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# Jurisdiction & Scope

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### Introduction

By Helen McDermott

Globalization has led to an increase in the ability of states and other powerful actors to affect, both positively and negatively, human rights beyond their territories. The declining significance of territorial borders and the emergence of powerful non-state actors have given rise to types of human rights violations, and categories of human rights violators, that were not originally envisaged. The posts in this chapter explore new and complex issues that impact on human rights, and consider how domestic and international legal systems have and/or should respond to them.

Regulating the conduct of non-state actors is one of the biggest and most critical challenges facing international law today. Traditional approaches to human rights, which view non-state actors as beyond the direct reach of international human rights law, can give rise to a gap in legal protection. This point is made in Avani Bansal's post ('Human Rights in Disputed Territories – Affixing Responsibility' p 29), which addresses the question of how responsibility for human rights law violations should be affixed in situations where non-state actors are exercising control over territory.

Economic players, especially multinational companies that operate across national borders, are another category of non-state actor that has gained unprecedented power to affect the human rights of individuals. Lucia Berro ('Where will the US go after *Kiobel*?' p 28) and Christina Lee's ('Lessons from *Daimler*' p 28) contributions consider the barriers to accessing judicial remedies in USA courts for human rights violations committed by businesses abroad. As discussed in these two posts, *Kiobel* 69 U. S. \_\_\_\_ (2013) and subsequent cases brought before USA courts concerning corporate accountability for extraterritorial human rights violations demonstrate how the presumption against extraterritorial application and the limitation of personal jurisdiction continue to pose barriers to those seeking access to judicial remedies.

Even in jurisdictions where applicants have been afforded access to judicial remedies for human rights violations, justice may nevertheless go undone. Ravi Nitesh's post ('Right to Justice' Deprived by State: Case of 'Manorama vs AFSPA from Manipur' p 36) on India's Armed Forces Special Powers Act is illustrative of this point. In practice, this type of legislation renders security forces immune from prosecution for human rights violations and in turn, deprives those affected from their right to justice; a right that cannot be remedied by financial compensation. Claire Overman's contribution ('Jones and Others v UK: Immunity or Impunity?' p 35) discusses another jurisdictional barrier to securing justice for human rights violations; state immunity for acts of torture. The decision of the European Court of Human Rights (ECtHR) in *Jones v United Kingdom* [2014] ECHR 32, rejected the argument that by dismissing civil suits alleging torture on grounds of immunity, the UK had violated the applicants' right to access justice.

In addition to expanding human rights obligations to non-state actors, Richard Martin ('Nonsense on Stilts? Tommy the Chimp's Legal Battle for 'Non-Human Person Rights' in the New York Courts' p 39) raises the question of whether the category of human rights holders can extend to 'non-human person rights'. In other words, does some legal notion of human rights exist for animals? The case discussed in this contribution, which was filed on behalf of a captive chimpanzee in New York, challenges the dominant legal paradigm that rights are held by virtue of being human. As Martin asks, "is litigation based on the rights of humans really the right way forward [in ensuring greater protection for animals]?"

Although courts often take a cautious approach towards extending jurisdiction over human rights claims, some have endorsed a broader understanding of their judicial authority to enforce human rights law. Nurina Ally's post ('Investigating crimes against humanity – South Africa's embrace of universal jurisdiction' p 30) examining the case of *National Commissioner of the South African Police Service v South African Human Rights Litigation Service* [2013] ZASCA 168, discusses the embrace of universal jurisdiction by the South African Supreme Court. The decision, which has since been upheld by the Constitutional Court, recognizes that the South African Police Service are both empowered and required to investigate crimes against humanity committed outside of South Africa. In addition to domestic courts, Claire Overman's piece ('Cyprus v Turkey: Arming the European Court against States' Complacency?' p 34), which considers the impact of the recent *Cyprus v Turkey* decision, illustrates the European Court of Human Rights' progressive approach towards its power to remedy human rights violations. This judgment 'heralds a new era in the enforcement of human rights' because it is the first time the ECtHR has awarded just satisfaction in an inter-State case under the Convention.

The UK has a long history of leadership in the area of fundamental rights but there are fears that this reputation may be jeopardised if calls for the repeal of its Human Rights Act (HRA) are realised. In the wake of the recent general election, the question posed by Alice Donald is one that is on the minds of many in the UK, *where next for the European Convention?* ('Brighton and Beyond – Where Next for the European Convention on Human Rights?' p 32). The European Court is currently undergoing a process of reforms and it is hoped that implementation of these will clarify and realign the relationship of the Court with national jurisdictions and, in turn, quell some of the hostility directed at the Convention system. In the event that the HRA is repealed, Sionaidh Douglas Scott's post ('Why the UK Should Embrace the EU Charter of Fundamental Rights' p 33) offers some hope. Her contribution discusses how the EU Charter of Fundamental Rights could continue to provide important fundamental rights protections to individuals against member states

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In addition to new categories of actors, globalisation has called for human rights law to respond to modes of human rights violations that were once not envisaged. Louise Arimatsu's post ('The Geography of International Law and the Cyber Domain' p 37) addresses the challenge posed by advancements in cyber technology. As pointed out by Arimatsu, this type of conduct does not sit comfortably with the standard of 'effective control' over territory and/or persons, which has been developed and endorsed by the human rights monitoring bodies to determine the extraterritorial applicability of human rights obligations. The criteria that will be used by courts in determining when international human rights law obligations are triggered by cyber operations remains to be seen.

The contributions in this chapter show that although human rights law appears to be moving towards greater extraterritorial application and non-state actors are increasingly being subjected to human rights scrutiny, many challenges remain. The common message that emerges from the posts herein is that those charged with enforcing human rights law should respond to these challenges with increased efforts to ensure remedies for those whose rights have been violated.

*Dr Helen McDermott is a Postdoctoral Research Fellow with the Oxford Martin School Programme on Human Rights for Future Generations at the University of Oxford.*

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### Where will the US go after *Kiobel*?

By Lucia Berro | 19th September 2014

Last year, the landmark US Supreme Court decision of *Kiobel v Royal Dutch Petroleum Co.* 133 S.Ct. 1659 (2013) held that the presumption against extraterritorial application of US law applies to the Alien Tort Statute (“ATS”). This was significant as the ATS potentially opens US federal courts to claims by non-US citizens harmed by violations of “the law of nations” – a category of international law that includes war crimes, crimes against humanity, and torture. Although *Kiobel* left open the possibility of resort to US courts for claims that “touch and concern the territory of the US” with “sufficient force”, *Kiobel* significantly restricts resort to US Courts in order to vindicate human rights violations committed against non-US citizens abroad. The direction of the case law since *Kiobel* has been uncertain and inconsistent. This post tracks this scattered path.

The first significant decision came from the 11th Circuit in *Chiquita* Case No. 12-14898 in 2014. This case alleged that Chiquita, a US based company, provided funding and logistical support to a Colombian paramilitary group (the “AUC”). In the context of parallel criminal proceedings, Chiquita pleaded guilty to engaging in more than 100 transactions with the AUC and was fined \$25,000,000. However, in respect of civil proceedings, the 11th Circuit’s majority declined jurisdiction. The majority emphasised that “all relevant conduct took place outside the United States” and concluded that Chiquita’s status as a US corporation was insufficient to rebut the presumption against extraterritoriality. Conversely, in dissent, Judge Martin considered that because Chiquita’s decisions to pay the AUC were made at company headquarters on US soil the case “touch[ed] and concern[ed] the territory of the United States.” She wrote that in holding otherwise, “we disarm innocents against American corporations that engage in human rights violations abroad. I understand the ATS to have been deliberately crafted to avoid this regrettable result.”

Similarly in August, 2014 Judge Scheindl dismissed a claim accusing Ford Motor and IBM of encouraging human rights abuses in apartheid-era South Africa. The Judge said that the plaintiffs failed to show any “relevant conduct” by Ford and IBM within the US to justify holding the companies liable. Notwithstanding she wrote “[t]hat these plaintiffs are left without relief in an American court is regrettable. But I am bound to follow [*Kiobel*] no matter what my personal view of the law may be”.

Conversely, in July 2014, the 4th Circuit issued a decision on the Abu Ghraib case, No.13- 1937. This lawsuit was filed by four Iraqi torture victims against CACI International Inc, and CACI Premier Technology, Inc—both with headquarters in the US. The plaintiffs argued that CACI participated in war crimes, including torture and other illegal conduct, when providing interrogation services at Abu Ghraib prison in Iraq. According to an official investigation by the US Department of Defence “numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees”. The 4th Circuit held that *Kiobel* is not a categorical bar against all ATS claims based on conduct abroad. Rather, it concluded that the plaintiffs’ ATS claims did “touch and concern” the territory of the US with sufficient force to displace the presumption because, (a) CACI is a US corporation, (b) the employees who allegedly mistreated Abu Ghraib prisoners were US citizens and (c) CACI’s actions were at a US military facility operated pursuant to a contract with the US Government.

Finally, last week, the 9th Circuit allowed an ATS case against Nestlé, Cargill & ADM to proceed. The case, filed by former child slaves forced to harvest cocoa in Ivory Coast, alleges that the companies “aided and abetted child slavery by providing assistance to Ivorian farmers” in an attempt to reduce costs. The decision (an expanded replacement of an earlier opinion) vacated the district court decision stating, “the prohibition against slavery is universal and may be asserted against the corporate defendants in this case”.

Notwithstanding international pressure to enforce Ruggie’s Third Pillar of access to judicial remedies for human rights violations by transnational businesses, the case law thus far is discouraging. This is because, as Justice Kennedy noted in his concurring opinion in *Kiobel*, the majority opinion left “significant questions” unanswered. The effect of this decision on future litigation against businesses for liability under the ATS for acts occurring outside the US remains unclear, aggravating an already uphill battle to hold US corporations accountable for abuses abroad.

*Lucia, a Uruguayan/Italian national, holds a Magister Juris from the University of Oxford where she took part in the Weidenfeld Scholarships and Leadership Programme.*

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### Lessons from *Daimler*

By Christina Lee | 16th February 2014

On January 14, 2014, in the case of *Daimler AG v Bauman et al* 134 S. Ct. 746 (2014) the United States Supreme Court held that *Daimler AG* (“*Daimler*”) could not be sued in federal court in California for injuries allegedly caused by conduct of its Argentinian subsidiary when this conduct took place entirely outside of the United States.

The case arose out of a claim brought by twenty-two Argentinian residents alleging that during Argentina’s “Dirty War” in the 1970s and 1980s, Mercedes-Benz Argentina worked with state security forces to kidnap, torture, and kill workers, and seeking damages

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for human rights violations. After the plaintiffs brought suit in federal court in California, Daimler moved for lack of personal jurisdiction, which the district court granted. The Ninth Circuit eventually reversed with Judge Reinhardt, writing for the panel, asserting that an agency relationship existed between Mercedes-Benz USA (“MBUSA”), an indirect subsidiary of Daimler, and considerations of reasonableness did not bar exercise of general jurisdiction.



In the Supreme Court, the majority reversed the decision of the Ninth Circuit. They rejected Judge Reinhardt’s agency relationship reasoning, noting that the Ninth Circuit’s conception of agency theory for personal jurisdiction would be sweeping and always yield a “pro-jurisdiction answer.” The Court went even further to say that even if MBUSA’s contacts were attributable to Daimler, Daimler still did not have enough contact to render general jurisdiction. Relying on *Goodyear* 131 S. Ct. 2846 (2011) and *International Shoe* 326 U.S. 310 (1945), the Court asserted that the correct inquiry for a foreign corporation was not whether the corporation’s in-forum contacts could be “in some sense ‘continuous and systematic’ but whether the affiliations with the State are so ‘continuous and systematic’ as to render it *essentially at home* in the forum state.” The Court found that the Ninth Circuit erred in finding personal jurisdiction, for two main reasons. First, neither Daimler nor MBUSA was incorporated in California nor had a principal place of business in California. Second, consideration had to be had of international comity in cases involving foreign governments.

Given the oral arguments, the decision from the overwhelming majority is unsurprising – almost all the justices expressed scepticism at the plaintiff’s attorney’s arguments. Moreover, as evidenced from the questions and the opinion, the Court expressed strong reservations about the sweeping nature of Judge Reinhardt’s Ninth Circuit opinion and the desire to limit forum shopping for litigants.

Nevertheless, for those who had hoped, or even wished, for the Supreme Court to clarify the jurisprudence in favour of foreigners who bring suit in the United States in the wake of *Kiobel*, 133 S.Ct. 1659 (2013) the *Daimler* opinion was a disappointment and has similarly far-reaching repercussions compared to *Kiobel*. Justice Ginsburg’s opinion rejected the notion that the U.S. federal courts had a particular interest in international human rights (briefly mentioning *Kiobel*) and limited the importance of agency theory and corporate liability, relying on the level of contact in determining personal jurisdiction.

However, *Daimler* serves as a lesson for those who want to access U.S. federal courts. Justice Ginsburg’s opinion emphasises the tangential connection between MBUSA, Daimler, and California. This suggests that other states might have served as options as the Court emphasised that California as a state had such tangential contacts that there could not have been general jurisdiction. However, given the criteria of principal place of business and headquarters, this suggests that if the plaintiffs had brought suit in Michigan, or another state, the suit would not have been dismissed based on personal jurisdiction. While Ginsburg’s opinion limits the ability to bring suit compared to the Ninth Circuit’s sweeping opinion, the framework provided by *Goodyear* and *Daimler* may provide future litigants more clarity in where and how to bring suit so that the case could move beyond the procedural hurdles and to the merits and the real issues of the case.

*Christina Lee is a law student at Harvard Law School.*

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### Human Rights in Disputed Territories – Affixing Responsibility

By Avani Bansal | 14th February 2014

“Human rights do not have any borders. It is vital to address underlying human rights issues in disputed territories, regardless of the political recognition or the legal status of a territory” – Navi Pillay.

Under normal circumstances, the responsibility of protecting human rights of persons residing within the territory of a State lies with the *de-jure* State (and its *de-jure* government). The problem with regards to the application of human rights law arises in disputed territories where the legitimacy of control over the territory is disputed, thereby creating a protection gap. So how should we affix responsibility for human rights violations in territories which are under the effective control of non-State actors, especially since non-State actors cannot ratify human rights instruments such as the International Covenant on Civil and Political Rights? These questions present a quagmire for a human rights lawyer. This piece suggests the ways in which one could seek to affix responsibility on non-State actors for upholding human rights in disputed territories.

One way to impose responsibility on non-State actors for protecting human rights of people in disputed territories is by arguing, that since human rights norms contained in the Universal Declaration of Human Rights (UDHR) are customary international law, they need to be guaranteed by the authority having effective control of the territory, regardless of its political status internationally. The responsibility to protect these human rights norms which form part of customary international law does not require specific accession to, or ratification of, treaties by concerned authorities.

Another argument could be that since non-state actors have responsibility for human rights violations in International Human Rights Law (IHRL) and International Humanitarian Law (IHL), they *ipso facto* have responsibility in disputed territories where they have effective control. While Public International Law (PIL) in general has developed in order to regulate the conduct of States in their international relations, IHRL and IHL have developed specific particularities, aimed at imposing certain types of obligations on others, including individuals and non-State actors.

It is generally accepted that IHL related to non-international armed conflicts, in particular the provisions contained in common article 3 of the Geneva Conventions and, when applicable, Protocol II, applies to parties to such a conflict, whether State or non-State armed groups. It is also recognized that rules of customary international law related to non-international armed conflicts, such as the principles of distinction and proportionality, are applicable to non-State armed groups.

Concerning international human rights obligations, the traditional approach has been to consider that only States are bound by them. However, in evolving practice in the Security Council and in the reports of some special rapporteurs, it is increasingly considered that under certain circumstances non-State actors can also be bound by international human rights law and can assume, voluntarily or not, obligations to respect, protect and fulfil human rights. For instance, the Security Council has called in a number of resolutions, such as Resolution 1564 (2004) and Resolution 1894 (2009), on States and non-State armed groups to abide by international humanitarian law and international human rights obligations, though these have been in the context of an armed conflict.

These arguments set a stage to better protect human rights in disputed territories, thereby avoiding their protection gap. It is clear that the international legal order is expanding slowly and human rights will not remain State-centric for long. However in disputed territories today, de-facto State governments can be seen as non-State actors with effective control, and therefore obligated to enforce human rights.

*Avani did the BCL and an MPhil in Law (International Environmental Law) at the University of Oxford and is currently setting up her legal practice in India.*

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### Investigating crimes against humanity – South Africa’s embrace of universal jurisdiction

By Nurina Ally | 10th January 2014

*“What business is it of the South African authorities when torture on a widespread scale is alleged to have been committed by Zimbabweans against Zimbabweans in Zimbabwe? It is that question that is at the heart of this appeal.”* (Judge Navsa, National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre [2013] ZASCA 168 paragraph 5)

In a ground-breaking judgment, handed down in November 2013, the South African Supreme Court of Appeal resoundingly affirmed South Africa’s international obligations to exercise jurisdiction over alleged crimes against humanity, even when committed in another country. Being the first case that has directly raised the question of South Africa’s competence to investigate crimes against humanity, *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* has been instrumental in testing the exercise of investigative powers of South African authorities, as mandated by the implementation of the Rome Statute of the International Criminal Court Act, 2002 or “the ICC Act”.

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The matter dates back to 2008, when the South African Litigation Centre sent a dossier to certain South African authorities detailing allegations of crimes against humanity (particularly torture) committed against Zimbabwean nationals in Zimbabwe. The memorandum implicated senior officers in the Zimbabwean government. For various reasons (including resource constraints, diplomatic considerations, and scepticism regarding the evidence placed before them), the South African authorities declined to initiate an investigation.

The authorities asserted that the obligation to investigate crime was territorially limited to inhabitants of South Africa and their property. Furthermore, they argued that in terms of the ICC Act, the actual presence of the perpetrator was required in South Africa before an investigation could be initiated (it was claimed by the authorities that the alleged perpetrators were not present in South Africa, and that the majority had never previously visited South Africa). Ultimately, the Supreme Court of Appeal rejected these arguments and the South African Police Service was ordered to initiate an investigation into the alleged offences.



Charting the development of the universality principle and the foundations of international criminal justice, the Court emphasised that the purpose of the ICC Act is to ensure that South Africa exercises international criminal jurisdiction over crimes against humanity. Through the enactment of the Act, South Africa had undertaken to fulfil its obligations as a party to the Rome Statute. The Court made three principal findings regarding these obligations.

1. First, it affirmed the power of South African authorities to initiate an investigation into conduct criminalised in terms of the ICC Act, even where such crimes have been committed extra-territorially.
2. Second, it declared that appropriate authorities may initiate an investigation into such crimes irrespective of whether or not the alleged perpetrators, or their victims, are present in South Africa. In this regard, and despite a more restrictive approach adopted in some foreign jurisdictions, the Court held that “*a strict presence requirement defeats the wide manner in which our legislation is framed, and does violence to the fight against impunity.*” However, the Court does recognise that if there is no prospect of the alleged perpetrator’s presence then it would be arguable that no purpose would be served by initiating an investigation.
3. Third, the Court recognised that the ambit of investigative powers is restrained in that, absent the consent or co-operation of foreign states, authorities cannot pursue an investigation in another country. It should be noted, however, that in the present case the complainants had not called for the requested investigation to extend outside of the borders of South Africa and had offered to make witnesses available to authorities within South Africa.

These broad principles are to be welcomed as giving proper effect to the obligations that South Africa has undertaken under international law. Whilst there is no doubt room for further development, the judgment has set fertile ground for the possibility of pursuing the prosecution of crimes against humanity in South African courts.

In the most recent set of developments, application for leave to appeal has been made to the Constitutional Court of South Africa. Whilst it has yet to be seen if the Court will grant leave for the matter to be heard, recent judgments from the highest court suggest a strong emphasis on ensuring that South Africa fulfils its international law obligations. It is hopeful then that the Constitutional



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Court will reinforce the general thrust of the principles endorsed by the Supreme Court of Appeal.

*Nurina Ally recently served as a law clerk at the Constitutional Court of South Africa and currently works at a Johannesburg-based law firm. She writes in her personal capacity.*

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### **Brighton and Beyond – Where Next for the European Convention on Human Rights?**

By Alice Donald | 20th December 2014

Two reports have been released which shine a spotlight on the relationship between national authorities (especially parliaments) and the European Court of Human Rights (ECtHR). Both take stock of the reforms initiated under the UK Government's chairmanship of the inter-governmental arm of the Council of Europe, the Committee of Ministers, in 2011-12, culminating in the Brighton Declaration.

The first report, by the parliamentary Joint Committee on Human Rights (JCHR), recommends that the UK should ratify Protocol 15 of the European Convention on Human Rights (ECHR). The second report by the Committee on Legal Affairs and Human Rights (CLAHR) of the Parliamentary Assembly of the Council of Europe, examines how to ensure the future effectiveness of the ECHR; it also (among other steps) encourages states to ratify Protocol 15.

In the JCHR's view, the most significant aspect of Protocol 15 is the addition to the Preamble of the Convention of references to the principle of 'subsidiarity' and the doctrine of 'the margin of appreciation.' Both reports are keen to dispel common misconceptions about what these principles mean. They are **not**, the JCHR stresses, a basis either for asserting the primacy of national law over the Convention, or for demarcating national spheres of exclusive competence, free from Strasbourg's supervision. Rather, as the CLAHR ventures, ensuring the long-term effectiveness of the Convention system is a 'joint enterprise for the executive, legislative and judicial organs, at both the national and European levels' (para 5 of the 'Explanatory memorandum').

The JCHR welcomes Protocol 15 as signifying (para 3.17) 'a new era in the life of the Convention, an age of subsidiarity, in which the emphasis is on States' primary responsibility to secure the rights and freedoms set out in the Convention.' It states that Protocol 15 creates opportunities and obligations both for national actors and for the Court itself.

Protocol 15 should not be viewed by national actors – governments, legislatures and courts – as an opportunity to assert their superiority over the ECtHR. Instead, the Protocol places a greater onus on governments to conduct detailed assessments of, and justify the reasoning behind, the Convention-compatibility of their laws and policies – and on parliaments to subject executive action or inaction to conscientious and well-informed scrutiny and debate. As I have recently argued at the Council of Europe, and as the CLAHR report underscores, too few parliaments in Council of Europe states are presently equipped to conduct such rigorous human rights oversight – the JCHR being one of a few striking exceptions.

The principles to be enshrined in the Preamble via Protocol 15 provide strong incentives for national authorities to strengthen their systems of human rights protection. As the Court's President Dean Spielmann notes (p. 12), the margin of appreciation is 'neither a gift nor a concession' to states, but an incentive to earn the deference of the Court. The JCHR argues, for instance, that it should incentivise ministers to continue to improve the quality of the human rights memoranda that accompany Bills, and create more opportunities for informed parliamentary consideration of Convention-compatibility issues.

The JCHR gives equal focus to the implications of Protocol 15 for the ECtHR. It urges the ECtHR (para 3.19) to accelerate and make more transparent the recent trend in its case law that pays respectful attention to detailed and reasoned assessment by national authorities of the Convention-compatibility of laws and policies (exemplified by the judgment in *Animal Defenders International v UK* Application No. 48876/08).

The practical import of Protocol 15 is as yet unknown. It will not come into force until it has been ratified by all 47 states (to date, ten have done so), which could take years. Meanwhile, the CLAHR has some more immediate recommendations.

It urges national authorities to discharge 'with renewed urgency' their obligations under the Convention to implement ECHR standards and ECtHR judgments in order to stem the flood of applications to the ECtHR.

It implores the Committee of Ministers to support the Court financially to dispose of its (once mountainous, but now reducing) backlog of cases – and to be tougher with recalcitrant states, including by deploying its (as yet unused) power to initiate infringement proceedings.

The CLAHR report also reflects on more fundamental suggestions for reform of the Convention system. It rejects proposals to turn the ECtHR into a constitutional court, at the expense of its role as the 'guardian of individual rights'. The CLAHR also urges

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vigilance against reform plans that appear to be motivated by 'a desire to dismantle the Court and undermine its authority' and any 'backsliding' on either the rights enshrined in the Convention, the Court's dynamic interpretation of those rights, or the right of individual application.

The message is clear: while Protocol 15 remains on the far horizon, political threats to the authority of the ECtHR are gathering – and will be resisted.

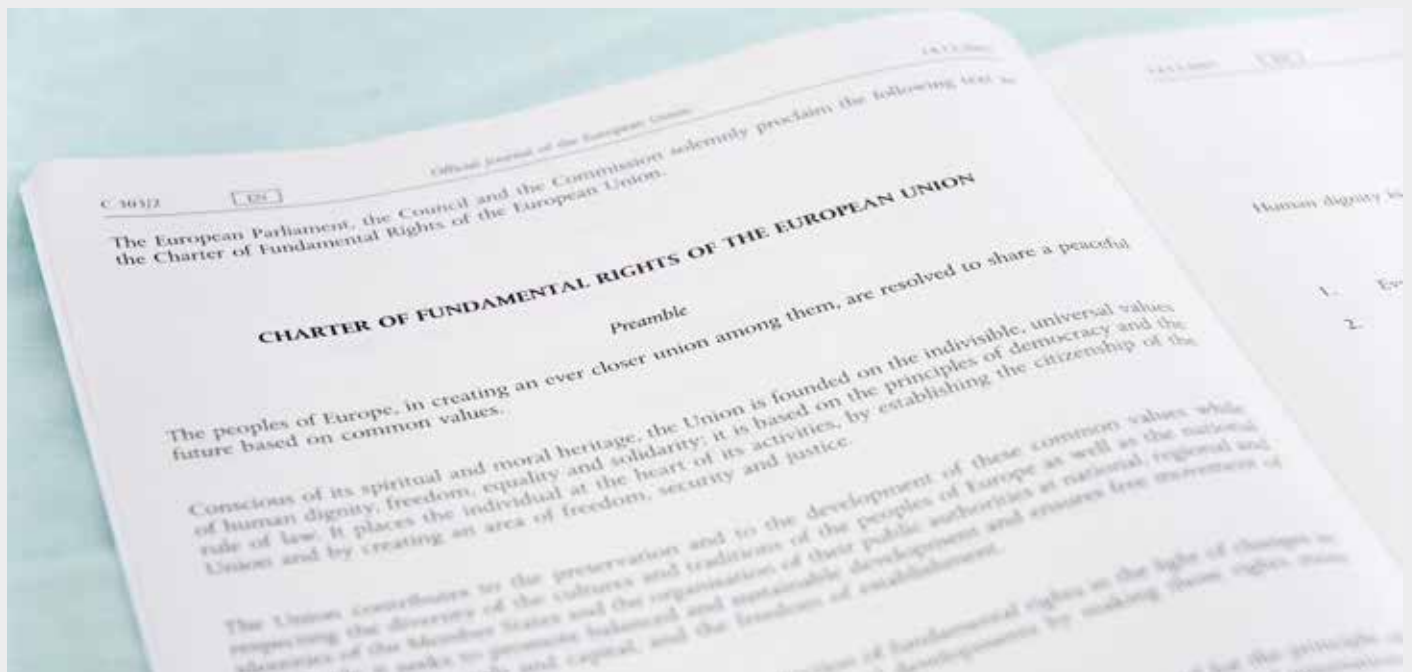
*Dr Alice Donald is a Senior Lecturer in the Department of Law and Politics at Middlesex University.*

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## Why the UK Should Embrace the EU Charter of Fundamental Rights

By Sionaidh Douglas Scott | 28th November 2014

The UK evinces a certain amount of scepticism for both human rights and for Europe. There has been much publicity about the plans of a Conservative government to repeal the UK Human Rights Act, should they be elected with a majority at the next general election. However, if the Human Rights Act is repealed, the EU Charter of Fundamental Rights would still remain in force in the UK.



Perhaps, unsurprisingly, the Charter has also come under attack, for example by the 2014 recommendation of the House of Commons European Scrutiny Committee, that the UK Parliament adopt legislation to disapply the Charter in the UK. Eurosceptics have woken up to the existence of the Charter. I believe that the Committee is misguided in its call for the Charter's disapplication. Much of the Committee's argument targets a lack of clarity in the Charter, including a fear that it could be used to extend EU competences. The report also expresses frustration that the UK's so-called 'opt-out', in Protocol 30 of the Lisbon treaty, is incapable of operating as such, despite the claims made for it by politicians at the time of its drafting. However, while there are some uncertainties in the Charter's application, these are no greater than those applying in human rights law generally, and European Court caselaw is in any case clarifying this law.

On the other hand, we should be clear that the alternative of disapplying the Charter would lead to far greater legal uncertainty and also expose the UK to large fines for breaching EU law. Further, the UK would also risk an action being brought under Article 7 TEU, which allows the EU to suspend the membership rights of a member state where that State is in serious and persistent breach of the EU's common values, which include fundamental rights. Art 7 has not been put into effect to date, and it would be highly regrettable if it were to be applied to the UK. In that case, there would also be some irony – the eurosceptics' longed for 'Brexit' would occur not through an 'in-out' referendum but through the means of expulsion from the EU – a humiliating and shameful end to the UK's relationship with the EU.

But crucially, what the Committee report also ignores are the important safeguards that the Charter offers against an overreaching EU – safeguards which have become visible in cases such as *Digital Rights Ireland*, in which the European Court invalidated

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a whole EU measure for its failure to comply with privacy rights in the Charter. This legislation required telecoms companies to retain personal telephone and internet records, with the aim of ensuring that state authorities could use such records in future investigations. The ECJ criticized the sweeping nature of the measure, holding that it 'entails an interference with the fundamental rights of practically the whole European population'. Why should UK citizens lack the protection of the Charter in areas such as these?

One cannot ignore Charter's role in upholding human rights within the scope of EU law. The Charter provides an important bulwark against abuse by the EU of its powers, but it is to be hoped that the EU would not commit the very gravest human rights violations, such as torture or inhuman and degrading treatment. Yet many EU states are still regularly found in violation of even the core human rights such as Art 3 ECHR, the prohibition on torture. States such as Greece have difficulties in complying with human rights obligations to asylum seekers. In *N.S.*, the ECJ gave precedence to fundamental rights over the obligations of member states to comply with the provisions of the EU Dublin II Regulation, recognising that member states must not return asylum seekers to other EU states when there would be a real risk of their being subjected to inhuman or degrading treatment within the meaning of Article 4 EU Charter. In this way, the Charter provides important protection to individuals against other member states abusing fundamental rights. The further the EU goes down the road of requiring mutual recognition of other states' practices (whether it be of food standards, technical requirements or criminal justice systems) the more the Charter is needed to provide human rights based exceptions to otherwise enforced recognition.

Therefore, rather than seeking to disapply the Charter in the UK, perhaps at the next general amendment of the EU treaties, the UK should seek to repeal Protocol 30 completely.

*Sionaidh Douglas-Scott is professor of European and Human rights law at the University of Oxford. She has published widely in the field of EU law and human rights.*

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## Cyprus v Turkey: Arming the European Court against States' Complacency?

By Claire Overman | 23rd May 2014

The European Court of Human Rights ("ECtHR") recently handed down judgment in *Cyprus v Turkey* [2014] ECHR 478. This case, the first to award damages to an applicant government in an inter-State case, may mark a development towards the ECtHR's more extensive use of damages as a punitive device against States.



This judgment represents the culmination of over 10 years of legal developments. In 2001, the ECtHR found various violations of the European Convention on Human Rights ("ECHR") by Turkey, arising out of Turkish military operations in northern Cyprus in the 1970s, the continuing division of the territory of Cyprus, and the activities of the "Turkish Republic of Northern Cyprus." Under

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Article 41 ECHR, a party is entitled to “just satisfaction” following a finding of violation. However the ECtHR held that the issue of just satisfaction was not ready for decision. It was not until March 2010 that the Cypriot government submitted to the Court its claims for just satisfaction.

The first question for the Court to consider was whether it was too late for Cyprus to make such a claim. It noted that general international law does, in principle, recognise the obligation on applicant governments in inter-State disputes to act without undue delay. However, it pointed out that, as the delay in this case occurred (a) due to the Court holding that the issue was not ready to be decided; (b) following judgment on the merits, meaning that Turkey would anticipate developments; (c) without the Cypriot government renouncing or waiving its right to just satisfaction, the claim could still validly be made over a decade later. The second issue was whether just satisfaction could be claimed in an inter-State case. Up until this point, damages had only ever been awarded to individual complainants whose rights had been violated by a State. In the only previous case to consider this issue, *Ireland v the United Kingdom* [1978] ECHR 1, the applicant government had stated that it did not invite the Court to consider just satisfaction.

In its judgment, the Court pointed out that the general logic of the just satisfaction rule was directly derived from principles of public international law on State liability, one of which was that the breach of an engagement involves an obligation to make reparation in an adequate form. It therefore considered that Article 41 did apply to inter-State cases, but noted that whether granting just satisfaction was justified “*has to be assessed and decided by the Court on a case-by-case basis.*” Relevant factors included the type of complaint made by the applicant Government, whether the victims of violations could be identified, and the main purpose of bringing the proceedings.

The Court then imposed a caveat. According to the very nature of the ECHR, it was the individual, not the State, who was primarily injured by a violation of Convention rights. Therefore just satisfaction should always be awarded for the benefit of individual victims. In the present case, the claims submitted on behalf of 1456 missing persons and enclaved Greek Cypriots were therefore found to merit an award of just satisfaction. This was assessed at €30 million and €60 million respectively.

As noted by the concurring judges, “*the present judgment heralds a new era in the enforcement of human rights.*” The Court has made clear that States will be held accountable in damages for invasions, wars, and other large-scale violations of the rights of citizens of other States. An interesting point raised by Judges Pinto de Albuquerque and Vučinić was that the just satisfaction awarded in this case, without reference to practicalities such as division of the award between individuals, was clearly intended to be punitive, rather than compensatory. One wonders whether this mechanism could be used more widely in future to provide the Court with greater weaponry when States fail to implement its judgments. It is not hard to imagine, for instance, UK prisoners launching fresh claims against the State for its continued non-implementation of the judgment in *Hirst v UK* [2005] ECHR 681, where a blanket ban on prisoner voting was deemed to violate the Convention. If such a claim were to succeed, would the Court impose a more punitive measure of just satisfaction? Such a development would lead to an interesting change in dynamic between domestic courts and the ECtHR.

*Claire is a former Editor and Communications Manager of the Oxford Human Rights Hub. She will be commencing pupillage at One Brick Court in October 2015.*

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## Jones and Others v UK: Immunity or Impunity?

By Claire Overman | 19th January 2014

The decision of the European Court of Human Rights in *Jones and Others v UK* [2014] ECHR 32 represents a missed opportunity to take a lead in developments in international law concerning state immunity for acts of torture. Yet, it expresses a cautiously optimistic view that such developments are set to continue.

The applicants were British nationals living in Saudi Arabia. They brought civil claims in the UK courts for damages for alleged acts of torture inflicted upon them by various agents of the Saudi Arabian government, including Lieutenants, police officers and prison governors. These claims were brought against the state of Saudi Arabia itself, and against these agents. The UK House of Lords rejected these claims holding that, under the State Immunity Act 1978, foreign states were generally immune from jurisdiction in the UK courts, and that this immunity extended to their government officials.

The applicants appeared before the ECtHR, arguing that this grant of immunity to Saudi Arabia and its officials violated their right of access to court under Article 6 of the European Convention on Human Rights. The ECtHR, however, disagreed, holding that there had been no violation.

It began with the premise that sovereign immunity is a concept of international law, by virtue of which one state shall not be subject to the jurisdiction of another. As such, it pursues the legitimate aim of promoting comity and good relations through the respect of another state’s sovereignty. The next question was whether the UK’s grant of immunity to foreign states and their officials

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was a proportionate way of achieving this aim. In answering this, the ECtHR stressed that the need to interpret the Convention harmoniously with other rules of international law meant that, if the UK measures reflected generally recognised rules of public international law on state immunity, they could not in principle be disproportionate.

The ECtHR accepted that there were some exceptions to state immunity in public international law. However, the recent decision of the International Court of Justice in *Germany v Italy* (I.C.J. Reports 2012, p.99) holding that a state was not deprived of immunity simply because it was accused of serious violations of international human rights law, was important. For the ECtHR, it provided conclusive evidence that international law had not moved on sufficiently from its previous decision in *Al-Adsani v UK* (Application no. 35763/97) in which state immunity was upheld in the context of torture allegations.

With regard to immunity of state agents for acts of torture, the position was less clear. The ECtHR noted that international law instruments and materials on state immunity give limited attention to that particular question. Whilst accepting that there was some emerging support in favour of a special rule in public international law in cases concerning civil claims for torture lodged against foreign state officials, the bulk of the authority was in favour of the argument, made by the UK House of Lords, that a state's right to immunity may not be circumvented by suing its agents instead. As a result, the Court held that the grant of immunity to the Saudi officials reflected generally recognised rules of public international law.

This decision is disappointing in two respects. First, on the facts of the case, the applicants have been left with no real means of redress for the alleged torture suffered at the hands of the Saudi authorities. Rosalind English notes, in the UK Human Rights Blog, that "judicial avenues are not the only, or indeed not even the most appropriate means to secure" accountability. However, this overlooks the reality that governments, shackled to diplomatic concerns, are likely to be much less inclined than courts to act upon allegations that other states have been complicit in torture. The very role of courts, as independent bodies, is to rule on difficult issues without political bias.

Secondly, the Court undertakes no real analysis of the question of what should happen when two important international principles – international comity, and the denunciation of torture – compete. It relies on the existence of a historical status quo as a conclusive reason for maintaining it, despite itself acknowledging that, due to the recognition in some countries of an exception to state immunity for acts of torture, international opinion may be changing. This very dynamism should have pushed it to engage independently with underlying principles in this area. In not so doing, the ECtHR has missed this opportunity to assist the development of this issue with an authoritative international judgment.

*Claire is a former Editor and Communications Manager of the Oxford Human Rights Hub. She will be commencing pupillage at One Brick Court in October 2015.*

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## **'Right to Justice' Deprived by State: Case of 'Manorama Vs AFSPA' from Manipur, India**

By Ravi Nitesh | 7th January 2015

Recently, in the case of *Union of India and ANR v State of Manipur and NR Case 14726 -14730 OF 2011*, which concerned Thangjam Manorama Manipur, (who was allegedly killed in 2004 by Assam Rifles, a security force of government), the Supreme Court of India directed the Government of India to award 10,00,000 INR or £10,340.00 GBP as compensation to Manorama's mother. But the serious concern is that in spite of such direction, the court could not spell any judgment against the culprits in the case of Manorama and other similar cases yet.

I visited Manorama's house two months ago and met her brother and mother. My visit was part of a solidarity visit where I participated in Asian solidarity events organized by May 18 Memorial, Forum Asia and Just Peace Foundation at Imphal, Manipur.

'I don't want to speak anything' were the words of Manorama's mother Thangjam Khumanleima, when it was conveyed by our local host, a human rights activist, Babloo Loitongbam, that we all came from various parts of India and from abroad to meet her. We were there for 40 minutes but she remained silent and appeared full of sorrow, despair and anger.

Manorama's brother Thangjam Dolen talked to us. He described what happened on that night of July 10-11 2004, when soldiers of Assam Rifles knocked on the door, called Manorama outside of house, tortured her, and forcefully took her away. They alleged that Manorama was associated with PLA (People's Liberation Army), an insurgent group in north east India. The denial by Manorama did not stop them. After few hours, the dead body of Manorama was found on the roadside. People came to protest as they noticed that there were bullet shots in her private parts and therefore suspected rape by the soldiers.

There were massive protests across Manipur. 10 women had staged a nude protest in front of the historical Kangla Fort with a banner reading "Indian Army Rape Us". These protests had forced the state government to order for an inquiry under the Justice Upendra Commission. However, Assam Rifles went to higher court in August 2004 and petitioned that no inquiry can be made as the concerned soldiers were protected by the Armed Forces Special Powers Act (AFSPA) and therefore, as per the AFSPA rule,

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a prior sanction is required from central government. While the Higher court (Guwahati High Court) had passed an order in the year 2010 and upheld that an inquiry commission could be set-up and the State of Manipur is authorised to act on the report of commission, however the Government of India moved to Supreme Court against this order. Now, Supreme Court of India agreed to hear the petition but only ordered compensation of Rs. 10 lakhs (INR) to the victim's family.



It is a case that witnessed massive protest. Still 10 years on, the order was for compensation, not justice. There are many such cases, of rapes, fake killings, torture, reported and unreported in the AFSPA imposed areas of North East Region of India (through AFSPA 1958) and in Jammu & Kashmir (through AFSPA 1990). AFSPA provided extra-ordinary powers of shoot on suspicion, search and arrest. It also provides impunity to armed forces with its section 6 where no criminal case can be lodged against any armed force personals without prior sanction from central government. Unfortunately, the sanction has not ever been provided, not even in a single case.

AFSPA is a draconian law. It is responsible for gross human rights violations by security forces and many national/international human rights groups including UN bodies have called for India to repeal it, but it is still surviving.

During the recent parliamentary elections in India, the state unit of Manipur of BJP promised to repeal AFSPA if voted into power. It has been 7 months now since the BJP has come to power, but AFSPA remains operational.

This scenario where the right to justice of common people has been deprived by 'impunity' granted to functionaries of state violence has only worsened people's despair and made them disillusioned by the state. Now it is upon the new government of India and civil society, together with activists from all over the globe to work towards the end of culture of violence and to ensure repeal of AFSPA and restore the right to life, the right to justice.

*Ravi Nitesh is a freelance writer, Founder-Mission Bhartiyaam, Convenor-Save Sharmila Solidarity Campaign (A nationwide campaign for repeal AFSPA).*

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## The Geography of International Law and the Cyber Domain

By Louise Arimatsu | 25th February 2015

The geographical scope of the law of armed conflict (LOAC) has engaged the interest of IHL experts for some years dividing opinion as to whether the reach of the law is determined by the territorial border, the location of the parties to the conflict, or restricted to the site of the hostilities. This is more than just a theoretical question since the consequence of adopting one particular

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view rather than another can result in different findings as to the legality of the conduct in question. International human rights law (IHRL) experts have likewise concerned themselves with the geographical scope of IHRL albeit in a different vernacular given the different point of departure.



Since the purpose of IHRL is to regulate the state's relations with persons in its territory, in contrast to LOAC, there is consensus that the law applies throughout the state's territory. However, divisions have surfaced on whether a state's obligations are geographically limited to the state's sovereign territory or, in exceptional circumstance, such obligations arise extraterritorially. Over the years, member states of the European Convention on Human Rights have accepted the idea that their obligations are triggered extraterritorially in situations where they have 'effective control' over persons and/or territory irrespective of sovereignty. Arguments persist over specific situations but the principle is now well-established.

The UN human rights bodies have long favoured a similar approach when interpreting the applicability of a state's obligations pursuant to the ICCPR. In General Comment 31, the Human Rights Committee expressly maintained that "a State party [to the ICCPR] must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party". Not all states subscribe to this interpretation including, for example, the US which has consistently asserted that the Covenant does not apply extraterritorially.

Measures adopted by the US following the Snowden disclosures have reinforced this distinction exemplified by the *legal* reforms (even if inadequate) which have been introduced to protect the privacy of US citizens in contrast to the *policy* announcement that the US would "take into account that all persons should be treated with dignity and respect, regardless of their nationality or wherever they might reside" when conducting digital surveillance operations.

But the challenge does not end there, since even if all states accepted the extraterritorial applicability of the Covenant, the traditional notion of 'effective control' sits uncomfortably with the nature of digital operations. One option is for states to agree that control over digital communication infrastructure through tapping or penetration amounts to effective control as suggested by the UN High Commission for Human Rights. An alternative way forward is for states to concede that their obligation is to respect the rights of all persons irrespective of geographical location or effective control. In time this latter option may prove to be the more attractive for technologically advanced states including, most notably the US, demonstrated by the experience of the Obama Administration following the cyber-attack on Sony Pictures in November 2014.

That the hackers violated US criminal law was not in doubt: the attack caused significant destruction and constituted theft on an unprecedented scale. As evidence suggesting North Korea's involvement in the attack mounted, legal experts opined that the hack also constituted a violation of international law: namely, a breach of US sovereignty. But when Sony cancelled the Christmas release of *The Interview* in response to subsequent threats by the hackers, as far as the American public were concerned, the

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perceived wrongdoing constituted – above all – an attack on the freedom of expression. This sentiment was echoed in a White House statement which stated, “we take seriously North Korea’s attack that aimed ... to threaten artists and other individuals with the goal of restricting their right to free expression.” But if North Korea does have a *legal* duty not to violate the freedom of expression of US citizens it must surely be on the basis that its Covenant obligations are extraterritorial in scope. This raises the question of whether, as societies become increasingly networked, states will feel the need to re-evaluate the scope of their IHRL obligations, if only for reasons of self-interest.

*Dr Louise Arimatsu is an Associate Fellow at Chatham House and Honorary Senior Research Fellow in the Law Department at Exeter University. She was a member of the Group of Experts on the Tallinn Manual on the International Law Applicable to Cyber Warfare.*

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## Nonsense on Stilts? Tommy the Chimp’s Legal Battle for ‘Non-Human Person Rights’ in the New York Courts

By Richard Martin | 15th January 2015

Tommy has been imprisoned for most of his life. Locked in a room in upstate New York, he has no money and cannot speak any languages. With the help of lawyers, he is now invoking the historic writ of habeas corpus to challenge his detention. Tommy, though, is not a human; he is a chimpanzee, and his representatives are on a quest for ‘non-human person rights’ for animals. What are lawyers and those seeking better protection for animals to make of Tommy’s case?

The legal battle, which began over a year ago, reached the New York Third Appellate Court last month, in the case of *ex rel. The Nonhuman Rights Project v Lavery* (2014 NY Slip Op 08531). Recognizing the novelty of the case, the court noted that animals have never been explicitly considered capable of asserting rights under US law. Rejecting the appeal, it reasoned that chimpanzees, unlike humans, cannot submit to societal responsibilities or be held legally accountable for their actions and, therefore, it would be inappropriate to confer upon such animals legal rights, including the right to liberty. To support this, the court pointed towards the historical ascription of rights with responsibilities in America stemming from principles of social contract, as well as the consistent definition of legal personhood in terms of both rights and duties.

The judgment poses a central conceptual question concerning the nature of rights-based claims and the extent of correlative duties. For legal theorists, this maps onto well-worn jurisprudential debates, where the answer depends on whether we grant rights an internal logic or complexity and how this to be understood. Off the jurisprudential map though, the court’s reasoning remains curious. Firstly, biologists would probably remind us that whether animals can in fact bear social responsibilities is less clear-cut than the court would like to think. Chimpanzees such as Tommy share 99% of our human DNA and can demonstrate highly complex cognitive functions, such as self-awareness and self-determination. Anyway, as a society would we not be willing to say that we have submitted a social responsibility to the likes of guide dogs tasked with assisting the blind or police horses used on our streets? Secondly, the strict aligning of rights with duties, pinned onto the responsibilities owed under the court’s vague and sparse description of an America’s social contract in 2014, creates a more general feeling of discomfort. Surely we would be reluctant to accept that those who are less able to shoulder societal responsibilities- babies, the elderly, the infirm- are in some sense written out of the social contract, thus losing the rights that come with it?

For those interested in ensuring greater protection for animals, is litigation based on the rights of humans really the right way forward anyway? Just last week, in a landmark case, Sandra, a 29-year-old ape, won an appeal similar to Tommy’s before an Argentinean court. The full judgment has yet to be released, but the notion of ‘non-human person rights’ seems to have found favour with the court and Sandra is being moved to a sanctuary in Brazil. Tommy’s application to the Court of Appeals has just been lodged. Maybe the real battle, though, should be one of hearts and minds outside the courtroom, encouraging us to reflect on the impact that our consumer habits and lifestyles, be it food, clothes, holidays, have on animals and their habitats. Steps have already been made by legislatures to better protect animals, as seen in the UK, for example, by the Animal Welfare Act 2006.

Over a century ago, the father of Utilitarianism, Jeremy Bentham, scoffed at the notion of universal rights held by virtue of being human. They were, he famously said, “nonsense on stilts”. Yet this very idea has become a dominant legal paradigm in the last century. With increasing concern about the sustainability of our planet, it’s creatures and future inhabitants, should we be reluctant to dismiss as nonsense something akin to human rights, with the weighty normative and legal claims they carry, being extended to those not currently understood as legal persons?

*Richard is an Editor of the Oxford Human Rights Hub Blog. He is completing his DPhil on human rights law and practice within the police at the Law Faculty’s Centre for Criminology, University of Oxford.*