LIMITING THE POTENTIAL FOR BYSTANDER APATHY: ON THE INTRODUCTION OF A DUTY TO RESCUE IN INTERNATIONAL LAW

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ABSTRACT

You could read on the faces of the passers-by that we were written off as doomed. The people of Lemberg had become accustomed to the sight of tortured Jews and they looked at us as one looks at a herd of cattle being driven to the slaughter house. At such times I was consumed by a feeling that the world had conspired against us and our fate was accepted without a protest, without a trace of sympathy.

Simon Wiesenthal[1]

I am only one,
But still I am one.
I cannot do everything,
But still I can do something;
And because I cannot do everything
I will not refuse to do the something that I can do.

Edward Everett Hale[2]

A INTRODUCTION

This article examines the concept of Good Samaritanism in national law, and contrasts this with the recent attempts of the International Criminal Tribunals for Rwanda and Yugoslavia to introduce the duty via international criminal law. The author assesses such developments, in light of the psychological factors underlying the practice of bystander apathy during periods of mass human rights violations, and consequently argues for the introduction of a general duty to rescue in international law, separate and apart from the international criminal justice system. In cases of mass atrocity, silence wins the day all too often. Vetlesen points out that '[m]ost often, in cases of genocide, for every person directly victimized and killed there will be hundreds, thousands, perhaps even millions, who are neither directly targeted as victims nor directly participating as perpetrators.'[3] Widespread and systematic human rights abuse requires malicious intent by a small number of organised and powerful individuals. However, evil only flourishes with the indifference of the masses. Local resistance serves the purpose of seriously damaging the success of a project of human rights abuse. Conversely, silence legitimises. In order to counteract this phenomenon, the author argues for the

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[1] S Wiesenthal *The Sunflower: On the Possibilities and Limits of Forgiveness* (Schocken Books New York 1998) 19.

[2] E E Hale 'Lend a Hand ' in James Dalton Morrison (ed) *Masterpieces of Religious Verse* (1984) 416.

[3] A J Vetlesen 'A Case for the Responsibility of the Bystander ' (2000) 37 Journal of Peace Research No 4 515, 520.

introduction of a general duty to rescue in international law. The duty at national law will be analysed, followed by an examination of the psychological processes involved in bystander apathy. The author highlights the extent the which the duty has been advocated for within key UN institutions, in concluding that while international criminal law is not the most appealing arena for the concept's introduction, it nevertheless warrants formal introduction within our current international law framework.

B THE DUTY TO RESCUE AT NATIONAL LAW

What is the Good Samaritan duty to rescue all about? Black's Law Dictionary defines Good Samaritanism as '[a] law that requires a person to come to the aid of another who is exposed to grave physical harm, if there is no danger of risk of injury to the rescuer.'[4] In short, it is a law which requires innocent bystanders to act altruistically in situations of peril. The doctrine is employed by a number of jurisdictions globally. France[5] and Germany,[6] like many of their civil law counterparts,[7] have codified a general Good Samaritan duty to assist, absent any prior personal or legal relationship. As one author notes, in such systems:

> [t]he law makers have decided that the evil of indifference to another's danger and consequent failure to extinguish it is more serious than possible infringements on liberty which the requirement of action might entail.[8]

Indeed, Schiff reports that 'almost every civil law jurisdiction, in Europe, as well as in Latin America, recognizes various types of duties to rescue…'[9] Despite the concept's prominence in such systems, it is essential to note that sentences imposed for failing to rescue are lenient in comparison to sentences imposed for perpetrating a given crime.[10]

The common law stands on the other side of the divide.[11] Vranken points out that 'the common law has never really accepted the existence of a common law duty to go, proactively, to the assistance of needy members of the general public.'[12] English law remains essentially the same as Sir James Fitzjames Stephen described it in 1883:

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[4] *Black's Law Dictionary* (Thomson West St Paul Minnesota 2004).
[5] French Criminal Code Article 223-6. Obstructing Measures of Assistance and Omission to help.
[6] German Criminal Code s 323c Failure to render assistance.
[7] Other civil law jurisdictions employing the concept include Italy, Spain, The Netherlands, Belgium, Norway, Finland, Denmark, Greece, Portugal and Austria.
[8] Note 'The Failure to Rescue: A Comparative Study' (1952) 52 Columbia Law Review 631, 646.
[9] D Schiff 'Samaritans: Good, Bad and Ugly: A Comparative Law Analysis' (2006) 11 Roger Williams University Law Review 77, 79. Jewish law also recognises a duty to assist by law.
The Torah states that '[thou] shalt not stand against the blood of thy neighbour.' *Lev* 19:16.
See generally, Besser and Kaplan, 'The Good Samaritan: Jewish and American Legal Perspectives' (1994) 10 Journal of Law and Religion 193, 211.
[10] *See* for example, the German Criminal Code, s 49.
[11] There are but a small number of exceptions to the common law rule that strangers are under no legal obligation to assist victims in peril, for instance, the Northern Territory of Australia, and a small subset of states in the US (Hawaii, Minnesota, Rhode Island , Vermont, Wisconsin).
[12] M Vranken 'Duty to Rescue in Civil Law and Common Law: Les Extrêmes se Touchent?' (1998) 47 The International and Comparative Law Quarterly 934, 935.

> [A] number of people who stand round a shallow pool in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the water, are no doubt shameful cowards, but they can hardly be said to have killed the child.[13]

What is to be made of the common law approach in comparison to jurisdictions which encourage Good Samaritanism? There is no doubt that law, by and large, has a role to play in shaping human conduct.

However, this only rings true in reality, it is suggested, where a basic moral framework does not already encourage the behaviour in question. That is, a criminal prohibition on failing to perform will have little effect where strong moral standards already dictate that performance. Indeed, Hyman argues *against* the introduction of a duty to rescue since figures in the US indicate that regardless of the law, individuals *do* come to the rescue of others in time of need. He therefore concludes that "although the no-duty rule presents a vital intellectual puzzle for law professors, judges, and philosophers, it has no detectable influence on the behaviour of ordinary people."[14] The author suggests that the reason for this anomaly is that, in practice, community morality renders the law unnecessary. It is ultimately the existence of a set of societal norms, whatever their origin, which creates the likelihood of altruistic behaviour. These societal norms, more often than not, are simply reflected by law and ultimately, it is simply a lack of necessity which dictates the common law passivity.

It is this important observation which adds complexity to the debate concerning the introduction of Good Samaritanism on an international plane. Should community morality break down, giving rise to a lack of emphasis on local moral conditioning, the law *would* become significant since it would serve the purpose of stepping in to replace the resultant void, and to thereby reshape the behaviour of its citizens. In cases of mass atrocity, both the legal and moral order find themselves uprooted, altered, even destroyed. Therefore, it is not sufficient to promote the introduction of Good Samaritan laws at a national level, but rather, to encourage their development internationally so that a higher normative system exists to guide citizens in the midst of gross human rights abuse. This will be explored in more depth below, following an examination of the introduction of the theory via international criminal law.

C DEVELOPMENTS IN INTERNATIONAL CRIMINAL LAW

The author argues that the *ad hoc* criminal tribunals[15] have slowly and subtly begun to introduce the doctrine of Good Samaritanism into international criminal law.[16] In such a setting, however, liability for failing to rescue can possess a number of different labels,

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[13] *See* Ashworth and Steiner 'Criminal Omissions and Public Duties: The French Experience' (1990) 10 Legal Studies 153,153 referring to J.F. Stephen, *History of Criminal Law* (1883) Volume III, 10. Despite recent parliamentary debates in Ireland on the issue of introducing a general duty to rescue, the Law Reform Commission has reported that '[t]here should be no reform of the law to impose a duty on citizens in general, or any particular group of citizens, to intervene for the purpose of assisting an injured person or a person who is at risk of such an injury.'-Consultation Paper on Civil Liability of Good Samaritans and Volunteers (Nov 2007) (LRC CP47-2007) 127.

[14] ibid 716.

[15] The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in particular.

[16] While many prominent UN actors have advocated for Good Samaritan-type laws as between *states* (the doctrine of "Responsibility to Protect," for instance), it is the international criminal tribunals which have vindicated its application at an *individual* level.

leading to a dangerous situation whereby omission becomes synonymous with commission, and unduly burdensome sanctions are handed down as a result.

International law criminalises omissions in a number of ways, the most prominent of which are the doctrines of command responsibility and joint criminal enterprise (JCE). It will be argued that a number of cases dealt with by the ICTR and the ICTY have stretched the definition of these doctrines in order to cater for a general duty to rescue in international criminal law. Cassese points out that international crimes 'tend to be expression of collective criminality…When such crimes are committed, it is extremely difficult pinpoint the specific contribution made by each individual participant in the criminal enterprise.'[17] JCE holds individuals equally responsible for a criminal action if they (i) participate in the action, *whatever their position and the extent of their contribution*; and in addition (ii) *intend to engage in the common criminal action*. Therefore they are all to be treated as *principals*.[18] Cassese suggests that such individuals must share liability whatever their role because (i) each of them is indispensable for the achievement of the final result; and on the other hand (ii) it would be difficult to distinguish the degree of criminal liability as between each, except for sentencing purposes.[19] The defendant need not have materially participated in the commission of the crime, but must substantially contribute to its facilitation. However, the notion of "substantial contribution" has been broadly interpreted by the courts. Indeed, Zahar and Sluiter note that what such contribution requires remains unresolved.[20]

In the case of *Kvočka*[21] it was held that a person may be considered as part of a JCE based on his or her intent as well as a substantial contribution to the system, even if that person had no previous links with the system. It has also been held that an individual who is a member of a JCE can be held responsible for acts which are committed by other members which do not constitute part of the initial plan. Therefore, in the 2006 case of *Karemera et al*[22] the ICTR Appeals Chamber held that this notion can encompass crimes in vast criminal enterprises; where crimes are geographically or structurally remote from the accused. This same view was taken by the ICTY in its 2007 case of *Brđanin*.[23] Cassese aptly points out that '[t]his broadening of the notion under discussion is excessive and raises doubts about its consistency with the *nullem crimen* principle and the principle of personal responsibility.'[24]

The flexibility with which the doctrine of JCE is applied raises serious questions regarding the scope of personal responsibility for those peripherally involved in the collective perpetration of mass atrocity. Much of the determination for inclusion in the JCE turns upon the intent of the defendant: after this is established, "substantial contribution" appears to require very little. Therefore, it would seem that negative sentiments, in addition to a failure to display resistance to the crimes of others, is activity enough to be placed within the sphere of JCE. This approach suggests that the tribunals are seeking to prohibit behaviour which *facilitates* mass atrocity, rather than directly *causing* it. This said development is particularly relevant to the doctrine of command responsibility.

Cassese points out that command responsibility has developed into a customary rule (i) imposing on military commanders as well as civilian leaders the obligation to prevent or repress crimes by their subordinates if they knew or should have known that the troops were

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[17] A Cassese *International Criminal Law* 2nd ed (Oxford Oxford University Press, 2008) 189.
[18] ibid 190. Italics in original.
[19] ibid 191.
[20] Zahar and Sluiter *International Criminal Law: A Critical Introduction* (New York Oxford University Press 2008) 241.
[21] *Kvočka et al (Judgement)* ITCY-98-30/1 (28February 2005).
[22] *Karemera et al (Judgment)* ICTR-98-44-T.
[23] Cassese (n 17) 211.
[24] ibid 195.

about to or were committing or had committed crimes; and (ii) criminalizing the culpable failure to fulfil this obligation, albeit without clearly outlining the mental element of such criminal liability.[25] The doctrine originates in articles 7(3) and 6(3) of the Statutes of the ICTY and ICTR respectively, as well as article 28 of Rome Statute of the International Criminal Court. The conditions for liability consist of (a) the commission of international crimes by troops or subordinates; (b) effective command and control over those subordinates; (c) knowledge (or constructive knowledge) or breach of obligation to acquire such knowledge, and (d) a failure to act.[26]

The doctrine has been expanded to include non-military commanders: in *Delalić*[27] it was held that liability could accrue simply where the individual in question had a 'material ability to prevent and punish the commission of offences'[28] even where that person was not a military superior. In *Nahimana et al*[29] the ICTR found that the defendants were guilty of public incitement to commit genocide for their supposed superior-subordinate relationship to the radio station RTLM, whose broadcasts allegedly instigated genocide, despite the fact that the defendants were absent for the majority of the period under examination.[30] Zahar and Sluiter therefore cogently argue that the tribunals have pushed the doctrine 'beyond its limits.'[31]

In *Blaškić*[32] the doctrine of command responsibility was expanded to impose a duty on superiors to safeguard the welfare of those under the control of one's subordinates. Failure to adhere to this requirement, according to *Blaškić*, would result in liability for the commission of crimes under article 7(1) of the Statute of the ICTY.[33] This constitutes a very wide interpretation of article 7(1), insofar as omission is sufficient to ground its operation. In *Jean Mpambara*[34] the Trial Chamber of the ICTR rejected this conclusion,[35] stating that liability for failure to prevent or punish is a wholly separate category of liability from that of simple commission. However, as Rana questions:

> [I]t is still not clear whether omission of failure of duty to prevent or punish will be considered as part of [a]rticle 6(1) of the statute as done by the other trial chambers [*Blaškić*] or will it be considered as a different species of crime as concluded by the trial chamber in this case?[36]

In the recent ICTY case of *Mrksic*, the Appeals Chamber held that failure to fulfil the obligation to safeguard prisoners in one's custody can also be described as 'aiding

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[25] ibid 241.
[26] ibid 247-249.
[27] *Delalić* (*Judgment)* IT-96-21-T (16 November 1998).
[28] ibid.
[29] *Nahimana et al* (*Judgment)* ICTR-99-52-A (28 November 2007).
[30] Cassese (n 17) 266.
[31] ibid 271.
[32] *Blaškić* (*Judgment)* IT-95-14-T (17 June 1996).
[33] Art 7(1) of the Statute of the International Criminal Tribunal Yugoslavia provides thus:
'A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in arts 2 to 5 of the present Statute, shall be individually responsible for the crime.'
[34] *Jean Mpambara* (Judgment) ICTR-2001-65-I (11 September 2006).
[35] ibid para 39 '[b]y conflating these two tests, the Prosecution comes perilously close to equating the failure to prevent or punish a crime with the commission of that same crime through a joint criminal enterprise. The Chamber emphatically rejects this approach. Failure to prevent or punish a crime cannot be characterized as a form of commission of that same crime.'
[36] Rajat Rana 'The Jean Mpambara Case: Outlining 'Culpable Omissions' International Criminal Law' (2007) 6(2) Chinese Journal of International Law 439.

and abetting by omission,' expanding the traditional definition of aiding and abetting significantly.[37]

In the case of *Popovic et al.*,[38] currently before the Trial Chamber of the ICTY, the prosecution has gone further by claiming, independent of the defendant's alleged culpability under the doctrines of JCE and command responsibility, that he had a legal duty to protect prisoners of war from harm "from his own troops *and others*"[39] even if the defendant did not necessarily have a pre-existing duty to come to their assistance within the remits of traditional legal doctrine.

Such recent developments suggest that the *ad hoc* tribunals are eager to find a way of imposing liability for failure to intervene in individual cases of human rights abuse. Should this become a regular occurrence, there is no reason to doubt that the International Criminal Court would also follow suit. Creating such a concept via this avenue is dangerous, however, on the basis that the sanctions imposed are unduly burdensome. Therefore, it is suggested here that in order to avoid the further arbitrary expansion of the concept, an explicit decision ought to be taken by states to introduce the doctrine formally at an international level.

D WHITHER?

In order to propose developments for this crucial area of international law, it is important to first understand how the practice of bystander apathy occurs in the first place. Therefore, this section examines the psychological factors involved in the failure to rescue, and in turn suggests the most desirable route for international law to take to tackle the phenomenon at a grassroots level.

1 Understanding Bystander Apathy from a Psychological Perspective

> Those who now learn of these events ask themselves why those who knew did not speak; they affirm that silence became complicity; they suspect that silence is as awful as the discoveries about those dreadful years that come to light day after day.[40]

Why is it an all too common occurrence that vast numbers of people are capable of indifference while their fellow human beings are assaulted, tortured, raped and killed? The instinctive answer to this question is that fear inhibits resistance. However, while the instillation of fear may be a feature of oppressive regimes, the widespread failure to object is commonly the result of more complex psychological processes. A number of common psychological factors will be explored here, which serve to explain the prevalence of bystander apathy in the face of mass atrocity.

According to Latane and Darley,[41] the fulfilment of five steps is required before a person will render assistance to another in time of emergency. The bystander must (1) notice that something is happening; (2) interpret the event; (3) decide that he has a responsibility; (4) decide what form of assistance to render; and (5) decide how to implement the assistance. Stohl notes that social scientific research subsequent to this study has solely served the

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[37] *Mrkšić et al* **(***Judgment)* IT-95-13 para 49 **(**5 May 2009).
[38] *Trbić (Indictment)* IT-05-88 (18 August 2006).
[39] ibid 92 (emphasis added).
[40] J Timerman 'Return to Argentina' *The New York Times Magazine* (New York, United States of America 11 March 1984) 39.
[41] B Latane & JM Darley 'Bystander Apathy' (1969) 57(2) *American Scientist* 244.

purpose of confirming its findings.[42] In the case of widespread and systematic human rights abuse, steps (2) and (3) are the primary obstacles to intervention. As a result of mass communication, step (1) is not difficult to accomplish, both locally and internationally. Furthermore, where (2) and (3) are left unfulfilled, steps (4) and (5) are rendered inconsequent. Therefore, it is the interpretation of the event in question and the assumption or otherwise of responsibility which requires attention. The typical bystander fails to overcome these critical hurdles for a number of reasons – reasons which will be analysed in what follows.

First, ideology, frequently employed as a powerful tool in oppressive regimes, serves to create a differentiation between two groups of individuals: *us* and *them*.[43] Tajfel has produced important work in this area, revealing that humans will favour their 'own' over others on the basis of minimal categorisation.[44] Categorisation allows individuals to strengthen their self-concept and to introduce power and harmony into the group. This is frequently learnt as part of family and community life and, according to Staub, 'having learnt to make differentiations between ingroups and outgroups, people will naturally create them under novel circumstances.'[45] The downside of this tendency is the fact that *the other* becomes devalued, blamed for conditions which are not necessarily attributable to him, and, in the extreme, dehumanised. It is therefore unsurprising that where ideology is proliferated by those in power, with negative intentions, it is often accepted without significant resistance. If *the other*, the enemy, is not considered human, any interpretation of the enemy's victimisation is warped, and an assumption of responsibility is not considered necessary. Even if the social images are alarming to the onlooker at first, dehumanisation coupled with routinisation dispels this alarm over time. Sheleff reports that 'to relate to such victims requires that spatial barriers and social differences be discounted, and that the victims, for all their anonymity and distance, be seen essentially in human terms.'[46] This identification is lost where ideology serves to dehumanise the targeted group, and thus hurdles (2) and (3) automatically impede the likelihood of intervention.

Second, the mind's inherent need to rationalise negative acts often leads individuals to conclude that such acts are, in some sense, justly imposed. From the perspective of bystanders, therefore, victims are often considered to be constructively liable for their own fate. Lerner refers to this enigma as 'just world thinking.'[47] Staub claims that while this is a common phenomenon, it can be counteracted by providing information to onlookers regarding the innocence of victims.[48] If *just world thinking* is allowed to prevail without evidence to the contrary, however, hurdle (3) will not be surpassed because responsibility will not be taken for those who have purportedly contributed to their own misfortune.

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[42] M Stohl 'Outside of a Small Circle of Friends: States, Genocide, Mass Killing and the Role of Bystanders' (1987) 24(2) Journal of Peace Research 151, 159.

[43] Staub refers to these groups as the "ingroup" and the "outgroup". *See* Ervin Staub *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge Cambridge University Press 1992).

[44] For instance, the like or dislike of a certain painter was enough for individuals to favour their own group. Staub(n 44). *See also:* Tajfel, H., Billig, M., Bundy, R. P. & Flament, C Social Categorization and Intergroup Behaviour' [1971] *European Journal of Social Psychology, 2* and Tajfel 'Social Psychology and Intergroup Relations' [1982] *Annual Review of Psychology, 33*.

[45] Staub (n 44) 66.

[46] Sheleff *The Bystander* (Lexington Lexington Books 1978) 192.

[47] Lerner and Simons Observer's Reaction to the 'Innocent Victim': Compassion or Rejection?' [1966] *Journal of Personality and Social Psychology, 4*, 203-10. See also: Lerner and Simmons *The Belief in a Just World: A Fundamental Delusion* (New York Plenum Press 1980).

[48] Staub (n 44) 67.

Third, obedience to authority and to normative pronouncements is a natural psychological tendency. It is easier to obey authoritative statements than to pragmatically and morally evaluate individual situations. As Staub suggests:

> [S]ocial reality is much less clear than physical reality, and we accept others' definition of it even more easily, particularly if cultural values or an ideology or devaluation of the persecuted support it.[49]

In short, we are all too willing to accept authoritative 'clarifications.' Indeed, social scientific studies point to the fact that 'altruistic behaviour is dictated by societal norms.'[50]

Kelman reports that three factors give rise to the silencing of the masses: authorisation, routinisation and dehumanisation.[51] The latter two factors have been discussed to above. Authorisation plays a pivotal role in the proliferation of violence and the failure of resistance because individuals have a natural tendency to obey instruction rather than taking personal initiative in ambiguous situations. As a result of authorisation, therefore, resistance is less likely to occur because the bystander interprets the event as legitimate, and consequently assumes little or no responsibility for the situation.

The work of Milgram is noteworthy in this regard.[52] Milgram constructed experiments whereby unexceptional, well-intentioned individuals obeyed directions to administer increasingly painful electric shocks to actors posing as students. Approximately one third of participants refused to continue the experiment at the administration of 150 volts where the actor showed clear signs of pain as well as a desire to be freed. By the end of the experiment, at 450 volts, an additional 10-15% of participants had refused to continue.[53] This study has been analysed by Packer,[54] who reports that those who left after the 150 volt mark did so on the basis that the student's right to stop trumped the right of the scientist to proceed. Therefore, human rights analysis provided a framework for evaluation where authoritative directions conflicted with the intuition of the participant. This is the danger of harbouring a weak conception of human rights: where rights are ambiguous, inhumane treatment may easily ensue.

The experiment has been replicated by Burger in more recent times.[55] Burger has discovered that those who refused to continue after 150 volts, when the student expressed a desire to stop, were those who considered themselves *responsible* for the acts, rather than attributing responsibility to the director of the experiment. Therefore, it was a perception of personal accountability which rendered them unwilling to go on. The importance of these findings cannot be overestimated, because they serve to prove that when an individual has a firm conception of human rights as well as a sense of individual accountability for wrong done, both of which are concepts capable of overriding the authoritative directions administered on the ground, he will be far more likely to display resistance to the inhumane treatment of others.

In cases of mass atrocity, the local legal and moral order is too often subject to collapse, resulting in normative ambiguity for its subjects. Where authoritative directions

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[49] Staub (n 44) 78.

[50] Note 'The Duty to Rescue in Tort Law: Implications of Research on Altruism' (1980) 55 Ind. L.J. 551.

[51] Kelman, Herbert, 'Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers,' *Journal of Social Issues*, vol 29, no 4.

[52] S Milgram 'Behavioural Study of Obedience' (1963) *Journal of Abnormal and Social Psychology* 371. *See also* http://www.nytimes.com/2008/07/01/health/research/01mind.html (2 March 2010).

[53] ibid.

[54] D Packer 'Identifying Systematic Disobedience in Milgram's Obedience Experiments: A Meta-Analytic Review' (2008) 3(4) *Perspectives on Psychological Science*.

[55] J M Burger 'Replicating Milgram: Would People Still Obey Today' (2009) *American Psychologist*.

replace moral norms, with no possibility of refuge in concepts such as individual human rights or personal responsibility, a majority of individuals will naturally obey direction, giving rise to acceptance and reducing the possibility of resistance to gross human rights abuses. Therefore, if a higher system of norms were to be available at an international level, this would hinder the success of novel directions by ceasing to allow rights and duties to become ambiguous in the first instance. The preceding analysis demonstrates that where Latane & Darley's third step (an assumption of personal responsibility) is fulfilled, resistance to authority is far more likely to obtain. Utilising the foregoing analysis, the author will examine the merits and demerits of introducing a duty to rescue in international law.

2 The Duty to Rescue in International Law

As emphasised above, there is little doubt that introducing a general duty to rescue via international criminal jurisprudence is dangerous and to be avoided. However, what that discussion also highlighted was that there exists a vacuum currently in this area: the international community would benefit from the introduction of Good Samaritan laws in a formal setting in order that local intervention in mass atrocity is encouraged and further that a clear distinction may be drawn between penalties for commission of a crime and penalties imposed for failing to rescue.

The debate concerning Good Samaritan laws frequently draws dissenters who are of the view that a legal requirement to act is an unnecessary restriction of personal liberty. However, the author suggests that liberty is restricted via the law all the time: this particular question concerns how *far* the law may go in requiring us to become enablers for one another. The further the law's reach, the weightier our obligations, and thus the more rapidly our quality of life decreases. However, once maintained within reasonable limits, the obligation to rescue need not be unduly onerous. Despite this, it is essential that the scope of the law would nevertheless be mapped out in order for it to provide clear behavioural guidance. How would this anomaly be resolved? It is suggested here that the closer we are to the emergency, the greater our duty to that particular victim is.[56] Indeed, the author agrees with Schmidtz to the effect that the phenomenon of *selective focus* should be adhered to. In short, that in order to live happy lives we must be granted the liberty to choose which injustices we desire to remedy, and thereby to sacrifice other legitimate concerns in the process.

Waldron echoes this sentiment: 'where I am on the spot, and where help, if it is to come at all, can only come from me, the demands of morality are compelling.'[57] Our instrumentality alters the nature of our obligation and thus location is highly significant. In this context, then, the duty would have to be limited to direct confrontation with emergency, so that individual welfare is not diminished through excessive obligation to causes which we have not chosen to support. The duty to rescue would thus entail an obligation to report an emergency, and an obligation to assist where there is no significant physical risk posed to the rescuer. A normative value such as this would provide bystanders in morally corrupt legal and political systems with a form of back-up morality; a guide to behaviour which otherwise would remain absent.

The author suggests that the most effective method of introducing the duty to assist under international law would be the drafting of a United Nations treaty through the

[56] See generally D Schmitdz 'Islands in a Sea of Obligation: Limits of the Duty to Rescue' (2000) 19 Law and Philosophy 683.
[57] ibid 1075.

negotiation of member states. Rather than framing the obligation in criminal terms, the duty would simply constitute an international legal obligation, violation of which would give rise to declaratory responsibility *simpliciter* rather than punitive sanctions. International law shapes human behaviour, independent of the existence of punitive sanctions. The ICESCR, for instance, acknowledges clearly its status as an advisory document with progressive realisation at its heart.[58] Despite this important limitation, it has nevertheless had a powerful impact on the way states, and indeed individuals, have regulated their affairs over the past thirty years. This provides an important view of international law, not as sanction-based, but as behaviourally normative. An international treaty concerning Good Samaritan laws would operate in a similar manner, with the important exception that it would be aimed primarily at individuals in their interaction with one another, in order to enhance bystander resistance and to thereby reduce the potentiality for further human rights abuses across the globe.

E CONCLUSION

Where legal and moral normative systems collapse, it is imperative that individuals can refer to a higher set of norms in their place, in order to possess behavioural guidance in the midst of moral crisis. Where this situation ensues, the significance of silent bystanders in the facilitation of mass atrocity cannot be overestimated. As Vetlesen sharply points out:

> [T]he bystander is the one who decides whether the harm wrought by the aggressor is permitted to stand unrectified or not…So whereas for the agent, bystanders represent the potential of resistance, for the victims they may represent the only source of hope left.[59]

Even where legal sanctions are not administered for failing in one's duty to rescue, developing a moral compass regarding obligations to one's fellow man would be a truly positive step towards the eradication of widespread and systematic human rights abuses. To borrow Staub's words, 'one of the very important things that we can do, as individuals and as groups, is to make a response, to take a stand, to express ourselves to perpetrators both at home and in other countries…' so that the peace and security of mankind is not threatened further by the frailty of local moral standards.

[58] Art 2 International Covenant on Economic Social and Cultural Rights 1966 available at: http://www2.ohchr.orh/english/law/cescr.htm (2 March 2010).
[59] Vetlesen (n 3) 529.