The consequences of war:
The UK’s responsibility towards its interpreters/translators in Afghanistan

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# Table of Contents

Abstract                                                                                       2  

1 Introduction                                                                                   4  
  1.1 Problem formulation, purpose and questions                                                  6  

1.2 Materials                                                                                   6  
  1.2.1 Primary and secondary materials                                                          6  

1.3 Research Ethical assessment                                                                6  

2 Theory and Method                                                                             7  
  2.1 Theory                                                                                     7  
  2.2 Method                                                                                     8  

3 Literature review and previous research                                                       8  

4 The Research                                                                                   12  
  4.1 British Interpreters in Afghanistan                                                        12  
    4.1.1. The Afghan and Iraqi Asylum Schemes                                                   14  
    4.1.2 Other NATO Countries’ Interpreter Asylum Policies                                     15  
  4.2 Outcome Responsibility                                                                    17  
  4.3 Legal Obligations under the 1951 Convention                                                 18  
  4.4 Afghan Interpreters and the Right to Asylum in the UK                                     21  
  4.5 The Securitisation of European Asylum Policy                                               23  

5 Analysis and discussion                                                                       24  

6 Summary                                                                                       27  

Bibliography                                                                                   28
Abstract
The paper engages a provocative, multi-dimensional legal, moral and human rights issue that strikes at the heart of 21st century UK asylum law. Throughout the NATO Afghanistan military campaigns (headed by the International Security Assistance Force) in which the UK committed combat troops from 2001 to 2014, hundreds of local Afghan nationals were employed by the British Army as interpreters and translators. The value of these Afghani operatives to the overall NATO operation is undoubted. It might seem axiomatic that such Afghan personnel would obtain UK asylum when sought, given their post-war status in Afghanistan would likely be equated to that of traitors amongst the Taliban and others opposed to NATO during this protracted conflict. This research has two aims, the first is to conduct high level, comprehensive research into this provocative question that has prompted strong arguments on both sides. The second aim is to make an appropriate, reasoned, and scholarly contribution to an issue that is arguably a very accurate litmus test regarding a nation’s true character as a just, and responsible international community member committed to the 1951 Convention principles. The second research aim is directly connected to the nature and extent of any State’s ‘post-conflict obligations’ assumed when its armed forces have derived benefits from the efforts of war zone nationals. The research will properly engage the legal arguments generated by 1951 Convention claims. It will also span the closely intertwined political and moral arguments that have generated particular controversy in this sphere. The primary theories that guide this proposed research are provided in two David Miller articles from which considerable inspiration regarding the entire research topic have been taken. The proposed research will be advanced using argument analysis methodology.

Keywords: Translators, Interpreters, Responsibility, Asylum
Abstract in Swedish


Nyckelord: Översättare, tolkar, ansvar, asyl
1 Introduction

In June 2013, the UK government confirmed that up to 600 Afghans who worked as interpreters or in other dangerous roles supporting British forces in Helmand Iraq would be permitted to resettle in the UK.\(^1\) The package was made available to staff who were in post on 19 December 2012 and had served for more than a year. The government announced that the offer was being made in response to contribution and commitment of Afghan nationals in their vital role in supporting the international mission in Afghanistan.\(^2\) It was anticipated that around 1200 would qualify for some form of redundancy package, including the offer of training and a severance deal or monthly stipend. From these 1200, around 600 were possibly eligible for the option of resettlement with their families.\(^3\)

Campaign groups who pushed for these measures have argued, however, that they do not go far enough, and the plans would leave hundreds of interpreters at risk. The proposal failed to offer the Afghans help with relocation to the UK that Iraqi translators received.\(^4\) During the NATO mission in Afghanistan, 26 Afghan interpreters were killed while working with British forces; a survey carried out by campaign group Avaaz estimated that 93 percent of translators that worked with the British have received death threats from the Taliban.\(^5\) Former interpreters reported the risks – in some cases their whole family have been subjected to persecution and violence and lived in fear for their lives.\(^6\) In contrast to other NATO members, the UK was slow at coming forward and offering the deal to its interpreters, despite having offered Iraqi interpreters the option to settle in the UK after British troops left the country.\(^7\)

The complete set of measures offered by the UK to its Afghan translators is considered to be insufficient, since they were limited to interpreters that had worked during specific dates during the conflict. A number of other former workers who faced threats to safety in

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2 Ibid
3 Ibid
4 Ibid
6 Ibid
7 Ibid
Afghanistan were 'considered for resettlement only in the most extreme cases.' Further, there have been cases brought before the courts where interpreters had not been offered asylum, some pre-dating this resettlement package and others post-dating it. The special asylum schemes, upon investigation, appear to be introduced based upon self-interest and an opposing argument to theories based upon repaying interpreters for their services to the particular country questions whether they risk the undermining of international protection regimes based upon the Refugee Convention. Refugee determination in international law is based upon a 'well-founded fear of persecution', and humanitarian protection for those at risk in their home states.

This research will consider the theoretical perspectives on the UK's moral and legal responsibility towards Afghan interpreters who supported the NATO mission into Afghanistan from 2001 onwards. In establishing an understanding of this form of 'responsibility', the work of David Miller and Antonia Chayes will be relied upon in order to establish a number of theoretical perspectives. The UK's legal responsibilities under international asylum and human rights law will also be considered and the question will be asked as to whether international obligations on asylum are actually in conflict with a form of 'responsibility' that can be established between the UK and its interpreters. This is of particular relevance during a period of increasingly restrictive asylum policies being implemented in the UK and other Western states that have traditionally offered resettlement opportunities.

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9 Ibid
10 Article 1A Convention Relating to the Status of Refugees 1951
1.1 Problem formulation, purpose and questions

The research question is presented in two parts:

(i) What are the theoretical arguments for offering asylum to Afghan translators/interpreters, who worked with the British army during the NATO invasion of Afghanistan? What form of responsibility might the UK have in this regard?

(ii) What are the legal and moral obligations for the UK government to offer assistance, specifically in the form of leave to remain in the UK for Afghan interpreters at risk of persecution in Afghanistan, who have provided assistance to the British army during conflict?

1.2 Materials

1.2.1 Primary and secondary materials

A number of UK cases and those of the European Court on Human Rights will be relied upon in order to examine the rights and responsibilities of the UK towards Afghan interpreters who were formerly employed by UK forces in Afghanistan. H v United Kingdom (70073/10) (2013)\(^{15}\) and R. (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs Queen's Bench Division (Administrative Court) [2015]\(^{16}\) are of specific relevance. The first case involves the asylum applications of NATO interpreters during the Afghan conflict and an employment discrimination case claiming discrimination between those on the Iraqi scheme and the Afghan scheme. The UN Convention Relating to the Status of Refugees 1951 and the European Convention on Human Rights 1950 are also important primary materials. Secondary materials include books, journal articles, government reports and other online sources from charity groups and established media sources.

1.3 Research Ethical assessment

\(^{15}\) H v United Kingdom (70073/10) (2013) 57 E.H.R.R. 17 (ECHR)

\(^{16}\) R. (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs Queen's Bench Division (Administrative Court) [2015] EWHC 1953 (Admin)
An important ethical consideration in the secondary analysis of sources is to avoid bias.17 The researcher might have certain political or moral views which they seek to demonstrate, but an evaluation of existing literature should remain as far as possible free from such influences. Where research does not include any form of primary research with live participants, ethical consideration focuses squarely upon the acknowledgement of the works of other authors through the use of a consistent referencing system and the maintenance of the highest level of objectivity (and avoidance of bias) throughout the analysis and discussions contained in the research project.18

2 Theory and Method

2.1 Theory

The theoretical basis of this research derives from the work of David Miller in 'Holding Nations Responsible' published in the journal *Ethics* in 200419 and 'Distributing Responsibilities' published in the *Journal of Political Philosophy* in 2001.20 Miller explains 'self-regarding' and 'other-regarding' individual responsibility and applies this responsibility to nations. Miller posits that when nation A causes harm to nation B, nation A has a present-day obligation to the members of nation B to repair the damage.21 It is argued that as a theory of justice and accountability, where nations commit to a course of military action, and foreign individuals provide assistance that protects the nations' military personnel from additional harm, the nation should protect these individuals from the negative consequences of offering such assistance.22

This theoretical perspective is related to the work of Antonia Chayes, 'Chapter VII 1/2: is jus post bellum possible?', published in the *European Journal of International Law* in 2012.23 Chayes argues that when a nation is victorious in war, it is the obligation of the 'victors' to rebuild the society which has been destroyed as the result of the war. Although Chayes acknowledges that it is neither a legal nor moral obligations of states to do this, it may be

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18 Ibid
19 David Miller 'Holding Nations Responsible' (2004) 114(2) Ethics, 240-268
22 Ibid
regarded as a practical method of ensuring self-protection from otherwise negative consequences of acts of aggression committed by a 'victorious' nation.\textsuperscript{24} These theoretical perspectives will be applied to the question of the obligation or responsibility of the UK to assist the individuals who are subject to persecution as a result of assistance to the British army as an interpreter.

\textbf{2.2 Method}

The research methodology adopted in this project is based upon \textit{argument analysis methodology}. \textsuperscript{25} This research methodology includes the close examination and critical evaluation of academic sources within the general academic scholarship of the chosen subject areas. Arguments are made to support the research thesis with support from the relevant scholarly literature. \textsuperscript{26} An example of such a methodology was proposed by Toulmin, which requires argument construction to be comprised of the following components: claim, data, warrant, backing, rebuttal qualify.\textsuperscript{27} Thus, the method to be adopted within this research project will be the establishment of certain research questions which focus upon theoretical underpinnings suggesting that support for Afghan interpreters who have worked with the British army to receive protection from subsequent requests. However, it will further examine the UK’s commitments under the Refugee Convention and question how any scheme to support Afghan interpreters lies within the UK’s general obligations under international law.

\textbf{3 Literature review and previous research}

In \textit{Holding Nations Responsible}, Miller posits that nations are considered to be responsible for historical injustices and as such present day citizens of those states are required to repair the damage committed by those citizens of the past.\textsuperscript{28} Miller also observes an inclination to hold nations responsible for their own present circumstances by suggesting that their current conditions are caused by past actions of individuals within that state.\textsuperscript{29} Thus, judgements are made about other-regarding responsibility and self-regarding responsibility in the cases of

\textsuperscript{24} Ibid
\textsuperscript{25} John Creswell, Research design: Qualitative, quantitative, and mixed methods approaches, 4th edn, Sage, 2013, p.17-28;
\textsuperscript{27} Stephen Toulmin, The Uses of Argument (OUP, 2003), 9.
\textsuperscript{28} David Miller ‘Holding Nations Responsible’ Ethics, (2004) 114(2), 240-268, p.241
\textsuperscript{29} Ibid
collectives like states as well as individuals. A liberal position focused upon individual responsibility is observed: the liberal view is to pin responsibility onto military or political leaders who can be shown to have inflicted suffering on their people.

According to Miller, our willingness to treat nations as potentially responsible actors has important implications for the notion of global justice. Within this context the notion of 'responsibility' is also an important one. Miller relies upon the term 'outcome responsibility' coined by Tony Honoré. Outcome responsibility means that the benefits and burdens of a particular action should accrue to the actor responsible for those actions: this may include liability to compensate for that harm. The purpose of assigning responsibility in this way is normative - to provide a guide about where the good and bad consequences of an actions should fall. It is more stringent than causal responsibility, but less stringent than moral responsibility which requires conduct which reveals moral fault.

In *Distributing Responsibilities*, Miller highlights the difficulty of identifying a particular agent, or group of agents who might have particular responsibility to remedy the far too many instances of deprived or suffering people in the world. In particular, those people whose basic human rights to security, or subsistence or health care are not being protected. The general question can arise as to what features of agents might single them out as having a special responsibility to come to the aid of particular victims, there are a number of plausible answers, which do not point in the same direction.

In August 1990, the sanctions against Iraq imposed by the UN Security Council constituted a near-total financial and trade embargo. Only medical supplies and foodstuff in the event of 'humanitarian circumstances' were permitted. Iraq was shut off from international financial

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30 Ibid
32 Ibid
36 Ibid p.246
39 Eckart Woertz, Oil for Food: The Global Food Crisis and the Middle East, Oxford University Press, 2013, p.134
transactions and its foreign assets were frozen.\textsuperscript{40} As a direct consequence of these sanctions the country saw a massive decline in food security, and increases in infant mortality, water-borne diseases and malnutrition, it is estimated that around '500,000' children died as a direct consequence of the imposition of sanctions by the United Nations between 1990 and 2003.\textsuperscript{41}

In terms of allocating the responsibility to remedy this situation, Miller asks whether it was the UN, more specifically Western powers, which imposed the economic sanctions on Iraq. Were Saddam Hussein and his government responsible since they diverted a large percentage of the countries GNP to military expenditure, or did the responsibility lie with the Iraqi people as a whole who had the duty to overthrow the current brutal regime?\textsuperscript{42} In answering this question, Miller attempts to establish remedial responsibility, which means to have a special responsibility, alone or in conjunction with others, to put a bad situation right.\textsuperscript{43} Thus determining those responsible for taking this action requires a set of principles for assigning responsibilities which carries moral weight, but also so those who fail in their responsibilities to remedy the situation are correctly sanctioned.\textsuperscript{44} Here Miller distinguishes between direct causal responsibility and moral responsibility. While the former may be clear, the latter may not be so obvious.\textsuperscript{45}

Chayes also presents a theory of moral responsibility for justice.\textsuperscript{46} He asks the question "Does victory in war imply a post-conflict obligation to rebuild the vanquished society after war".\textsuperscript{47} \textit{Jus ad bellum} and \textit{jus in bello} are the legal regulations which govern the use of force prior to conflict and the use of force during conflict.\textsuperscript{48} \textit{Jus post bellum}, then would constitute a set of legal obligations on states once the conflict is over.\textsuperscript{49} If this obligation exists, it is a legal, or moral, or a practical necessity for self-protection? No such legal norm appears to exist within international law: after all states are unlikely to sign up to an international treaty providing

\begin{thebibliography}{99}
\bibitem{40} Ibid
\bibitem{41} Eckart Woertz, Oil for Food: The Global Food Crisis and the Middle East, Oxford University Press, 2013, p.135
\bibitem{42} David Miller, ‘Distributing Responsibilities’ (2001) 9 Journal of Political Philosophy 453-471, p.454
\bibitem{43} Ibid
\bibitem{44} Ibid
\bibitem{48} Carsten Stahn 'Jus ad bellum', 'jus in bello'... 'jus post bellum'? Rethinking the Conception of the Law of Armed Force (2007) 17(5)The European Journal of International Law, 921-943, p.921
\bibitem{49} Ibid
\end{thebibliography}
for such an obligation, and since it is not established state practice it is not capable of formulating into customary international law.\textsuperscript{50}

As Chayes confirms, international law, which enables states to legitimately use force, does not require any form of post-war construction as a legal obligation. Chapter VII of the UN Charter permits military action by the Security Council in the case of a threat to international peace and security, and Article 51 of the UN Charter permits self-defence against the use of force in international law. If such provisions are stretched, ignored or reaffirmed they do not seem to create any form of legal obligation to reconstruct after such military action is taken.\textsuperscript{51}

If there is no legal obligation for reconstruction in a post-conflict situation, Chayes asks whether a moral obligation exists? Since international reconstruction efforts after war have been too inconsistent over too many years to make a strong case that a norm has emerged.\textsuperscript{52}

The dramatic increase in irregular warfare since the terrorist attacks in Washington and New York after September 22, 2001 and US-led incursions into foreign lands, allegedly associated with the ‘war on terror, lead to the conclusion that post-conflict reconstruction might well be seen as a protective measure.\textsuperscript{53} Assistance in reconstruction in post-conflict societies is more likely to be carried out in the state’s own self-interest, than as some form of moral or legal norm. Interveners in irregular warfare, such as that undertaken in Afghanistan and Iraq, see post-conflict reconstruction as military necessity.\textsuperscript{54} US military doctrine spells out this fact: US manual FM3-07 on stability operations makes clear that they have little to do with a norm of humanitarian response. The manual suggests that conditions which create belts of state fragility and instability constitute a grave threat to national security.\textsuperscript{55}

As President Obama later stated, he wished to deny a safe-haven for Al Qaeda, so any reconstruction efforts in Afghanistan were predominantly focused upon protection of Americans rather than the Afghan people.\textsuperscript{56} This theoretical perspective therefore leads to the

\textsuperscript{52} Antonia Chayers, Chapter VII½: Is Jus Post Bellum Possible? (2013) 24(1) European Journal of International Law, 291-305, p.298
\textsuperscript{53} Ibid
\textsuperscript{54} Ibid
conclusion that the only form of 'responsibility' established here as a result of international practice is the responsibility to states’ self-interest in removing safe-havens for terrorism. There does not appear to be any emerging moral norm of just post belum as a humanitarian mission, but possibly one as an act of state self-interest.

Offering some form of protection in the form of leave to remain in the relevant state might be considered to be in that state’s self-interest of those who have assisted states during conflict situations. In particular, the argument might be advanced that offering asylum to interpreters who have assisted fighting forces of the invading army during conflict situations might be in that state’s self-interest in being able to garner such support in the future. Since other NATO states have offered asylum to their interpreters, and an asylum package was made available to Iraqi interpreters as British troops began to withdraw from Iraq, the question will be raised as to whether an emerging moral norm is being created that those who have risked their lives to assist the British army.

4 The Research

4.1 British Interpreters in Afghanistan

Interpreters working in war zones risk death and injury on a daily basis: soldiers from foreign powers operating in a country whose language they do not speak need help from local interpreters. During the NATO incursions into Iraq and Afghanistan, thousands of interpreters were recruited both locally and internationally to assist foreign troops, and were even required to provide assistance on the front lines. In mid-July 2011, British forces in Afghanistan employed 650 local interpreters. In 2009, seven such interpreters were killed and twenty-three injured; in 2010, four were killed and thirty-three injured; and in 2011, three were killed and nineteen injured. The risks that such individuals subjected themselves to during the conflict in Afghanistan might lead to the conclusion that the UK should now be morally (if not legally) obligated to such individuals by their providing direct assistance to British military during the conflict and assisting the forces in their mission.

58 Ibid
59 Sam Marsden ‘Afghan Interpreters Pay a High Price For Working for Britain’. The Scotsman, 22 August 2011
60 Ibid
Since the withdrawal of British troops from Afghanistan, many Afghan interpreters who worked with the British army have received death threats from the Taleban. The interpreters requested the British government to establish an assistance scheme so they were not abandoned as British troops withdrew from the country. Serving British soldiers however warned against establishing a special asylum system for Afghan interpreters, arguing that it would lead to 'brain drain' from Afghanistan and deprive the country of some of its most talented individuals.

Some British officers have claimed that Afghans signed up to interpretation services hoping to gain a visa for access into the UK, whereas interpreters have denied these assertions arguing that they did not want to leave their families in Afghanistan but were being forced into it due to intimidation. Fitchett comments however that "The talent has therefore been recognised, No mention is made as to how dead talent might help a country". Arguments about economic migration deny the fact that it was the British and other foreign forces’ intervention in Afghanistan over decades that have led to increasingly desperate conditions in the country: who would not want to escape this for a better life?

In *R. (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2015] the claimants had been employed as interpreters for British forces in Afghanistan. When British forces withdrew from Afghanistan, the UK Government established a scheme which offered finance and training to former interpreters a redundancy package that offered the possibility of relocation to the UK. The particular claim in this case was that the scheme offered to Afghan interpreters was less beneficial than the scheme offered to Iraqi interpreters upon the British forces’ withdrawal from Iraq. The claimants wished to apply the provisions governing discrimination in relation to employee benefits under s.39(2) and s.29(6) Equality Act 2010, which meant the same terms should be applied.

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61 James Glossop, British soldiers oppose asylum for interpreters, 6 August 2011 [online] <https://www.thetimes.co.uk/article/british-soldiers-oppose-asylum-system-for-interpreters-k96kk13sngd> accessed 7th August 2017
62 Ibid
63 Ibid
to locally employed staff in Iraq and Afghanistan. It was claimed that the UK government had failed to comply with the public sector equality duty under s. 149 Equality Act 2010.\textsuperscript{67}

The court failed to find discrimination, due to the lack of territorial reach of the Equality Act to Afghanistan. It was held that there was no physical connection with Britain: the connection was limited to the identity of the employer.\textsuperscript{68} The court found that s.39 (2) Equality Act 2010 had no application to the claimants’ circumstances. There was no direct discrimination on the grounds of nationality, since the relevant schemes were implemented in different countries at different times, with different levels of threat and risk. It was not right for the Government to quash the Afghan scheme because of the failure to undertake a quality analysis before it was put in place.\textsuperscript{69}

4.1.1. The Afghan and Iraqi Asylum Schemes

Although this case was based on employment law, the main contention of the applicants appears to be based simply upon fairness and expectations that the Afghan interpreters be offered the same form of protection as the Iraqi ones had. The legal basis that was chosen was employment law: the claim was brought under the Employment Act 1996 and the Equality Act 2010 as a claim of discrimination in employment. In Hottack, the High Court judge Burnett LJ had argued that the evidence of intimidation in Afghanistan was on a much smaller scale than occurred in Iraq.\textsuperscript{70} The Intimidation Scheme was adopted in November 2010 and modified in 2013: it aimed to keep former locally employed Afghan staff safe in Afghanistan in the event of risks arising from their former employment, and is separate from the redundancy arrangement found in the ex gracia scheme.\textsuperscript{71}

Under the 2010 scheme, more than 200 claims of intimidations and 96% of cases individuals were offered security advice; in a small number of cases, it was concluded that the person concerned should either relocate within Afghanistan or change his car, with the costs being covered by the UK Government.\textsuperscript{72} The overall assessment was that there was not justification for a large-scale offer of relocation to the UK. After 2013, modifications to the scheme

\textsuperscript{67} R. (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs Queen's Bench Division (Administrative Court) 08 July 2015 Case Analysis 
\textsuperscript{68} Ibid 
\textsuperscript{69} Ibid 
\textsuperscript{70} R. (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs Queen's Bench Division (Administrative Court) [2015] EWHC 1953 (Admin); [2015] I.R.L.R. 827; [2015] A.C.D. 138; 
\textsuperscript{71} Ibid at 10 
\textsuperscript{72} Ibid at 9
introduced a means of grading risk known colloquially, which graded the threat against the former Afghan national employee as green, amber and red.\textsuperscript{73} If the assessment reaches amber, funding can be made available to the former employer and their family within Afghanistan.

If the assessment is red, such cases can be referred for relocation to the United Kingdom.\textsuperscript{74} Relocation to the UK requires the person being engaged in "the most dangerous tasks which took him regularly outside protected bases and onto the front line in Helmand" as well as being an Afghan national and having been made redundant on or after 19 December 2012 with at least 12 months' service.\textsuperscript{75} The Iraq Scheme was introduced in 2007 when Iraq was in a state of civil war.\textsuperscript{76} In this scheme the opportunity to relocate to the UK was made available to a small category of former staff, which in practice constituted interpreters and translators who were employed before 1 January 2005 but had left before 8 August 2007, having completed at least 12 months of service.\textsuperscript{77}

\textbf{4.1.2 Other NATO Countries’ Interpreter Asylum Policies}

Canada announced its special-measures program in autumn 2009, which brought it into line with other NATO countries that had already introduced similar programmes. Applicants were required to demonstrate that they faced extraordinary risk as a result of their work with Canada.\textsuperscript{78} The Canadian Special Immigration Measures program requires that interpreters have worked for Canada for a period of 12 months between October 2007 and July 2011 in Kandahar province.\textsuperscript{79} The Canadian program was similar to the British one which was implemented in 2013; it also appears to have had strict inclusion criteria which, like the British program, accepted only those who faced the most serious risks and having undertaken at least 12 months service.\textsuperscript{80} The Canadian scheme, also like the British scheme, was open to

\textsuperscript{73} Ibid at 11
\textsuperscript{74} Ibid at 10
\textsuperscript{75} Ibid at 12
\textsuperscript{76} Ibid at 13
\textsuperscript{77} Ibid at 15
\textsuperscript{79} Ibid
\textsuperscript{80} Ibid
those who had their lives threatened by insurgents, and some others who had serious injuries and could no longer work.\textsuperscript{81}

Like the UK Intimidation Scheme, there were numerous criticisms of the Canadian scheme.\textsuperscript{82} A number of the linguists from Afghanistan found themselves left behind in Afghanistan or in European refugee camps facing deportation where insurgents had targeted them as traitors.\textsuperscript{83} The International Association of Conference Interpreters (AIIC) explain that many interpreters were unable to submit their applications to the scheme by September 2011. They requested that Canada prioritise linguists who put their lives in danger alongside Canadian soldiers over the major influx of refugees from Syria into Canada.\textsuperscript{84} This sort of request raises questions of obligation under international asylum law, since the Refugee takes no account of the asylum seeker’s previous links with a country through employment, but bases the asylum claim upon a "well founded fear of persecution".\textsuperscript{85} This also raises the issue of whether the establishment of some form of moral obligation on the UK (or other NATO states) to assist its interpreters in offering asylum in post conflict situations should rightfully set aside claims of individuals who are in even greater danger. While it may be hard to compare the risk of one individual against another, international and domestic asylum legislation sets out clear requirements to establish the basis upon which refugee determination is to be made, and it may be that if special schemes lead to prioritising such applicants over other asylum applicants, this impact requires careful consideration.

A similar programme was introduced in the United States, the U.S. Afghan Allies program was supposed to award up to 1,500 visas each year initially until 2013 - it was introduced by the Afghan Allies Protection Act of 2009.\textsuperscript{86} Extensions were passed in 2014, 2015 and 2016 that made 8,500 visas available.\textsuperscript{87} In Spring 2017, 1,437 visas remained with the State Department estimating that the remaining visas would be exhausted by 1 June 2017. This left


\textsuperscript{83} Ibid

\textsuperscript{84} Ibid

\textsuperscript{85} Article 1A Convention Relating to the Status of Refugees 1951


over 15,000 Afghans and their families waiting at some point of the application process.\textsuperscript{88} From the perspective of this study the importance of the scheme appears to be based upon U.S. self-interest. Since U.S. involvement in Afghanistan is ongoing, the mission there is not possible without translators.\textsuperscript{89}

The fulfilment of the commitment to protect the translators who worked with the NATO allies is then considered to be vital to completing the U.S. mission in Afghanistan and to U.S. national security.\textsuperscript{90} In this way it appears that the asylum process is being hijacked to promote U.S. interests as opposed to serving the strict requirements of international asylum law which is based upon a well-founded fear of persecution. Indeed, as Reinhold explains, the U.S. attitude to Afghanistan has been that 'weak states are unable to exercise effective territorial control and frequently become safe havens for terrorist networks and other irregular groups'.\textsuperscript{91} U.S. academics and politicians have eroded the notion of state sovereignty in such states by determining for themselves that they are not deserving of the privilege based upon some notion that a particular state does not achieve a standard of responsible governance.\textsuperscript{92} Reinold fails to establish who it would be that would determine what level of governance is required in order to determine which states should retain their sovereign privileges. In a practical sense, the fact that the U.S. led operations into Afghanistan and Iraq suggests that they themselves have become self-appointed judges of this status.

\textbf{4.2 Outcome Responsibility}

In applying the theoretical perspective of 'outcome responsibility' to the situation of interpreters in Afghanistan therefore, it is suggested that since the British army (and therefore theoretically the British people and government) benefited from their services during the NATO invasion. Thus, the negative consequences that have accrued by using them as interpreters (death threats from the Taliban) are the consequences for which the British government and people would take responsibility for the harm that is caused. This does not establish a legal responsibility and as Miller suggests it is not as stringent as a moral

\textsuperscript{88} Ibid
\textsuperscript{89} Ibid
\textsuperscript{90} Ibid
\textsuperscript{91} Theresa Reinold, State Weakness, Irregular Warfare and the Right to Self-Defense Post-9/11 (2011) 105( 2), American Journal of International Law, 244-286, p.244
\textsuperscript{92} Ibid p.248
responsibility - therefore there does not appear to be any formal obligation to take responsibility.\textsuperscript{93}

The court in \textit{Hottak} concluded that there was no \textit{legal} responsibility under the Equality Act 2010 for the British government to offer the same relocation package to Afghan interpreters as it did to the Iraqi interpreters who were offered asylum in the UK after the British troops withdrew from Iraq. There are also various legal obligations incumbent upon the UK under asylum law, which need to be considered in order to evaluate what obligations the UK has to the Afghan interpreters. These commitments do also raise questions of specific protection schemes, however, which are based upon the risks that interpreters have undertaken while working with NATO troops, and whether international asylum law would justify such measures. Territorial sovereignty of course enables states to offer protection to any individuals it sees fit; however, the Refugee Convention and human rights agreements aim to offer protection based upon risks of persecution, and these other considerations have no part in asylum determinations based upon the Refugee Convention.

\textbf{4.3 Legal Obligations under the 1951 Convention}

This section will now explore what legal obligations the UK has to provide asylum to individuals under international law. These obligations are found primarily within the UN Convention Relating to the Status of Refugees 1951(Refugee Convention) and its 1967 Protocol.\textsuperscript{94} There are also various other obligations to be found in the treatment of foreign nationals within various international human rights agreements, in particular the European Convention on Human Rights and Fundamental Freedoms 1950, under which extra-territorial human rights obligations have recently been the subject of a number of cases before the European Court on Human Rights.\textsuperscript{95}

A number of Afghan nationals who worked as interpreters for British forces in Afghanistan have sought asylum in the UK as a result of persecution experienced due to their connection with British forces during the NATO invasion of Afghanistan in 2001.\textsuperscript{96} Elyas Mohtasham, an Afghan national, began work as an interpreter with the British army in Helmand in 2009.

\textsuperscript{93}David Miller ‘Holding Nations Responsible’ Ethics, (2004) 114(2), 240-268, p.246
\textsuperscript{94}UN Convention Relating to the Status of Refugees 1951
\textsuperscript{95}Marko Milanovic, Extra-Territorial Application of Human Rights Treaties, Oxford University Press, 2011, p.75
He occupied a high-profile position and regularly put his life in danger to assist British troops in communicating with local people. After receiving death threats from the Taliban, Mr Mohtasham took the decision to leave Afghanistan; he arrived in the UK without a passport, having paid an 'agent' for a false passport, who had confiscated it before he landed. His Afghan passport was also given on instruction to the agent. When Mohtasham entered the UK he claimed asylum immediately but was arrested for entering Britain without a passport and held on remand at Wormwood Scrubs.

Following the withdrawal of British forces in Iraq, the government offered asylum to several hundred interpreters and their families: the failure to make such an offer to Afghan interpreters was the subject of the Hottak case mentioned above. In contrast, Mr Mohtasham was charged with failure to have possession of his identity documents with the asylum interview under section 2 Immigration and Asylum Act 1999. A defence to the section 2 offence is provided under section 5(c) to 'prove that they have a reasonable excuse for not being in possession of the document as specified in section 2'. The prosecution later made a statement that the decision to discontinue the charge was taken due to the services Mr Mohtasham had provided to British forces in Afghanistan. Mohtasham was also granted asylum in the UK and a right to remain in the UK for 5 years.

The UK's 'responsibility' regarding to asylum in international law stems from its ratification of the Refugee Convention and its 1967 Protocol. There is no explicit obligation on states in international law to grant asylum to those seeking protection, but individuals are provided with right to seek asylum under Article 14(1) Universal Declaration on Human Rights 1948, which states that "everyone has a right to seek and enjoy asylum in other countries from persecution". As Guy Goodwin-Gill confirms, there is no international obligation for states to grant asylum to individuals fleeing persecution. Since states maintain territorial integrity over their own borders, it is incumbent on states to decide who will enter.

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97 Ibid
99 Section 5(c) Immigration and Asylum Act 1999
102 Article 14(1) Universal Declaration on Human Rights 1948
104 Ibid
Nevertheless, it is uncontested that the right to grant asylum as part of an exercise of state sovereignty without fearing the hostility of the asylum seeker home state.105 Article 1(1) of the UN Declaration on Territorial Asylum states "Asylum granted by the State, in the exercise of its sovereignty... shall be respected by all other States".106 Moreover, scholars have also attempted to establish a right of an individual to be granted asylum through the duty of non-refoulement. Grahl-Madsen for example states that "[t]o say that an individual has a right to be granted asylum is to say that the requested State is... duty bound to admit him to its territory, to allow him to remain there, or to abstain from extraditing him".107

This principle of non-refoulement exists with the Refugee Convention and other international human rights agreements. Article 1 of the Refugee Convention defines a refugee as someone with "a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion".108 The individual must be "outside of [their] country of residence and unwilling or unable to return" or to avail themselves of the protection of their state of nationality.109 Article 33 of the Refugee Convention provides that "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of [grounds of persecution]". This is a provision to which no reservations are permitted, so all signatories of the Refugee Convention are bound by this obligation.110

The European Convention on Human Rights (ECHR) also provides protection from extra-territorial human rights abuses, which means that a party to the Convention is obliged not to return an individual to a third state where there is a real risk that their ECHR rights would be violated. In Soering v UK,111 the European Court on Human Rights (ECtHR) established that the UK could breach Article 3 of the applicant by extraditing a murder suspect to the United States to face the death row phenomenon, which would amount to inhuman or degrading treatment or punishment. Even though the UK itself would not impose the treatment itself, it could still be in breach of its obligations by returning an individual to a third state that might do this.

106 Article I(1) of the UN Declaration on Territorial Asylum UNGA res 2312(XXII) 14 Dec 1967.
108 Article 1A(2) Convention relating to the Status of Refugees 1951
109 Ibid
110 Article 42(1) Convention relating to the Status of Refugees 1951
Further, in *Saadi v Italy*, the ECtHR found that it does not depend upon the characteristics as to whether their Convention rights would be breached. In *Saadi*, the applicant had been convicted of various terrorist offences in Italy and Tunisia in his absence, although the UK (intervening) argued that the dangerousness of the individual subject to the deportation order should be taken into account when considering if their Article 3 rights may be breach, the ECtHR held otherwise. The *Saadi* court found that a person's dangerousness does not reduce their risk of being tortured or subjected to inhuman or degrading treatment or punishment.

### 4.4 Afghan Interpreters and the Right to Asylum in the UK

If Miller's notion of 'outcome responsibility' or 'remedial responsibility' is to be invoked in relation to Afghan interpreters seeking protection in the United Kingdom from threats of persecution in Afghanistan it would follow that the UK has some form of obligation to mitigate that threat. Afghan interpreters that have been subjected to death threats by the Taliban have done so on the basis of their assistance of the British army or other NATO forces during the 2001 invasion. It may then be the case that the UK is obligated not in law, but based on Miller's theoretical form of responsibility. Interpreters from Afghanistan have failed to attain asylum in the UK since 2001.

In *H v United Kingdom*, the first applicant was an Afghan national originally from Wardak province in central Afghanistan. He arrived in the UK on 30 October 2008 and claimed asylum three days later on 3 November 2008. He based his claim on the fact that he had been a driver for UN organisations between 2004 and 2008 and faced persecution by the Taliban and Hizb-i-Islami due to his perceived connections with the Afghan Government and the UN. In August 2008, he received a telephone call threatening his life and that of his family unless he stopped working with 'foreigners and non-Muslims'. The Secretary of State refused the first applicant's asylum application on 17 December 2008. It was accepted that those working with the UN in Afghanistan had been subjected to persecution in the past; it was not accepted that he had been targeted by the Taliban or was at risk in the future. Moreover, the applicant had not sought assistance from the Afghan Government or attempted to relocate within

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112 *Saadi v Italy*, Application No. 37201/06, judgment of 28 February 2008 (Grand Chamber)
113 *H v United Kingdom* (70073/10) (2013) 57 E.H.R.R. 17 (ECHR);
another area of Kabul for safety. The Asylum and Immigration Tribunal also dismissed the first applicant's appeal.

The second applicant was also an Afghan national who had worked as an interpreter for the United States armed forces and the International Security Assistance Force (ISAF) from February 2009 to April 2011. He arrived in the UK on 2 June 2011 and claimed asylum the next day. The second applicant claimed that he had received death threats from the Taliban, who threatened to behead him if he continued to work with foreigners. He also claimed that he could not relocate to Kabul for safety as he had relatives there who were connected to Hizb-i-Islami, who would forcibly recruit him. On 20 June 2010, the second applicant's asylum application was refused, it was accepted that he had been an interpreter for the US government, but not that he had been subject to threats from the Taliban. It was also held that he had not demonstrated that he could not seek safety and relocate in another area of Kabul. Both applicants took their case to the ECtHR that their removal to Afghanistan would expose them to a real risk of having the Article 3 rights violated. The second applicant also complained that removal to Afghanistan would subject him to a real risk of treatment contrary to Article 2 ECHR (right to life) and Article 8 ECHR (right to private and family life).

The ECtHR allowed the appeal in respect of Article 3, but found there to be no breach of the ECHR in this case. They found that there was little evidence of the Taliban targeting those who had already stopped working for the international community. The ECtHR did not accept that the second applicant would be at risk from the Afghan authorities: they approached the outlined in \textit{N v the United Kingdom} (2008)\textsuperscript{116} to assess the second applicant's claim that he could not relocate to Kabul safely. This requires that the court assess whether the second applicant's claim was an exceptional one where the humanitarian grounds for removal were compelling. The assessment of the ECtHR was that there were no exceptional circumstances in this case. There was no suggestion that the second applicant would be identified in Kabul, which was an area outside of Taliban control.\textsuperscript{117}

\textsuperscript{116} \textit{N v the United Kingdom} (2008) 47 E.H.R.R. 39
The ECtHR relied upon the domestic authorities’ conclusions about the level of risk in Afghanistan for the two applicants: this was central to the court's finding that there would be no violation of Article 3 if the applicants were removed. Judge Kaldijieva, in dissent, argued that the situation had changed in Afghanistan, noting the UN High Commissioner for Refugees had assessed the effect of mass returns of Afghans as its ‘worst mistake’. Guidelines published in 2012 indicated that civilian employees of the UN and US missions were increasingly being targeted by the Taliban, including in Kabul.

The domestic decisions and the decisions of the ECtHR were based on the fact that the alleged risk was unfounded, and that relocation opportunities had not been fully explored. These cases also did not include interpreters who had specifically worked with the British army, so they do not highlight any issues of specific responsibility which the UK might have

4.5 The Securitisation of European Asylum Policy

While asylum policies in the pre-Cold War period were supposedly characterised as humanitarian in nature, post-Cold War policies in the West have been characterised as 'securitised'. Since the terrorist attacks of 11 September 2001, there has been a growing trend within Western States to frame the refugee crisis in national security terms, but also to expand their hypothetical borders beyond their physical demarcations in order to control migration. Such policies appear to disregard the original humanitarian nature of the regime under the Refugee Convention, as established in the post-Second World War period.

As Hathaway comments, the Refugee Convention was "clearly born of the strategic goals of Western States in the immediate post-Second World War era, an extraordinary judge-led commitment in the years since 1990 has ensured the continuing viability of this definition to meet most modern needs". The creation of the United Nations High Commissioner for Refugees (UNHCR) in 1950 and the Refugee Convention in 1951 are now considered to be

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119 Ibid
121 Ibid
watershed moments in the international protection of refugees.\textsuperscript{122} Since this original commitment it would appear that states have primarily sought to politicise their obligations under the Refugee Convention and integrate their own self-interest in doing so.

Externalisation is part of the policy of the politicisation of refugee policy. Hyndman and Mountz define this as a "bundle of political, securitised practices that constitutes asylum as part of state-centric international relations discourse, not legal discourse".\textsuperscript{123} Such policies include "regional protection zones" which are located at the boundaries of conflict zones to address asylum claims arising localised conflicts or natural disasters; off-shore detention and processing centres, such as those established by Australian in Christmas Island and Nauru to divert sea-bound asylum seekers from reaching Australian shores. Various related policies include the patrolling of international waters to detect and intercept vessels, airline carrier sanctions and the building of a wall to prevent asylum seekers waiting in Calais and Dunkirk from boarding vehicles bound for the UK.\textsuperscript{124}

5 Analysis and discussion

The theoretical basis of this research has been based upon Miller's work of 'outcome responsibility', which loosely states suggests that those responsible for bad situations had some form of moral duty to remedy or at least mitigate the harms caused by their actions. Chayes further considers the law of \textit{jus post bellum}, where those who have resorted to the use of force in international law should be required to undertake a form of reconstruction afterwards. Upon examination, it is clear that countries have done this: for example, the United States has been involved in a number of reconstruction projects in Afghanistan and Iraq.

Following this logic where these theories are applied to the asylum claims of translators who worked for NATO forces during the 2001 invasion of Afghanistan, referred to by the U.S.

\textsuperscript{123} J. Hyndman and A Mountz, "Another Brick in the Wall? Neo-Refoulement and the Externalisation of Asylum in Australia and Europe" (2008) 43(2) Government and Opposition, 249-269, p.251
\textsuperscript{124} Richard Sudan, Calais Wall is no solution - it's just a temporary Band-Aid, 12th September 2016 [online] <https://www.rt.com/op-edge/359086-calais-uk-france-wall-uk/>accessed 10th August 2017
government as *Operation Enduring Freedom*. The original justification for this invasion along with the NATO allies in the International Security Assistance Forces (ISAF) was reprisal for the September 11, 2001 terrorist attacks carried out by Al Qaeda on the United States. President George W. Bush declared that "We will make no distinction between terrorists who committed these attacks and those who harbour them". The United States demanded that Afghanistan hand over Osama Bin Laden and provide full access to Al Qaeda terrorist training camps. However, the official position of Afghanistan, which was still under the control of the Taliban, was that they would not hand over Bin Laden without evidence that he had been involved in the terrorist attacks. The Taliban ambassador to Pakistan, speaking for the Taliban in Afghanistan, explained that Bin Laden would not be extradited to the U.S. for trial.

If one considers the doctrine of 'outcome responsibility', the United States and the United Kingdom as one of the NATO allied forces in *Operation Enduring Freedom*, the United Kingdom accrued some form of responsibility to address the negative consequences of their intervention into Afghanistan. Applying this principle to the interpreters/translators that assisted the British army during this operation, it might be concluded that the negative outcomes, including intimidation and death threats by the Taliban, were ones for which the UK should take responsibility. However, the extent of this responsibility is not comprehensively covered by this theory: if such a moral obligation exists, how far it extends is unclear.

In *Hottak*, the complainants argued that the financial packages which the UK government offered the interpreters to relocate and find safety in Afghanistan merely put them further at risk. They argued that the Afghan interpreters should receive the same assistance provided to Iraqi interpreters, which provided assistance to travel to the UK. The complainants argued that many interpreters had cover stories, which had been compromised and hence were at danger by remaining in Afghanistan. While one of the applicants conceded that, as a result of the ISAF interventions in their country, Afghanistan had become safer from Taliban

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forces, it was not safe, particularly for those seen as having collaborated with the Western forces.\textsuperscript{129}

It has been established within this research that motivations for offering asylum, particularly in such cases, have been political rather than motivated by humanitarian concerns. In the U.S. case for example, former President Barrack Obama stated publically that initiatives such as those to protect interpreters were in the nation's self-interest and furthered U.S. national security interests. While asylum policies since the Refugee Convention are frequently associated with states’ national security interests, this is not reflected in the wording of the Convention. While many scholars who have written about the worldwide 'refugee problem' have acknowledged that the refugee regime has never been purely humanitarian,\textsuperscript{130} there is nevertheless an understanding that the regime was instituted to solve the plight of the displaced.\textsuperscript{131}

The adoption of policies which offer protection to Afghan (or Iraqi) interpreters based upon the need to secure the services of such interpreters in the future in order to assist NATO countries in further incursions into foreign lands in the name of 'national security' does, however, appear to undermine any supposed humanitarian ethic which the Refugee Convention represents. It is also symptomatic of Western states’ increased refusal to offer protection to the world's 21 million refugees, which appears to be a large number but constitutes only 0.3% of the world's population. At present, 10 of the world's 193 countries host more than half its refugees. These are not wealthy countries, nor European states as national media appear to suggest, but poor countries in Asia and the Middle East. They include Turkey, Iran, Pakistan, Lebanon, Chad, Jordan, Ethiopia, Kenya, DRC and Uganda.\textsuperscript{132}

This situation which has been increasingly referred to as the 'refugee crisis' has exemplified the increasing reluctance of Western governments to offer asylum or other forms of immigration (including based upon family connections) to those who seek it.\textsuperscript{133} While Afghan interpreters are facing danger in Afghanistan, so are a large number of other

\textsuperscript{129} Ibid
\textsuperscript{130} Guy S Goodwin-Gill "The Politics of Refugee Protection" (2008) 27(1) Refugee Survey Quarterly, 8-23, p.9
\textsuperscript{133} Ibid
individuals. One might also apply Chayes' theory of *jus post bellum* construction to the situation of many Afghan asylum seekers. In recent years, many of the Afghan refugees who initially sought protection from their war-torn country who had sought refuge in Pakistan seem no longer to be welcome.\(^{134}\) Recently at least 10,000 Afghan refugees have been forced back over the border into Afghanistan. Rather than winding down, the conflict in Afghanistan is still escalating; thus the U.K. are now not only failing to offer safety to the Afghan interpreters - they have failed to finish what they started in Afghanistan.\(^{135}\)

### 6 Summary

This research project has focused upon the issue of whether any form of normative responsibility exists that underpins the moral or ethical requirement of the U.K. to offer asylum to interpreters who have supported the British army during the NATO mission in Afghanistan. The basis for such an obligation has been explored within the work of Miller and Chayes, who suggest that in conflict situations a state that uses force has some form of responsibility to reconstruct or mitigate the country as well as the associated harm it has caused by using force. It is clear that legally no such obligation exists, nor does there exist a moral or ethical obligation. Although NATO member states have offered this form of protection to their former interpreters in Afghanistan, upon investigation it appears that they have done so out of self-interest, and in the interests of national security as opposed to some moral sense of obligation. Furthermore, even though the package offered to the former Iraqi interpreters who assisted the British army in Iraq also provided resettlement assistance, the *Hottack* case makes clear that there is no legal obligation which was established in providing such assistance in Iraq, to those in Afghanistan. Despite appearing to be beneficial, therefore it is concluded that such schemes based upon national self-interest might be contrary to humanitarian efforts which the Refugee Convention was theoretically created to address. An assessment of well-founded fear of persecution is the legal requirement of the Refugee Convention; however, international law does not require that countries give states assist asylum seekers to reach their sources: they are merely required to assess their application and make a status determination upon arrival. This is not an argument to support the proposition that Afghan interpreters are not deserving of protection by the UK. However, the current asylum framework as well as ethical and moral arguments do not oblige the UK to offer

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\(^{135}\) Ibid
asylum to those who do not come within the Refugee Convention definition, nor do they require that the state offers assistance to applicants to relocate from Afghanistan to the UK.

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