid for independence. In response to criticism that the EU was becoming a centralized super-state, the EU adopted the principle of subsidiarity.130 In essence this principle this means that decisions should be made at the lowest political level unless actions by higher powers in the EU would make the process more efficient.131 As a result, the EU has encouraged national governments to implement decentralization strategies which would distribute powers from the center to the periphery.132

If the Scots legitimately wish to pursue independence via an international remedy (i.e. by either U.N. or EU law) then they must focus on their population. For the Scots, the emphasis on secession in international law should focus on the people, not the nation. Self-determination is codified in international agreements as a human right. For example in the case of South Sudan the Machakos Protocol stated “[t]hat the people of South Sudan have the right to self-determination . . . through a referendum to determine their future status.”133 Additionally, when addressing the possible secession of Quebec the Supreme Court of Canada said self-determination was “a people’s pursuit of its political, economic, social and cultural development within the framework of an

127 Charles B. Smith, South Sudan and Declarations of Independence, 47 TEX. INT’L L.J. 542, 544 (2011-2012)
128 Id.
129 Id. at 550.
131 Id.
132 Id.
133 Smith, supra note 127, at 547.
existing state.” By emphasizing the human rights (i.e. political, social, and economic determination) aspect of secession along with seemingly apparent authority to secede from Westminster, Scotland may believe they can mount a legitimate claim in international court. However, the threshold requirements for a remedy under international law are very high and not likely to be found in this case. With a lack of human rights violations in seems to be an insurmountable burden on the Scots. But, an emphasis on their unique culture must be a consideration.

A final position that may help the Scots in their quest to gain independence via international justice may be through international recognition. For example, in the Quebec Case the Supreme Court of Canada stated the success of unilateral secession may depend on international recognition. The fact that Kosovo has received eighty-nine recognitions has shown that it is perceived by many as an independent state. Such recognition can only help in their bid to become an independent state. The Scots may argue that they have been recognized by Westminster. The fact that Scots have been given devolved powers recognized by Westminster since 1998 could help with their recognition internationally. But, more importantly the fact that Westminster has given Holyrood power to determine their international status may be seen as Westminster recognizing the international capacity of Holyrood. But, much more international recognition is needed for the Scots to invoke this principle.

Ultimately, if the Scots look to the international forum for relief it will be a hard burden. Currently, the Scots have the elements for statehood, but in terms of criteria for a successful unilateral declaration of independence they currently are lacking. However, that could all change after a successful referendum. If the Scots feel that appropriate legislation is not enacted following a successful referendum, then they may gain the necessary criteria for proposing a unilateral declaration of

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135 Id. at 555.
136 Id.
137 Id.
138 See Sengupta, supra note 123, at 190.
independence. But until then, the international law argument is based on speculation and hypotheticals. While the ideals of self-determination seem to be present in both the Edinburgh Agreement and international law, those ideals are determinative of very little legally. This is especially true when there are no violation human rights present. However, recent cases in international law could be analogous and thus advantageous to the situation the Scots may face after the referendum. Depending on the fallout from the 2014 referendum, a unilateral declaration of independence may become a colorable option for the Scots to gain independence. But, questions remain whether the Scots would have the will to undergo such a strenuous process or remain content with devolution.

B. The Moral Obligation

Aside from the possible obligations based on international principles, what about a possible moral obligation from the UK Parliament? What should happen if the Scottish referendum voting results favor independence, but some legal or political impediment negates the validity of independence legislation coming from Edinburgh? Would it be best for this impediment to be ignored? For many it appears that under the current legislation both the UK Parliament and the Scottish Parliament have come to the understanding that should the Scots vote in favor of independence then criteria to further legislation for an independent Scotland has been met. However, the current legislation obligates neither party to anything as the result of the referendum, but it seems to be understood that there should be subsequent legislation that conforms to the results of the referendum. But, there is a big difference between the consequences of what is implied and what is obligated under the Agreement.

If Westminster finds a legal obstacle to Scottish independence after a successful referendum then what will be the perception of the UK government? The first perception will likely be untrustworthiness. After apparently giving the Scots the tools to forge their own destiny and apparently promising to honor their will, any acts to the contrary would be viewed as a broken promise with significant implications. Secondly, there could be allegations of incompetence. After years of preparation and with the consultation of expensive lawyers if the Edinburgh Agreement fails to uphold legally then it will appear there was some
poor legal work by government officials or a blatant disregard for the law.

A problematic parallel for Westminster - if it withholds a Scottish secession - comes from the case of Montenegro independence. In 2006 Montenegro successfully seceded from Serbia via referendum.\(^\text{139}\) The referendum had a sound legal basis and the results dictated the validity of independence. Such a precedent internationally may help Scotland in terms of public opinion on the international stage. If Westminster obstructs Scotland's secession then the questions will be asked on how can Montenegro conduct a valid referendum but the United Kingdom cannot? Such an incident will reflect badly on Anglo law.

So, could Westminster and the United Kingdom ignore legal impediments or by extralegal means allow for Scottish independence. Historically speaking, Anglo-American law has never found legal technicalities to be an impediment when it was expedient, the execution of Charles I and the American Constitutional Convention being prominent examples.\(^\text{140}\) An example that is pertinent to Scottish independence is the Anglo-Irish Treaty.

C. The Anglo-Irish Treaty Precedent

To avoid the possible conundrum that would be the “moral obligation,” the British could allow the Scots to follow in the footsteps of the Irish almost a century before. In the early 20\(^{th}\) century the Irish rose up in rebellion against the British occupiers that led to a bloody civil war on the island.\(^\text{141}\) The origin of the conflict began with the election of several Irish Nationalists to Parliament in 1918.\(^\text{142}\) The platform of the *Sinn Féin* (Gaelic for “We Ourselves”)\(^\text{143}\) party was based on complete Irish separation from Britain and if elected they were determined to take matters of independence into their own hands.\(^\text{144}\) After receiving a


\(^{142}\) Id.

\(^{143}\) Translation provided by Kevin Govern, Professor of Law, Ave Maria School of Law.

\(^{144}\) Id.
majority of the Parliamentary seats in Ireland, the Sin Fein kept their pledge of not taking their seats in Westminster and proceeded to establish and independent Irish Parliament in Dublin. Consequently, a war emerged against British in Ireland. After two years of hostilities in Ireland, Lloyd George passed the Government of Ireland Act of December 1920. The Act called for the establishment of Parliaments in Dublin (Southern Ireland) and Belfast (Northern Ireland), which allowed for more Irish autonomy. However, nationalism in Southern Ireland had gone beyond mere devolution, so the guerilla war continued. The combination of a prolonged war with the Irish nationalists and international pressures eventually forced the British hand. In 1921, British Prime Minister Lloyd George and representatives from the Irish Parliament began negotiations. The agreement that the parties reached, which would give the Irish independence as a dominion in the Commonwealth, was called the “Anglo Irish Treaty.” However, even in pre-Vienna Convention days its status as treaty was not clear. The parties signed not as members of government but “on behalf of” the British and Irish delegation respectively. Nevertheless, the validity of the treaty stands to this day.

The conflict with Ireland is not the only one where the British have conferred independence on questionable parties. The precedent of the Anglo-Irish Treaty has been followed during similar situations that arose during decolonization. During decolonization, the colonized nations were given a quasi-state status in order to negotiate for independence. Essentially, with both Ireland and their colonial possessions, the UK government negotiated with sub-state entities that

145 Id.
146 Id.
147 Id. at 607.
148 Id.
149 Id.
150 Id.
151 Id.
152 Bell, supra at note 97.
153 Bell, supra at note 97.
154 Id.
155 Id.
had no treaty making capacity. These emerging nations were states in waiting and their validity as treaty making entities existed only after the treaties were executed.

The solution for Scottish independence seems simple under this theory and has precedent. The current situation between Scotland and the rest of the United Kingdom may not be completely analogous to cases seen in Ireland and during decolonization, but manageable. The referendum legislation between Holyrood and Westminster has a strict domestic character that does not implicate an international relationship between the two. However, that could all change after a successful referendum. Westminster could recognize Holyrood in the same way they recognized the Irish plenipotentiaries in 1921 and give Holyrood a quasi-state status. But again, even taking this route to independence still depends on the willingness of Westminster to legislate for Scottish independence. Even more problematic in this case is that the legislation from Westminster is founded on giving the Scots a quasi-legal status. In this case, the Scots are still relying on Westminster and a legal fiction. Ultimately, the example from the Anglo-Irish Treaty and decolonization is effective, but not exactly legal.

IV. CONCLUSION

The Edinburgh Agreement does nothing to change the constitutional status of Scotland and empower Scotland to legally gain independence. It only allows for a referendum on independence, which is nothing more than a political opinion poll. For legal independence the Scots will need a successful referendum and subsequent legislation from Westminster to give them the ability to determine their sovereign status. Alternatively, the Scots could turn the international community for satisfaction. The burden on the Scots would be high and improbable, but the argument has some merit. Following the Anglo legal tradition the Scots may ultimately gain their independence on the grounds of legal fiction.

156 Id.
If given the opportunity to declare independence Scotland will face the many difficulties that emerging nations face. While Scotland will have more independence in NATO, the European Union, and the international community, it will lose many of the benefits it has being united with the rest of the United Kingdom. To the outsider it may seem Scotland is already independent enough. Scotland has its own Football Association\textsuperscript{157}, flag\textsuperscript{158}, culture, legal system, and political system while being a part of the United Kingdom. While this may seem significant for some, to others it is not nearly enough. Does gaining the status of an independent nation outweigh the burdens that independence will bring? On September 18, 2014 the Scottish voters will have told us.

\textsuperscript{157} The Scottish Premiership, which separate from the English Premiership and allows Scotland to participate as a nation in the Fédération Internationale de Football Association (FIFA) competitions.  
\textsuperscript{158} The Cross of St. Andrew is the flag of Scotland and the Flag of England is the Cross of St. George. The flags were combined upon the Act of Union in 1707. See Act of Union of 1707, supra note 22, § 1.
FREEDOM OF EXPRESSION

JUDr. Daniel Lipšic, LL.M.†

Freedom of speech has traditionally been an ally of the liberals. In the recent times, however, it is the liberal elite calling for new restrictions on freedom of expression. The evidence of this is an ever growing body of hate speech laws being enacted and enforced in many European countries. It comes as no surprise that the three main areas in which “hate speech” laws are being applied pertain to: (1) abortion protests, (2) criticism of homosexual conduct, and (3) criticism of Islam. Yet in defending free speech, our position needs to be one of principle. We are not arguing for freedom of expression for Christians only, but for everybody, even those we are in sharp disagreement with. And while acknowledging together with Sir Winston Churchill that “[f]ree speech carries with it the evil of all foolish, unpleasant, and venemous things that are said,”¹ freedom of expression echoes the inherent dignity of every human being endowed with a free mind and conscience.

The crucial question we are facing is whether a government has or should have a power to restrict speech, which a certain group finds offensive or insulting. My answer to that question is crystal clear: it should not. As the U.S. Supreme Court Justice Robert Jackson put it in the Youngstown case, although in a different context “such power either has no beginning or it has no end.”²

The most important freedom in the constitutional system of any democratic country is freedom of speech. Without free speech there is no discussion and without discussion there is no democracy.

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Any possible restrictions on speech have to meet three basic conditions set by the wording of Article 10 § 2 of the European Convention on Human Rights (here and after “the Convention”) reflected in a settled jurisprudence of the European Court of Human Rights³ (here and after “the Court”). They have to be:

1. prescribed by law,
2. tailored to one of the legitimate aims described in Article 10 § 2 of the Convention, namely to the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
3. necessary in a democratic society.⁴

I would argue that prosecuting “hate speech” does not meet the second and third prongs of the Court’s test.

The most troublesome issue is that there is no legitimate aim upon which free speech is being restricted in hate crime cases. The one most


1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
readily susceptible is “the protection of the reputation or rights of others.”\textsuperscript{5} If a person is blackmailed then the protection of reputation may trigger a restriction on speech. Of course, nobody has a right to exercise free speech in your living room, because that would run contrary to your rights guaranteed by the Convention, namely the right to respect one’s home\textsuperscript{6} and the right to property.\textsuperscript{7} The other potential legitimate aim—“prevention of disorder”—wouldn’t do the trick either. There has never been any evidence introduced to suggest that a radical expression of views may spur violent action.

The problem therefore rests with identifying a right guaranteed by the Convention that is breached by “hate speech.” Indeed, there is no societal group that has a right guaranteed by the Convention against “insulting” speech which can cause traumatic emotional pain. In fact, a large portion of opinions in the body of politics or in other public fields do cause emotional pain. If we would allow criminal prosecution for any opinion that is capable to cause emotional pain to a certain group in the society, free speech would depend upon a whim of whoever has an immediate majority in a national legislature. Furthermore, if we would be willing to restrict speech for the protection of other rights, not only those explicitly guaranteed by the Convention, we could effectively strike Article 10 from the Convention. After all, the basic goal of the cited provision is to stop the legislative power restricting free speech beyond the scope allowed by Article 10 § 2.

According to a well-settled jurisprudence of the Court, the “adjective “necessary” [w]ithin the meaning of Article 10 § 2, [i]mplies the existence of a “pressing social need.’’\textsuperscript{8} The member states have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision exercised by the Court. The Court has emphasized that although freedom of expression may be

\textsuperscript{5} Id.

\textsuperscript{6} See European Convention, supra note 4, art. 8 (stating that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”).


subject to exceptions, they must be “narrowly interpreted” and “the necessity for any restrictions must be convincingly established.” The tailoring to one of the legitimate aims therefore has to be pretty much a “custom fit” not a loose summer beach style.

The aim of suppressing “hate speech” is to strengthen harmony in the society among various groups and shield these protected groups from emotional pain. The threat of prosecution should foster tolerance in the society. Such an argument is based on a premise that individuals confronted with radical expressions are so ignorant that they will readily identify with these opinions. And while tolerance among many groups is far from perfect in many countries, it is necessary to suppress the opposite – the possible rise of intolerance – even by a threat of a criminal sanction. The power to restrict speech based on an argument that truth has not yet prevailed has, however, one critical flaw—it implies the power of the government to decide where the truth lies. Furthermore, such an argument is in contradiction with the basic condition of free speech—namely that adult persons should be able to come to any conclusion upon which they can be persuaded in a free debate.

Criminal procedure and criminal sanctions represent the most heavy-weight means by which the government intrudes into individual freedoms. Criminal prohibitions are categorical—by using criminal law, government intends not just to put a price on conduct but to shut it off altogether. As Harvard Law Professor Charles Fried puts it: “a criminal law that says you may not say certain things, or seek to hear them, is a law that asserts a claim to control your mind.” Such an extreme intrusion into individual liberties does not meet a basic proportionality test when balanced against the hypothetical possibility of an insulting speech leading to violent acts. The causal link between a criminal ban on hate speech and the quantity of violent acts motivated by radical speech has never been established and is purely hypothetical.

The quest to find a principle clearly dividing constitutionally protected speech and speech that can be prosecuted is rather futile both at the national level, but also at the level of the Court.

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I will try to present this troubling situation on two very recent cases adjudicated by the Court—however with radically different reasoning and outcome.

The first case is *Vajnai v. Hungary*, in which the applicant was prosecuted for wearing five-pointed red star on his jacket. He was convicted for the crime of “using totalitarian symbols” in a public place, but the court refrained from imposing a sanction for a probationary period of one year. Here the Court found a violation of Article 10. The Court analyzed the restriction on speech under the two legitimate interests already described: prevention of disorder and the protection of the rights of others. As to the prevention of disorder the Court employed a sort of a “real and present danger” test. The Court found no evidence that wearing a Communist symbol can lead to “actual or even remote danger of disorder” and “a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a pressing social need.” On the legitimate aim of protecting the rights of others, the Court sounded like a real champion of free speech:

[The Court] accepts that the display of a symbol which was ubiquitous during the reign of [Communist] regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful. It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression . . . In the Court’s view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling—real or imaginary—cannot be regarded as meeting the pressing social needs recognized in a democratic society.

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12 Id. ¶ 8.
13 Id. ¶ 55–57.
14 Id. ¶ 49.
15 Id. ¶ 55.
16 Id. ¶ 57.
However, just three years later, the Court totally reversed its reasoning. The second case—*Vejdeland and Others v. Sweden*17—involved applicants who went to a secondary school and distributed leaflets in or near pupil’s lockers. The leaflets criticized homosexual behavior—referring to it as “deviant sexual proclivity” which has a morally destructive effect on the substance of society”—and warned the pupils of “homosexual propaganda” allegedly being promulgated by teachers in the school.18 The applicants were prosecuted for “agitation against a national or ethnic group” and eventually were given suspended sentences combined with fines.19 The Court found no breach of Article 10. The Court based its decision on some kind of a “totality of circumstances” test—namely that the content of the leaflets contained “serious and prejudicial allegations”20 and “the leaflets were left in lockers of young people who were at an impressionable and sensitive age.”21 The Court also emphasized, however, that “inciting hatred does not necessarily entail a call for an act of violence, or other criminal acts.”22

What a U-turn that is with the reasoning in *Vajnai*.23 There the Court held that a real danger for public order needs to be established before a restriction on speech would meet the requirements of Article 10.24 So what was the difference between these two cases? The first involved an extreme left-wing politician, the second involved activists opposing homosexual lifestyle. Is the outcome of a case depending on how sympathetic the applicant is?

Thus the Court left us with no workable principle at all. The only “principle” at work is the ideological preference of the majority deciding

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18 *Vejdeland and Others v. Sweden*, ¶ 8.
19 *Id.* ¶ 9–17.
20 *Id.* ¶ 54.
21 *Id.* ¶ 56.
22 *Id.* ¶ 55.
24 *Id.* ¶ 49.
a case. As ECHR Judge Andras Sajo pointed out in his dissenting opinion in Féret v. Belgium:\(^\text{25}\):

Content regulation and content-based restrictions on speech are based on the assumption that certain expressions go “against the spirit” of the Convention. But “spirits” do not offer clear standards and are open to abuse. Humans, including judges, are inclined to label positions with which they disagree as palpably unacceptable and therefore beyond the realm of protected expression. However, it is precisely where we face ideas that we abhor or despise that we have to be most careful in our judgment, as our personal convictions can influence our ideas about what is actually dangerous.\(^\text{26}\)

Without having a clear-cut principle, however, the case-to-case jurisprudence of national courts and the Court may well cause a chilling effect on free speech all around Europe. If the Court doesn’t know where to draw the line, how can a citizen be safe in the exercise of his or hers freedoms?

I would therefore like to offer my insight on where to draw the line between protected and unprotected speech. I do admit that there may be alternative principles established, but the burden of proof lies extremely low in the case at hand—because there is no workable principle present in the current jurisprudence.

So, where to draw the line? It is clear that an expression of a Neo-Nazi in front of a Roma ghetto “let’s go and lynch them” falls outside protected speech. The line between protected and unprotected speech must therefore lie between an expression of an idea and an incitement to violent action. Indeed, it may prove to be difficult to draw the line in some marginal cases, but that is not an argument for throwing outside constitutional protection a vast amount of speech that does not incite violent action at all.


\(^{26}\) Féret v. Belgium, supra note 25.
Otherwise we grant the government the power to decide which opinions are bad and which of the bad opinions can the government prohibit expressing. That is to say that opinions supporting racial or religious tolerance are protected by freedom of speech, whereas opinions expressing racial or religious intolerance fall outside legal protection. In other words, the government would thus have the power to decide that if a group of extreme right-wing activists and Roma meets, one group (Roma) can insult the other (the far right), but it would be prohibited *vice versa*.

I am convinced that the government should not have the right to intrude into a debate in a discriminatory fashion. To put it more metaphorically: the government should not prescribe one side of the discussion the rules for Greco-Roman wrestling and let the other side use the Freestyle. The government should equally not have a power to arbitrarily decide that certain groups based e.g. on their national origin, religion, race, sexual orientation are protected against “hate speech” while other groups (based on sex, age, wealth, veteran status, political preferences, criminal record) can be verbally attacked *ad libitum*. The government should not be in a position to usurp our minds—what we believe in and what others can persuade us to believe. One of the basic conditions of freedom is a requirement that nobody restricts (or asks the government to restrict) somebody else’s freedom only because he or she disagrees with the other’s opinion on what is Good. Nobody can be forced, in a free society, to accept or refute a particular theory of Good.

As Justice Jackson wrote for the U.S. Supreme Court in *West Virginia State Board of Education v. Barnette*:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men . . . .

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28 See id. at 392.
29 See id. at 391.
31 Id. at 237.
Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.\textsuperscript{33}

With a view of having a principled jurisprudence on freedom of expression, the selection of the Court’s judges is of paramount importance. Practically all judges elected to the Court are senior lawyers in individual member states. It is very unlikely that they will change their legal or judicial philosophies once on the Court. It is therefore vital to get information on their positions in advance. Unfortunately, the “living document” doctrine that is the basis of activist judiciary is not restricted to the United States. It is becoming orthodoxy in the last decades among many European constitutional tribunals, including the Court itself.\textsuperscript{34} It goes without saying that when the judges at the Court choose to take ideological positions that go well beyond textual interpretation of the Convention, they usually take sides with the liberals. Therefore trying to get on the Court judges that are bound by the text of the Convention in the adjudication of individual complaints is essential.

\textsuperscript{34} The “living document” doctrine emerged in the Court’s decision in \textit{Golder v. the United Kingdom}, in which the Court found an implied, unenumerated substantive right of access to courts in Article 6 § 1 of the Convention that grants a right to a fair hearing. \textit{See Golder v. the United Kingdom}, App. No. 4451/70, Eur. Ct. H.R. (1975); European Convention, supra note 4, art. 6, para. 1. In \textit{Tyler v. the United Kingdom}, the Court put the doctrine forward in unequivocally clear terms stating that “the Convention is a living instrument which ... must be interpreted in the light of present-day conditions.” \textit{Tyler v. the United Kingdom}, App. No. 5856/72, Eur. Ct. H.R. (1978).
CATHOLIC CONTRIBUTIONS AND CRITIQUES OF HUMAN RIGHTS LAW WITHIN EUROPEAN INSTITUTIONS

Fr. Piotr Mazurkiewicz

HOW DEMOCRATIC IS THE PARTICIPATIVE DEMOCRACY?

With regard to the EU, we are accustomed to talking about a democratic deficit. This expression is a euphemism, as if a political regime is not fully democratic, the question immediately becomes how is an incomplete democracy “completed”? Whether we have there “a surplus” of autocracy, bureaucracy or of something else? Regardless the answer, there is awareness that we have a problem with democracy (see: Karlsruhe ruling on Lisbon Treaty). It results not due to the luck of good will, but to the fact that democracy as political regime was invented in the history only for small political entities, like Greek polis, and in the modern time was applied to the nation-state level. Strictly speaking, democracy is not possible at the international level.

As the EU would like to become one day a federal state, it also has ambition to be recognized as a democratic entity. But the transformation of international organizations in general is not going toward a model of political democracy. So-called global governance is much more similar to a kind of a network than to the worldwide gathering of the nation-states. Although the nation-states (USA, China, Russia, India, Brazil, UK or Germany) remain the main actors, “new players” with much differentiated identities have appeared on the scene:

- political entities (UN, EU, CE, AU, ASEAN, G8, G20, OSCE etc.),
- entities of rather economical nature (IMF, ECB, international corporations, cartels etc.),
- international courts,
- international NGO’s,
individual people ("eminent persons," technical experts, academics, etc.).

The luck of democratic legitimacy is the common factor for all of them. To hide this fact from the public, politicians and bureaucrats usually refer to the concept of “deliberative” or “participative democracy.” In their interpretation of these terms, democracy is much more linked with public debate (consultations, crowd-sourcing) than with democratic elections. In other words, contemporary democracy – in this view - does not need any more democratic elections. Elections can be substituted by consultations with a thin group of so called “stakeholders.” Recently, one of those groups called The High Level Panel of Eminent Persons prepared The Report on the Post-2015 Development Agenda. The report proposes a “new global partnership” which does not abolish democratic institutions but should coexist with them. In the “partnership” model, the governments, the only form that can have democratic legitimacy, would be treated on an equal footing with all other “stakeholders” and “horizontal leaders”, which are not democratic by their nature. If we follow this line, the future world will be less and less democratic. In former times, communist countries had inserted in their constitutions expressions declaring that the political regime would be called a “peoples’ democracy,” which is an equivalent to the “proletarian dictatorship” (“people’s democratic dictatorship” – as expressed in Chinese constitution). So, the adjective was added here in order to deny the sense of the noun. Luckily, we are in a totally different moment of history but still it could be worthwhile to remind ourselves of

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2 CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA, Mar. 14, 2004,pmbl., available at http://wwwnpc.gov.cn/englishpc/Constitution/2007-11/15/content_1372963.htm (“The People’s Republic of China is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People’s Republic of China. Disruption of the socialist system by any organization or individual is prohibited”).
the observation done by blessed John Paul II: “As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism.” (Centesimus annus, 46).

The current transformation in international relations produces results, so that politics (in traditional sense) is frequently replaced by economics, and financial instruments often are at the service of political ideology. The mechanism of conversion of ethical and political issues into financial ones is well elaborated in the EU policy. It allows the EU to be very active also on the fields where its competence is very limited, like bioethics and family policy (see: TFEU art 81 (3)).

Also the role performed by constitutional and international courts, both, at the national and international level, has changed. By using a “creative approach” to the jurisprudence, in practice, they are playing a role of “the third chamber” of the parliament. Instead of interpreting existing laws, through the jurisprudence, they create new laws, quite often very ideological. Being by definition out of democratic control, they are playing nowadays very important political role, provoking the transformation of democracy into a new political regime called “juristocracy.” The jurists are trying to introduce into the legal system “a new consensus” on non-discrimination, same-sex unions, and redefinition of marriage, without slightest changed in any constitution or treaty. This elitist group is trying to impose on the societies a “new mindset,” usually very ideological. Some decisions, like Roe vs. Wade, have completely changed national political framework. Other, like Lausti, pretended to do this. One should not forget the negative character of this tendency even if some of the judgments (few of them like Brüstle or finally Lausti) are in favor of his understanding of the common good.

International NGOs’, even if they are getting money mostly from public resources, do not represent any more the civil society. In the process of consultation they are still treated as they would play this role, but in reality they replaced, i.e., eliminated the civil society. They are

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financed, in general, by international organizations, national governments and some very rich people, and are at the service of their agenda. “Who pays the piper, sets requirements.” Some of them probably where even created on the request of some international institutions. Jürgen Habermas described this as a process of “re-feudalization of the civil society,” when the society is once again reduced to the status of an observer and its opinion is replaced by the opinion of experts and “stakeholders.”

**NEW PUBLIC PHILOSOPHY**

The post-war international legal order was based on the natural law philosophy. Nowadays, it is being replaced by gender ideology, which is being pushed by some Western states as a new public philosophy. Concerning the philosophy of law, as stressed pope Benedict XVI when he addressed the Reichstag in Berlin, “there has been a dramatic shift in the situation in the last half-century”—a shift from the natural law to purely functional positivist conception. Into the vacuum, created by this purely functional positivist approach, has entered the gender ideology, which – regarded from the political point of view - is nothing more than a new form of Marxist thinking. This means that there is a real risk that with time it will provoke similar social and political consequences as the original Marxist philosophy, which also has been born on the West.

Some elements of possible analogy between the Marxist and gender ideologies:

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5 Pope Benedict XVI, The Listening Heart: Reflections on the Foundations of Law, Address Before the Bundestag (Sept. 22, 2011), http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin_en.html (“For the development of law and for the development of humanity was highly significant that Christian theologians aligned themselves against the religious law associated with polytheism and on the side of philosophy, and that they acknowledged reason and nature in their interrelation as the universally valid source of law.”).
<table>
<thead>
<tr>
<th>Marxist ideology</th>
<th>Gender ideology</th>
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</thead>
<tbody>
<tr>
<td><strong>Main common ideas:</strong></td>
<td></td>
</tr>
<tr>
<td>the materialistic vision of the world</td>
<td>the materialistic vision of the world</td>
</tr>
<tr>
<td>the idea of the class struggle</td>
<td>the idea of the struggle of sexes and genders (men – women; heterosexuals – homosexuals)</td>
</tr>
<tr>
<td>the workers as the exploited social class</td>
<td>the women and LGBT people as the new exploited social class</td>
</tr>
<tr>
<td>the marriage and family as the main structures of oppression (F. Engels)</td>
<td>the marriage and family as the main structures of oppression (F. Engels)</td>
</tr>
<tr>
<td><strong>Main common aims:</strong></td>
<td></td>
</tr>
<tr>
<td>to liberate people from economical oppression</td>
<td>to liberate people from heterosexual constraint; to separate fertility and heterosexuality (due to new technologies)</td>
</tr>
<tr>
<td>the violent social and political revolution</td>
<td>the “silent” social and political revolution; the deconstruction of the main social institutions like marriage and family, and their replacement by the new one based on gender ideology</td>
</tr>
<tr>
<td>the imposition of a dictatorship of the previously oppressed class (eventually: to destroy the social class difference)</td>
<td>the imposition of new androgynes great narrative (eventually: to destroy the difference between feminine and masculine)</td>
</tr>
</tbody>
</table>

6 The analogy faces here an important limit: the difference between those two kinds of revolution is evident as one of them cost life of around 100 million people.
<table>
<thead>
<tr>
<th>the communist party control over instruments of ideological and cultural production</th>
<th>the feminist/LGBT control over instruments of ideological and cultural production (media, culture, education - see: UNESCO and WHO standards on sexual education)</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>The class which has the means of material production at its disposal has control at the same time over the means of mental production</em> (Karl Marx, <em>The Civil War in France</em>)</td>
<td></td>
</tr>
<tr>
<td>the communist <em>Newspeak</em></td>
<td>the performative function of the language</td>
</tr>
<tr>
<td>(the imposition of a new terminology and redefinition of old terms: gender, homophobia, reproductive health, new human rights, negative and positive reproductive rights, “gay marriage” etc.)</td>
<td></td>
</tr>
<tr>
<td>the preventive censorship</td>
<td>the political correctness: the promotion of some likeminded people and elimination of opponents from public life (R. Scruton)</td>
</tr>
<tr>
<td></td>
<td>(see: black list of pro-lifers distributed in the European Parliament)</td>
</tr>
</tbody>
</table>

**Why Most of the Contemporary Liberals Are Against Freedom and Democracy?**

One could be surprised by the fact that those who should be in favor of liberty are now taking so many legal and political initiatives to limit citizens access to freedom. Just some examples:
recently Catholic adoption agencies disappeared in England because they refused to provide children to homosexual couples,

in the Parliamentary Assembly of the Council of Europe, British Labours have proposed a resolution against the right to conscientious objection (Mac Cafferty resolution) (similar law was approved in Sweden); in the European Parliament the same aim had Estrela Report on Sexual and Reproductive Health and Rights; the same problem appeared in the recent debates on so called same-sex marriage in France and England

hate speech laws and anti-discrimination laws are more and more restrictive – these laws, refereeing to a very ambiguous term “homophobia,” are used to stigmatize people and to limit their rights concerning the real possibility of being in the opposition to the liberal mainstream; they are imposing restrictions on the rights of parents to educate their children in conformity with their religious and moral convictions, restrictions on freedom of religion, freedom of expression, freedom of conscience, on the right of the ethos-based institutions to maintain their activities (see: the proposal of a law on homophobia in Italy)\(^7\)

refusal of a referendum on abortion in Ireland and on “gay marriage” in France

organized attacks against Hungarian constitution (and in the past also against Lithuanian law on the protection of minors)\(^8\)

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\(^8\) In the same direction was going health system reform the USA with the attempt to force all the employers (Catholic bishops including) to cover by the health insurance the costs of contraception and abortion.
If in all these cases the main aim would be the promotion of tolerance and non-discrimination, one could imagine much more liberal solutions, leaving “old fashion” institutions and establishing new ones just as an alternative. The tendency to eliminate the opponents, which is not just an unexpected side effect, shows that the gender ideology is not just a kind of a “liberation theology” for discriminated LGBT people. The fight for the rights of individuals (i.e. non-discrimination policy, access to the institution of marriage for same-sex unions, adoption for gays and lesbians) seems to be only an excuse to deconstruct main social institutions of Christian civilization and to take the political leadership (“the power over the souls of people”) in the Western world.

FROM BUITTIGLIONE CASE TO BUITTIGLIONE 2.0

In Conscience, the review published by the anti-Catholic movement called Catholics for Choice, recently one could read that the withdrawal in 2004 of Rocco Buttiglione as a candidate for the European commissioner, was for conservative Christians a humiliating experience which, at the same time, mobilized them to be more present, more active and better organized in Brussels and Strasbourg.\(^9\) Certainly, this was a very shocking experience for Christians, demonstrating openly that – even if the biggest in the EP political group is called (back since 2009) Christian Democrats – it’s very difficult for a convinced Christian to get an important position in the EU structures. It doesn’t mean that this is impossible for so called “moderate” Christians. But the “production of new Christian martyrs” was recognized by the anti-Catholic league as a serious error, what results with a change of strategy. Observing recent developments, it could be noted that two alternative strategies have merged. The first is to “moderate” active believers by an act of public humiliation or, second, if this is not working, to eliminate them from public life on a base of an organized defamation. A person publicly accused on committed (in fact or not) crimes, immoral life, plagiarism

etc., is losing political support. The defamation strategy is effective only against values-oriented people.

Recently one could observe similar games as with Rocco Buttiglione around the nomination of Tony Borg for the European Commission’s Health and Consumer Policy portfolio. His nomination was at risk because the European Humanist Federation, the International Planned Parenthood Federation and the International Lesbian and Gay Association (ILGA) looked his personal views on abortion, same-sex “marriage” and divorce as being “extremists.” None of these topics fall under EU competence or have anything to do with the portfolio he would inherit if confirmed. None of these organizations is a part of the European political system. Nevertheless, under the pressure of these lobby groups, maintaining that the simply holding Christian beliefs on social issues is a sign of extremism, he was forced to sign a “declaration of loyalty to the European values” before he was officially nominated by the vote of the deputies.

**How Christian is Christian Democracy?**

Another problem is directly linked with the European crisis of Christian democracy. To answer properly on the question one should first articulate a list of the core values/core political issues from the Christian point of view. To draw up such a catalogue is not a difficult task when you have at hand *The Doctrinal Note on participation of Catholics in political life* and Pope Benedict XVI exhortation *Sacramentum caritatis*. On the list of not negotiable values, published in these documents, one can find:

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10 *Congregation for the Doctrine of the Faith, Doctrinal Note On Some Questions Regarding the Participation of Catholics in Political Life*, sec. 2, no. 4 (U.S. Council of Catholic Bishops, 2002) available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html ("In this context, it must be noted also that a well-formed Christian conscience does not permit one to vote for a political program or an individual law which contradicts the fundamental contents of faith and morals. The Christian faith is an integral unity, and thus it is incoherent to isolate some particular element to the detriment of the whole of Catholic doctrine. A political commitment to a single isolated aspect of the Church’s social doctrine does not exhaust one’s responsibility towards the common good. Nor can a Catholic think of delegating his Christian responsibility to others; rather, the Gospel of Jesus Christ gives him this task, so that the truth about..."
- the basic right to life from conception to natural death
- the respect and protection of the family, based on monogamous marriage between a man and a woman

man and the world might be proclaimed and put into action. When political activity comes up against moral principles that do not admit of exception, compromise or derogation, the Catholic commitment becomes more evident and laden with responsibility. In the face of fundamental and inalienable ethical demands, Christians must recognize that what is at stake is the essence of the moral law, which concerns the integral good of the human person. This is the case with laws concerning abortion and euthanasia (not to be confused with the decision to forgo extraordinary treatments, which is morally legitimate). Such laws must defend the basic right to life from conception to natural death. In the same way, it is necessary to recall the duty to respect and protect the rights of the human embryo. Analogously, the family needs to be safeguarded and promoted, based on monogamous marriage between a man and a woman, and protected in its unity and stability in the face of modern laws on divorce: in no way can other forms of cohabitation be placed on the same level as marriage, nor can they receive legal recognition as such. The same is true for the freedom of parents regarding the education of their children; it is an inalienable right recognized also by the Universal Declaration on Human Rights. In the same way, one must consider society's protection of minors and freedom from modern forms of slavery (drug abuse and prostitution, for example). In addition, there is the right to religious freedom and the development of an economy that is at the service of the human person and of the common good, with respect for social justice, the principles of human solidarity and subsidiarity, according to which «the rights of all individuals, families, and organizations and their practical implementation must be acknowledged». Finally, the question of peace must be mentioned. Certain pacifistic and ideological visions tend at times to secularize the value of peace, while, in other cases, there is the problem of summary ethical judgments, which forget the complexity of the issues involved. Peace is always «the work of justice and the effect of charity». It demands the absolute and radical rejection of violence and terrorism and requires a constant and vigilant commitment on the part of all political leaders.

Pope Benedict XVI, Post-Synodal Apostolic Exhortation Sacramentum Caritatis of the Holy Father Benedict XVI To the Bishops, Clergy, Consecrated Persons and the Lay Faithful On The Eucharist As The Source and Summit of The Church’s Life and Mission, no. 83 U.S. Council of Catholic Bishops, 2007) available at http://www.vatican.va/holy_father/benedict_xvi/apost_exhortations/documents/hf_ben-xvi_exh_20070222_sacramentum-caritatis_en.html ("Evidently, this is true for all the baptized, yet it is especially incumbent upon those who, by virtue of their social or political position, must make decisions regarding fundamental values, such as respect for human life, its defense from conception to natural death, the family built upon marriage between a man and a woman, the freedom to educate one’s children and the promotion of the common good in all its forms. These values are not negotiable. Consequently, Catholic politicians and legislators, conscious of their grave responsibility before society, must feel particularly bound, on the basis of a properly formed conscience, to introduce and support laws inspired by values grounded in human nature. There is an objective connection here with the Eucharist (cf. 1 Cor 11:27-29). Bishops are bound to reaffirm constantly these values as part of their responsibility to the flock entrusted to them.").
- the freedom of parent regarding the education of their children (especially moral and religious),
- the protection of minors
- the freedom from modern forms of slavery (drug abuse, forced work, prostitution),
- the right to religious freedom
- the development of an economy that is at the service of the human person and of the common good, with respect to social justice, the principles of human solidarity and subsidiarity
- the peace in the world

In the European Parliament one can observe two different coalitions. The first is on economics, formed by Christian-democrats, Social democrats and Liberals, and the second “on values,” formed by Social democrats, Liberals and Greens. This means that Christian-democrats are able to push in the European policy the model of social market economy but at the same time they are losing nearly all the battles on other values. Is this problematic for Christian deputies? The EPP group is giving impression that rather prefers to avoid internal axiological debates (on the importance of the “C” in the name of Christian Democracy) because they could provoke in-house conflicts or even dissolution of the group itself. It doesn’t mean that convinced Christians are missing in the European Parliament but they are not the mains “stakeholders” in any of the important political groups.

One can observe the same process on the national level with a sad but justifiable conclusion that the majority of the most problematic laws on life, marriage and family probably would be never approved in Europe without the Christian Democrats’ strategy of the “lesser evil.” The main example, as highlighted by Vladimir Palko, is the Italian law no. 194 on abortion, which is the only pro-abortion law in the world signed exclusively by Catholic politicians (Giulio Andreotti, Tina
Anselmi, Francesco Bonifacia, Tomasso Mirilina, Filippo Pandolfi).\textsuperscript{11} Giulio Andreotti, 25 years later, said: “Today, I would have resigned rather than signed the bill.”\textsuperscript{12} Unfortunately, this is still the main strategy of those Christian democratic parties, which are big enough to think about taking over the power. In assessing their policies on the basis of the fruits, one could get a strange impression that their political opponents might infiltrate them. This provokes the question: How to regain Christian democracy for Christian agenda? One possible way could be the organization of small Christian clusters inside existing big political parties. This could help their members to overcome a feeling of lowliness, push Christian reflection on main political issues and ensure that Christian point of view is really expressed in the political debate.

ETHICAL ISSUES AS A SUBSTANCE OF POLITICAL DEBATE

Not much is said directly on religion in current European political debate. Recent and lost by Christians, was the battle concerning the reference to Christianity in the preamble of the Constitutional Treaty. A few years later there was a court case on the cross in public space in Italy (Lautsi), finally won. In France, we had, on the one hand, the debate launched by president Sarkozy on laïcité positive and, on the other hand, a public declaration by Vincent Peillon, minister of education, that Catholicism should disappear from the country, if the objectives of the French revolution should be achieved.\textsuperscript{13} But there are also some achievements concerning guaranties for religious freedom. Churches have lost the preamble in new European treaties but have won article 17 on dialogue between the EU institutions and religions. One can say this is an ambivalent success, as in the article Churches are put at the same footing as small secularists associations. This allows the EU institutions, searching for the “just equilibrium,” to treat secularists as counterbalance to religions and to attribute each of them the same weight. Hence

\textsuperscript{12} See id.
\textsuperscript{13} See Vincent Peillon, La religion catholique doit disparaître, YOUTUBE (Jun. 22, 2013), http://www.youtube.com/watch?v=RjN3XcJZYNQ.
the risk that Churches, pushing their position, will become unintended promoters of secularist groups.

On the other hand, looking at the number of statements issued by the EP and EEAS on defence of people persecuted on the base of religion, Christians included, the number of religious delegations received in Brussels and Strasbourg, it’s evident that European politicians are very active on this field. It’s also clear that Europe and the European institutions from the outside are regarded as the main existing point of reference for persecuted Christians. Last but not least, it is worth mentioning the recently approved EU Guidelines on freedom of religion or belief, by the Council of Foreign Ministers of the EU.

In the EU policy, religious freedom is not the main field of battle between secularists and Christians. The real conflict concerns some fundamental ethical issues. The catalogue of ethical values, which are subject here to a conflict, coincides well with the list of non-negotiable values formulated by Pope Benedict XVI: life, marriage, family, freedom of conscience, freedom of expression, freedom of education and—only indirectly—freedom of religion. In the background of the conflict we find a dispute between a Christian and a completely materialistic anthropology. The latter is constructed on the basis on an “anthropological error.” It is fully evident in the case of authorizing the creation of human chimeras and hybrids (England), euthanasia of children and mentally diseased people (Belgium), of attempts in so many countries to redefine marriage, to allow surrogates mothers, in vitro fertilization for lesbians and the adoption of children by same-sex couples. In each of these situations, no one cares about the rights of children and of surrogate mothers in India or elsewhere. Quite characteristically, the recently adopted Guidelines to protect and promote the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, differ greatly from the Guidelines on freedom of religion and do not refer to human rights, as recognized in the international law. LGBTI Guidelines rather are intended as a tool, at the disposal of the European diplomatic service, to impose on the international community some so-called “new rights.”

Reason to shift in the European policy from the controversy on the issue of religious freedom to the dispute over the ethical issues is probably double. Firstly, the dispute over the ethical values is of paramount importance when it comes to the future of Christian
civilization in Europe. The dramatic change in social attitudes and in the legal framework in this area would mean a break up with Christianitas. Secondly, the Catholic Church is practically the only large institution standing in defence of the "old values" and traditional social institutions. It is therefore an intermediate but consciously chosen strategy of combating the Catholics.

WHERE WE ARE TODAY?

Alasdair MacIntyre wrote years ago:

It is always dangerous to draw too precise parallels between one historical period and another; and among the most misleading of such parallels are those which have been drawn between our own age in Europe and North America and the epoch in which the Roman empire declined into the Dark Ages. Nonetheless certain parallels there are. A crucial turning point in that earlier history occurred when men and women of good will turned aside from the task of shoring up the Roman empire and ceased to identify the continuation of civility and moral community with the maintenance of that empire. What they set themselves to achieve instead—often not recognizing fully what they were doing—was the construction of new forms of community within which the moral life could be sustained so that both morality and civility might survive the coming ages of barbarism and darkness. If my account of our moral condition is correct, we ought also to conclude that for some time now we too have reached that turning point. What matters at this stage is the construction of local forms of community within which civility and the intellectual and moral life can be sustained through the new dark ages, which are already upon us. And if the tradition of the virtues was able to survive the horrors of last dark ages, we are not entirely without grounds for hope. This time however the barbarians are not waiting beyond the frontiers; they have been governing us for quite some time. And it is our lack
of consciousness of this that constitutes part of our predicament.\textsuperscript{14}

I do not think the time has come for Christians to withdraw from the public life and to try to build a parallel society. It would be too easy. However in MacIntyre’s vision, one can find some useful analogies. First, we live at the turn of civilizations. One, perhaps, is dying on our eyes, at least in the form known to us. The next comes, probably, in two or three hundred years. Second, the barbarians are already within the walls of our city. “And it is our lack of consciousness of this that constitutes part of our predicament.”\textsuperscript{15} Living in a democratic regime, it’s hard to believe in this assessment of the situation. But if one day it has fulfilled the prophecy of self-distraction of the Western civilization, it would probably have nothing of apocalyptic disaster. The nature of the process would be much better than the verses from the Book of Revelation captured by T.S. Eliot’s intuition that “\textit{the world ends not with a bang but a whimper.”}\textsuperscript{16} Third, if someone has already agreed with this pessimistic perspective, must not forget that the future of our civilization has not been determined. The future, as Pier Giorgio Frassati used to say, “is in the hands of God and could not be better.” Christians, however, also have a part of responsibility for the future to fulfil. When Rocco Buttiglione once was compared to Saint Thomas Moor, he replied with humor: “He lost his head and I lost only my chair.” Price to be paid for fidelity is generally not too high.

There remains the intellectual work yet. The Second Vatican Council position on politics, articulated in the context of the bipolar world, seems to assume a positive scenario of the “earthly city.” It takes as a standard, being on line with the human nature, the Western model of democracy, associating it with the hope for a “healthy cooperation” between Church and state (GS 75-76). Fifty years later, one must conclude that the positive scenario materialized only in relation to the communist world. Western world, especially after the collapse of the communist system, has evolved in a different direction than assumed at the time of the Council. Also, the very institution of the nation-state -

\textsuperscript{14} Alasdair MacIntyre, \textit{After Virtue} 263 (3d ed., 2007).
\textsuperscript{15} Id.
what I tried to demonstrate - has changed. This applies both to the issue of sovereignty, as well as to the concern for the common good. The modern nation-state is no longer a *societas perfecta*, the organization of politics causes that the ratio of the government to the common good is increasingly ambivalent. In this sense, the state, as it is seen in *Gaudium et spes*, no longer exists. This statement is a lot of deliberate exaggeration, but it’s the only way to giving more focus to the nature of the problem.

The challenge seems to be double. The first concerns the language in which the position of the Church is formulated. To have a dialogue with ideologically neutral state, the Church agreed to translate her social teaching into secular language. Today, however, the question arises whether the Church is not suffocating in this corset of ideologically neutral concepts invented for the purpose of political science, in which she is not able to express the essence of her teaching. It’s hard to resist the impression that today what goes articulate in these categories is unattractive to Catholics, and at the same time is simply ignored by potential dialogue partners. Pope Benedict XVI mentioned this problem in his speech in the Reichstag. Facing the risk of a communication deadlock, the Church, rather to propose the renewal of theological language, which would explain the world in a complete and at the same time understandable manner, took over the terminology proposed by the world. Instead of the proposal of a new great theological narrative, she made her own secular thesis about the end of the era of any great storytelling. Thus, the second challenge: the idea of a paradigm shift, the demand for a new grand narrative, a new humanistic synthesis.

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17 Dominating today liberal terminology was proposed originally to describe the “artificial” political space invented by philosophers, not the real world created by God, *See generally John Milbank & Simon Oliver, The Radical Orthodoxy Reader* 178–196 (2009).
18 *See generally Pope Benedict XVI supra* note 5.
19 Pope Paul VI, *Gaudium et Spes*, THE HOLY SEE (Dec. 7, 1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html (In *Gaudium et Spes*, we can find two ways of talking about the socio-political reality. One refers to the tradition of St. Thomas Aquinas, the other to St. Augustine. So we have a reference to the principle of independence, autonomy and co-operation of the political community and the Church (76), but also to the idea that “the earthly and the heavenly city penetrate each other” (40). It seems that the adequacy of the proposed descriptions to the contemporary world is associated with the answer on whether the modern state of liberal democracy is ideologically neutral and that still serves the common good. The Christian community was named in the New Testament after the Greek word *ekklesia*, which meant anyone who possessed rights of
citizenship in the Greek polis. Although the Church was not a competitive polis, which aims to replace the temporal one, the language of citizenship was used to describe the membership of the community of believers (cf. Ep 2:19, Ph 3:20). Church citizenship, achieved through the baptism, is available to all, including those excluded from the political community.; William T. Cavanaugh, Migrations of the Holy: God, State, and the Political Meaning of the Church 125–127 (2011) (According to St. Augustine theological vision of two poles, the earthly city (civitas terrena) and the divine city (civitas Dei), Christians are, in a way, citizens of two worlds, required to “double” loyalty. They are bound to be loyal to some extent to the earthly, and in another aspect to the heavenly city (See: GS 43). However, while the reflection based on Aquinas thought puts two entities (Church and state) side by side, separating the ranges of loyalty (temporal things, spiritual things and res mixtæ), whereas in the school of St. Augustine their relationship is rather compared to the two taking place simultaneously on the same stage performances. Every word or gesture of a human actor provokes retort of the angels and of the bureaucrats (see Cavanaugh at 46–68). Performances, however, do not tell the history of the two institutions, but the history of two communities established through love: the love of God to self-denial (amor Dei usque ad contemtum sui) and a selfish love to deny God (usque ad contemptum Dei). Each one is a kind of love story that engages the whole person. Therefore, also the history of the earthly city is neither morally, nor religiously neutral. It is not indifferent to whom one offers his heart. History of the City of God is intimately linked to the history of the Church, although it cannot be identified with it, as the real community of the Church is the community of sinners. For this reason is not only the story of the triumph, but of the repentance and penance. The paradigm of St. Augustine, not so much present in the mainstream of the current Catholic reflection, can be quite easily inscribed into the theological understanding of the “clash of civilisations” (“civilisations of life” and “civilisation of death” - John Paul II). The category of “death” here is not limited to the loss of earthly life, but it is understood in the perspective of the choice of eternal death, as a consequence of rejecting God. Contributing to the temporal death of innocent people is not the cause of attribution to the “culture of death,” but the consequence of the earlier personal choice of the eternal death. The rejection of God is not a mere matter of an intellectual choice but also causes concrete effects in social life. Losing the sense of God, you lose the sensitivity to human. But, what should not be forgotten, it is impossible to determine the visible boundaries between the “city of God” and the “city of the devil.” If love is the criterion of citizenship, the border runs through the heart of every man. Each one of us sometimes is on the one, sometimes on the other side. The perception of social and political life as a “divine drama” may be better suited to the current dynamics of the political process.).
CATHOLIC CONTRIBUTIONS TO AND CRITIQUES OF HUMAN RIGHTS WITHIN THE UNITED NATIONS

Robert John Araujo, S.J.†

The Charter of the United Nations boldly asserts that “the Peoples of the United Nations... reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small.”1 These noble aspirations, which are further defined in the substantive articles of the Charter, are reiterated in the teachings of the Catholic Church. A brief excursion through the documents of the Church—from papal encyclicals and other documents, e.g., the Catechism, to the Compendium of the Social Teachings, to works of early Catholic authors such as Francis de Vitoria—illustrates that the Church recognizes and endorses the fundamental rights of the human person and has held and expressed this position for a long time. If that were all that need be stated, I could sit down, now. But I cannot for another question follows: how do the Church and the UN understand what is constitutive of human rights today in the present age that encompasses the work of the UN and the Church? Here, we see that there exists a growing divide between what is at the core of human rights claims and therefore, what human rights and their protection mean.

There is profound divergence between these two institutions on definitions of terms essential to authentic, fundamental human rights. This deviation concerning meaning is not a matter of reasonable and acceptable argument about degree; rather, it is a substantive disagreement on the essence of authentic human rights. The disagreement is not with the UN and its Charter per se, but it is with

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1 U.N. Charter at pmbl.
those who often control the direction in which the work of the institution
goes, a direction that increasingly has become an exercise of totalitarian
democracy and pure positivism.

To assist you in understanding this assertion, I will first offer the
explanation of totalitarian democracy and how it has affected many
understandings of human rights particularly within the United Nations
Organization and also within the democracies of North America and
Western Europe. Second, I shall explain the Catholic take on human
rights and why it is often involved in a robust disagreement with those
delusions who pave the path to totalitarian democracy and positivism.
In the second component, I shall also offer some thoughts of how the
emergence of totalitarian democracy can be met and countered by those
of us in the Church who are concerned about the legitimate rights of the
human person, human dignity, and the future of the legal understanding
of these important matters as they intersect the common good, which is a
fundamental precept of the Church’s teachings.

I. TOTALITARIAN DEMOCRACY AND POSITIVISM—THE TRANSFORMATION OF
HUMAN RIGHTS

In the early 1950s, the modern historian, Jacob Talmon (1916–
1980), began a study of what he identified as totalitarian democracy: the
corruption of democratic institutions based on the fallacious assumption
that there is a sole and exclusive truth in political systems. What I term a
“corruption,” Talmon calls “political Messianism,” which relies upon a
kind of paradoxical freedom—i.e., a freedom defined by a segment of
society that is a self-promoted elite. Totalitarian democracy is a political
system of absolute power which presents and then demands a monistic
view of the world. For the totalitarian democrat, all societies are a subset
of the state with the latter in absolute control.

Talmon remarks that the role of religion in the public exercise of
totalitarian democracy is negated and replaced by the “secular, social
morality” defined by the State. This kind of morality is a “doctrinaire

3 Id. at 2.
4 TALMON, supra note 2, at 3.
spirit” rather than spirited discussion and debate amongst the members of society that is characteristic of totalitarian democracy. This spirit necessarily relies on an uncompromising positivism that makes, interprets, and enforces law. Open and fair debate and discussion about important issues are eliminated in this society because contrary views, no matter how reasonable and relevant (and true), are considered enemies of the state and society in that they pose challenges to the values espoused by the state and its influential, controlling elite. Eventually, totalitarian democracy mutates into “an exclusive doctrine represented by a vanguard of the enlightened, who justify themselves in the use of coercion against those who refused to be free” in the sense that totalitarian democracy defines freedom.

While Talmon’s multi-volume study necessitates further investigation, let me conclude with one other thought of his here: he contends that totalitarian parties of the “Left have invariably tended to degenerate into soulless power machines, whose lip service to the original tenets is mere hypocrisy.”

Talmon was not alone in advancing this kind of thesis. Christopher Dawson (1889-1970), another historian and an Englishman, who was the first holder of the Chauncy Stillman Chair at Harvard (1958–1962), also studied dictatorships and totalitarian systems in addition to the role of Christianity in public life and culture. When it came to examining despotic systems, the objects of his investigation tended to be fascism, National Socialism, and Soviet Communism. However, Dawson also had a keen eye and an equally perceptive mind which enabled him to conclude that western democracies, including the United Kingdom and the United States, were not immune from the fanatical control by a despotic regime of Man and society which is the driving force of totalitarianism. As he said in his 1960 book *The Historic Reality of Christian Culture*,

The totalitarian state—and perhaps the modern state in general—is not satisfied with passive obedience; it demands full co-operation from the cradle to the grave. Consequently the challenge of secularism must be met on the cultural level, if it is to be met at all; and if Christians cannot

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5 *Id.* at 4.
6 *Id.* at 5.
7 *Id.* at 7.
assert their right to exist in the sphere of higher education [and I, Araujo, extend the remark to the sphere of the public square], they will eventually be pushed not only out of modern culture but out of physical existence. That is already the issue in Communist countries, and it will also become the issue in England and America if we do not use our opportunities while we still have them. We are still living internally on the capital of the past and externally on the existence of a vague atmosphere of religious tolerance which has already lost its justification in contemporary secular ideology. It is a precarious situation which cannot be expected to endure indefinitely . . .

The suggestion that Talmon and Dawson are prophets for the direction of the present age may disturb some people—even people who think they represent good will. But the prophet’s role is to disturb not because he is unkind or evil or mischievous but because he comes to alert his audience to impeding calamity. In the case of the corruption of good government, the calamity is the transformation of democracy into a despotism that defies objective reason in order to satisfy the appetite of the political, social, cultural, and economic elite who control the societies in which they live and operate. The absence of objective reason and the pull of a strong will founded on an exaggerated and aggressive subjectivity are the fuel which propels the machine of totalitarian democracy and its ally, legal positivism.

Talmon critically notes that it is an atypical understanding of freedom or liberty that is at the root of the mutation of democracy that becomes totalitarian democracy. Totalitarian democrats rely on the appearance of “rights” and want to seem that they befriend and protect them. But ultimately it is what the political elite who control the totalitarian democracy decides what “rights” are and by whom they are to be exercised in the fashion they prescribe. While the origin of the exaggerated freedom that is vital to the emergence of totalitarian democracy is not isolated to a particular country, its crux is well-captured

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9 See TALMUND, supra note 2.
by the plurality decision of Planned Parenthood v. Casey which the United States Supreme Court decided in 1992.

Casey was a legal controversy concerning abortion and the Commonwealth of Pennsylvania’s legal efforts to narrow and regulate the killing of unborn children permitted by the Court’s 1973 decision of Roe v. Wade. In Casey, the Court’s definition of the core right of “liberty” was subsequently used to rationalize the decision of Lawrence v. Texas decriminalizing same-sex sodomy and again most recently to redefine the import of marriage in United States v. Windsor. The Casey plurality defined liberty in this fashion: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”

While this definition may appeal to advocates of robust freedom, this expansive and dangerous definition of freedom has corrupted an important social and legal concept, and this distortion is overwhelming the discourse about human rights today. Here is the essence of the problem with the Casey definition: when two individuals are determined to follow the Casey understanding of liberty, there is no safety mechanism to avert the inevitable head-on collision when their respective views of freedom are diametrically opposed. Objective reason counsels against the definition, but objective reason is not sufficiently relevant to those who proclaim rights that are founded on satisfying extreme subjectivity.

There are a number of important illustrations of this mutation of rights in the context of the United Nations. Over the years since the 1950s, the Holy See has been combatting efforts to introduce birth

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13 Casey, 505 U.S. at 851.; see also Fr. John Courtney Murray, S.J., THE CHURCH AND TOTALITARIAN DEMOCRACY, 13 Theological Studies, 525–563 (1952) (where Fr. Murray had this relevant remark: “This philosophy [akin to that of the totalitarian democracy and found in Casey] asserts the absolute autonomy of the individual human reason. Each man is a law unto himself. Thus the freedom with which reason endows him knows no limits. Everything is in principle permissible, a matter of individual choice . . . . There is no objective order of obligations imposed on man; there is no one and nothing to create such an order. Man is bound to obey only himself.”).
limitation by various means. More recently in the 1990s, the use of the term “reproductive health” has been a key measure to further this morally problematic enterprise which is disguised as a “human right.” At one time, this term had a very helpful meaning. In 1999 the UN Population Information Network put together a draft dictionary that was available online at the UN official website which explained the meaning of terms frequently employed in UN discussions and debates. In this draft dictionary, the term “reproductive health” was defined as: “The health of an individual from puberty through the adult life span.” This could have been a definition which many, including the Church, may have accepted in the UN discussions without further ado because it captures the essence of the nature of and truth about human reproductive health. But two things occurred.

The first is that the dictionary and this definition disappeared without comment. It was as if Winston Smith’s “memory holes” from Orwell’s novel *1984* consumed what was but no longer is. Whatever the Ministry of Truth wished to rewrite and revise was facilitated by the memory holes scattered throughout the Ministry—or, for that matter, the UN. Second, a new understanding of the frequently used term “reproductive health” emerged which opened up access to abortion and artificial contraception as exercises of “human rights.”

This reformulation continues and is often insisted upon by the employment of a very heavy hand. The evolving understanding of “reproductive health” was not consistent with the 1999 draft definition to which I have previously referred. Today the term has become code language for something that was not originally intended, i.e., abortion and aggressive “family planning” regimes. The disappearance of the noncontroversial and sensible definition seems to be the sort of work of the totalitarian mind: eliminate that which harms the cause of a dangerous form of positivism, which is the social engineering tool of a political elite.

Another illustration of how this sense of disordered liberty has infected the United Nations is the 2012 document of the United Nations Office of the High Commissioner, Human Rights entitled *Born Free and*...
Equal: Sexual Orientation and Gender Identity in Human Rights Law.\textsuperscript{16} While this text asserts the protection of rights that belong to everyone, it makes a special case for the protection of sexual orientation and gender identity—categories which provide grievous problems for authentic human rights because they are exercises of totalitarian democracy and determined positivism. The UN documents and discussions rely on the polemic description of gender identity formulated in the highly controversial 2007 Yogyakarta Principles which subjectively defines this concept as: “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.”\textsuperscript{17} This means that even though a person is, in reality, a man (is male) does not really mean that a person is a man until he so decides that he is male. Given the exaggerated logic of this way of thinking, the man may decide that he is really a female—or perhaps something else—who happens to have the body of a male but his gender is female or something else. What makes him one or the other is not the intelligible reality of his physical nature that can be scientifically corroborated but his decision to be what he wants to be in spite of the physical, biological evidence to the contrary. This is empowerment of the “liberated” human person at its “finest,” which really means at its worst.

This explanation of the meaning of “gender” which has been accepted by strong and influential sources within the United Nations system is the source of a grave problem that is established on a false anthropology. The problem’s essence is that the meanings of “human rights” and “human dignity” are coerced in the direction of an exaggerated liberty that is not ordered but disordered; consequently, the capacity to protect the nobility of the human person, human society, and


the human family has been unduly compromised. What is promoted and protected is not the human person but a vulgar caricature of the noble creation of God.

Paradoxically, the Secretary General of the UN in his 2010 Human Rights Day speech expressed concern about discrimination that is based on sexual orientation and gender identity; thus, he was resolved to protect these faux “rights” because they, like any other right, cannot be compromised. He affirmed that “rights must carry the day.”18 Without further discussion and distinction about the meaning and substance of rights, the Secretary General’s assertion paves the way for future corruptions of human rights and their constitution. The formulation of liberty crafted in the smithy of the Casey plurality has wide-sweeping impact because it has given birth to these and other corruptions. Without being challenged, they will continue and proliferate, all to the detriment of authentic human rights and their necessary ally: objective reason.

What the Secretary General does not consider and the apocalypse which he does not address is the need to restrain the manufacture of more faux rights and prevent the havoc that will inescapably occur when these “rights” which are, in fact, licenses without sensible limitations, collide with the rights that are protected by human rights regimes and by the need to protect everyone one and the common good, which is indispensable to the human race. No consideration is afforded by the Secretary General to the rights of those persons who legitimately express objective and reasonable concerns about the claims based on sexual orientation or gender identity and abortion rights and the rights of the scientific community to clone new human life which is destined for destruction at an early age. What is happening in the present age is that anyone who disagrees with these problematic developments is labeled a bigot or a back-ward thinker to whose reasoned concerns dictate not engagement but exclusion from the public square.

As we have seen in the United States within the past year of major developments of sexual orientation and gender identity “rights,” same-sex marriage advocates have expressed surprise that their efforts and victories have opened the door to further redefinition of marriage

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that will permit just about any combination of persons and, perhaps in
due course, other entities to be deemed marriages demanding protection
of the state and its laws. These domestic developments have a
tremendous impact on international developments and the work of the
UN.

Here I now suggest that there is an indispensable assessment of
the Catholic Church’s stance on and necessary role in human rights
discourse. But first, there is a need to explain why the Church does two
things regarding this difficult transformation of otherwise legitimate
human rights: there is the need (1) to engage others in good faith through
reasoned and fair debate; and, (2) to speak and teach the truth that is
essential to the protection of the human person and the appurtenant
common good.

II. THE CATHOLIC UNDERSTANDING OF AND CONTRIBUTION TO HUMAN RIGHTS

The critique offered by the Church in many UN and other similar
debates today is not really of human rights; rather, the critique is of their
flawed interpretation, an appraisal directed to those who insist that there
can be different interpretations of fundamental rights as perceived
through a highly subjective lens. To apprehend correctly this critique, it
is crucial to understand the basis of the beliefs of the one offering the
critique and the foundation in reason on which these views are
presented. In addition, it is crucial to see that the Church does not give
up easily on those who do not accept the rational premises of her
teachings and the logical arguments used to justify them. The Church has
had a very long history of over fifteen hundred years of engaging the
temporal powers of the world so that the truth of God’s peace, love, and
care for each member of the human family may be recognized and
achieved and the common good sustained. In one important way, this
truth was tested early when at his trial before Pilate, our Lord Jesus
Christ stated that he was the way, the truth, and the life; but, the skeptical

19 See generally Kent Greenfield, The Slippery Slope to Polygamy and Incest, THE AMERICAN PROSPECT
Pilate asked, “What is truth?” The Church has answered Pilate’s question and has been teaching the response ever since.

When addressing matters related to human rights discourse, the Church argues that the human person has a nature essential to properly understanding human rights—a universal nature that is founded on an objective understanding of this moral agent, the human person. This is the objective truth of what we are as intelligent creatures who are citizens of two realms—the earthly and the eternal—are capable of understanding. In this context of dual citizenship, the human person possesses a dignity that inheres in the fabric of humanity. Regarding man’s nature: the human person is a beloved creature of God given reason and the intelligent ability to distinguish between right and wrong; good and evil; virtue and vice. The nature of the human person encompasses the destiny that embraces all people, which is union one day with the Creator of all. Regarding the dignity of the human person, the words of Jacques Maritain, as later used by Blessed John Paul II, define well this dignity: human dignity “means nothing if it does not signify that by virtue of the natural law, the human person has the right to be respected, is the subject of rights, possesses rights. There are things which are owed to man because of the very fact that he is man. The notion of right and the notion of moral obligation are correlative.”

From the Catholic perspective, rights and dignity are only part of the central concern about human rights as Maritain points out. There is another vital component of human rights discourse in the Catholic intellectual tradition that needs to be considered as was just suggested: responsibility. In essence, the claims to and exercise of rights untethered from responsibility will inevitably lead to the result of the uninhibited license codified by *Casey*. The Church recognizes the critical nexus

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21 The Gelasian Thesis of two powers—the Church and the State—is denied by the totalitarian democracy. The monism of totalitarian democracy not only abandons but is intent on eradicating the role of the Church and other religious institutions. The new religion under the totalitarian democracy is the state itself and the autonomous individual to whom this state caters within limits. Since there is nothing beyond the isolated individual and autonomous person, there is no god other than the individual himself. This view of course is a narrow construction which constricts the nature of the human person in an exceedingly artificial manner.
22 JACQUES MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW 65 (Doris C. Anson trans., Charles Scribner’s Sons, 1951).
between responsibility and rights, for without the former being the companion of the latter, bedlam is the inescapable result. Without the exercise of responsibility, each person becomes the judge of what is a right and how it is to be exercised. Responsibility reminds the rights-bearer that what he or she exercises must be properly claimed by everyone else if the right claimed is authentic. In essence, responsibility molds the right so that it enhances the dignity of the bearer and everyone else; it does not make the holder a caricature of the human person which some alleged rights inexorably do. [If you question what I am arguing here, I refer you to online photographic albums of images taken at the year’s Pride Parades in various cities around the globe.]

Another important element of the Catholic understanding of human rights law—as is true for all legal systems and principles considered by the Catholic mind—is the natural law and its indispensable role in explaining and protecting authentic human rights. The Church’s understanding of the natural law contends that human intelligence relies on objective reason to comprehend the intelligible reality of the world and human existence within it. This comprehension further enables the law maker to formulate norms that incorporate this comprehension. It is this natural law, and its derivative the natural moral law, which demonstrate that those who make claims that abortion, free sex, same-sex marriage, etc. are human rights are, in fact, wrong to advance and advocate for such things.

What is of further importance to the Church and her teachings about human rights is that objective reason must be the guide for charting the course for the proper direction which human rights advocacy must take. It is objective reason which illustrates that the Casey formulation of liberty and the rights claimed from it are unsustainable. In this regard, human intelligence taking objective stock of the intelligible reality of the human person is crucial to the task of formulating norms dealing with the rights and obligations of the human person and the freedoms the person claims. The UN Report to which I have referred fails to acknowledge any sympathy with objective reason and the intellect that is its companion. In essence, the Report removes the important modifier “ordered” out of the phrase “ordered liberty” which is important to the protection of fundamental rights. The result is that liberty becomes known by another name: chaos.
One more element of the Catholic approach to human rights discourse and debate must be considered. Stalin was correct when he questioned the Church’s temporal authority and asked how many divisions does the pope have? However, Stalin's commentary on military capability assumed that there are only certain kinds of power in this world to which we need to pay attention. But Premier Stalin did not consider that there is an authority in reasoned argument that is unimpeachable in its logic and ability to convince. This is the kind of argument which the Church labors to present when she engages the temporal powers of the world in human rights and other socio-legal debates at the UN or other public forums. Keeping in mind what Shakespeare’s Marcellus said in Hamlet about Denmark, the Church nonetheless holds the view and presents the case that even that which is spoilt might still be saved—including those public institutions that seem to be on the path that will embrace totalitarian democracy and legal positivism. Her view is established on three principles—1. the cultivation of the virtuous person and citizen who is schooled in the theological virtues of faith, hope, and charity and the cardinal virtues of justice, prudence, courage, and forbearance; 2. fidelity to the one who came to save us all and the confidence that God will help us in our exercise of faith; and, 3. generosity to never abandon that which may seem lost. After offering her critique, this is one particular, and I trust, true path on how the Church and her members contribute to the non-derogable rights of the human person.

The task is ours. Let us be steadfast to it and faithful to what God asks of us who follow His Son.

23 “Something is rotten in the state of Denmark.” *Hamlet*, I, IV, 90.