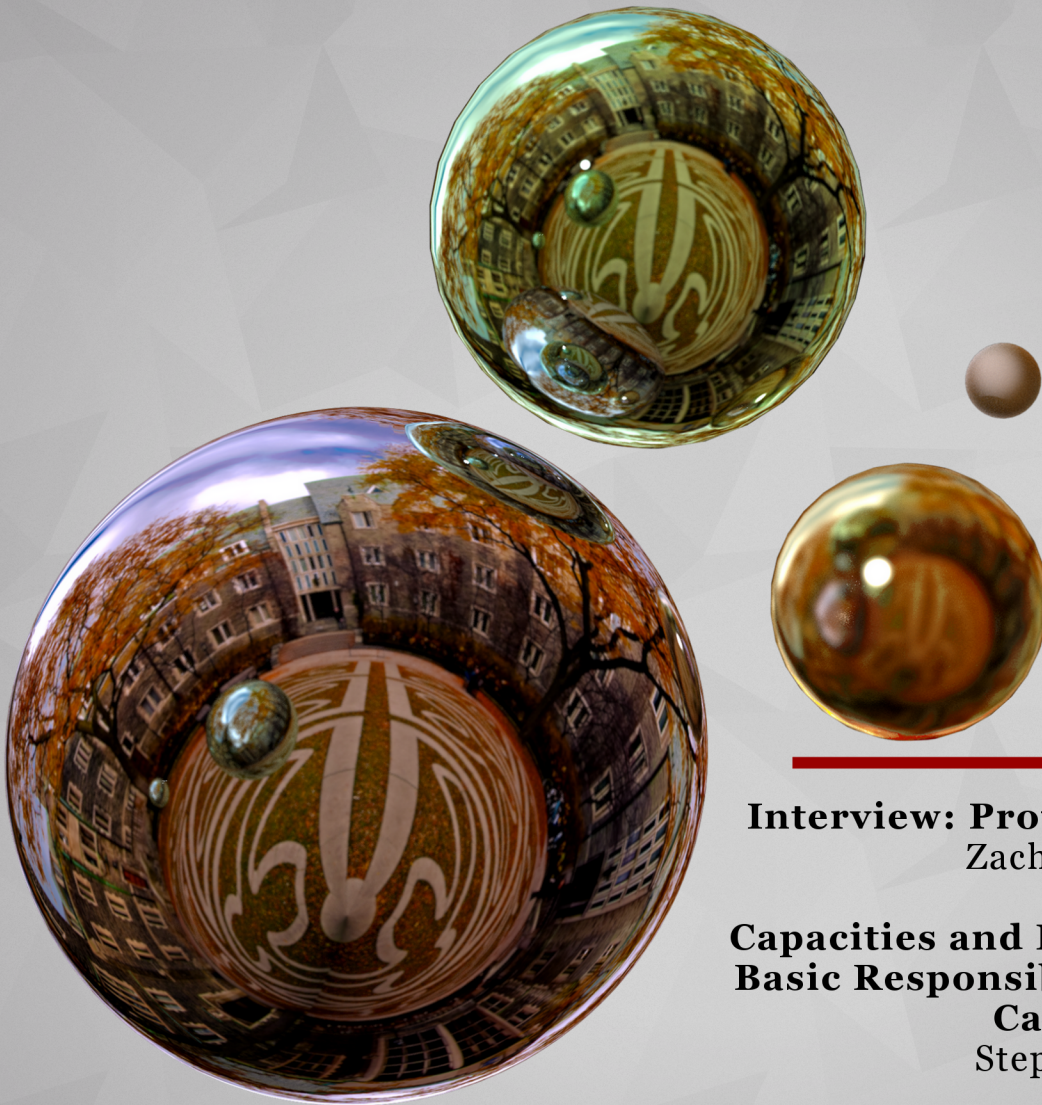


# mindful

Journal of Ethics, Society, and Law

Trinity College, University of Toronto

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**Interview: Professor John Duncan**  
Zach Davidson

**Capacities and Legal Responsibility:  
Basic Responsibility Is Not A Viable  
Candidate**  
Stephen Stich

**A Case for Consequentialism at the  
International Criminal Court**  
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International Arbitrators in Canada**  
Margaret Kim

**Proportionality and Necessity**  
Professor Tom Hurka

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# m i n d f u l

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## EDITOR'S INTRODUCTION

This fourth edition of *Mindful* marks a new chapter in the journal's history. Formerly *Mindful* was mainly affiliated with the University of Toronto's Centre for Ethics, where it largely focused on theoretical issues in the realms of moral and political philosophy. *Mindful*'s new home is the Ethics, Society, and Law (ES&L) program at Trinity College, University of Toronto. The undergraduate ES&L program is distinctively interdisciplinary, emphasizing and engaging with issues that have both theoretical and practical resonance. *Mindful* has a similarly interdisciplinary mission going forward: the journal seeks to gather excellent undergraduate papers in a range of fields that address topics that are relevant to society today.

The theme of this edition of *Mindful* has largely grown out of the submissions we have received. We pay special attention to the interconnected notions of conflict and responsibility. The journal opens with an interview with the director of the ES&L program, Professor John Duncan. Professor Duncan and I discuss the exciting new partnership between the ES&L program and *Mindful*, and what we hope to achieve. We also discuss Professor Duncan's own research on the war in Afghanistan, from both a practical and a normative perspective.

The three undergraduate papers we have assembled for this edition of *Mindful* take the baton from Professor Duncan and go from there. In "Capacities and Legal Responsibility: Basic Responsibility Is Not a Viable Candidate," Stephen Stich examines John Gardner's theory regarding capacity-responsibility, which has broad implications for our understanding of responsibility, particularly in a legal context. Shakir Rahim's paper, "A Case for Consequentialism at the International Criminal Court," argues that the ICC should not indict individuals if the result of doing so would be to increase the occurrence of international crimes under the ICC's jurisdiction. Finally, in "Conflict of Interest: Regulating International Arbitrators in Canada," Margaret Kim examines the problems that arise from the competing sets of ethical guidelines that regulate international arbitration.

The journal concludes with an essay by the philosopher Tom Hurka, entitled "Proportionality and Necessity," which focuses on just war theory. Professor Hurka argues that just war theory takes a deontological approach to evaluating the consequences of war, and he examines the theory in the context of past wars, including the Gulf War and the Iraq War.

Before concluding this introduction, I want to point out that *Mindful* has not been published since the fall of 2008. After such a period of inactivity, a special effort was required in order to get the journal back up and running. On that note, I owe a big thank you to all of our contributors and to the two editors who have made this edition of *Mindful* a reality. Shainaya Balchandran, who will be responsible for the next edition of the journal, did a terrific job of editing the undergraduate papers and keeping the journal on schedule. Russell Hoy also contributed valuable editing and insights, and was responsible for designing the cover for this edition of *Mindful*.

The fourth edition of *Mindful* coincides with the quarter-century anniversary of the ES&L program. We hope you enjoy it.

Zach Davidson, *Mindful* Editor-in-Chief

## AN INTERVIEW WITH PROFESSOR JOHN DUNCAN

*John Duncan is an assistant professor and the director of the Ethics, Society, and Law program at Trinity College, University of Toronto. He has been director of the program since 2005. Professor Duncan is currently writing a book on the war in Afghanistan.*

*Mindful's Editor-in-Chief, Zach Davidson, conducted an interview with Professor Duncan over email in the summer of 2012 in order to get his thoughts on both Mindful and the Afghanistan war.*

Mindful: *Mindful* has been mainly affiliated with the University of Toronto's Centre for Ethics since the journal's inception in 2005, publishing three issues in that timespan. *Mindful's* new home is the Ethics, Society, and Law (ES&L) program at Trinity College. As the director of the ES&L program, what are your hopes for the journal going forward? What do you think the journal will add to the ES&L program?

John Duncan: Let me begin by thanking you, Zach, and the rest of the editorial team for putting together the first couple of issues of *Mindful* under the wing of the Ethics, Society, and Law (ES&L) program, which we call "E-S-and-L." You are making an excellent beginning.

Producing a journal requires the work of talented and dedicated people, ES&L has an excellent student body, and *Mindful* and ES&L share interests in interdisciplinary normative issues. The fit between the program and the journal is all but natural. We hope ES&L students continue to take to the journal with enthusiasm, creating a regular vehicle for the expression of their work, both as editors and as authors.

We also expect the journal to be a significant co-curricular project, beyond the classroom, bringing ES&L students together to produce an issue each year. Such activities encourage students to do some of their finest work, provide them with excellent experience, help them hone research, writing, editorial, management, and public relations skills, and build strong relationships within the student body. We are excited about what *Mindful* and ES&L can bring to each other this year.

I should also mention that although ES&L is taking the lead in the production of the journal, the editorial team remains open to non-ES&L students, and the journal will solicit submissions from the entire undergraduate community at the University of Toronto and beyond.

Mindful: The ES&L program is distinctly interdisciplinary, and a goal of this edition of *Mindful* was for the content of the journal to share explicitly that interdisciplinary attitude. What do you think is the value of interdisciplinary education?

JD: Yes, ES&L is a truly interdisciplinary undergraduate major program, and by the way the program celebrates its 25<sup>th</sup> year at the University of Toronto this year. Its core is normative questions usually addressed in philosophy, political science, sociology, and the law. Each disciplinary approach has its merits, of course, but actual normative issues are considered exclusively according to single disciplines only in abstraction. To grasp an actual issue in its fullness one has to consider all its relevant facets. For example, each of international law, political theory, sociology, and ethics treats the legitimacy of war differently, for there are different disciplinary approaches to questions about the legitimacy of war, but a war is a war, a single, multifarious, and dreadful concrete object. It is important to consider all the relevant disciplinary approaches to get as full a picture as possible of the legitimacy of war. Of course, this generalizes to other issues as well. A university that did not tackle issues from both disciplinary and interdisciplinary perspectives would be a poorer university. ES&L is proud of its 25 year contribution to interdisciplinary studies at the University of Toronto, and we are very pleased to be moving into the next 25 years with *Mindful* as part of the program.

Mindful: In this edition of *Mindful*, our contributors provide both a theoretical and practical analysis of issues pertaining to ideas of responsibility, law, and conflict. Your most recent research has focused on a topic that touches on all three of these areas, namely, the war in Afghanistan. First, I would like to know, who do you think is responsible for the Afghanistan War (assuming you can assign responsibility to some party)?



JD: This question has anything but a straightforward answer. Even answers such as “Osama Bin Laden” are criticized. Because there are many international processes with respect to which the Afghanistan war has occurred, and because there are diverse frameworks of information about the conflict, a comprehensive answer exceeds what can be said in a chapter, let alone an interview.

Keeping that in mind, my simple answer is that the western powers, including Canada, and led by the United States are responsible for the war. We went to war to deal with a significant threat, but war is not the only way to deal with threats, and the threat of more attacks like 9-11 was very quickly reduced by increased security around the world as well as a bright light focused on the perpetrators. It was a war of choice. Furthermore, it was not a good choice, for nearly eleven years into it the US, NATO, and their allies—the greatest economic, political, and military force in history—has failed to defeat a tiny, undertrained, technologically primitive, and badly funded insurgent force in a small impoverished country. We chose war, and we chose badly. Perhaps a vibrant public discussion about alternatives to war would have altered that choice; building such a discussion today would be worth doing.

Mindful: The paper by Shakir Rahim examines the role of the international community in responding to armed conflicts, specifically the role of the International Criminal Court. What do you think has been the role of the international community in the Afghanistan War thus far?

JD: “The international community” is a term often used by politicians and the media, and it is usually meant to indicate the majority of the world’s states, all sharing a reasonable view about a particular situation. It has been invoked often to lend justification to war. Afghanistan and Iraq—more recently, Libya, Iran, and Syria—have been said to be defying the international community, which means, allegedly, that most states, all reasonable, support our policies against them. However, although there was a great deal of popular international support for the US immediately after 9-11, even within states at odds with US policy, that support did not carry over to the invasions of Afghanistan and

Iraq. Nevertheless, the US, NATO, and their allies have continued to claim that their policies are supported by the international community.

Interestingly, Egypt was not said to be defying the international community, at least not until it was clear that President Mubarak was unable to bring an end to the popular uprising. Although Egypt has been a leading player in the Arab Spring, seen around the world as a sign of hope, in which sustained non-violent popular protest can oust a corrupt and brutal dictator, the West's ties to Mubarak spared him from being called an adversary of the international community. Of course, dictators of regimes toward which the West is hostile are not spared.

Interesting international opinion polls show that more people consider the US a threat than al Qaeda, the Taliban, or Iran, and a review of United Nations General Assembly votes, or Security Council vetoes, reveals that the US and its allies are often at odds with the majority of states, which certainly has some claim to be called the international community. Because of the great power of the permanent members of the Security Council, which preserves the dominant international relations of power from the period immediately following World War II, important mechanisms of international governance fail to adequately represent the international community. Thus with respect to Afghanistan, the majority of citizens and states on earth—which constitute the actual international community—have been unable to end the very hawkish approach that has been taken.

Institutions such as the International Criminal Court (ICC), which is still only a decade old, are promising. However, the US withdrew from the ICC almost at its inception, and it withdrew from the International Court of Justice nearly two decades before that, not to mention the significant conventions of international humanitarian law it has not ratified. Even if the US were a completely benign state, because it has no obligations under such international mechanisms it is difficult to understand how its war of choice in Afghanistan is consistent with an adequate conception of the international community or

its norms. By standing outside the international community's normative institutions and mechanisms it defies that community, and its actions are in a significant sense lawless.

For example, the Western-supported regime in Afghanistan provided formal amnesty to regime-supporting warlords alleged to have committed war-crimes before the invasion (when the warlords were being supported by the West against the Soviets). Because the West supported the warlords in the 1980s, because it supports them now, because US non-membership in the ICC excludes its current support for the warlord-shielding Afghan regime from ICC jurisdiction, and because the ICC cannot investigate situations that occurred before 2002, Afghans wanting justice with respect to those war crimes will get none from the ICC. There are many other examples of major difficulties in the application of international norms. A largely just world remains a long way off.

Mindful: What do you think *should* have been the role of the international community in the Afghanistan War? And what do you think the role of the international community should be going forward?

JD: The war has been waged for nearly eleven years now, it will continue for another half decade at least (with massive Western financial and logistical support, if not troops), and the results are not encouraging at best. The international community should foster discussion about alternatives to war. It should have done so in 2001, to keep us out of a bad war of choice, and it should do so now to pull us out. Of course, voices have been building such a discussion, and they will continue to do so, but the drum beat for war is often very loud, requiring much more critical engagement.

Mindful: Has there been any discovery that has particularly surprised you regarding the Afghanistan war as you've conducted your research?

JD: When I wrote about close air support and civilian deaths in Afghanistan I was struck by the simplicity of certain mechanisms of spin. Our NATO-led forces simply deny wrongdoing when it is alleged, whether or not they are responsible. They blame the

enemy wherever it is convenient to do so, and they only make admissions and apologies well after other sources have made it clear that they are responsible, usually long after main-stream media scrutiny has moved on to other issues. Together with a developed sense of what the media and the public want to see and hear about the war, this simple stance of denial, blame, and delay works well to deflate serious criticism of policy and action in Afghanistan. It all proceeds quite simply, day in and day out, and there is something unnerving about that.

Mindful: If there were one thing that the Canadian public should know about the war in Afghanistan, what would that thing be?

JD: That information about the war is being managed, sometimes intentionally and sometimes unintentionally, but that some perseverance is all that is needed to dig for more and better information. Because we are democrats with strong beliefs in civil and human rights we Canadians expect our officials, including members of the media, to be on the morally better side of important issues. However, that very expectation may lead to credulity as much as to critical engagement, for the message may be managed so as to meet our expectations as much as possible, deflating rather than enabling serious criticism.

Since our country is engaged in war in Afghanistan, and since war is deadly business, it is up to each of us to resist the temptation to simply believe what we are told. It is our duty to subject our officials to the kind of scrutiny that helps ensure our country will be on the better side of history. If each of us picked an issue and engaged in some sustained digging, together we might expose the managed information and enable healthy and effective criticism.

Mindful: The last piece in this edition of *Mindful* is an essay by the philosopher Thomas Hurka that examines just war theory. I thought it would be fitting to end our interview on the same topic. So, I was wondering, do you consider the Afghanistan War to be a just war?



JD: I have not read Thomas Hurka's piece, which I am sure is excellent, but I have to admit I am not a fan of just war theory. There has already been too much war in human history so I do not think it helpful to come up with reasons to justify it. Even what some academics think are the right reasons may be, and are, misused in practice, and the misuse of a justification for war can have horrendous consequences. Rather, we need to develop criticisms of war.

Take the apparently simple case of self-defense. Very few would say that a war of self-defense is illegitimate in the case where a state minding its own business is attacked by an aggressor state. However, if we find ourselves judging an entire state to be purely aggressive, in contrast to our own innocence, and if we then go on to conclude that war is justified, we have made a strange sort of judgment with a dire consequence. Most likely, at least a significant minority of citizens in the aggressor state would much prefer peace. It is very difficult to imagine a state being essentially, fully, or completely aggressive, down to its last citizens. Such a state—entirely uncompromising and violent—is so unlikely we ought to be critical of any such judgments we or others make. Actions that might very well maim and kill people ought not to be based on such judgments.

In many cases such judgments have been made about states' leaders alone, but often enough those leaders have been befriended when it was useful for us to do so. Friends one day, enemies the next, such leaders are not purely aggressive, but rather individuals (with supporting elites) with whom negotiations and diplomacy have worked, and may yet work again.

Furthermore, war could be called the failure of peaceful co-existence, which comes close to saying that war is the failure of ethics as such. If we cannot live together and adjudicate disputes peacefully, if we must kill each other, we have in many respects failed as ethical individuals and communities. In such a situation of failure there might be better and worse considerations both about the fight as a whole, and about particular aspects within the fight, which are the two traditional domains of just war theory, but the

only genuinely good option is the peaceful cessation of war. Thus I find it difficult to defend any war with a term as normatively important as justice. Because the Afghanistan war is a war of choice, and a bad choice at that, I am certainly unwilling to defend it as a just one. Entering such a war is a very deep failure of peaceful co-existence. As I said above, there are other ways to deal with threats, including diplomacy, which, with important exceptions of course, is on the side of peaceful co-existence, unlike war. We are too quick to judge that diplomacy must fail and so war is legitimate by some kind of necessity.

Finally, I suggest that the fruits of a wide-ranging and careful analysis of the facts in any particular case will exceed just about any example of just war theory. And surely, careful and reflective analysis and discussion of the details are necessary to decide if a theory is applicable, so one cannot substitute theory for investigation. The particulars are always challenging; just war theories are usually Procrustean beds.

Of course, these objections are all too briefly stated, and proponents of just war theory will attack them on many grounds. I might reply at length with much more subtle clarifications, but then I would be falling into the world of just war theory, which, in my opinion, would do little to help build the sort of relevant citizen-based discussion that might help us avoid more war.

Let me close by commending you for kicking off ES&L's *Mindful* with an issue that is open to disciplinary, interdisciplinary, and engaged and critical discussions.

Also, I have seen some of the work going into the second ES&L issue—including an interview with Sharhazad Mojab—which looks wonderful.

I look forward to seeing the first two issues on-line during this the 25<sup>th</sup> year of the Ethics, Society, and Law program.



*If it tempts you so much, try going inside in spite of my prohibition.  
But take note. I am powerful. And I am only the most lowly gatekeeper.  
But from room to room stand gatekeepers, each more powerful than the other.  
I cannot endure even one glimpse of the third.*

Franz Kafka, *Before the Law*

CAPACITIES AND LEGAL RESPONSIBILITY:  
BASIC RESPONSIBILITY IS NOT A VIABLE CANDIDATE

Stephen G.W. Stich

ABSTRACT. In this paper, I argue that John Gardner's version of capacity-responsibility is inadequate. In §1, I outline his position. In §2, I raise an objection and address three possible responses. My general strategy is to show that Gardner's view entails that basic responsibility is a necessary condition for consequential responsibility, but that this results in unintuitive consequences.

INTRODUCTION

The nature of legal responsibility is fundamentally important to the philosophy of law, since responsibility is closely related to liability and criminal punishment. Unfortunately, the notion of responsibility is difficult to understand, particularly because it is used in different senses. Here are two such senses: (1) Nigel is acquitted because he was deemed *not a responsible person* (think of "diminished responsibility"), and (2) Melissa is *held responsible* for accidentally breaking the vase. In (1), responsibility is understood as some sort of a capacity, and as such can be specified without direct reference to any law; we might say that Nigel is *not responsible, simpliciter*. In (2), though, responsibility is understood roughly as a duty to compensate, and therefore is based on the violation of a particular legal duty; we might say that Melissa is *responsible to someone* for breaking the vase.

It seems plausible that there is a close connection between these two senses of responsibility, since one might like to think that people are *held responsible for their conduct* only when they *are responsible people*.<sup>1</sup> In other words, one might think that

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<sup>1</sup> That capacities play a central role in determining responsibility is not universally agreed-upon, as some, such as Arthur Ripstein, believe that responsibility is based on entitlements and duties rather than on



being a responsible person is a necessary condition for being held responsible, at least in the sphere of actions in which one is held responsible for one's own conduct.<sup>2</sup> While this claim seems plausible, it is difficult to provide an adequate account of the relevant capacity that determines when one is a responsible person. One such account is given by John Gardner, who claims that capacity-responsibility, or *basic responsibility* as he calls it, is understood as the "ability to respond"<sup>3</sup> or, literally, "response-ability."<sup>4</sup> What this means will be explained shortly.

The purpose of this paper is to show that basic responsibility is an inadequate notion of capacity. In §1, I explain the relevant aspects of Gardner's account. In §2, I examine a case in which the defendant is held responsible but is not basically responsible, which shows that being a responsible person *cannot* be a necessary condition for being held responsible, at least on Gardner's conception of what it means to be a responsible person. Intuition and the law both dictate that the defendant in question should be held responsible, so I will also respond to three objections to my argument, all of which attempt to show that the defendant actually is basically responsible. The narrow

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capacities . This means that, depending on the definition of "capacity," views such as Ripstein's might entail that one can be held responsible without being a responsible person . See, for example: Ripstein, Arthur. "Philosophy of Tort Law," in *The Oxford Handbook of Jurisprudence and Legal Philosophy*, ed. Jules Coleman and Scott Shapiro. Oxford: Oxford University Press, 2001.

<sup>2</sup> This proviso excludes cases such as, for example, pet-owners' responsibility for the actions of their pets, in which it is less (or not at all) intuitive that one is held responsible only when one is a responsible person.

<sup>3</sup> Gardner, John. *Relations of Responsibility*. Oxford Legal Studies Research Paper No. 15/2011, p. 1. The final version of this paper has since been published in Gardner, John. "Relations of Responsibility," in *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff*, ed. Rowan Cruft, Matthew H. Kramer, and Mark R. Reiff. New York: Oxford University Press, 2011. I am citing the working paper because I have not been able to access the book.

There is an ambiguity in what it means for a person to be able to respond to reasons, since this ability might or might not involve sensory capacities in addition to rational ones . I think that a more charitable and accurate reading of Gardner would place this ability solely within the rational sphere . However, because my eventual counterexample to Gardner works on both interpretations, and because it would take several pages to show that the correct interpretation involves only rational abilities, I have concluded that resolving this ambiguity would take us too far afield . I suggest that the reader think of the ability to respond to reasons as a solely rational ability (i.e. one that takes place only after perception of the relevant facts has occurred).

<sup>4</sup> Gardner, John. *Offences and Defenses*. Oxford: Oxford University Press, 2007, p. 182.

conclusion of the paper is Gardner's notion of capacity is inadequate. The broad conclusion is that, if there is a type of capacity that is independently relevant to legal responsibility, it cannot be understood solely in terms of the ability to answer for oneself. Let me start by explaining Gardner's view.

## I. THE BASICS OF BASIC RESPONSIBILITY

In addition to the above characterizations of basic responsibility, consider this one: Basic responsibility is "the ability to explain oneself, to give an intelligible account of oneself, to answer for oneself, as a rational being."<sup>5</sup> This implies that basic responsibility has two elements: the ability to have reasons for one's conduct, and the ability to communicate these reasons to other rational beings. As Gardner puts it, these elements form a compound that entails that one has "the reason of a communicator, and the communication of a reasoner."<sup>6</sup> In trials, this often comes out as the "ability to offer justifications and excuses,"<sup>7</sup> since justifications and excuses are normally *reasons* for the defendant's behaviour that free her from liability. For example, you might justify your decision to punch me in the face by claiming that it was reasonable to do so, given that I was running at you with a knife. Thus, by asserting that she had a reason for behaving in a particularly way, the defendant *a fortiori* claims that she is a being capable of having and communicating these reasons. So, by offering a justification or excuse, one asserts one's basic responsibility.

However, according to Gardner, basic responsibility is more than an ability – it is also a propensity that all rational beings possess: "Those who are capable of explaining

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<sup>5</sup> Gardner (2007), 182.

<sup>6</sup> Ibid., 186.

<sup>7</sup> Ibid., 182.

themselves cannot but want to do so.”<sup>8</sup> This is illustrated by the fact that defendants, when given the choice between pleading diminished responsibility – thereby asserting that they were incapable of responding to reasons at hand – and offering a justification or excuse, will almost always choose to offer the justification or excuse.<sup>9</sup> For, as we have seen, offering a justification or excuse involves giving a *reason* for one’s conduct, which *de facto* asserts one’s status as a rational being. However, in pleading diminished responsibility, the defendant gives up her chance at making this assertion, since diminished responsibility entails an *inability* to respond to the reasons at hand. So, Gardner claims that the fact that defendants would rather offer a justification or excuse than plead diminished responsibility shows that rational beings want to be seen as rational.

Furthermore, Gardner holds that the assertion of basic responsibility is intrinsically valuable for two reasons. First, he sees it as a “human good,”<sup>10</sup> or a natural part of exercising one’s existence as a rational being. Second, he holds that all rational beings have an interest in possessing a “successful understanding of the world around them.”<sup>11</sup> In a trial, it is most often the case that a large part of this understanding turns on the reasons that the defendant gives for her conduct. Thus, the defendant’s correct assertion of her identity as a rational being enables all involved in the trial to have a successful understanding of the world around them.

However, as we have already seen, basic responsibility is not the only kind of responsibility found in trials. Gardner identifies the other kind, *consequential*

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<sup>8</sup> Gardner (2011), 3.

<sup>9</sup> Gardner (2007), 180-1.

<sup>10</sup> Ibid., 181.

<sup>11</sup> Ibid., 188.

*responsibility*, with being forced to bear the moral or legal consequences of one's conduct (i.e. being held responsible in the sense that Melissa is held responsible for breaking the vase).<sup>12</sup> Consequential responsibility plays two important (but, as we shall see, dispensable) roles relevant to basic responsibility in trials. First, the *threat* of consequential responsibility (i.e. the threat of being punished, being held liable, etc.) provides a motivation for people to express their basic responsibility. This works because, all things being equal, people do not want to be held consequentially responsible, and the threat of being held consequentially responsible provides a motivation for the defendant to offer a justification or excuse – in other words, it provides a motivation for the defendant to explain herself, and therefore to assert her basic responsibility. The threat of consequential responsibility is an effective means of motivating such assertions because the only alternative open to the defendant, apart from accepting avoidable and unpleasant consequences, is to assert that she was incapable of responding to reasons in the situation. And, as we have already seen, this is inconsistent with rational beings' innate propensities to assert their rationality. Therefore, the threat of consequential responsibility motivates assertions of basic responsibility, which are intrinsically valuable.

Second, according to Gardner, being held consequentially responsible serves to *express* the fact that one is basically responsible.<sup>13</sup> That is, the fact that one is held responsible expresses the fact that one is a responsible person. The converse, however, is not true: basic responsibility does not express consequential responsibility, since communicating that one acted in accordance with reasons does not express that one must

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<sup>12</sup> Ibid., 177.

<sup>13</sup> Ibid., 191-2.



bear the consequences of this conduct. After all, one can assert one's basic responsibility by offering a justification or excuse, which can nullify consequential responsibility.

Crucially, the fact that consequential responsibility expresses basic responsibility means that being held consequentially responsible when not basically responsible prevents part of the intrinsic value of basic responsibility – that of enabling people to understand the world around them – from being actualized. In other words, if consequential responsibility serves at least partly to express basic responsibility, then a defendant's being held consequentially responsible when not basically responsible hinders the community of rational beings from understanding the world around them. This is because this finding of consequential responsibility incorrectly asserts that the defendant is also basically responsible, thereby providing false information to the community of rational beings. For this reason, we can say that, on Gardner's account, *basic responsibility is a necessary condition for consequential responsibility*. It is worth noting that Gardner claims that trials would still be valuable even if punishment and civil remedies were abolished from them because defendants would still be given the opportunity to explain themselves,<sup>14</sup> for people's propensities to express their rationality would still motivate this explanation. This reflects an important sense in which basic responsibility is more basic than consequential responsibility – there are some cases in which people can be basically responsible without being consequentially responsible, but, according to Gardner's theory, the converse is impossible.<sup>15</sup>

It might occur to the reader – for good reason – that trials are an incomplete means to the end of helping all rational beings understand the world around them. For, as

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<sup>14</sup> Ibid., 190-2.

<sup>15</sup> Remember, of course, that our discussion is restricted to the sphere of consequential responsibility in which one is held responsible *for one's own conduct*.

Gardner admits, one can be compelled to explain oneself only when one is suspected of having committed a wrong because, “[t]o challenge someone to justify or excuse herself, with a threat of punishment in the event that her justification or excuse is unsatisfactory, is to accuse her of committing a wrong.”<sup>16</sup> However, Gardner does not mean for trials to be the only useful way of expressing basic responsibility – they are just the only situations in which people can be *forced* to give an account of themselves. In fact, all assertions of basic responsibility are valuable.<sup>17</sup>

Before concluding this section, it is important to note that Gardner does not claim that basic responsibility is a sufficient condition for legal responsibility more generally. For Gardner recognizes that there are some senses of responsibility that are based on what one person owes another, but denies that basic responsibility is one of these senses.<sup>18</sup> Coupled with his claim that one can be threatened with consequential responsibility only when one is legitimately suspected of legal wrongdoing, it can be reasonably inferred that Gardner holds that responsibility in the law also requires the violation of a legal duty; people can be punished or held liable only when they have been found to have violated a legal duty. But, crucially, they must also be basically responsible, since basic responsibility is a necessary condition for consequential responsibility.<sup>19</sup> In what follows, we shall be primarily concerned with the relationship between basic and consequential responsibility.

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<sup>16</sup> Ibid., 196-7.

<sup>17</sup> This clearly presupposes that the trial is at a stage at which it has been established that the defendant was in some way implicated in the wrong; for some trials might center on whether or not the prosecution is able to causally connect the defendant with the wrong, and therefore whether or not it is legitimate to demand that the defendant explain herself. Such trials would not necessarily require the defendant to take the stand, let alone justify or excuse herself.

<sup>18</sup> Gardner (2011), 2.

<sup>19</sup> There is a terminological question here of whose answer I am not sure. It could be that, for Gardner, one must be basically responsible in order to be said to violate a legal duty; on the other hand, he might say that

## II. MY OBJECTION: A CASE IN WHICH THE DEFENDANT IS CONSEQUENTIALLY RESPONSIBLE BUT NOT BASICALLY RESPONSIBLE

In this section, I raise an objection to the notion that basic responsibility is a necessary condition for consequential responsibility. This is not meant to diminish the value of basic responsibility, but to show that there are some instances in which a person can be held consequentially responsible without being basically responsible. This means, broadly speaking, that, if we want to hold onto the claim that people are held responsible because they are responsible people, being a responsible person cannot be understood in terms of being basically responsible.

My objection is best illustrated with an example: Charles is a person of normal capacities who has a habit of walking on people's yards even when he could just as easily walk on a sidewalk. The habit is so entrenched that he does not even realize that it is a habit, and so does not think about changing it – it is part of his normal routine. As he walks on Darren's yard, he accidentally tramples some flowers. Now, intuition and the law both dictate consequential responsibility in this case – Charles must pay Darren for the damages caused to the flowers. However, it is not clear here that Charles had a reason for behaving in the way he did, for his behaviour was simply the result of habit. Because Charles did not have a reason for his conduct, he cannot be held basically responsible or, by extension, consequentially responsible. And, this violates intuition and the law. So, in a nutshell, my objection is:

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one can violate a legal duty without being basically responsible, but can be held consequentially responsible for it only when basically responsible. The answer to this question makes no difference to my argument, though, because my counterexample in Section 2 already assumes that the defendant 1) violates a legal duty, and 2) is consequentially responsible.

(1) Assume (for *reductio*) that basic responsibility is a necessary condition for consequential responsibility.

(2) Charles is not basically responsible.

Therefore,

(3) Charles is not consequentially responsible. [1, 2]

But,

(4) Charles is consequentially responsible.

Therefore,

(5) (1) is false. [3, 4]

Where might one object? (1) is from Gardner's view, (3) logically follows from (1) and (2), and (4) is given by intuition and the law. Given that (3) and (4) entail a contradiction, (1) or (2) must be denied. The only option for a defender of Gardner, therefore, would be to deny (2). So, in the rest of the section, I will defend (2) against three potential objections. The first is that some non-rational ability prevented Charles' basic responsibility from being expressed, but Charles really ought to be considered basically responsible. The second is that Charles' habit expresses his basic responsibility. The third uses Joseph Raz's Rational Functioning Principle to argue that Charles can be held responsible for the failure of his rational capacities.

Before starting with the objections, though, let me say a few words about the intuition of the case. It might be thought that, because Charles does not realize what he is doing, he must be mentally ill, and would therefore not be held consequentially responsible – he could plead diminished responsibility. While this might be a tempting thought, we normally do not consider a person to be mentally ill only in virtue of his

having a relatively trivial habit. For example, if a person, while presenting a paper, has a habit of raising the pitch of his voice at the end of each sentence, we do not due to this fact doubt the legitimacy of his presentation because the habit suggests that he is insane, or recommend to him later that he get psychiatric help. Rather, we simply recognize that this otherwise completely normal person has a strange habit, and leave it at that. In other words, we treat the person with the strange habit *normally*. The same is true for Charles. That is, there is no reason to infer from the fact that he has a relatively trivial habit to the fact that he must be of diminished responsibility. For, he could be otherwise completely normal. Sometimes normal people have strange habits, and Charles is one of those people. His habit is no reason to think that he ought not to be treated normally; in other words, it is no reason to think that he ought not be absolved of his consequential responsibility.

## II.1: NON-RATIONAL ABILITIES PREVENTED CHARLES' BASIC RESPONSIBILITY FROM BEING EXPRESSED.

There is an ambiguity in what Gardner means by the ability to respond to reasons (see footnote 3). It clearly involves the ability to process information given by one's sensory faculties, but it is an open question to Gardner whether it can also require the ability to obtain this information (e.g. via sense perception) in the first place. I think that Gardner would claim that it involves only the rational part of this ability (i.e. not one's ability to obtain the relevant information via sense perception), and I am willing to concede this point for the sake of the following objection. There is no disadvantage to the defender of Gardner for allowing me to concede this because it is necessary for the objection.

Now, suppose that a defendant fails to exercise her rational abilities not because her rational abilities fail, but because a non-rational ability prevents them from kicking in in the right way – perhaps, for example, she did not see the car swerving in front of her own car until it was too late, but she could have seen it had her reflexes been working properly.<sup>20</sup> It is clear that the defendant is not strictly basically responsible because she did not respond to a relevant reason, but it is equally clear that the defendant is not ‘not-basically-responsible’ in the same sense as she would be if she had seen the car in time but not acted accordingly. This is because her failure to respond to relevant reasons in this case is not caused by a failure of her rational faculties. And, because the ability to respond involves *only* one’s rational faculties (as we are supposing for the sake of this objection), there is a sense in which it would be disingenuous to claim that this defendant is not basically responsible.

The objector might claim, therefore, that there should be a third category – indeterminate basic responsibility – that captures situations in which this occurs. However, this is complicated when it comes to trials because in trials there are only two options instead of three: either the defendant is consequentially responsible or she is not. Because there is no room for this third category in trials, the defender of Gardner might claim that the best option given the situation is to make the best possible inference as to whether or not the defendant *would have* been able to respond to the reason at hand had

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<sup>20</sup> It is important to be careful here, for there *is* a sense in which she is acting rationally – she is acting in accordance with her senses’ report of a clear road ahead. However, she is *not* acting rationally with respect to the question at hand, for the question at hand is whether she ought to be considered basically responsible for hitting the car. And, we cannot infer from the fact that she is acting rationally with respect to the information that there is a clear road ahead to the fact that she would have acted rationally had her senses reported that there was a car in front of her. So, while she is acting rationally in a sense, it is not the sense that we are concerned with – in assessing liability for damage caused to the car and its occupants, the question that must be asked is whether she is basically responsible for hitting the car, not whether she was acting rationally given her sensory information.

her non-rational abilities been working properly. And, in many cases, the defendant would have been able to respond to reasons but for the failure of her non-rational abilities. Therefore, even though she did not respond to reasons, she ought to be considered basically responsible anyway.

Again, I will concede this line of argument to the defender of Gardner, since it seems plausible. The next step will be to claim that Charles is prevented from responding to reasons by the failure of some non-rational ability and that, on the whole, he should be considered basically responsible because, had this non-rational ability not failed, he would have responded to the relevant reason. The question, then, is: Which factor in Charles' situation prevents his rational abilities from kicking in? The only potential candidate, it seems, is a factor that distracts Charles from contemplating reasons against walking on Darren's law, namely his habit of walking on lawns. In order for the response to work, the following proposition, hereafter called P, would have to be true: "If a person is distracted then her rational faculties do not fail, but rather do not have the chance to kick in." I will now show that P is false.

On the face of it, P seems plausible, since it seems that the capacities required to overcome a distraction (in Charles' case, his habit of walking on people's lawns instead of the sidewalk) are not necessarily the same as the capacities required to contemplate the reason that the distractions are preventing one from contemplating. For it might be the case that if Charles had recognized that his habit distracted him from contemplating a reason, he would have contemplated that reason. Thus, not holding Charles consequentially responsible, according to P, would imply that he did not have the rational capacities required to contemplate that reason, which would be an incorrect identity

assertion. This would mean that Charles would have to be held consequentially responsible.<sup>21</sup>

For what follows, by “recognizing a reason” I mean: “realizing that a particular reason applies to one’s sensory information.” This is to be distinguished from the acquisition of that information – recognizing a reason comes after sense perception. Now, it is first important to realize that P presupposes that recognizing a particular reason is not part of the act of contemplating that reason. For if it were part of the act of contemplating that reason, then the failure to recognize a reason would constitute a failure to contemplate it, since it is impossible to contemplate a reason that one has not recognized. And, if a failure to recognize a reason were to constitute a failure to contemplate it then P would be false, since it would be the case that a person’s being distracted *would* entail the failure of her rational faculties. I will now show that there is no good reason to believe that recognizing a reason is not part of the act of contemplating it.

We saw above that P seems plausible because the capacities required to overcome a distraction are not necessarily the same as those that involve other aspects of contemplation. However, the reason for this stipulation is *ad hoc*. Now, it is clear that contemplating a reason can involve more than one distinct activity; for example, contemplating a reason can involve weighing it against other reasons, applying it to different circumstances, etc. Moreover, these distinct activities could involve different capacities. This means that it is already presupposed that distinct activities involving different sets of capacities can be part of the overall act of contemplation. Therefore, to exclude the recognition of a reason (and by this I mean only in those cases in which one

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<sup>21</sup> Strictly speaking, this only means that he would have to be held basically responsible . But, as he also satisfies the other condition of consequential responsibility – the violation of a legal duty – he will also be held consequentially responsible.



already has the correct sensory information) from the overall act of contemplating it would require that there be some salient difference between recognizing a reason and all other ways of contemplating one; and there is strong reason to believe that there is no such difference. For, like all other activities involved in contemplation, both involve the use of distinctively rational capacities, and both are necessary conditions for the success of the act of contemplation whenever they apply.<sup>22</sup> And, these seem to be the paradigmatic features of instances of contemplation. Therefore, because there seems to be no salient reason to exclude the process of recognizing a reason from the process of contemplating a reason, doing so would be *ad hoc* – there are better reasons to think that the process of recognizing a reason *is* part of the process of contemplating a reason.

Furthermore, factors that distract one from contemplating a particular reason are themselves simply impediments to recognizing that reason. This means that the failure to overcome these distracters is a failure of the capacity to recognize a particular reason. And, given that the capacity to recognize a reason is a necessary component of the overall act of contemplation (it is surely impossible to contemplate a reason at all without recognizing it), the failure to recognize a reason constitutes a failure of the overall act of contemplating that reason. Therefore, the failure to overcome a distracting factor can be considered a failure of the ability to contemplate the reason that the distracter prevents one from contemplating, since the failure to overcome the distraction constitutes the failure to recognize the reason. This entails that P is false and that, therefore, Charles cannot be held basically responsible in virtue of assuming basic responsibility from a strictly indeterminate case. Thus, the first response to my objection fails.

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<sup>22</sup> I stipulate “whenever they apply” because, in some cases, certain possible aspects of the overall act of contemplation will not exist. For example, it will sometimes not be necessary to weigh a particular reason against others, because no such others will exist. However, recognition of a reason applies in all cases.

## II.2: HABITS EXPRESS RATIONALITY

Now, the second response has a significantly different flavour from the first: while the first denies that Charles' rational capacities fail, the second claims that Charles' habit itself expresses his rational capacities. This response would claim that, since Charles' habit itself derives from the consideration of a reason, it therefore expresses his rational identity.

There are two problems with this response. The first is that it might be simply false, i.e. that Charles might have acquired a habit due simply to repeated behaviour involving him walking on people's lawns that did not involve contemplating reasons. The second problem is that, even if Charles' habit were to express his rational abilities in virtue of the fact that his habit was arrived at due to consideration of some reasons, these are the wrong rational abilities, since they could very well be significantly outdated – perhaps Charles acquired this habit when he was a child and did not bother contemplating his behaviour since then. In this case, Charles would, by being held consequentially responsible, express the rational identity he had when his rational abilities were markedly different from his current ones; the fact that he was able to use particular reasons a long time ago does not entail that he still has the same ability. Furthermore, when he was formulating the habit in the past, he was beset by different circumstances, most pertinently the fact that, in the past, he did not have the impediment of a habit making it more difficult for him to consider the relevant reasons. Therefore, this response fails in virtue of the fact that it would express the wrong rational identity.

### II.3: BASIC RESPONSIBILITY CAN BE EXPRESSED BY THE FAILURE OF ONE'S RATIONAL CAPACITIES

The third response to my objection stems from consideration of Joseph Raz's Rational Functioning Principle. According to Raz, we are responsible for "conduct which is the result of the functioning, successful or failed, of our powers of rational agency."<sup>23</sup> It should be pointed out that this is not entirely consistent with Gardner's account of the way in which we are held responsible. While Gardner claims that asserting one's basic responsibility for a particular conduct involves communicating the reason that one used in contemplating said conduct, Raz's principle does not have this requirement. Instead, Raz requires only that one have mastery of the conduct in question, that the conduct in question be in one's "domain of secure competence."<sup>24</sup> This is not the same as basic responsibility, but it is very similar, and serves a similar function. According to Raz, by asserting that one's failure to behave in a certain way was due to a malfunction in one's rational capacities, one is thereby *de facto* asserting that one has said capacities. In Gardner's terms, according to the Rational Functioning Principle, one can express one's basic responsibility when one fails to use a reason by asserting that using the reason is normally within one's domain of secure competence.

It might seem, therefore, that embracing the Rational Functioning Principle solves the problem of basic responsibility in the Charles case. For, if we can be held basically responsible for failures as well as successes, then it might seem as if Charles can be held basically responsible for the failure of his rational capacities to consider a reason against trampling Darren's flowers. However, the Rational Functioning Principle presupposes

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<sup>23</sup> Raz, Joseph. *Responsibility and the Negligence Standard*. Oxford Journal of Legal Studies 30:1, p. 16.

<sup>24</sup> *Ibid.*, 16.

that the conduct in question be within Charles' domain of secure competence, and there are telling reasons that we should not assume that walking on the sidewalk falls into this domain for Charles.

Now, Raz does not provide a definition of the "domain of secure competence," but he does associate this domain with the range of actions of which we are masters.<sup>25</sup> Again, this is somewhat ambiguous, but it is plausible that, broadly speaking, an action of which one is a master is an action that one can be reliably expected to complete on a given occasion, and one that is primarily within one's sphere of control.<sup>26</sup> If this is indeed what Raz means by the domain of secure competence, then it should be clear that not trampling Darren's flowers is not within Charles' domain of secure competence. While the behaviour is within Charles' sphere of control, past experience dictates that it is unlikely that Charles would have not trampled the flowers, given his habit of walking on people's lawns despite the sidewalk being right beside him. This means that he cannot be reliably expected to avoid the lawn, from which it follows that not trampling the flowers is not within Charles' domain of secure competence. Therefore, Charles cannot legitimately assert that trampling Darren's flowers constitutes a malfunctioning of his rational capacities in the sense required by the Rational Functioning Principle. Moreover, since the habit is so ingrained, recognizing the habit is also not within Charles' domain of secure competence, which means that he cannot be held responsible for not recognizing it. This means that, even if Gardner's account were amended to allow failures to assert rationality, this amendment still would not capture Charles' situation.

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<sup>25</sup> Ibid., 16.

<sup>26</sup> Here I use a descriptive – not a normative – sense of "expected."

## CONCLUSION

I have shown in this paper that basic responsibility cannot be a necessary condition for consequential responsibility because there are some situations – exemplified by the Charles case – in which defendants can be consequentially responsible without being basically responsible. While my conclusion provides good reason to doubt our intuition that we are held responsible only when we are responsible people, I should emphasize that it does not provide a *conclusive* reason; for there might be an unproblematic way of understanding “responsible person” that is not basic responsibility. While I cannot go into detail, I will briefly outline two possible approaches.

First, we might attempt to stay close to Gardner’s intuition by claiming that being considered a responsible person still depends only on one’s rational capacities, but that these capacities are not defined solely by the ability to respond to reasons. While there does not seem to be anything *prima facie* wrong with this possibility, it is hard to see how such a view would not be susceptible to the same problem as Gardner’s. The other possibility is to allow that the capacity that expresses one’s responsibility does not always have to be a rational one. This might make for an easier resolution of the Charles case because Charles might possess the non-rational capacity that can serve as a necessary condition for consequential responsibility. The difficulty with this possibility is in squaring it with what is generally meant by “responsible person,” since the term “responsible person” seems closely linked with rationality.

I am not sure if either of these approaches works – I intend on looking into the issue further. However, I have provided good reason to believe that Gardner’s account is not the right one.

# A CASE FOR CONSEQUENTIALISM AT THE INTERNATIONAL CRIMINAL COURT

Shakir Rahim

**ABSTRACT.** In recent years, the International Criminal Court (ICC), the body designed as a last resort to address crimes against humanity, has more actively indicted individuals who are party to ongoing conflicts. This has raised the question of what impact an indictment can have on the outcome and severity of a conflict that is unresolved. Critics of these indictments have argued that they could worsen the situation on the ground and the prospects for peace. A prime example that is cited in the literature concerns the response of Sudanese President Omar al-Bashir to his indictment in 2008.

In this paper, I argue that the ICC ought not to indict individuals if doing so would increase the incidence of international crimes under its jurisdiction. I justify this limitation through the criminal prevention role that forms part of the ICC's mandate under the Rome Statute, and its inability to discharge that role through criminal deterrence alone. I proceed to argue that an indictment can increase the incidence of international crimes in two major ways: by undermining peace prospects and/or inciting retaliatory action against humanitarian actors. I designate the Office of the Prosecutor within the ICC as the appropriate entity to assess the permissibility of indictments when considering their consequences. Lastly, I provide a preliminary framework on how to assess whether the consequences of an indictment meet the threshold for a deferral, and apply it to the indictment of Sudanese President Omar al-Bashir, concluding that the indictment ought not to have been issued.

## INTRODUCTION

This paper answers the question: should the International Criminal Court (ICC) consider the consequences of an indictment as part of its decision-making procedure? I argue that the Court, specifically the Office of the Prosecutor (OTP), ought to do so if an indictment has a high likelihood of increasing the incidence of international crimes under its jurisdiction.

The paper will proceed in four sections to construct this argument. The first section argues that the Court in general has an obligation to assess the consequences of its indictments that derives from its criminal prevention role, established in the preamble of the Rome Statute. The second section evinces that an indictment can increase the

incidence of international crimes by undermining peace prospects or inciting retaliatory action against humanitarian actors. The third section argues that the OTP is the appropriate entity to adopt the consequentialist assessment role because such considerations fall under the “interests of justice” that can defer a prosecution under Article 53 of the Rome Statute. The paper concludes by proposing a preliminary framework to assess the consequences of an indictment and to apply it to the case of the indictment of Sudanese President Omar Al-Bashir.

#### BACKGROUND

The question of this paper finds its birthplace in the classic debate about the relationship between peace and justice in conflict situations. Are these goals compatible and, if not, which should be prioritized? Organs of the Court have differed on what the right answer to this question is and there is a robust debate among scholars of the Court.<sup>1</sup> The recent efforts of the OTP to indict high ranking individuals in ongoing conflicts has raised this question directly, and provided the Court’s most firm position on this issue to date: it has no place in considering so-called extralegal effects of indictments.<sup>2</sup> The indictment of Sudanese President Omar Al-Bashir in 2009, the first of a sitting head of state, and its subsequent effect on the situation in Sudan, has generated an especially heated debate about whether the ICC undertook the appropriate course of action.<sup>3</sup>

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<sup>1</sup> Kenneth Rodman, “Why the ICC Should Operate Within Peace Processes,” *Ethics and International Affairs* 26:1 (2012): 59-60.

<sup>2</sup> *The Prosecutor*, 30:32, dir. by Barry Stevens (2010; National Film Board of Canada).

<sup>3</sup> *Ibid.*, 40:00.

## I. SHOULD THE COURT BE CONSEQUENTIALIST?

The first question that must be answered is whether the Court should consider the consequences of its actions on ongoing conflicts. The views on this question largely fall into two camps. First, there is the view that the Court and similar institutions ought to be concerned with prosecuting cases based on the legal facts alone. According to this perspective, concerns about how an indictment could affect a peace process, the welfare of the population on the ground, and so forth are outside the scope of the ICC. Proponents of this view do not dismiss the importance of these concerns; however, they argue that the ICC is an inappropriate and ineffective entity to address them. An overarching theme is that these questions are *political* rather than *legal* and so outside the purview of the ICC.<sup>4</sup> This idea is referred to as “legalism.”<sup>5</sup> On this understanding, Article 16 of the Rome Statute, which endows the Security Council with the power to defer indictments in twelve-month increments, is considered a more appropriate mechanism than the Court itself to address so-called political concerns.<sup>6</sup> The paper will return to why Article 16 is inadequate for this purpose in a later section.

The second view is that the ICC must consider the consequences of its actions because of the impact they can have on populations in conflict zones. According to this view, the distinction between the political and legal is not as clear-cut as the legalists contend. On the contrary, the fact that the Court can have an enormous impact on political situations creates questions that have a dual legal-political character. This is a byproduct of the unique situation that the Court finds itself in when it is prosecuting

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<sup>4</sup> Rodman, “Peace Processes,” 59.

<sup>5</sup> Ibid., 60.

<sup>6</sup> Human Rights Watch, *The Meaning of “the interests of Justice” in Article 53 of the Rome Statute* (New York: Human Rights Watch, 2005), <http://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>, 5.



individuals who are involved in ongoing events and hence the court becomes a more active actor than when the Court operates at the end of hostilities, such as the Nuremberg Trials at the end of WWII. Accordingly, this view holds that the Court decision-making procedure towards indictments should be more composite, one which includes consequentialist considerations.<sup>7</sup>

The Rome Statute, the international treaty that governs the Court, incorporates both of these views. The legalist view is acknowledged directly, the preamble to the Statute describes the Court's role in the "enforcement of international justice" to ensure that perpetrators of international crimes do "not go unpunished."<sup>8</sup> The consequentialist inclusive view comes to life in the preamble more indirectly. The Statute states that it seeks to "end impunity" for perpetrators in order to "contribute to the prevention of said crimes."<sup>9</sup> The presence of a deterrent function underpinning criminal punishment is important. It acknowledges that the Court does not exist only to prosecute cases in order to punish individual perpetrators for wrongdoing; the Court acknowledges that it has a wider mandate to prevent international crimes and that it seeks to discharge this part of its mandate through deterrence.

The problem with envisioning the Court's preventive role through deterrence is that it does not have adequate enforcement capacity to deter international crimes. The Court lacks direct or reliable access to coercive forces to investigate and indict individuals.<sup>10</sup> It relies on the political cooperation of state signatories to the Rome Statute

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<sup>7</sup> Rodman, "Peace Processes," 69.

<sup>8</sup> United Nations, *Rome Statute* (2002), [http://untreaty.un.org/cod/icc/statute/english/rome\\_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf), preamble.

<sup>9</sup> Ibid.

<sup>10</sup> Rodman, "Peace Processes," 60.

who have agreed to arrest indicted individuals within their territory.<sup>11</sup> In practice, states may or may not discharge this obligation, as was the case when indicted Sudanese President Omar al-Bashir was not arrested on a visit to Chad, a Rome Statute signatory.<sup>12</sup> Accordingly, the Court has issued indictments where there is a negligible chance that it will arrest the individuals in question. It cannot guarantee arrest, or even the risk of arrest, in a manner that would in fact deter prospective perpetrators.<sup>13</sup>

The Court's inability to deter international crimes entails that its preventive role needs to be re-evaluated. To reject its preventive role all together would undermine one of its core purposes: to reduce the incidence of international crimes. The Office of the Prosecutor (OTP) has expressed contrary positions on this subject. On the one hand, current Prosecutor Luis Moreno-Ocampo has argued that indictments have had a positive effect on ongoing conflicts in media appearances. For example, he has suggested that the indictment of the Lord's Resistance Army (LRA) leaders in Uganda have "sped up peace negotiations," led to a "reduction in violence," and that "their arrest is essential for peace and justice."<sup>14</sup> In addition, Ocampo has stressed the importance of changing leaders' behaviour through indictments.<sup>15</sup>

On the other hand, the OTP has issued a policy paper which states that a consequentialist inclusive view of indictments is outside the Court's purview. The policy paper interpreted Article 53 of the Rome Statute, which permits the OTP to defer

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<sup>11</sup> Ibid., 61.

<sup>12</sup> *The Prosecutor*, 1:32:00.

<sup>13</sup> For a fuller discussion of the issue from both a criminal justice and international relations perspective, see Kenneth Rodman, "Darfur and the Limits of Legal Deterrence," *Human Rights Quarterly* 30:3 (2008).

<sup>14</sup> "Interview with ICC Prosecutor Luis Moreno-Ocampo on Darfur with La Croix (English Translation)," Coalition for the International Criminal Court, last modified May 15, 2007, <http://www.iccnw.org/?mod=newsdetail&news=1697>.

<sup>15</sup> *The Prosecutor*, 30:00.

prosecutions in the “interests of justice”.<sup>16</sup> The OTP argued that peace is a separate question from justice, along with other “humanitarian, security, political, development” concerns.<sup>17</sup> What should the policy of the OTP be in this regard? The OTP states that its interpretation of Article 53 is based on the spirit of the Rome Statute, and that these sorts of concerns are extralegal and do not form part of the Rome Statute’s mandate.

The Statute, as I previously mentioned, envisions a robust role for the Court to prevent international crimes in its preamble; however, deterrence as a means to satisfy this role is inadequate. In light of this dilemma, the Court ought to consider other means through which it can adopt a preventative role, while hewing to its core obligation to prosecute the perpetrators of international crimes. It would seem that the current Prosecutor, through extolling the positive consequences of the LRA indictment in the court of public opinion, recognizes this to some degree. In this context, a consequentialist inclusive framework toward indictments is a logical step forward to take; it retains the Court’s focus on prevention that cannot be satisfied through deterrence because of its operating constraints. The question now turns to whether an indictment can pose consequences that would escalate the incidence of international crimes and so have a basis for deferral by the Court.

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<sup>16</sup> *Rome Statute*, Art. 53.

<sup>17</sup> International Criminal Court — Office of the Prosecutor, *Policy Paper on the Interests of Justice* (Geneva: ICC, 2007), <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf>, 8.

## II. CAN AN INDICTMENT UNDERMINE THE PROSPECTS FOR PEACE?

The effect of an indictment on peace prospects, whether positively or negatively, is highly dependent on the characteristics of the particular conflict.<sup>18</sup> This section aims to show that it is possible for an indictment to undermine peace prospects significantly, meaning an indictment can extend the length of a conflict and the incidence of international crimes that are occurring within it. This does not preclude an indictment from assisting peace prospects; however, it does entail that how an indictment affects peace prospects is a relevant consideration with respect to whether or not the indictment is issued.

An indictment can significantly undermine peace prospects by deterring a party in a conflict from participating in peace talks.<sup>19</sup> Recall that an indictment does not guarantee an arrest, and hence resolving an ongoing conflict requires the voluntary participation of parties in peace talks that may be occurring parallel with the Court's activities. A prime example of this phenomenon is the indictment of Charles Taylor by the Special Court in Sierra Leone in 2003.<sup>20</sup> While this did not involve the ICC directly, it offers valuable insight into how an indictment for international crimes can threaten peace prospects in an ongoing conflict.

The Liberian civil war was a conflict that lasted from 1989-2003 and claimed millions of lives. It involved a number of belligerents, most notably Charles Taylor, who served as the President of Liberia during part of the civil war, specifically from 1997-

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<sup>18</sup> Nick Grono and Adam O'Brien, "Justice in Conflict? The ICC and Peace Processes," in *Courting Conflict? Justice, Peace, and the ICC in Africa*, ed. Nicholas Waddell et al. (London: LSE, 2008), 13.

<sup>19</sup> Jacqueline Geis and Alex Mundt, "When to Indict? The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action" (paper prepared for The World Humanitarian Studies Conference, Groningen, Netherlands, February 2009), [http://reliefweb.int/sites/reliefweb.int/files/resources/8BDDA70A374D6CA68525759E00698137-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/8BDDA70A374D6CA68525759E00698137-Full_Report.pdf).

<sup>20</sup> Ibid., 3.

2003. The conflict spilled over into neighbouring Sierra Leone, and Taylor supported the Revolutionary United Front (RUF) in Sierra Leone, a group accused of war crimes and whose actions formed the basis of his indictment by the Court in Sierra Leone. The indictment was issued just as peace negotiations were commencing in Accra, Ghana, to end the Liberian civil war. The Ghanaian government refused to hand over Taylor to the Court and he returned to Liberia. The peace process continued with Taylor in Liberia and culminated in an agreement that resulted in his exile to Nigeria, with a guarantee that he would not be handed over to the Court in Sierra Leone until democratic elections were held (an unlikely prospect at the time). Taylor was later handed over to the Court by the Nigerian government after a request from Ellen Johnson-Sirleaf, the democratically-elected President of Liberia. Taylor was convicted of all charges.<sup>21</sup>

If Ghana had acted upon the indictment by the Court, the consequences would have been severe. The US Ambassador to Liberia at the time suggested that it would have ended the peace process and risked the lives of millions of Liberians, given that peace talks had been an elusive prospect for some time.<sup>22</sup> That said, the indictment did have some positive effects. For example, it is believed that Taylor was willing to abdicate the Presidency in its aftermath;<sup>23</sup> this has led some to argue that the indictment proved its worth in the broader picture.<sup>24</sup> What needs to be stressed, however, is that political authorities adamantly *refused* to enforce the indictment and that Taylor was instead granted negotiated asylum in Nigeria. His successful prosecution occurred at a later date

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<sup>21</sup> Ibid., 2-4.

<sup>22</sup> Ibid., 4.

<sup>23</sup> Prosecutions Program at the International Center for Transitional Justice (ICTJ), *Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice* (New York: International Center for Transitional Justice, 2007), <http://ictj.org/sites/default/files/ICTJ-Global-Justice-Conflict-2007-English.pdf>, 5.

<sup>24</sup> Human Rights Watch, *The Meaning of "the Interests of Justice"*, 15.

and the indictment was effectively deferred via political intervention in the interests of peace.<sup>25</sup> The threat that an executed indictment could pose to peace prospects was recognized and neutralized.

### III. CAN AN INDICTMENT CONSTRICT HUMANITARIAN SPACE?

Humanitarian actors are often active in conflict zones where state incapacity and large numbers of internally displaced persons (IDP) result in an emergency need for shelter, food, healthcare, and other services.<sup>26</sup> Humanitarian actors require the consent of an entity that controls territory in order to operate, which may be a state, rebel group, or some combination thereof. In order to maximize their reach, humanitarian actors adopt a neutral point of view regarding the geopolitics of a conflict and are afforded special protections under international law in order to carry out their activities. Some belligerents, however, target or restrict humanitarian actors because they associate them with politicized entities that are part of the UN family. Retaliatory attacks against humanitarian actors and the intentional restriction of humanitarian space in order to starve a population are both classified as war crimes under the Rome Statute.<sup>27</sup>

As stated above, the Court is viewed as part of the UN family and belligerents have been known to target humanitarian actors because of the Court's actions.<sup>28</sup> The closure of humanitarian space can threaten the livelihood of millions, because humanitarian groups are often the only ones satisfying emergency needs that exist in

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<sup>25</sup> Geis and Mundt, "When to Indict?", 4.

<sup>26</sup> "Internally displaced persons: ICRC statement to the United Nations, 2010," International Committee for the Red Cross, last modified April 10, 2010, <http://www.icrc.org/eng/resources/documents/statement/united-nations-internally-displaced-persons-statement-2010-11-04.htm>.

<sup>27</sup> *Rome Statute*, Art. 8.2(b)(xxv) and Art.8.2(b)(xxvi).

<sup>28</sup> Wairagala Wakabi, "Aid expulsions leave huge gap in Darfur's health services," *The Lancet* 373:9669 (2009).

conflict zones. An example of this phenomenon is Sudanese President Omar al-Bashir's expulsion of thirteen major aid agencies the day after his indictment by the Court for crimes against humanity,<sup>29</sup> a move that had been predicted by scholars who had been observing the unfolding events in Sudan.<sup>30</sup>

The expelled NGOs in Sudan served over 4.7 million Sudanese, and their expulsion threatened food aid to 1.5 million people and water and sanitation support to 1 million people.<sup>31</sup> In several regions of the country, the expelled NGOs were responsible for the delivery of the vast majority of humanitarian aid, and no other option for those populations was readily available.<sup>32</sup> A monumental effort was undertaken by the remaining humanitarian actors in Sudan, spearheaded by the UN, to mitigate the impact of the immediate and sizable reduction in humanitarian capacity.<sup>33</sup> While a widespread humanitarian catastrophe was averted as a result of this effort,<sup>34</sup> the expulsion deteriorated the quality of aid delivery,<sup>35</sup> compromised local partnerships built over extended periods of time,<sup>36</sup> and strained the scarce resources available for humanitarian aid.<sup>37</sup> The UN and other humanitarian agencies had to redouble their cooperation with the

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<sup>29</sup> Neil MacFarquhar and Marlise Simons, "UN panel says Sudan expulsion of aid groups is deplorable," *The New York Times*, March 6, 2009, <http://www.nytimes.com/2009/03/06/world/africa/06iht-06un-sudanCND.20646906.html>.

<sup>30</sup> Alex de Waal and Gregory H. Stanton, "Should President Omar al-Bashir of Sudan Be Charged and Arrested by the International Criminal Court?," *Genocide Studies and Prevention* 4:3 (2009): 332.

<sup>31</sup> Jonathan Lynn, "Millions endangered by Sudan aid group expulsions—UN agencies," *Reuters*, March 6, 2009, <http://www.reuters.com/article/2009/03/06/idUSL6685622.CH.2400>.

<sup>32</sup> Sara Pantuliano, Susanne Jaspers, and Deepayan Basu Ray, *Where to Now? Agency Expulsions in Sudan: Consequences and Next Steps* (London: Humanitarian Policy Group, ND), <http://www.odi.org.uk/resources/docs/4190.pdf>, 5.

<sup>33</sup> "Never before had the importance of a well-coordinated response been so clear," UN Office for the Coordination of Humanitarian Affairs, last modified December 12, 2011, <http://unocha.org/top-stories/all-stories/broader-view-%E2%80%9CNever-had-importance-well-coordinated-response-been-so-clear%E2%80%9D>.

<sup>34</sup> Ibid.

<sup>35</sup> Pantuliano et al., *Where to Now?*, 13.

<sup>36</sup> Ibid., 8.

<sup>37</sup> Ibid., 4.

central government in Khartoum in order to recover humanitarian capacity, which stood in contrast to the isolationist goal sought by the OTP in pursuing the indictment.<sup>38</sup>

The reaction of the Government of Sudan in the aftermath of Bashir's indictment evinces the potential for retaliatory action against humanitarian actors, thereby showing that an indictment can escalate the incidence of international crimes in a conflict. The paper now examines how the Court ought to shift its indictment decision-making procedure in light of this fact. I then determine whether, in combination with other factors such as the impact on peace prospects and the likelihood of Bashir's arrest, this fact – i.e., that an indictment can increase the prevalence of international crimes in a conflict – suggests that the indictment ought to have been deferred.

#### IV. WHICH ORGAN OF THE COURT SHOULD ADOPT THE CONSEQUENTIALIST INCLUSIVE ROLE AND HOW?

There are two candidates within the Court apparatus that could be tasked with considering whether or not to defer an indictment on consequentialist grounds: (1) the Pre-Trial Chamber (PTC), a body of expert international judges that authorize indictments proposed by the OTP and performs other judicial functions, or (2) the OTP itself, which is responsible for commencing investigations, pursuing indictments, and prosecuting cases. The third candidate is outside the Court apparatus but is delegated power by the Rome Statute, namely, the UN Security Council.

Those who support the Security Council undertaking a role of assessing the consequences of an indictment argue that it is the appropriate body because they are political concerns. According to this perspective, endowing the OTP or PTC with the role

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<sup>38</sup> Rodman, "Peace Processes," 66.



of assessing the effects of an indictment thrusts them into a political role unimagined in the Rome Statute and one that is inappropriate for a judicial organ. The underlying concern is well founded: anything that would compromise the integrity of the Court's judicial process could undermine its legitimacy and by extension ability to prosecute international crimes. The Rome Statute does authorize the UN Security Council to defer indictments in twelve-month increments under Article 16.<sup>39</sup>

There are, though, serious reservations regarding endowing the Security Council with this authority. First, the Council consists of member states who have historically based their votes on their own national self-interest.<sup>40</sup> This concern has been cited by other international mechanisms that endow it with a central decision-making role, such as the Responsibility to Protect.<sup>41</sup> The prioritization of national interest by states would undermine an objective assessment of cases. This is a particular risk when it comes to indictments against heads of state or members of government, because states have pre-existing relationships that could influence their voting behaviour. There are other concerns as well, such as the unrepresentative nature of the Council in terms of population and geography,<sup>42</sup> and a lack of clarity about whether intranational concerns would always fall under the Council's mandate per Chapter VII of the UN Charter to deal with threats to "*international* [emphasis added] peace and security".<sup>43</sup>

Most importantly, however, is questioning whether it is appropriate to classify the effects of an indictment as a *political* rather than a *legal* question. As argued in the first

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<sup>39</sup> Human Rights Watch, *The Meaning of "the Interests of Justice"*, 6-7.

<sup>40</sup> Henry Lovat, "Delineating the Interests of Justice," *Denver Journal of International Law and Policy* 35:2 (2006-2007): 283.

<sup>41</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>, 51.

<sup>42</sup> *Ibid.*

<sup>43</sup> United Nations, *UN Charter* (1945), <http://www.un.org/en/documents/charter/>, ch. VII.

section of this paper, this is a false distinction considering one of the Court's stated purposes is to reduce the incidence of international crimes through deterrence. The inability of the Court to discharge the deterrent function ought not to relegate prevention as an institutional afterthought. On the contrary, the Court ought to critically examine how its judicial actions interact with the incidence of international crimes if it is to satisfy its mandate. The OTP offers us a method to do this through Article 53 of the Rome Statute.

The preceding thought is not a novel one, for Article 53 stipulates that the OTP has a statutory obligation not to indict an individual if, "a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims".<sup>44</sup> The simplest method of introducing consequentialist considerations into the Court would be to include them as part of the "interests of justice" and thus under the pre-existing model to defer prosecution.<sup>45</sup> If the consequences of an indictment are to receive the same objective treatment as the legal facts that underpin it, the OTP is the logical choice; it carries the chief responsibility to conduct investigations and pursue indictments.

The second candidate for the consequentialist assessment role is the PTC. The PTC has characteristics that make it a strong candidate for the consequentialist assessment role; for example, it is composed of judges with considerable legal training and its decisions must be based on provisions of the Rome Statute and not external considerations. The PTC is better suited to act as an oversight mechanism for the OTP.

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<sup>44</sup> *Rome Statute*, Art. 53(1)(c).

<sup>45</sup> Philippa Webb, "ICC Prosecutor's Discretion Not to Proceed in the Interests of Justice," *Criminal Law Quarterly*, 50:3 (2005): 335.

This is its current role under the Rome Statute.<sup>46</sup> The PTC also possesses the power to act on its own initiative if its judges conclude the OTP is deficient in discharging certain functions.<sup>47</sup> In all cases, the PTC is reviewing the acts of the OTP as opposed to independently carrying out an investigative or prosecutorial process. Accordingly, its appropriate role would be to oversee the consequentialist assessment role, not to be primarily responsible for it.

There are several implementation considerations if the OTP adopts a consequentialist assessment role, two being rather critical, namely, how should the OTP evaluate potential consequences and what should be the threshold for not pursuing a prosecution? First, the OTP must consult with a broad range of stakeholders in order to assess the situation. A relevant list of stakeholders follows, suggested in part by the International Center for Transitional Justice.<sup>48</sup>

- i. The victims of international crimes; their views are identified as relevant for consideration under Article 53.<sup>49</sup>
- ii. States that are implicated in the conflict. Such states may hold territorial control that could affect the delivery of humanitarian aid and/or are party to peace efforts.<sup>50</sup>
- iii. Humanitarian actors operating in the conflict zone.
- iv. Regional organizations. Given that IDPs, arms, and hostilities themselves are often cross-border issues, a regional perspective would be informative.<sup>51</sup>

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<sup>46</sup> Ibid, Art. 15.

<sup>47</sup> Ibid., Art. 56(3)(a).

<sup>48</sup> Prosecutions Program at the ICTJ, *Pursuing Justice*.

<sup>49</sup> *Rome Statute*, Art. 53(1)(c).

<sup>50</sup> Prosecutions Program at the ICTJ, *Pursuing Justice*, 8.

- v. Community leaders and actors, mediators, and others that may be involved in peace efforts.

The second implementation consideration concerns what should be the threshold regarding a decision not to prosecute. This paper does not seek to propose detailed model; however, there are several factors that should frame the development of a formal policy. The consequentialist assessment role co-exists with the existing mandate of the OTP and its responsibilities under the Rome Statute. Accordingly, it must be considered compositely with the overarching mandate of the Court to prosecute alleged perpetrators of international crimes. There must be strong evidence, based on a consultation with stakeholders, that an indictment will undermine the prospects for peace, such as by disrupting an ongoing process or agreement, threatening humanitarian space, or posing some other serious risk to those in an ongoing conflict.

To provide some clarity about the threshold, there is one case in which the consequences of an indictment clearly outweighed the cost, namely, the indictment of Sudanese President Omar al-Bashir. The Court ought not to have indicted Bashir under the framework of this paper. The indictment posed minimal prospects of success because of the weak likelihood of enforcement but risked the livelihood of millions. African states had indicated that they would not arrest Bashir, and consequently they have rerouted his travel plans to their territories or simply not arrested him when he has visited, as was the case in Chad.<sup>51</sup> These countries are violating their legal obligations under the Rome Statute, however, there is no desire from the international community to punish them for their derogation. Furthermore, there were warnings that an indictment could disrupt the

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<sup>51</sup> Ibid., 14.

<sup>52</sup> *The Prosecutor*, 1:32:00.

Comprehensive Peace Agreement (CPA) that was reliant on President Bashir's cooperation.<sup>53</sup>

Bashir indicated that he would retaliate against an indictment by expelling humanitarian actors, which had been noted as a risk by leading scholars who were following the situation.<sup>54</sup> It is reprehensible that Bashir uses the population of Sudan to escape criminal accountability, but, absent his removal, it is a fact that cannot be changed. If the Court was operating with due consideration of the impact of an indictment on the situation in Sudan, it should have deferred its indictment. The indictment would not enhance the prospects of peace or lead to Bashir's prosecution. Instead, it posed a serious and tangible risk to the people of Sudan because of the expulsion of humanitarian actors.

## CONCLUSION

This paper has answered the question of whether the ICC should consider the effects of an indictment on ongoing conflicts in three stages. The paper began by examining the statutory foundation of the Court and found that it designates a criminal prevention role for the Court for crimes under its jurisdiction. As the first section argued, the inability of the Court to discharge prevention through deterrence entails it must examine prevention in a more expansive manner. The paper argued that the issuance of indictments themselves can affect the incidence of international crimes and it articulated how this occurs through prolonging conflicts where crimes are occurring or leading to retaliation against humanitarian actors. The paper concluded that an internal Court organ, the OTP,

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<sup>53</sup> de Waal and Stanton, "Should President Omar al-Bashir of Sudan Be Charged," 330.

<sup>54</sup> Ibid., 332.

is the appropriate entity to evaluate the effects of an indictment and defer prosecution if necessary, in line with its statutory provision under Article 53. Holding the perpetrators of international crimes to justice is a core part of the Court's mandate, but no longer should the Court envision its obligations vis-a-vis international crimes ending at this point.

## CONFLICT OF INTEREST: REGULATING INTERNATIONAL ARBITRATORS IN CANADA

Margaret Kim

**ABSTRACT.** As international arbitration becomes increasingly popular, this legal phenomenon poses new ethical challenges to the dispute resolution process. This essay examines issues that arise from the competing sets of ethical standards in international arbitration. In particular, it will explore the problem of double deontology of ethical standards among arbitrators with respect to conflict of interest. By comparing approaches taken in various jurisdictions, the essay will consider whether mandatory rules for regulating international arbitrators would be a viable and preferred solution for international arbitration in Canada.

### INTRODUCTION

From the substantial growth in international trade and commerce, international arbitration has recently emerged as a popular method of resolving disputes. Some of the advantages of resorting to arbitration over litigation include a speedy resolution, party control and selecting the seat of arbitration.<sup>1</sup> Arbitration also offers the parties neutrality in the choice of law, procedure and tribunal.<sup>2</sup> These positive features of arbitration cater to the increased complexity and size of disputes in commercial disagreements between parties from different countries. However, the increase in the volume of international arbitration also begets new ethical challenges in the dispute resolution process, such as potential bias of arbitrators, and their conflict of interest.<sup>3</sup> At present, ethical codes or professional standards that apply specifically to arbitrators or counsel in international arbitration do not exist in Canada, although the rules of procedure that govern the conduct of arbitration

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<sup>1</sup> "Considerations when Contemplating Arbitration" *Canadian-Lawyers.ca* (12 February 2010), online: Canadian-Lawyers.ca <<http://canadian-lawyers.ca/Understand-Your-Legal-Issue/Litigation/Considerations-when-Contemplating-Arbitration.html>>.

<sup>2</sup> Julie Macfarlane ed, *International Commercial Arbitration, Dispute Resolution: Readings and Case Studies*, 3rd ed at 560.

<sup>3</sup> Emily Cardenas and David W Rivkin, "A Growing Challenge for Ethics in International Arbitration" (2004) Yale LJ 193.

in Canadian jurisdictions are set out by the United Nations Commission on International Trade Law (UNCITRAL) Model Law, as well as some arbitral institutions and the International Bar Association. While a licensed member of one of the provincial and territorial law societies or bars is subject to ethical and professional obligations established by the law society or bar when acting in a regulated capacity related to an international arbitration, there are no overarching international mechanism that govern enforcement or discipline of arbitrators.<sup>4</sup> Citing Professor Catherine Rogers at the first ICCA Conference in South America, Doak Bishop portrayed the lack of regulation with the following remarks:

There is no supra-national authority to oversee attorney conduct in this [arbitration] setting, and local bar associations rarely if ever extend their reach so far...specialized ethical norms for attorneys in international arbitration are nowhere recorded. Where ethical regulations should be, there is only an abyss.<sup>5</sup>

The purpose of this paper is to address issues stemming from the competing sets of ethical standards in international arbitration. In particular, it will explore options of regulating arbitrators' conduct, which then raises structural issues with respect to providing solutions to this ethical conundrum. Part I will examine the current legislative framework for international arbitration in the context of Canada with a focus on Ontario, and present the theoretical underpinnings of an arbitrator's independence and impartiality

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<sup>4</sup> Barry Leon and Andrew McDougall, "Global Arbitration Review: Canada" *Global Arbitration Review* online: <http://www.globalarbitrationreview.com/reference/topics/61/jurisdictions/7/canada/>. Also, look at 2010 – UNCITRAL Arbitration Rules that set out procedural rules upon which parties may agree for the conduct of arbitral proceedings. Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html).

<sup>5</sup> Speech of Doak Bishop, 26 May 2010 in International Council for Commercial Arbitration (ICCA) Rio 2010 Conference, "Advocacy and Ethics in International Arbitration" online: [http://www.arbitration-icca.org/media/0/12763302233510/icca\\_rio\\_keynote\\_speech.pdf](http://www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf).



through observing relevant international treaties and arbitral institutions' ethical codes. Part II will compare how different national courts have dealt with the issue of an arbitrator's conflict of interest, contributory to the "Double Deontology" of ethical standards among arbitrators. Part III of the essay will evaluate the significance of these competing approaches, and consider whether mandatory rules for regulating international arbitrators would be the preferred solution for international arbitration in Canada.

## PART I

### A. CANADA'S LEGISLATIVE FRAMEWORK

In 1986, Canada acceded to the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is also known as the New York Convention.<sup>6</sup> This means that an international arbitration award rendered in Canada may be enforced in other signatory jurisdictions. In the same way, an arbitration award granted in another signatory jurisdiction can be enforced in Canada as well. This fundamental principle of international arbitration under the Model Law is entrenched in Article 35 (1) of the Model Law, with the exceptional circumstances listed under Article 36. Article 35(1) states:

An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.<sup>7</sup>

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<sup>6</sup> William Stromberg, "Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes" (2007), 40 Loyola of Los Angeles L Rev 1337, at 1342-49, and 1358-59.

<sup>7</sup> UNCITRAL Model Law on International Commercial Arbitration, [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)

In Canada, the federal *Commercial Arbitration Act* applies to domestic and international commercial arbitrations, but is limited to maritime or admiralty arbitrations or those disputes that involve at least one party that is Her Majesty in right of Canada, or a Canadian federal crown corporation or department.<sup>8</sup> This federal legislation attaches the UNCITRAL Model Law as a schedule called the Commercial Arbitration Code, adopting the Model Law rules as part of Canada's own legislation. Other than these matters, all other matters are under the jurisdiction of provincial and territorial governments, and they are subject to respective arbitration acts.<sup>9</sup> Canadian courts give strong deference to arbitration agreements, especially international commercial arbitration agreements, by staying court proceedings and enforcing the awards.<sup>10</sup> Each of Canada's common law provinces and territories has enacted its own laws on domestic and international arbitration.<sup>11</sup> For parties involved in arbitration – whether domestic or international – the provincial superior courts are usually the initial point of contact with Canada's domestic courts. The provincial superior courts are empowered to provide assistance to international tribunals sitting in Canada, hear applications to set aside international arbitral awards rendered in Canada and also enforce foreign arbitral awards.<sup>12</sup>

Equipped with such federal and provincial legal provisions, Canada is recognized as a worthy place to hold international arbitration, and reasons for such a reputation are

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<sup>8</sup> Claude R. Thomson and Annie M.K. Finn, "*International Commercial Arbitration: A Canadian Perspective*" online: ADR Chambers International <<http://adrchambersinternational.com/publications.htm>>.

<sup>9</sup> Michael Hwang, *Claims against arbitrators for breach of ethical duties, Contemporary Issues in International Arbitration and Mediation*, ed by Arthur W. Rovine (Fordham, USA: Martinus Nijhoff Publishers, 2007).

<sup>10</sup> "2.1 Legal Framework for International Arbitration" online: *Blakes LLP* <[http://www.blakes.com/DBIC/guide/Dispute/html/international\\_commercial\\_arbit.html](http://www.blakes.com/DBIC/guide/Dispute/html/international_commercial_arbit.html)>.

<sup>11</sup> David R. Haigh and Louis Novinger Grant, "Arbitration in Canada Chapter 20" online: <[http://www.bdplaw.com/titanweb/bdp/BDPWEBSITE.NSF/AllDoc/C09B031184A95F6E852577920058072F/\\$File/Arbitration%20in%20Canada%20Chapter.pdf](http://www.bdplaw.com/titanweb/bdp/BDPWEBSITE.NSF/AllDoc/C09B031184A95F6E852577920058072F/$File/Arbitration%20in%20Canada%20Chapter.pdf)>.

<sup>12</sup> *Ibid.*

recognizable in the following three ways. First, Canadian laws and courts are supportive of arbitration. As stated, the accession to the New York Convention and adopting the Model Law have indicated that Canadian courts maintain independence and demonstrate competency in arbitration.<sup>13</sup> For investors and parties seeking fair remedy, a judicial system that can be trustworthy and reliable is an attractive element to consider for arbitration. Secondly, Canada's multicultural and diverse environment is conducive for dispute resolution that involves parties from different cultural and national settings. According to Barry Leon, Chair of International Chamber of Commerce (hereinafter the "ICC") Canada, Canada's adoption of both common and civil law provides familiarity to many parties based in Europe and Asia.<sup>14</sup> For example, the Civil Law system is available in the jurisdiction of Quebec, a province which has adopted *An Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration*. This amendment added Title 13A "Of Arbitration Agreements," replacing Book VII "Arbitrations" of the Code of Civil Procedure.<sup>15</sup> As the Supreme Court of Canada has explained in *GreCom Dimter Inc v J.R. Normand Inc.* decision, Québec's codification of private international law

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<sup>13</sup> Some may contend that Canadian courts have not been receptive to granting arbitral award, raising the Supreme Court of Canada's ruling on *Yugraneft v Rexx Management* [2010] 1 SCR 649. In this case, SCC held that Alberta Court of Appeal's decision to apply a limitation period of 2 years was upheld. Y Corp. was unable to enforce its foreign arbitral awards. Barry Leon wrote on this issue prior to the decision, stating: "If the Alberta decision stands, not only will it severely restrict enforcement of foreign awards in Alberta but likely will affect decisions across Canada, unless other appellate courts rule in a different way when the issue comes before them" (James Redmond and Barry Leon, "Web Exclusive: Will SCC hear high profile international arbitration case?" Canadian Lawyer Magazine (November 2008) online: <http://www.canadianlawyermag.com/Web-Exclusive-Will-SCC-hear-high-profile-international-arbitration-case.html?print=1&tmpl=component>). However, Canadian courts' high degree of independence and judicial fairness encouraging arbitration can be found in other decisions, such as *Onex Corp v Ball Corp* (1994) 12 BLR (2d) 151 (Ont Gen. Div) and *Schreter v Gasmac Inc* (1992), 7 OR (3d) 608, 89 DLR (4th) 365 (Ont Gen Div). In *Schreter*, for instance, the Ontario court granted an application under s.35 of the Model Law, enforcing an award made in the State of Georgia in the USA.

<sup>14</sup> Ibid.

<sup>15</sup> Claude R Thomson and Annie M.K.Finn, "International Commercial Arbitration: A Canadian Perspective" *ADR Chambers International*, online: <http://adrchambersinternational.com/publications.htm#9>.

indicates “Québec legislature’s [recognition of] the primacy of the autonomy of the parties, [including] in situations involving conflicts of jurisdiction.”<sup>16</sup> Therefore, Québec arbitration law “must necessarily be harmonized” with the New York Convention and the interpretation given thereto by courts of other jurisdictions.<sup>17</sup> Finally, Canada is a desirable place for international arbitration as it is geographically and systematically accessible. Its major cities are well-connected by air, and there are good hearing facilities available.<sup>18</sup> Recently, a new international arbitration centre called “Arbitration Place” opened in Toronto, appointing the recently retired Supreme Court Justice Ian Binnie. The new firm’s partnership with the London Court of International Arbitration (hereinafter the “LCIA”) and the ICC Canada is an example of Canada’s ambition and potential to be a major gathering place for more international arbitration affairs in the near future.<sup>19</sup> Furthermore, research conducted by Taylor Wessing Global Dispute Resolution in 2009 confirms this trend as well. Canada is known to be a “predictable and reliable jurisdiction to determine disputes,”<sup>20</sup> ranking first in best value for money, and third in integrity of procedure and judiciary. Canada’s overall global ranking of user experience of dispute resolution was third (7.91 / 10), after Switzerland and Australia (See Figure 1 below). As Canada further moves forward to maintain and establish its reputation as an international arbitration hub, it is vital to engage in a critical analysis of how sufficient the currently existing ethical standards are for international arbitrators. As important as bringing more international arbitration cases to Canada is, taking a comparative approach to consider

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<sup>16</sup> *GreCon Dimter Inc v J.R. Normand Inc*, 2005 SCC 46 at para 48-56.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> “Arbitration Place: Partners”, online: <<http://arbitrationplace.com/partners/>>.

<sup>20</sup> Global Dispute Resolution: The Report, Taylor Wessing LLP, <[http://www.taylorwessing.com/disputessurvey/getfile.php?file=Global\\_Dispute\\_Resolution\\_2009.pdf](http://www.taylorwessing.com/disputessurvey/getfile.php?file=Global_Dispute_Resolution_2009.pdf)>.

legitimate accountability for arbitrators is equally necessary. The next section will examine different sources of ethical codes found in international treaties and provisions of arbitral institutions. In conjunction with comparing different ethical codes, this section will delve into the legal underpinnings of why ethical behaviour is so important in international arbitration.

FIGURE 1: OVERALL GLOBAL RANKINGS FOR INTERNATIONAL LITIGATION AND  
ARBITRATION\*  
(EMPHASIS ADDED)

Jurisdiction	Ranking	Rating
Switzerland	1	8.08
Australia	2	7.97
Canada	3	7.91
Netherlands	4	7.69
UK	5	7.65
Singapore	6	7.56
Germany	7	7.56
USA	8	7.11
Ireland	9	6.97
France	10	6.85
Poland	11	6.71
Bermuda	12	6.63
South Africa	13	6.22
Spain	14	6.14
Dubai	15	5.60
Italy	16	5.46
China	17	4.78
Russia	18	4.42
India	19	4.32
Turkey	20	4.24
Brazil	21	3.60

\* Rankings in this table were derived from average ratings given in response to a number of different questions.

Source: Taylor Wessing Global Dispute Resolution Report 2009, Figure 19 at Pg. 18. Online: <[http://www.taylorwessing.com/disputessurvey/getfile.php?file=Global\\_Dispute\\_Resolution\\_2009.pdf](http://www.taylorwessing.com/disputessurvey/getfile.php?file=Global_Dispute_Resolution_2009.pdf)>.

## B. DOUBLE (TRIPLE?) DEONTOLOGY: COMPETING SOURCES OF ETHICAL OBLIGATIONS FOR ARBITRATORS

While a limited effort has been made to ensure that there is consistency among provincial arbitration statutes in developing uniform domestic and international arbitration statutes in Canada,<sup>21</sup> there is no uniform approach to regulating international arbitrators or evaluating their immunity. Unfortunately, the UNCITRAL Model Law, upon which many arbitration acts are largely based, does not prescribe provisions on the liability of an arbitrator for misconduct or error. Michael Hwang, an international arbitrator and a former acting Judge for the High Court of Singapore, reaffirms such a lack of enforcement in international arbitration law, noting that there was general agreement among members of the Working Group on International Contract Practices in the drafting of the Model Law that “the question of the liability of an arbitrator could not appropriately be addressed in a model law on international commercial arbitration.”<sup>22</sup> The reason for this under-inclusion was that the liability issue was not widely regulated and remained highly controversial. This ambiguity and lack of guidance by the Model Law have resulted in different formulations of national arbitration laws, and judicial considerations, which follow no established pattern of granting immunity or imposing liability on arbitrators.<sup>23</sup> As such, the source of arbitrators’ ethical obligations remains an open and complex topic.<sup>24</sup>

There are multiple sources of ethical duties for the arbitrators, such as the international conventions, national law, national bar associations and arbitral institutions.

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<sup>21</sup> *Uniform Arbitration Act*, Uniform Law Conference of Canada (1989) online: <[http://www.ulcc.ca/en/us/Arbitrat\\_En.pdf](http://www.ulcc.ca/en/us/Arbitrat_En.pdf)>.

<sup>22</sup> *Supra* note 7 at 10.

<sup>23</sup> *Supra* note 16 at 11.

<sup>24</sup> Catherine Rogers, “Regulating International arbitrators: A Functional Approach to Developing Standards of Conduct”, (2005) 41 *Stan Int’l L Rev* 53.

Doak Bishop explains this phenomenon as the application of “double deontology” in the practice of international arbitration. Bishop expounds upon this ethical conundrum using an anecdotal example of counsels for arbitration:

A problem arises when the same course is subject to more than one set of national ethics rules. Sometimes, for example, the same counsel may be subject to conflicting rules, and in other instances, being subjected to different sets of rules raises the prospect of having to comply with rules with which counsel has no particular familiarity.<sup>25</sup>

Although this example speaks to the problem of international arbitration counsels, the problem of double deontology is also relevant to international arbitrators. In fact, the concern is heightened at the arbitrators’ level, as they execute the decision-making that goes into arbitrations, rendering arbitral awards that could be universally enforceable among UNCITRAL Party states. While Bishop called competing source of ethical codes a “double deontology” phenomenon, I would even go further to suggest that a “*triple deontology*” phenomenon is occurring. The first source of ethical obligation would be at a broad and vaguer level, where international arbitrators are expected to conduct their practices ensuring “fairness, objectivity and impartiality,” as stipulated in Article 11 (5) of the UNCITRAL Model Law.<sup>26</sup> Another source of ethical obligations is the International Chamber of Commerce (ICC) Rules, which echo the UNCITRAL Model, stating that “in all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.”<sup>27</sup> On the same level as

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<sup>25</sup> AJ van den Berg, Cour Permanente d’Arbitrage, *Arbitration advocacy in changing times* (ICCA congress series, no.15. Alphen aan den Rijn: Kluwer Law International cop, 2010) at 396.

<sup>26</sup> UNCITRAL Model Law on International Commercial Arbitration, (1985). <[http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)>.

<sup>27</sup> “Article 22(4): Arbitration and ADR Rules”, (2012) International Chamber of Commerce Online: <[http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012\\_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf)>.

the ICC Rules are the provisions by other arbitral institutions such as the ICC, the LCIA and the Stockholm Chamber of Commerce; they all provide some type of formal regulation to arbitrators.<sup>28</sup> Even among these international institutions' provisions, a conflict exists. For example, the International Bar Association (IBA) has also inscribed the Rules of Ethics for International Arbitrators, in addition to the IBA Guidelines on Conflicts of Interest in International Arbitration in 2004. Its content, however, diverges from the UNCITRAL Model Law and the ICC Rules, as the IBA Rules of Ethics presents a more stringent requirement of arbitrators, accentuating that "international arbitrators should be impartial, independent, *competent, diligent and discreet*" (emphasis added).<sup>29</sup> This adds three more ethical criteria for the arbitrators. In addition to these international sources of ethical standards, a third source of ethical obligations is national arbitration acts.

In Ontario, the *International Commercial Arbitration Act* (hereinafter "the *Act*") is the governing legislation on the execution of international commercial arbitration.<sup>30</sup> The current Ontario law also requires an ethical standard of independence and impartiality, as it has adopted the UNCITRAL Model law. The relevant provision is Article 12 of the UNCITRAL Model law, attached as a schedule in the *Act* stipulates grounds for challenge:

Article 12: *Grounds for challenge*

- (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any

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<sup>28</sup> Catherine A Rogers, "The Vocation of the International Arbitrator" (2005) 20 Am U Int'l L Rev 957.

<sup>29</sup> "Rules of Ethics for International Arbitrators", International Bar Association, online: <[http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#ethics](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#ethics)>.

<sup>30</sup> *International Commercial Arbitration Act*, RSO 1990 c I.9. Available at: [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90i09\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90i09_e.htm)



circumstances likely to give rise to justifiable doubts as to his *impartiality or independence* [emphasis added]. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

- (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.<sup>31</sup>

If the parties agree to arbitrate under the National Arbitration Rules, an arbitrator need to remain wholly impartial and shall not act as an advocate for any party to the arbitration. Furthermore, every person must, before accepting an appointment as Arbitrator, sign and deliver to the parties a statement declaring that he or she knows of no circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality and that he or she will disclose any such circumstances to the parties if they should arise after that time and before the arbitration is concluded.<sup>32</sup> No Arbitrator shall be disqualified or subject to challenge by reason of one or more of the arbitrator, counsel, party or representative of a party being a member, officer, or director of the Institute.<sup>33</sup> Current law in Ontario further illustrates the difficulty in enforcing the principles of fairness and impartiality suggested by international organizations in a pragmatic sense.

In light of the triple deontological competition examined above, how can one measure the level of competency, diligence and discreetness? Can a claimant request to cancel an award because one of the arbitrators failed to be discreet or competent? Such

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<sup>31</sup> Ibid.

<sup>32</sup> National Arbitration Rules, October 1, 2008 16 (a) – (c) ADR Ontario <<http://www.adrontario.ca/media/ADRInstituteofCanadaIncNationalArbitrationRules10012008.pdf>>.

<sup>33</sup> Ibid.

lack of uniform source of ethical guidance poses a threat to the legitimacy and credibility of the international arbitrators. The nature of duty and obligation required by the international arbitrators is compounded, which make the compliance difficult.

There are two inherent problems associated with this befuddlement. First is the issue of *what* to regulate. If one does not know which principles to uphold and cannot precisely define the scope of acceptable practice, what would be the subject of liability for the international arbitrators? The second issue is *who* is to decide the breach. Not only are there different legal rules regulating the conduct of arbitrators, and “much still remains to be determined by the area of law designated as ‘conflict of laws’ and of private international law,”<sup>34</sup> but also who is to rule that a breach of ethical standard has occurred.

#### C. “COMPETENCE-COMPETENCE” AND AUTONOMY OF ARBITRAL TRIBUNAL

Along with the nuances and complications discussed above, the significance of impartiality and independence goes to the “crux of arbitration.”<sup>35</sup> Respecting the right and ensuring a non-partisan decision-making process at the same time is utterly significant because of a key aspect of arbitral awards, namely, their finality. The binding nature of arbitral awards requires a clear ethics code “to create some behavioural benchmark and uphold the integrity of arbitration practice.”<sup>36</sup> While these ethical guidelines of arbitral institutions and bar associations may provide a useful guideline as

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<sup>34</sup> Anastasia Tsakatoura, “Arbitration: The Immunity of Arbitrators” online: (20 June 2002) Lex E-Scripta <<http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm>>.

<sup>35</sup> Martin F Gusy et al, *A Guide to the ICDR International Arbitration Rules* (New York: Oxford University Press, 2011) at 84.

<sup>36</sup> Olga K Byrne, “A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel”, online: (2002) 30.6 Fordham Urb LJ 1 at 1816 <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2211&context=ulj>> .

to which ethical expectations should be upheld by international arbitrators, a major problem lies in their actual impact and capacity to regulate. For example, the IBA Rules of Ethics explicitly states that the rules cannot be directly binding on arbitrators, and that the guidelines are not intended to create grounds for the setting aside of awards by national courts.<sup>37</sup> The only way these rules can be applicable to arbitrators is if the parties incorporate them into parties' arbitration agreements. This optional approach towards the rules renders the system incoherent and detrimentally flexible, failing to provide substantial accountability to the arbitrators practicing internationally.

This issue of autonomy presents a challenge against pragmatically recognizing the fundamental principle of the *competence-competence doctrine* of international arbitrators.<sup>38</sup> "Competence-competence" means that the "arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court."<sup>39</sup> This rule of priority in favour of the arbitrators, embodied in Article II.3 of the New York Convention, is one of the founding principles of international arbitration law. It "provides for the arbitrators' power to rule on their own jurisdiction."<sup>40</sup> Furthermore, Article 16 of the Model Law expressly recognizes the competence-competence principle:

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<sup>37</sup> Ibid.

<sup>38</sup> This doctrine is also known as *compétence de la compétence* in French, and *Kompetenz-Kompetenz* in German.

<sup>39</sup> *UNCITRAL Model Law on International Commercial Arbitration*, 1985, (with amendments as adopted in 2006) <[http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)>.

<sup>40</sup> Article II(3) of the New York Convention states "the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed". Text available at: <[http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf)>.

*Article 16. Competence of arbitral tribunal to rule on its jurisdiction*

- (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause [...]
- (3) The arbitral tribunal may rule on a plea referred in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.<sup>41</sup>

In sum, competence-competence empowers an arbitral tribunal “to rule on its own jurisdiction without any illogicality arising from the fact that it is not a permanent body and that the determination of its jurisdiction is founded on the parties’ agreement, which it may eventually find to be inexistent or vitiated, to arbitrate their dispute.”<sup>42</sup> The Supreme Court of Canada has also recognized the significance of competence-competence of international arbitrators in *Dell Computer Corp v Union des consommateurs*<sup>43</sup>. In this case, Dell submitted that the “competence-competence” principle was implicitly adopted by [the SCC] in *Desputeaux v Éditions Chouette (1987) inc.*<sup>44</sup> In rendering a decision for *Dell*, SCC concluded, “an arbitrator has jurisdiction to assess the validity and applicability of an arbitration clause and that, although there are exceptions,

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<sup>41</sup> *UNCITRAL Model Law on International Commercial Arbitration*, 1985, (with amendments as adopted in 2006) <[http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)>.

<sup>42</sup> Emmanuel Gaillard and Yas Banifatemi, “Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators” online: (2008) at 260. <[http://www.shearman.com/files/Publication/5770aa7b-a9e6-4c3e-8c1b-04c00efc2480/Presentation/PublicationAttachment/17f65c74-f8f9-4e8c-a626-146d1a015ece/IA\\_070208\\_01.pdf](http://www.shearman.com/files/Publication/5770aa7b-a9e6-4c3e-8c1b-04c00efc2480/Presentation/PublicationAttachment/17f65c74-f8f9-4e8c-a626-146d1a015ece/IA_070208_01.pdf)>.

<sup>43</sup> *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 (cited to “*Dell*”).

<sup>44</sup> [2003] 1 SCR 178, (cited to “*Desputeaux*”).

the decision regarding jurisdiction should initially be left to the arbitrator.”<sup>45</sup> Proponents of the competence-competence rule claim that “the policy consideration underlying the rule of priority in favour of the arbitrators” guarantee the prevention of delaying tactics by the parties and the centralization of litigation concerning the existence and validity of the arbitration agreement.<sup>46</sup> On the other hand, this autonomy can create a problem, where “if the validity of the arbitration *itself* and thus the competence of the arbitrator is impugned, he or she does not have to stop proceedings but can continue the arbitration and consider whether he or she has jurisdiction.”<sup>47</sup> Trying to respect the *competence-competence* principle while potentially seeking to regulate international arbitrators can therefore be an extremely difficult task in both Canada and across the globe.

## PART II:

### A. DIFFERENT NATIONAL COURTS’ APPROACH TO CLAIMS FOR FAILURE TO DISCLOSE CONFLICTS OF INTEREST

Mindful of the difficulty in balancing competence-competence and the recognition of ethical obligation of international arbitrators, this section examines various national courts’ approach towards resolving this ethical issue, particularly with regards to disclosing conflicts of interest. One of the essential ethical obligations an international arbitrator has is the duty to disclose conflicts of interests to ensure independence and impartiality. Because of the mixed approaches with respect to granting immunity and

<sup>45</sup> *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 (cited to “*Dell*”) at Para 11.

<sup>46</sup> Emmanuel Gaillard and Yas Banifatemi, “Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators” online: (2008) at 260. <[http://www.shearman.com/files/Publication/5770aa7b-a9e6-4c3e-8c1b-04c00efc2480/Presentation/PublicationAttachment/17f65c74-f8f9-4e8c-a626-146d1a015ece/IA\\_070208\\_01.pdf](http://www.shearman.com/files/Publication/5770aa7b-a9e6-4c3e-8c1b-04c00efc2480/Presentation/PublicationAttachment/17f65c74-f8f9-4e8c-a626-146d1a015ece/IA_070208_01.pdf)>.

<sup>47</sup> Jack Tsen-Ta Lee, “Separability, Competence-Competence and the Arbitrator’s Jurisdiction in Singapore”, online: (1995) 7, *Sing Ac LJ* at 422.

regulating the behaviour of arbitrators, different jurisdictions have used different ways to resolve these claims.

1) FRANCE:

In *Raoul Duval v V* (Tribunal de Grand Instance, Paris), the French courts have found arbitrators liable to compensate parties for losses resulting from a breach of the duty of disclosure that leads to a successful challenge of the award.<sup>48</sup> In this case, the chairman of the arbitral tribunal started working for one of the parties the day after the award was decided, and the chairman did not disclose this information to the parties. As a result, the arbitral award was set aside and the arbitrator was liable on a contractual basis to pay damages for the fees paid to the arbitrators and the arbitral institution, in addition to the costs for the defense.<sup>49</sup>

2) FINLAND:

Similarly, the Finnish Supreme Court has held that an arbitrator is liable to compensate the arbitral costs incurred by a party in a case where the arbitral award had been set aside on the basis of the arbitrator's conflict of interest, which had not been duly disclosed to the parties. In case 2005:14, *Urho, Sirkka and Jukka Ruola v X*,<sup>50</sup> the Finnish Supreme Court held that the relationship between an arbitrator and a party is generally comparable to a contractual relationship, and that the liability of an arbitrator must therefore be assessed under the rules of contractual liability.<sup>51</sup>

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<sup>48</sup> Jean-Francois Poudret, Sébastien Besson, "Comparative Law of International Arbitration" (2002) Sweet & Maxwell at 429.

<sup>49</sup> Ibid.

<sup>50</sup> *Urho, Sirkka and Jukka Ruola v X*, KKO 2005:14.

<sup>51</sup> Petri Taivalkoski, Aapo Saarikivi, "The International Comparative Legal Guide to: International Arbitration: A practical cross-border insight into international arbitration. To what extent are there laws or rules in Finland providing for arbitrator immunity?" (2010) <<http://www.iclg.co.uk/khadmin/Publications/pdf/3809.pdf>>.

### 3) UNITED STATES:

Contrary to the proactive decisions demonstrated by France and Finland, the United States has taken a less punitive approach. For instance, claims against arbitrators for failure to disclose conflicts of interest do not result in any loss of arbitral immunity, although the degree of this application varies from a state to state. This is stipulated by Section 14(c) of the *Revised Uniform Arbitration Act 2000*, as an arbitrator's failure to make a disclosure required by Section 12 does not invoke any loss of immunity under this section.<sup>52</sup> What is interesting about the American model is that although an award may be vacated on the basis of a clear bias, the doctrine of arbitral immunity protects an individual arbitrator from being personally liable for the failure to disclose conflicts of interest. A recent example of this practice is found in *Positive Software Solutions Inc v New Century Mortgage Corporation*,<sup>53</sup> in which the sole arbitrator had been co-counsel with the defendant's counsel in the arbitrator's prior law firm more than ten years before the arbitration. The arbitrator ruled in favour of the defendant, and the plaintiff sought to have the award set aside on the ground of "the reasonable impression of possible bias and that the arbitrator's failure to disclose that prior relationship deprived the plaintiff of the opportunity to make an informed selection of arbitrator."<sup>54</sup> This decision was reversed in the Fifth Circuit Court of Appeals upon the defendant's petition, and the U.S. Supreme Court affirmed it by holding that a failure to disclose trivial or insubstantial relationships is not a sufficient basis to vacate an award.

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<sup>52</sup> *Supra*, Note 17 at 238.

<sup>53</sup> *Positive Software Solutions, Inc., v New Century Mortgage Corporation* US Ct. of Appeals for the fifth Circuit, No 3:03-CV-257, January 18, 2007 <<http://www.ca5.uscourts.gov/opinions/pub/04/04-11432-CV2.wpd.pdf>>.

<sup>54</sup> *Ibid.* at 16.

#### 4) ONTARIO:

In Ontario, the Ontario Superior Court of Justice has recently dealt with the arbitrator's conflict of interest and a potential apprehension of bias in *Telesat Canada v Boeing Satellite Systems International, Inc.*<sup>55</sup> In this case, the impartiality of the Chair Arbitrator, Ms. Kaufmann-Kohler, was questioned by Telesat. Ms. Kaufmann-Kohler is a lawyer at a boutique Swiss firm, and one of the partners at her firm, Mr. Levy, had already been acting as an arbitrator in a case involving Boeing brought by Insurers of Thuraya Satellite Telecommunications<sup>56</sup> Although Ms. Kaufmann-Kohler stated that she had no knowledge on the content of the arbitration, Kane J decided that there was a reasonable apprehension of bias for the following reasons:

Because the Chairperson would be asked to determine whether the decision of her partner applies in this arbitration, that seems to me to be as close a relationship as the one stated in 2.3.3 [of the IBA Guidelines]. Parties should not have to struggle with the relationship between these two arbitrators and the potential conflict and reasonable apprehension of bias resulting on these facts in what Boeing argues are virtually identical cases.<sup>57</sup>

Based on this analysis, Kane J found that there was a reasonable apprehension of bias pursuant to s. 13(1) of the *Arbitration Act* and the Chairperson was therefore removed pursuant to s. 15(1) of the *Act*.<sup>58</sup> The closeness of these two partner arbitrators where one was now being required by Boeing to review and make a judicial finding as to the binding nature of Mr. Levy's decision in this arbitration involving, according to

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<sup>55</sup> 2010 ONSC 4023, (cited to "*Telesat*").

<sup>56</sup> "Boeing prevails in satellite arbitration", (February 17, 2009), Edwards Angell Parlemer & Dodge, online: <<http://www.lymanadr.com/boeing-prevails-in-satellite-arbitration/>>.

<sup>57</sup> *Telesat Canada v Boeing Satellite Systems International, Inc.*, 2010 ONSC 4023.

<sup>58</sup> *Ibid* at Para 161.



Boeing, the same issues, facts and parties, created pursuant to the Supreme Court in *Szilard v Szasz*,<sup>59</sup> the reasoned suspicion of an underlying biased appraisal and judgment, unintended though it was. The impartiality of this arbitration panel and the public's perception of the integrity of the arbitration process generally were enhanced by the replacement of the Chairperson under these conditions. In his reasoning, Kane J cited the IBA Guidelines on Conflicts of Interest in International Arbitration. This recognition of the IBA Guidelines principle can be viewed as a positive step towards integrating the international bar association's authority and Canada's application of accountability towards international arbitrators.

### PART III: FURTHER CONSIDERATIONS FOR REGULATING ARBITRATORS' ETHICAL OBLIGATION

Although ONCA's recent *Telesat* decision could be regarded as indicative of Canadian court's willingness to punish bad faith behaviour of international arbitrators, the jurisprudence on the issue of arbitrators' immunity is still under-examined and unsatisfactory. For example, in *Flock v Beattie*, the Alberta Court of Queen's Bench confirmed that "in the absence of fraud or bad faith, an arbitrator enjoys immunity from civil liability from all types of claims, including tort and breach of contract."<sup>60</sup> For its reasoning, the Court adopted the legal analysis contained in the Supreme Court of Canada's decision in *Sport Maska Inc v Zittler*.<sup>61</sup> In *Sport Maska Inc*, the Court had held that "in the absence of fraud or bad faith, an arbitrator enjoys immunity from civil

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<sup>59</sup> *Szilard v Szasz* [1955] SCR 3.

<sup>60</sup> *Flock v Beattie*, 2010 ABQB 193, cited to "Flock". Also, Mandy Moore, "Case Comment – Flock v. Beattie", Lex Arbitri, Spring/Summer 2010 edition, Vol. 6, No. 1. Available at: <<http://www.ycap.ca/files/YCAP%20newsletter%20spring-summer%202010.pdf>>.

<sup>61</sup> *Sport maska inc v zittler*, [1988] 1 SCR 564, cited to "Sports Maska Inc".

liability. Arbitral immunity is not restricted to tort alone, but rather extends to all types of claims including breach of contract.”<sup>62</sup> Such immunity is a matter of public law because of the similarity of arbitration to the judicial function. In *Flock*, the Court rejected the Plaintiff Arlene Flock’s submission on the grounds that if the case were accepted, the only existing exceptions to arbitral immunity protection (fraud and bad faith) would be expanded to include cases where an arbitrator simply fails to follow the terms of the arbitration agreement, regardless of the arbitrator’s motives or in the absence of a blameworthy state of mind.<sup>63</sup>

As part of his reasoning, Justice Wilson of Alberta Court of Queen’s Bench of Alberta states the following:

I am persuaded by LeBel J.A.’s legal analysis, which, L’Hereux-Dubé, writing for the majority cited in *Sport Maska Inc.* Justice Wilson states: “I am persuaded by LeBel J.A.’s legal analysis and in particular agree with him that ‘arbitral immunity’ may be properly expressed as meaning – ‘In the absence of fraud or bad faith, an arbitrator enjoys immunity from civil liability.’”

I am also satisfied that LeBel J.A.’s conclusions do not restrict arbitral immunity to tort alone. His language choices e.g., “certain immunities” (the plural) and “immunity from civil liability” are instructive. Clearly LeBel J.A. was speaking of immunity from all types of lawsuits, not merely immunity from an action in tort.<sup>64</sup>

Unfortunately, as Jonnette Watson Hamilton criticizes in “Doubts about Arbitrator Immunity,”<sup>65</sup> a quick note-up of the judicial history reveals that *Sports Maska* had not been “relied upon on the question of arbitral immunity by any common law court

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<sup>62</sup> Ibid. at para 17.

<sup>63</sup> *Flock* at para 26 <<http://www.canlii.org/en/ab/abqb/doc/2010/2010abqb193/2010abqb193.html>>.

<sup>64</sup> *Flock* at para 17 -18.

<sup>65</sup> Jonnette Watson Hamilton, “Doubts about Arbitrator Immunity”, 28 April 2010, ABlawg.ca <[http://ablawg.ca/wp-content/uploads/2010/05/ablawg\\_jwh\\_flock\\_abqb\\_apr2010.pdf](http://ablawg.ca/wp-content/uploads/2010/05/ablawg_jwh_flock_abqb_apr2010.pdf)>.

in Canada before Justice Wilson's legal analysis." In fact, the only justification offered by LeBel JA in the passage quoted is "a superficial assertion of the similarity of arbitration to the judicial function."<sup>66</sup> Hamilton further notes that "there is no discussion in Justice Wilson's decision about whether the common law of arbitral immunity is still available, or whether the *Arbitration Act* of Alberta (RSA 2000, c A-43) is an exhaustive code, ruling out resort to the common law to fill an alleged gap." The questions Hamilton asks are extremely pertinent in light of the case; as she says: "Although the *Arbitration Act* does not say anything about arbitral immunity, it does speak to every other type of arbitrator entitlement including arbitrators' powers and liberties, duties and liabilities. Is the absence of any mention of arbitral immunity significant? If arbitrators were entitled to immunity, would it not be spelled out in the legislation?"<sup>67</sup> These questions bring us back to the issue of the delicate balance between the competence-competence doctrine of international arbitration while ensuring that the process is impartial and independent by the fair conduct of arbitrators.

## CONCLUSION

The examination of Canada's current status as an international arbitration place, while considering the difficulty arising from competing sources of ethical codes, indicates that there is an increasing prevalence of providing accountability to international arbitrators. An expansion of resorting to international arbitration spurs potential for more ethical dilemma for arbitrators in the future. After a brief discussion of how some countries have dealt with ethical issues pertaining to conflict of interest, it is clear that different national courts have competing ways of dealing with similar issues. The danger of such difference

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid. at p. 4.

is that astute arbitrators may start selecting the seat of arbitration according to the tendency of national courts' recognition of arbitral immunity. The potential consequence of such selection can seriously distort the treasured *lex arbitri*, a set of mandatory rules that governs the seat of arbitration.<sup>68</sup>

Ontario's recent decision on *Boeing v Telesat* illustrates that the Canadian court is willing to provide some regulation over arbitrators' questionable conduct. However, with the double, or triple, deontology of competing ethical codes and guidelines, it is extremely difficult to determine what to hold arbitrators accountable for as well as to know whom they are accountable to. This is the reason why the contemporary scholarship on ethics of international arbitration lacks a consensus regarding stringent regulation of national law. These conflicting results of different national courts need to be resolved, as "one nation's assertion that a particular law is mandatory does not necessarily make it inescapable if another nation adjudicates the case or refuses to enforce the judgment."<sup>69</sup> An international arbitration ethics expert Catherine Rogers writes on this issue; she states that skeptics of private arbitration may be doubtful by evidence that "arbitrators are generally willing to enforce the mandatory rules encompassed in law selected by the parties."<sup>70</sup> From the skeptic's perspective, international arbitration may seem to allow parties to contractually circumvent the mandatory law of one nation by choosing the law of another. This is precisely why safeguarding the competence-competence doctrine of international arbitration is so

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<sup>68</sup> A. Tweedale, K. Tweedale, *Arbitration of Commercial Disputes, International and English Law and Practice*, Oxford 1st Edition, 2005. Chapter 7.39.

<sup>69</sup> *Supra* Note 57.

<sup>70</sup> Rogers, Catherine A., "International Arbitration's Public Realm", 10 June 2010, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, Martius Nihoff Publishers; The Pennsylvania State University Legal Studies Research Paper No. 3-2011. Available <http://ssrn.com/abstract=1746189>.

important.

Going forward, Ontario and Canada courts and legislatures should continue to consider whether they could continue to afford more self-regulation of the arbitrators, and allow the arbitral institutions to bear greater burdens of providing accountability. Another option would be to adopt a more structured approach of regulation according to the national law. If various national courts and national bar associations begin devising and applying their own arbitral ethical rules to international arbitrators who are also locally licensed lawyers, those institutions will become venues for “interpreting and enforcing those rules.”<sup>71</sup> As a result, the conduct of international arbitrators would become subject to the very national institution from which arbitral decision-making is supposed to be insulated.<sup>72</sup> As such cases of dealing with international arbitrators’ ethical obligation continue to emerge, Canada will have to find a solution that adopts the international guidelines but also sustains Canadian values of good faith and fairness in international arbitration.

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid.



*A man without ethics is a wild beast loose upon this world.*

Albert Camus

PROPORTIONALITY AND NECESSITY  
Thomas Hurka

*Editor's note: "Proportionality and Necessity" first appeared in Larry May, ed., War: Essays in Political Philosophy (Cambridge: Cambridge University Press, 2008), 127-44. The essay has been reprinted here with the author's permission.*

I. CONSEQUENCE CONDITIONS

Just war theory, the traditional theory of the morality of war, is not a consequentialist theory, since it does not say a war or act in war is permissible whenever it has the best consequences. On the contrary, its *jus ad bellum* component, which concerns the morality of resorting to war, says a war with the best overall outcome can be wrong if it lacks a just cause, that is, will not produce a good of one of the few types, such as resisting aggression or preventing genocide, that alone can justify war. It can likewise forbid a war that is not declared by a competent authority or fought with a right intention. Similarly, the theory's *jus in bello* component, which concerns the morality of waging war, contains a discrimination condition that can forbid military tactics with the best outcome if they target civilians rather than only soldiers. In all these ways the theory is deontological rather than consequentialist.

But just war theory does not ignore the consequences of war and would not be credible if it did: a morally crucial fact about war is that it causes death and destruction. The theory therefore contains several conditions that forbid choices concerning war if their consequences are in some way unacceptable. The *jus ad bellum* insists that a war must have a *reasonable hope of success* in achieving its just cause and other relevant benefits; if it does not, its destructiveness is to no purpose and the war is wrong. A further, *proportionality* condition says that even if a war does achieve relevant benefits, it

is wrong if the destruction it causes is excessive, or out of proportion to, those benefits. And a *last resort* condition forbids war if its benefits, though significant, could have been achieved by less destructive means such as diplomacy. The *jus in bello* contains conditions parallel to these last two. An *in bello proportionality* condition says an act in war is wrong if the harm it causes, especially to civilians, is out of proportion to its military benefits, while a *necessity* condition forbids acts that cause unnecessary harm, because the same benefits could have been achieved by less harmful means.

These *consequence conditions*, as I will call them, have been central to recent moral debates about particular wars. Before the 1991 Gulf War some critics said it would be disproportionate, because it would result in a wider Middle East conflagration. Many objected that the Iraq War of 2003 was not a last resort, because any weapons of mass destruction Saddam Hussein had could just as well be eliminated by UN inspections. And a common critique of Israel's anti-terrorist operations in the Palestinian territories is that they have caused disproportionate harm to Palestinian civilians.

Just war theory could interpret these conditions in a consequentialist way, so that, for example, a war is proportionate if the total of all its benefits, of whatever type and however caused, is even slightly greater than its total harms, and a last resort if its net benefits minus harms are even slightly better than any alternative's. And indeed some of the theory's proponents have interpreted it this way.<sup>1</sup> Then the theory, while not as a whole consequentialist, because it contains just cause, discrimination, and other non-consequentialist conditions, mimics consequentialism in how it assesses a war's results.

But this interpretation is neither most intuitive nor truest to how the conditions

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1. See e.g. James Turner Johnson, *Morality and Contemporary Warfare* (New Haven, CN: Yale University Press, 1999), pp. 27-28.



have usually been understood. A more attractive reading departs from consequentialism, first, by distinguishing among types of benefit and harm, saying only some are relevant to the assessment of a war or act in war while others are not. Second, it distinguishes among causal processes, saying benefits and harms with one kind of causal history can count toward the assessment of a war or act while the same benefits or harms with another history cannot. Finally, it does not always weigh benefits and harms equally but gives more weight to harms an act directly causes than to any benefits it produces. In all three respects the resulting theory assesses consequences in a deontological way.

Before elaborating these points, we need to say something about the mutual relations of the conditions. The hope-of-success condition, though often presented as a separate condition in the *jus ad bellum*, can actually be subsumed under the proportionality condition. If a war has little or no chance of achieving relevant goods, then its destructiveness is out of proportion to its expected benefits and the war is wrong. But in each branch of the theory the proportionality and necessity conditions – the last resort condition is really an *ad bellum* necessity condition – are independent. A war can be proportionate, because the destruction it will cause is tolerable compared to its benefits, but not a last resort, because the same benefits could be achieved by less destructive means. Or it can be a last resort, because it is the only way of achieving certain goods, but disproportionate, because it will cause excessive harm compared to those goods.

At the same time, the necessity conditions are derivative from the proportionality conditions, because they are comparative versions of them. To assess the proportionality of a given war we identify its relevant benefits and harms and then subtract the latter

from the former to arrive at its net effect: only if that is sufficiently positive is the war permitted. Applying the last resort condition would be easy if there were some alternative that would achieve all the same goods; then the only question would be whether that alternative was less destructive. But often the alternatives to war will not achieve all the same goods, or not all to the same degree, and sometimes they risk additional harms. For example, if we try to reverse an aggression by diplomacy and fail, that may give the aggressor time to strengthen its military, making the eventual war more bloody. We must therefore do a separate proportionality assessment for each alternative to war, subtracting its relevant harms from benefits, and count the war as a last resort only if its net effect is better than that of any alternative. To put it slightly differently, we must determine whether the additional benefits of war, compared to its alternatives, justify its additional harms, and make a similar assessment for particular acts in war under the *in bello* necessity condition. So in each branch of the theory the proportionality condition considers the relevant benefits and harms of a war or act considered on its own, while the necessity condition compares the result of that calculation with the results of similar calculations for relevant alternatives, allowing a choice only when its balance of benefits to harms is better than that of any alternative.

Though the proportionality conditions are not comparative in the same way as the necessity conditions, they still involve a comparison. They require us to identify the benefits and harms a war will cause, which requires comparing the situation that will result from the war with the situation that would have obtained had it not been fought. Imagine that a war to remove a brutal dictator will cause 10,000 deaths among his country's civilians, but that if he remained in power he would kill 100,000 civilians. The

relevant fact about the war is not that it will kill 10,000; it is that it will result in a net saving of 90,000. But what is the baseline situation with which this comparison is made?

The simplest view is that the baseline is whatever a nation would have done had it not fought the war or, better, if the just cause for the war had not arisen. But this view is problematic at at least two points. Imagine that a nation is contemplating a war that has a trivial just cause and will be immensely destructive, but that if it does not fight this war it will fight another even more destructive war with no just cause. The fact that the second war will have an even worse result surely cannot make the first war proportionate, and to exclude this implication we must consider only alternatives that do not involve the nation's doing something morally wrong. Now imagine that two nations are contemplating the same war, with the same just cause and same level of destruction. If the first nation does not fight the war, it will spend the money the war would cost on welfare programs that will significantly benefit its poor. If the second does not fight, it will spend the money on tax breaks for the rich, which while not strictly forbidden will be much less beneficial. If the proportionality assessment considers just what a nation would otherwise do, the first nation's war will be less likely to be proportionate. That seems wrong: why should a nation's doing more good in its activities outside war make its resorting to war less permissible? To avoid this implication, we should compare the net effect of war with that of the least beneficial alternative that is morally permitted: then the two nations in our example will have their option of war compared with the same baseline, which is now not purely factual but at two points moralized.<sup>2</sup>

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2. On this issue see David Mellow, "Counterfactuals and the Proportionality Criterion," *Ethics and International Affairs* 20 (2006): 434-54.

## II. RELEVANT BENEFITS

Given this baseline, the first step in assessing the proportionality and then the necessity of a war or act in war is identifying its relevant benefits. Consequentialism counts benefits of all types, but just war theory seems not to, holding that some types of good are, as types, irrelevant. Imagine that a war will give pleasure to our soldiers, who are bored with training and eager for real combat. Their pleasure is undeniably good but seems here morally irrelevant: the case for war cannot be stronger given this kind of effect. Or imagine that a war will stimulate more profound art than would otherwise be created; that too seems irrelevant to its justification. It may be objected that these benefits are too trivial to count seriously in a proportionality calculation, but others are more significant. Imagine that our nation's and indeed the world's economy is in a recession, and that war would end that recession, as World War II ended the depression of the 1930s. The economic benefits the war will produce here are significant, but they again seem incapable of justifying war. An otherwise disproportionate conflict cannot become proportionate because it will boost GDP.

Which types of benefit are relevant, then? They clearly include those in a war's just causes. If the war will prevent aggression or major rights-violations by a government, the goods thereby achieved count uncontroversially against the harm the war will cause. And some very restrictive versions of just war theory say they are the only goods that count. In determining whether a war is proportionate and a last resort, we weigh the harm it will cause against only those benefits involved in its initial just causes.

But most versions of the theory are less restrictive, because they recognize what have been called "conditional" just causes. Unlike "independent" just causes such as

resisting aggression, merely conditional ones cannot on their own supply a just cause; if one has only conditional just causes, one is not permitted to fight. But once some other, independent just cause is present, conditional causes become legitimate goals of war and can contribute to its justification, in particular by helping to make it proportionate and a last resort.<sup>3</sup> Three main such causes have been recognized: forcibly disarming an aggressor, deterring future aggression, and preventing humanitarian wrongs that, though serious, do not mount to the level of an independent just cause.

On most versions of just war theory, the mere fact that a nation has weapons it may or even is likely to use aggressively at some time in the future is no justification for war against it now; *pace* the Bush Doctrine, merely preventive war is wrong. But once a nation has committed aggression, forcibly disarming it to prevent it from doing so again becomes on most views a legitimate goal of war and can even justify continuing the war after its initial goals have been achieved. It is widely held that in World War II the Allies were permitted to forcibly disarm Germany and Japan after their aggressions had been reversed. Many likewise hold that in 1991 the UN coalition was permitted to send troops into Iraq after liberating Kuwait, in order to eliminate Iraq's weapons of mass destruction; that is why, when they chose not to, they were also permitted to write conditions about disarmament into the ceasefire agreement that ended the war.

A similar point applies to deterrence. The mere fact that war against a nation will deter future aggressors cannot justify war, but once there is another, independent just cause, deterrence becomes a relevant benefit of war and can play a vital role in its justification. Argentina's invasion of the Falklands in 1982 gave Britain a just cause for

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3. This distinction is introduced (though using different terminology) in Jeff McMahan and Robert McKim, "The Just War and the Gulf War," *Canadian Journal of Philosophy*, 23 (1993): 501-41, pp. 502-06.

war, but given the islands' sparse population and remoteness from Britain that cause may have been insufficient to outweigh the harms of war in a proportionality calculation. But in justifying her resort to war British Prime Minister Thatcher also cited the need to resist aggression wherever it occurs, which was in effect to appeal to deterrence. And deterrence may have done more to make the war proportionate than its initial just cause did. Something similar applies to the last resort condition. In the lead-up to the Gulf War, some nations sought a negotiated Iraqi withdrawal from Kuwait, but it was evident that any such solution would require concessions to Iraq, for example, about some disputed islands on the Iraq-Kuwait border. The United States and its closest allies vigorously opposed the negotiations, saying there must be "no rewards for aggression." For them the conditional just cause of deterrence made diplomacy unacceptable when it might otherwise have been the morally preferable alternative.

The final type of conditional just cause is illustrated by the 2001 Afghanistan War. While the Taliban government's oppression of the Afghan people, and especially of Afghan women, was serious, I think most would deny that it constituted an independent just cause; a war fought only to liberate Afghan women would have been wrong. But once the Taliban provided an independent just cause by harbouring terrorists, the fact that war against them would end their oppression became for many an additional relevant benefit that counted toward its proportionality.<sup>4</sup>

A less restrictive view, then, counts as relevant benefits the goods in both a war's

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4. Given the role of these conditional just causes, an independent just cause must involve not only a good of a relevant type, such as resisting aggression, but also one above a threshold of seriousness. Otherwise goods such as disarmament and deterrence could justify war given only a trivial wrong of a relevant type, such as another nation's improperly imprisoning one of our citizens: that wrong would satisfy the just cause condition, and disarmament or deterrence could then satisfy the proportionality and last resort conditions. But surely if those goods cannot justify war on their own, they cannot do so given only a trivial wrong. We avoid that implication by requiring independent just causes to be not only of a relevant type but also above a threshold of seriousness.

independent and its conditional just causes. What weighs against the war's destructiveness is not just its initial justifying goal but also its potential to prevent future wars by disarming and deterring would-be aggressors and to correct lesser humanitarian wrongs. And there may be further relevant benefits. Imagine that in 1990 Saddam Hussein conquered Saudi Arabia as well as Kuwait and used the resulting control of their oil supplies to drive up the world oil price, causing significant harm to the world economy. I think many will say that preventing that economic harm would then have been a relevant benefit, making the case for war against Saddam stronger than if his aggression had not affected the oil price. But how can that be if preventing an economic recession is not a relevant benefit? How can economic goods count in the one case but not the other? The answer may lie in how the goods are produced.

When war lifts an economy out of recession, the benefit results from a means to the war's just cause: in order to reverse an aggression, say, we invest money in military production, and the resulting increase in industrial activity boosts our economy. But in the Saddam example the benefit results from the achievement of the war's just cause itself: it is the ending of Saddam's occupations of Kuwait and Saudi Arabia that prevents the increase in the world oil price. So it may be that economic goods count when they are causally downstream from a war's just cause, but not when they result only from a means to that cause. This suggestion may be confirmed by a diplomatic example. In the years immediately after its end, it looked as if the Gulf War might contribute to resolving the Israeli-Palestinian conflict, through the Oslo Accords it helped make possible. But I think most would deny that this was a relevant benefit of the war: one could not fight Iraq in order to bring peace to Palestine. And the reason may again be that the benefit resulted

from a means to the war's just cause rather than from that cause itself. In order to expel Iraq from Kuwait, the United States assembled an international coalition including both western and Arab states and with Israel as an unofficial partner, and the contacts that coalition involved helped stimulate the Oslo process. But now imagine that the 2003 Iraq War had, by ending Iraq's payments to the families of Palestinian suicide bombers, reduced the level of suicide bombing and so stimulated an Israeli-Palestinian settlement. Here it seems the settlement would be a relevant benefit, because ending support for terrorism is a legitimate goal of war.

It may therefore be that some goods are relevant benefits when they are causally downstream from a war's just cause but not when they result only from the means to that cause. Not all goods allow this treatment, however. If a nation's citizens get pleasure from its military victory, that seems irrelevant to the war's justification even if the pleasure results from the nation's achieving a just cause. But if it holds for even some goods, the just war conditions depart even further from consequentialism: not only do they exclude some types of good as types, they count others only when they result from one causal process rather than another.

The restrictions on relevant goods we have identified also bear on the last resort condition. Any time a nation fights a war, it could have spent the money the war cost in some other way, which could have had better consequences. For example, rather than fight the Gulf War the United States could have spent the billions of dollars it cost on development aid to Africa, which might well have produced greater benefits. For consequentialism this makes the war morally wrong, but it does not do so for just war theory. The reason is that the benefits of development aid, no matter how great, are of the



wrong type to be relevant to assessing the Gulf War. They are not involved in the war's just causes, either independent or conditional, nor are they causally downstream from those causes, and they therefore cannot make development aid a morally mandatory alternative to war. For last-resort purposes, the relevant alternatives to a war are only alternative ways of achieving the war's benefits, not policies that produce benefits of some totally different type.

These issues about relevant benefits also bear on the *in bello* proportionality condition. Its legal formulations require only that the damage an act in war will cause not be excessive "in relation to the concrete and direct military advantage anticipated," with no further explanation of how "military advantage" is to be understood.<sup>5</sup> But if an act in war is justified it surely can only be because it contributes to the war's relevant benefits, which means those in the war's independent and conditional just causes, and perhaps others causally downstream from them. But then any other benefits are irrelevant to *in bello* proportionality: an otherwise disproportionate tactic cannot become proportionate because it will please soldiers or have economic benefits, for example by testing a technology with civilian applications. Just as these benefits cannot count in assessing a war as a whole, so they cannot count in assessing acts within it.

It also follows that what counts as a proportionate tactic varies with the magnitude of a war's benefits, and in particular with the moral significance of its just causes. A level of harm to civilians that would be permissible in war against a genocidal enemy such as Nazi Germany would not be permissible in the Falklands or Kosovo War. That seems intuitively right and even undeniable, but it contradicts the widespread assumption that

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5. 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Art. 51 (5) (b), in *Documents on the Laws of War*, 3<sup>rd</sup> ed., ed. Adam Roberts and Richard Guelff (Oxford: Oxford University Press, 2000), p. 449.

the *jus ad bellum* and *jus in bello* are independent. It is commonly held that a nation may be morally wrong in its resort to war but fight the war entirely in accordance with the *in bello* rules. This is possible for the discrimination condition, if that permits both sides to target enemy soldiers, but it is not true of the *in bello* proportionality and necessity conditions. If they permit acts in war only when their relevant benefits outweigh their relevant harms, and an aggressor can produce no relevant benefits because it has no just cause, then no acts by that nation's soldiers can be proportionate or necessary. The *in bello* conditions are not independent of the *jus ad bellum* but depend crucially on the latter's specification of relevant benefits.

### III. RELEVANT HARMS

Having identified relevant benefits, the next task in assessing proportionality or necessity is to identify relevant harms. Here again some types may be excluded as types. For example, if an aggressor nation's citizens will be saddened by its defeat, that does not count at all against a war to reverse its aggression. But there seem to be many fewer such exclusions than in the case of benefits. If a war will cause pain to soldiers who do not want to fight, prevent the creation of great art, or harm the world's economy, these evils seem all to count fully against the war's benefits, and to do so whether they result from the war's just cause or not. While many types of benefit are irrelevant to the justification of war, most types of harm are relevant.

The more important exclusions of harms concern their causal histories, and in particular the role of other agents' choices in those histories. Consider first the deaths of enemy soldiers. The *jus in bello* seems to give these deaths very little weight. Its

necessity condition forbids killing enemy soldiers wantonly or to no purpose, and this is not a trivial restriction. It can, for example, justify the ban on explosive bullets: once a soldier has been hit by gunfire he is effectively disabled, making any further harm to him unnecessary. But if killing an enemy soldier will produce even a small benefit, it seems to be permitted. If killing a hundred or even a thousand enemy soldiers is necessary to save one of our soldiers, it is on standard military views not disproportionate. (In the movie *Saving Private Ryan* there is surely no number of German soldiers such that Tom Hanks must be careful not to kill more than that number while saving Ryan.) It is less clear how far this discounting of enemy soldiers' deaths carries over into the *jus ad bellum*. On many views the fact that a war will kill enemy soldiers counts more than trivially against its proportionality, but on most it counts much less than if the war will kill enemy civilians. This is reflected in popular criticisms of the Gulf and Iraq Wars, which focus much more on the number of Iraqi civilians killed than on the number of Iraqi soldiers; the latter are often barely mentioned. So in both branches of just war theory enemy soldiers' deaths have significantly discounted weight as harms, and the same is true to some extent for our soldiers. Imagine that to prevent terrorist attacks that will predictably kill 10,000 of our civilians we must fight a war that will kill 15,000 of our soldiers. I think most will say this war is permitted, implying that soldiers' deaths in general count less than civilians'.

This discounting of soldiers' deaths again distinguishes just war theory from consequentialism, which ignores the causal histories of harms. It is also connected to the discrimination condition in the *jus in bello*, which permits soldiers on each side to target enemy soldiers but not civilians. Different justifications have been proposed for this

permission, but the one I find most plausible is most clearly available given volunteer militaries on the two sides. Then we can say that by voluntarily entering military service, soldiers on each side freely took on the status of soldiers and thereby freely accepted that they may permissibly be killed in the course of war. More specifically, by volunteering they gave up their right not to be killed by particular people in particular circumstances, namely enemy soldiers in a declared war, and so made their killing in those circumstances not unjust. Their situation is like that of boxers who, in agreeing to a bout, permit each other to do in the ring what would be forbidden as assault outside it. This explains not only why targeting them in war is not wrong, but also why their deaths count less in assessing a war or act for proportionality or necessity: by making their deaths not unjust they themselves gave them less weight. In the case of our soldiers there are competing moral considerations. Our nation owes them special concern just as citizens, and may also have undertaken when they enlisted to safeguard their lives so far as possible. But even here there is an initial discount resulting from their initial decision to take up the soldier's role.<sup>6</sup>

This justification applies most clearly when soldiers are full volunteers, but often they are not. They may be conscripts, or have enlisted only because of lies told to them by their government or because they had no acceptable career alternatives. Are their deaths still discounted, or discounted as much? A hardline view says they are. Even though not fully voluntary, their enlistment was voluntary to some degree: the conscripts could have fled the country or gone to jail. And its being voluntary to that degree is sufficient to give them the same moral status as full volunteers. They are likewise

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6. This justification is surprisingly rarely given, but for hints of it see Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), p. 145; and Paul Christopher, *The Ethics of War and Peace*, 2<sup>nd</sup> ed. (Upper Saddle River, NJ: Prentice-Hall, 1994), p. 126n23.

legitimate targets during war, and their deaths likewise have minimal weight against our soldiers' deaths. But a soft-line view adjusts soldiers' moral standing by the degree of voluntariness of their enlistment. If they are conscripts they may be legitimate targets while actively fighting, but not when sleeping in barracks far behind the front lines, and their deaths have more weight against the benefits of war than the deaths of full volunteers. A war with a comparatively minor just cause, such as the Falklands War, might not be proportionate if fought against conscripts though it would be if fought against volunteers. In the Gulf War the Iraqi troops defending Kuwait were largely teenage conscripts; on the soft-line view this obliged the UN coalition facing them to accept greater risks to its own troops than if the troops opposing them were Republican Guards.

On the view just described, the moral weight of soldiers' deaths is diminished by choices they made in the past, and the same can be true of non-soldiers. Imagine that some enemy civilians install themselves as voluntary shields around a military target, hoping to deter attacks on it. Their deaths still have some moral weight. If we can attack either this target or another of equal military value that lacks shields, we should attack the one without shields. But if the civilians placed themselves near the target, that surely discounts their deaths to some extent, so attacking it may be proportionate where it would not be if their proximity were not their choice. Or imagine that if we win a war with a just cause some terrorists on the other side will launch suicide attacks on our civilians. Setting aside the civilians' deaths for a moment, can it count against the war's proportionality that it will result in the suicide bombers' deaths? The answer is surely no, and the obvious explanation is that by themselves choosing their deaths the bombers took the

responsibility for them on themselves and removed it from us.

In all these cases harm to a person is discounted because of his own wrongful choices, but can it also be discounted because of others' choices? Imagine that, losing on the battlefield, enemy troops retreat into a city where our pursuing them will inevitably cause civilian deaths. In assessing that pursuit for *in bello* proportionality, do we count the resulting civilian deaths fully against our act or can we discount them partly as the enemy's responsibility for bringing the civilians into the line of fire? International law seems to say we cannot. It forbids using civilians as involuntary shields, which the enemy troops in effect are doing. But it also says that one side's violating its legal obligations does not release the other side from its obligations, which suggests that our proportionality assessment should remain unchanged. Not everyone accepts this view, however; for example, the U.S. military seems not to. When a battle in the Iraq War moved into the city of Nasiriyah after Iraqi forces retreated there, the commander of a U.S. artillery battalion firing on the city "placed responsibility for any civilian deaths on the Iraqi soldiers who drew the marines into the populated areas," saying "'we will engage the enemy wherever he is.'"<sup>7</sup>

The same issue arises in the example of suicide bombers. If they kill civilians after we win an otherwise just war, do the resulting deaths count fully against our resort to war or are they partly discounted as due to the bombers' wrongful acts? And it is a pervasive issue in wars against guerrilla or insurgent forces, whose common tactic is to hide among a civilian population. The Viet Cong used this tactic in the Vietnam War, as do Hamas, Hezbollah, and other opponents of Israel today. One view says their use of

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7. "Marines Wade Into Dreaded Urban Battle," *The Globe and Mail*, Mar. 25, 2003 (New York Times Service).

this tactic makes no moral difference: the forces fighting them must count any resulting civilian deaths fully against their own acts. But some commentators on the Vietnam War say the main responsibility for civilian deaths lay with the Viet Cong and not the U.S.;<sup>8</sup> similarly, defenders of Israel say if Hezbollah locates rocket launchers in Lebanese towns, the deaths that result when Israel eliminates the launchers are attributable to Hezbollah.

In thinking about this issue we must not assume that the assignment of responsibility is zero-sum: a harm can be both wholly one agent's fault and wholly another's. The issue is just whether an enemy's having wrongfully contributed to a harm reduces somewhat that harm's weight in our assessments of proportionality and necessity. That said, the issue is a difficult one. It is not one where there are clear or uncontroversial judgements about particular cases; on the contrary, there are sharp disagreements about examples such as the Vietnam War and Israel's attack on Hezbollah. Nor do abstract principles tell decisively in favour of either view. On the one hand, one wants to say that we must take the world as we find it and not ignore features of our choice situation because we disapprove of how they came about. If an act of ours will kill civilians, that is the morally salient fact and far more important than the precise reason why it will do so. On the other hand, one wants to say that agents should not be morally protected by their bad characters: that they have performed or will perform seriously wrong acts should not make tactics against them impermissible that would be permissible if they were less grossly immoral. At the same time, the issue is vitally important for current moral debates about particular wars. At the bottom of these debates is a disagreement about how far, if

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8. Paul Ramsey, *The Just War: Force and Political Responsibility* (New York: Scribner's, 1968), p. 437; William V. O'Brien, *The Conduct of a Just and Limited War* (New York: Praeger, 1981), p. 100.

at all, the harms an act of ours will cause are discounted if they also depend on others' wrongful choices.

#### IV. WEIGHING BENEFITS AGAINST HARMS

Having identified relevant benefits and harms, just war theory must weigh the two against each other. Consequentialism does so by giving them equal moral weight, so an act can be right even though its benefits are only slightly greater than its harms. But deontological moralities are much more restrictive. If they do not contain absolute prohibitions against acts of direct harming such as killing the innocent, they allow these acts only in extreme cases, where their benefits are not just somewhat but vastly greater. Thus they allow killing an innocent person not to save just two other innocents, as consequentialism would, but only to save a hundred or a thousand, and in so doing they weigh harms much more heavily than benefits. As an instance of deontology, just war theory follows this line, but in two different ways at two different points.

When deontological views forbid acts of direct harming, they understand the directness at issue using either or both of two distinctions. The first says it is morally worse to cause harm by what one actively does than merely to allow harm to happen by not acting to prevent it; thus it is worse to kill than merely to allow to die. The second says it is worse to cause harm intending it as one's end or as a means to one's end than to do so merely foreseeing that the harm will result; thus aiming at harm is worse. These two distinctions are independent of each other. One can actively cause harm while not intending but only foreseeing it, and one can allow a harm because one wants it as an end or means, for example, allow someone to die because one wants to inherit her wealth.



Of these two distinctions, the second, between intending and merely foreseeing harm, is the more important in just war theory. When the discrimination condition forbids targeting civilians, it on most readings forbids acts that intend serious harm to civilians as an end or a means, while not in the same way forbidding acts that merely foresee civilian harm, as when bombing a legitimate military target unavoidably kills civilians living nearby. Some versions of the theory are absolutist, forbidding the targeting of civilians in any circumstances whatever. But others allow such targeting when it is necessary to avert an absolute catastrophe, or in conditions of “supreme emergency.” Michael Walzer thinks these conditions were present in the early stages of World War II, when the only way available to fight the massive evil of a Nazi victory was to bomb German cities. But he denies that they were present when the U.S. bombed Hiroshima and Nagasaki, even if doing so saved, as President Truman argued, many thousands of lives.<sup>9</sup> In this case the lives saved were primarily soldiers’, which may be discounted by their voluntary enlistment. But many just war theorists would take a similar view of civilian lives. Imagine that the only way to save 100,000 of our civilians’ lives from terrorist attacks is by bombing another country’s cities and intentionally killing 10,000 of its citizens. Many just war theorists would say this bombing is wrong, thereby giving the harms an act intentionally causes much more weight than its benefits.

The theory gives rather less weight to the other distinction, between doing and allowing, since it often allows active doings that cause significant harm to civilians. But it still seems to make some use of this distinction, and to count the harms a doing causes somewhat more than its benefits. This is, however, not always easy to see.

Consider a trade-off between different civilian lives, as when a war to prevent our

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9. Walzer, *Just and Unjust Wars*, ch. 16.

civilians from being killed in terrorist attacks will inevitably kill some civilians in an enemy country; this was the case in the Afghanistan War. The simplest versions of consequentialism weigh all lives equally and will forbid this war if it takes just one more life than it saves. But most adherents of just war theory start from a different position. They say a nation is permitted and even required to weigh its own citizens' interests more heavily than non-citizens'. When deciding trade, immigration, and other policies, it should look primarily to the effects on its own people. Does this view transfer to the case of war, so there too a nation may care more about its own citizens' good? I think it does, but only in a significantly weakened form. Whereas a nation may be permitted to save its own citizens from a natural disaster rather than save up to  $n$  times as many foreign citizens, it may not be permitted to save its citizens from terrorism if that will involve its killing  $n$  times as many foreigners. Even if some national preference is allowed in the second case, the degree allowed is less. But then the doing/allowing distinction is doing some work, making harms that result from a doing count more against its benefits than they would if the harms were merely allowed.

Now consider a trade-off between soldiers' and civilians' lives, as when a tactic that reduces the risk of death for our soldiers increases the risk for enemy civilians. (The intense bombing of Iraq at the start of the Gulf War had this effect, as did the Kosovo War policy of flying NATO planes only above 15,000 feet, where they were safe from anti-aircraft fire but from where their bombing was inevitably less accurate.) Here the baseline trade-offs are harder to determine. On the one hand, our soldiers are soldiers, and by entering military service have surrendered their right not to be killed in war as enemy civilians have not. On the other hand our soldiers are *ours*; they are citizens of our

nation and deserve extra consideration as such. It is hard to determine exactly how these considerations weigh against each other; perhaps they roughly balance each other, so the baseline weights of the two groups are roughly the same. But then the fact that a tactic will actively kill enemy civilians can boost that harm's moral weight, making the civilian deaths count somewhat more. While our military would be permitted to save  $n + 1$  of its soldiers rather than save  $n$  enemy civilians, it must be saving rather more than  $n + 1$  of its soldiers to be justified in killing  $n$  civilians.

These initial trade-offs have all involved lives, which are goods of the same general type, but just war theory must also weigh goods of different types. Consider the commonly accepted just cause of resisting aggression. An aggressor may, if successful, kill or imprison citizens of the victim nation; if so, preventing those wrongs is one justification for military self-defence. But sometimes the aggressor has no such aim. If not resisted, it will merely absorb the victim nation's territory and replace its government, with no further rights-violations to follow. In this case all that is threatened is the political self-determination of the nation's citizens. How much harm is permitted to protect that?

Some philosophers argue that none is, and that war against merely political aggression is always disproportionate and wrong: though political rights are important, they are not nearly as important as the right to life and may not be protected by taking life.<sup>10</sup> This is a radical argument, and would make many widely accepted wars wrong. But there are several responses to it. First, by threatening to kill the victim nation's citizens if they resist, the aggressor brings their right to life into play and so increases the level of force they may use in self-defence. Second, a defensive war will kill mostly

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10. Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995), ch. 4; David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), ch. 6.

soldiers, and if they freely entered military service that greatly reduces the weight their deaths have in a proportionality assessment. Third, even if the war will kill some of the aggressor's civilians, it will presumably do so without intent, which again reduces those deaths' weights. And even if one person's right of political self-determination does not count much against a death, aggression threatens millions of people's self-determination, and their rights added together may justify substantially more resistance. Finally, aggression threatens not just a political right, but the right to remain secure in a cultural and political home, one to which citizens normally feel deeply attached. In the morality of self-defence an attack inside one's home has special moral status, raising the level of defensive force one may use; and international aggression too invades a home.

These responses show, I think, that war against merely political aggression can be morally permitted, but they do not give a precise algorithm for determining when that is so. More generally, proportionality and necessity judgements can never be made with complete precision. There are, first, daunting empirical demands on these judgements. To know in advance whether a proposed war or tactic will be proportional or necessary, we need to know what consequences it will have, which before the fact we can only estimate roughly. Even after the fact, when its consequences are known, we have to compare them with various hypothetical scenarios: with the baseline situation of acting as we could otherwise permissibly have done, for the proportionality conditions, and with the results of relevant alternatives, for the necessity conditions. As merely hypothetical, these scenarios can again only be roughly estimated. And beyond these empirical challenges is the moral challenge of comparing different types of value. To reach a decisive conclusion about proportionality or necessity we must know how to weigh our soldiers' lives against

those of enemy civilians, political self-determination against the lives of soldiers, economic costs against deterrence, and much more. These weightings are very difficult, and different people may make them differently, leading to different moral assessments of particular wars or actions even given an agreed-on set of facts.

That said, proportionality and necessity are not always impossible to judge; sometimes there are clear cases. For example, most believe that, despite the massive destruction that resulted, the Allies were right to fight World War II against an enemy such as Nazi Germany. It would likewise have been undeniably proportionate if a military intervention had prevented the Rwandan genocide of 1994. On the other side, the benefits of the Iraq War – ending Saddam Hussein’s dictatorship and removing the threat of his acquiring weapons of mass destruction – seem too meagre to justify the large-scale havoc it has caused, so that war was on balance disproportionate. Nor, at least regarding the weapons issue, was it a last resort, since that benefit could have been achieved by UN inspectors. On the *in bello* side, it is hard to see the bombing inside Iraq at the start of the Gulf War as proportionate: the harm it caused Iraqi civilians seems much greater than its benefits to the coalition forces. And some of Israel’s tactics against terrorism, such as bulldozing entire streets in Palestinian towns and bombing as far into Lebanon as Beirut, seem to cause excessive harm.

Moreover, even when there are disputes about proportionality and necessity, we can identify their underlying grounds. They do not involve just conflicts among underivative moral judgements, but reflect deeper disagreements about such issues as the moral status of enemy conscripts and the significance of others’ wrongful agency. They are principled disagreements, with a more abstract philosophical basis. This may not

make them easier to resolve; the underlying principles may be just as contentious. But it does illuminate them, showing where the disputants most fundamentally differ and what would be needed to bring them together.

## V. CONCLUSION

As it must to be credible, just war theory evaluates wars and acts in war partly in light of their consequences. It does not do so, however, in a consequentialist fashion. It does not include all consequences in its assessments, holding that some types of harm and especially benefit are irrelevant as types, so they cannot count morally for or against a war or military tactic. Nor does it include consequences regardless of how they came about. It may deem certain benefits relevant if they result in one way from a war but not if they result in another, and may discount harms if their causal history includes certain choices, for example by soldiers to enter military service or by an enemy to bring civilians into the line of fire. Nor, finally, does it weigh benefits and harms equally. If certain harms will result from what we actively do, then even if we do not intend them they count more heavily against our act than if we merely allowed them to happen. The resulting morality of war is sometimes more restrictive than consequentialism, for example when acts that will save our soldiers will kill enemy civilians. And it is sometimes more permissive, as when the same acts will kill only enemy soldiers. But it takes a distinctively deontological approach to assessing the consequences of war, as befits its overall character as a version of deontology.

## UNDERGRADUATE BIOGRAPHIES

### STEPHEN STICH

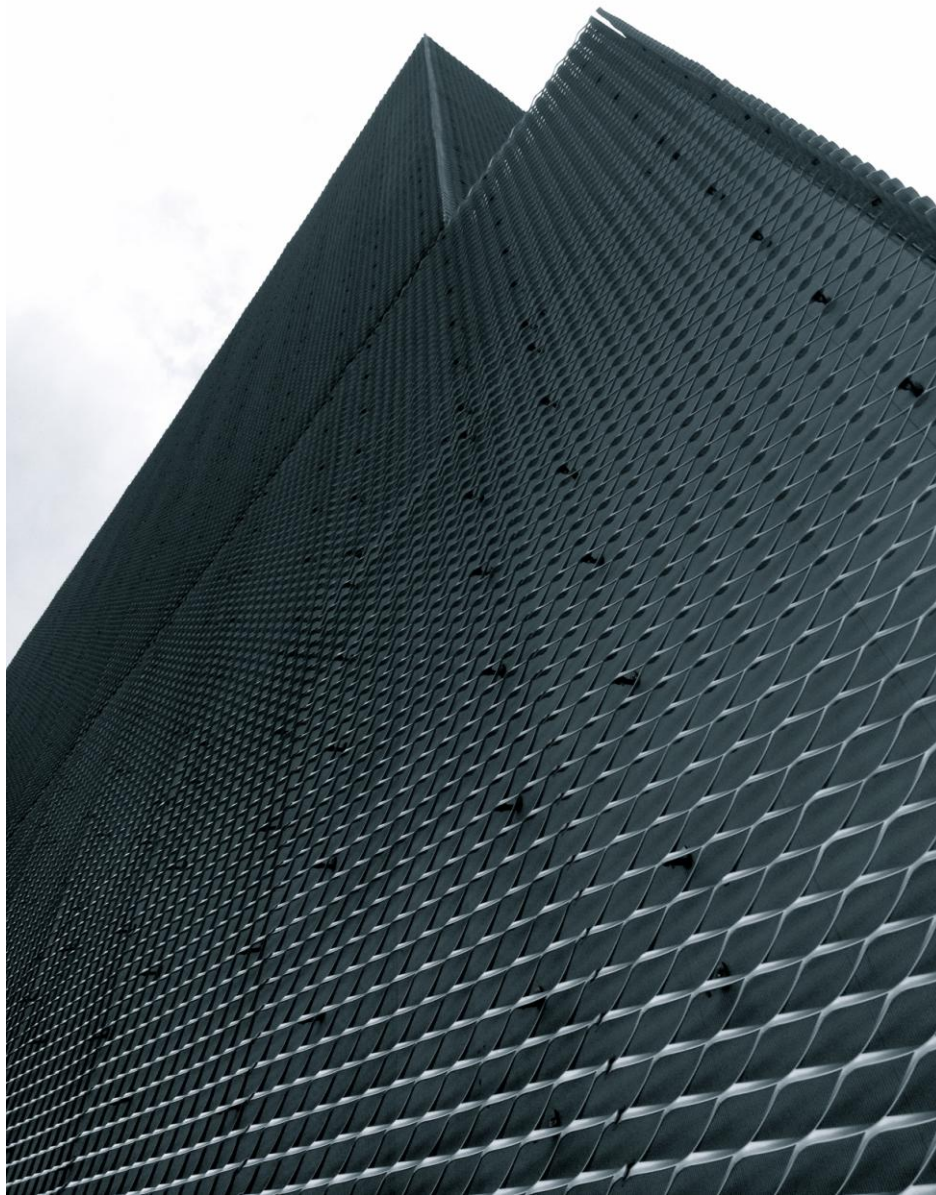
I graduated from University of Toronto in 2012 with a specialist in philosophy. For most of the next decade, I will be simultaneously pursuing a PhD in philosophy at the University of Arizona and a JD at Yale Law School. My main interests are in political philosophy and the philosophy of law. More specifically, I am interested in the natures of (1) legal and political institutions, and (2) the normative relationship between these institutions and their members.

### SHAKIR RAHIM

I am in my final year at the University of Toronto, majoring in political science and minoring in philosophy and bioethics. My academic interests include: moral philosophy, particularly consequentialist theories; contemporary international affairs; and international law. I work part-time as a debate coach and upon graduating I will be moving to Queenstown, South Africa for six months to begin a debate program at a low-income school. I hope to pursue law in some public-interest capacity in the long run.

### MARGARET KIM

I am in my second year of the English Common Law Program at the University of Ottawa Faculty of Law. My main areas of interest are international law, ethics and politics, which grew out of the double-major I pursued as an undergraduate at Trinity College, University of Toronto, in political science and ethics, society, & law. In September 2012, I will be attending the World Trade Organization Public Forum in Geneva, Switzerland, where I will be looking to learn more about the multilateralism of the trade system.



*Little evil would be done in the world if evil never could be done in the name of good.*

Marie von Ebner-Eschenbach